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Vakil
29.7.41

S. N. DAR, B.A., LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

S. N. DAR, B.A., LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

DONATED
By
PANDIT SHAMBOO NATH DAR.
(1901 — 1969)
ADVOCATE,
and former President
SRINAGAR MUNICIPAL COUNCIL

29.7.

THE
QUINQUENNIAL DIGEST
1936—1940

VOLUME I

BY

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ABBREVIATIONS EXPLAINED

S. N. DAR. B.A. LL.B.
Vakil High Court.
SRINAGAR (Kashmir)

Reports

All or A. I.L.R. 1940 All.	Indian Law Reports, Allahabad Series.
A.L.J	Allahabad Law Journal.
A. L. R.	Allahabad Law Reports.
A.W.R.	Allahabad Weekly Reporter.
A. Cr.C.	Allahabad Criminal Cases.
A.I.R. 1940 All. or 1940 A.	All India Reporter, 1940 Allahabad.
A.M.L.J.	Ajmer-Merwara Law Journal.
Bom. or B. I.L.R. (1940) Bom.	Indian Law Reports, Bombay Series.
Bom. L. R.	Bombay Law Reporter.
A.I.R. 1940 Bom. or 1940 Bom.	All India Reporter, 1940 Bombay.
Bur. L. T.	Burma Law Times.
Bur. L. J.	Burma Law Journal.
B.R.	Bihar Reports.
Cal, or C. I.L.R. (1940) 1 & 2 Cal.	Indian Law Reports, Calcutta Series.
C. L. T.	Cuttack Law Times.
C. L. J.	Calcutta Law Journal.
Cr. C.	Criminal Cases.
Cr. L. J.	Criminal Law Journal.
C. W. N.	Calcutta Weekly Notes.
Comp. C	Company Cases.
A. I. R. 1940 Cal. or 1940 Cal.	All India Reporter, 1940 Calcutta.
A. I. R. 1940 F. C.	All India Reporter, 1940 Federal Court.
Fed. L. J.	Federal Law Journal.
F. L. R.	Federal Law Reports.
I. A.	Law Reports, Indian Appeals.
A. I. R. 1940 P. C.	All India Reporter, 1940 Privy Council.
I. C.	Indian Cases.
I. T. R.	Income-tax Reports
R. P. C. ; R.F.C. ; R. A.; R. B.; R. C. ; R. L.; R. M.; R. N.; R. O.; R. P.; R. R.; R. S.	Indian Rulings, Privy Council, Federal Court, All. Bom., Cal., Lah., Mad., Nag., Oudh, Pat., etc.
I.L.R. (1940) Kar.	Indian Law Reports, Karachi Series.
Lah. or L. I. L. R. (1940) Lah.	Indian Law Reports, Lahore Series.
A. I. R. 1940 Lah. or 1940 Lah.	All India Reporter, 1940 Lahore.
Lah. L. T. or L. L. T.	Lahore Law Times.
L. B. R.	Lower Burma Rulings.
L. W.	Law Weekly.
Luck.	Indian Law Reports, Lucknow Series.
Mad. or M. I. L. R (1940) Mad.	Indian Law Reports, Madras Series.
M.L.J. (1940) M. L. J.	Madras Law Journal.
M. L. T.	Madras Law Times.
M. W. N.	Madras Weekly Notes.
A. I. R. 1940 Mad. or 1940 Mad.	All India Reporter, 1940 Madras.
M. L. R.	Marwar Law Reports.
Mys. H. C. R.	Mysore High Court Reports.
Mys. L. J.	Mysore Law Journal.
I. L. R. (1940) Nag.	Indian Law Reports, Nagpur Series.
N. L. J.	Nagpur Law Journal.
N. L. R.	Nagpur Law Reports.
A. I. R. 1940 Nag. or 1940 Nag.	All India Reporter, 1940 Nagpur.
A. I. R. 1940 Oudh or 1940 Oudh	All India Reporter, 1940 Oudh.
O. A.	Oudh Appeals
O.L.R.	Oudh Law Reports.
O. W. N.	Oudh Weekly Notes.
P. R.	Punjab Record.
P. L. R.	Punjab Law Reporter.
Pat. or P.	Indian Law Reports, Patna Series.
P. W. R.	Punjab Weekly Reporter.
A. I. R. 1940 Pat. or 1940 Pat.	All India Reporter, 1940 Patna.
Pat. L. J.	Patna Law Journal.
Pat. L. T.	Patna Law Times.

P. W. N.	Patna Weekly Notes.
A. I. R. 1940 Pesh.	All India Reporter, 1940 Peshawar.
R. or Rang.	Indian Law Reports, Rangoon Series.
1940 Rang. L.R.	Rangoon Law Reports.
A. I. R. 1940 Rang. or 1940 Rang.	All India Reporter, 1940 Rangoon.
R. D.	Revenue Decisions.
S. L. R.	Sind Law Reporter.
A. I. R. 1940 Sind or 1940 Sind	All India Reporter, 1940 Sind.
U. B. R.	Upper Burma Rulings.

Other Abbreviations.

Appl.	Applied.	Disc.	Discussed.	P. C.	Privy Council
Appr.	Approved.	Diss.	Dissented from.	Ref. or R.	Referred.
Comm.	Commented.	Doubt	Doubted	Rel.	Relied.
Cons.	Considered.	Expl.	Explained.	Rev.	Revenue.
Cr.	Criminal.	Foll.	Followed.	S. B.	Special Bench.
Dist. or D.	Distinguished.	F. B.	Full Bench.		

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QUINQUENNIAL DIGEST

CIVIL, CRIMINAL & REVENUE

1936—1940

VOLUME I

ABADI.

See also (1) C. P. Land Revenue Act.
(2) Co-sharers—Abadi.
(3) Custom (Punjab).
(4) Landlord and Tenant—Abadi.

——*Abandonment—Proof of intention—House left in disrepair and not rebuilt—If necessarily proves abandonment.*

A tenant who abandons a site leaves the site to revert to the zamindar. In such a case proof of intention to abandon is necessary. The mere fact that a house is left in a dilapidated condition and is not rebuilt does not necessarily prove that the tenant means to abandon the site or lead to the result that the zamindar is entitled to enter upon the land. (*Allsop, J.*) Misri Lal *v.* Durga Narain Singh. **1940 A W.R. (H.C) 171.**

——*House allowed to fall down—Abandonment of site—Whether can be inferred.*

The mere fact that a *raiyas* house completely falls down does not justify the proprietor to take possession of the site, unless the circumstances afford a reasonable ground for believing that the *raiya* had abandoned all intention to rebuild it. In cases of doubt the proprietor might well give notice to him requiring him to rebuild the house and intimating that in case the house was not rebuilt within a reasonable time, he would treat the site as abandoned and would resume possession thereof. (*Niamatullah, J.*) Sheo Sahai *v.* Tilok Singh. **164 I.C. 205=9 R.A. 128=1936 R.D 248=1936 A.W.R. 541=1936 A.L.J. 569=A.I.R 1936 All. 553.**

——*House occupied by cultivator—Whether appurtenant to his holding—Presumption.*

There is no presumption that a house occupied by a cultivator on the abadi site is appurtenant to his holding, and a tenant who loses his holding does not thereby lose his right of residence in his house. (*Sulaiman, C J. and Bennet, J.*) Rajdhari Lal *v.* Bishunath Singh. **162 I.C. 503=8 R A. 870=1936 A W R. 471=1936 R.D. 184=1936 A. L.J. 505=A.I.R. 1936 All. 867.**

——*Land to be used* Sehan-darwaza—*Right to make constructions on it.*

A Rayat entitled to use a bit of land as *Sehan-darwaza* cannot make construction on it. (*Bajpai, J.*) Ram Narain Singh *v.* Shirpal Singh. **173 I.C. 140=10 R A. 459=1937 A.W.R. 1093=1938 R.D. 52=1938 A.L.R. 94=A.I.R. 1938 All. 20.**

——*Licence to build—Building put up leaving a portion as* sehan-darwaza—*Rights of the licensee.*

Where a person was given a licence to build a house on a piece of land in the abadi and he proceeds to build a house keeping a portion of the land vacant to be used as *sehan-darwaza*, all within the area of the land given, the licensee who has thus built the house in pursuance of the licence, has a possessory interest in the land to which the licence relates such as will enable him to maintain a suit, whether against his licensor or against any third party. As against the licensor the licence is unrevocable under S. 60 (*b*) of the Easements Act. (*Collister, J.*) Azhar Hussain *v.* Mansab. **1940 A.W.R. (H.C) 290 =1940 A.L.J. 354=1940 R.D. 187=A.I.R. 1940 All. 324.**

——*Nature of—Rights of persons entitled to plots in.*

The village abadi is not communal land. Persons entitled to plots of land in the abadi are entitled, when they receive possession of it, to exclusive possession and are entitled to exclude every other member of the community from occupation. (*Bose, J.*) Evangelical German Mission *v.* Mahant Ramsahaigir. **182 I. C. 613=12 R N 18=1939 N.L.J. 153=A.I.R. 1939 Nag. 145.**

——Sale of house in, by tenant to co-sharer—Other co-sharers, if can sue for joint possession. *See* Co-Sharers—Abadi. **1939 A.W.R. (H.C.) 840**

——*Tenant's rights to transfer — Difference between rural and urban areas.*

In the United Provinces, generally, the tenants in rural areas or agricultural villages are not entitled to transfer houses and the sites of houses but are only entitled to transfer the materials of which the houses are built. But the tenants in urban areas are entitled to transfer the houses as they stand upon their sites and the rights of occupation therein. Thus tenants in urban areas have to all intents and purposes a proprietary right over the sites of their houses and the zamindar or the owner of the land is left only with a right of escheat in the case of abandonment or in the case of the decease of a tenant who leaves no heirs to succeed him. (*Allsop, J.*) MISRI LAL *v.* DURGA NARAIN SINGH. **1940 A.W.R. (H.C.) 171=1940 R.D. 213=A.I.R. 1940 All. 317.**

——Transfer of house—Right of fixed rate tenant. *See* LANDLORD AND TENANT—ABADI. **1936 R.D. 18.**

——Transfer of sites in village—Right of—Custom—Proof. *See* LANDLORD AND TENANT—ABADI. **1936 R.D. 19.**

ABANDONMENT.

——Of appeal. *See* C. P. CODE, O. 23, R. 1.

——Of claim. *See* C. P. CODE, O. 23, R. 1.

——Of Holding.

See (1) AGRA TENANCY ACT, S. 107.
(2) BENGAL TENANCY ACT, S. 87.
(3) BURMA LAND REVENUE ACT, S. 11.
(4) LANDLORD AND TENANT.

——Of issue.

See (1) C P, CODE, ORDERS 6, 7 AND 8.
(2) PRACTICE.

——Of partnership. *See* PARTNERSHIP.

——Of plea. *See* (1) PRACTICE.
(2) LEGAL PRACTITIONER.

——Of Tenure. *See* LANDLORD AND TENANT.

——Of Wife.

See (1) HINDU LAW—MAINTENANCE.
(2) HUSBAND AND WIFE.
(3) RESTITUTION OF CONJUGAL RIGHTS.

——Of Worldly affairs. *See* HINDU LAW—ASCETIC.

——Surrender of rights in property—Proof—Evidence requisite — Registered document—Necessity—Express declaration—Proof of. *See* REGISTRATION ACT, S. 17 (1) (B). **A.I.R. 1936 Cal. 774.**

ABATEMENT.

——Of appeal. *See* C. P. CODE, O. 22, Rr. 4, 9 AND 11 AND PRIVY COUNCIL—PRACTICE.

——Of cause of action. *See* C. P. CODE, O. 22, R. 1.

——Of Execution. *See* EXECUTION — JOINT DECREE-HOLDERS.

——Of Nuisance. *See* TORT.

——Of Partial. *See* C. P. CODE, O. 22, R. 4.

——Of Rent. *See* BENGAL TENANCY ACT, S. 38 —LANDLORD AND TENANT.

——Of Suit. *See* AGRA TENANCY ACT, S. 44 ; C. P. CODE, O. 22, AND S. 92

——Of Trial. *See* CRIMINAL TRIAL.

——Of Wrong. *See* TORTS.

——*Appeal—Death of appellant—Substitution of widow and minor son—Death of widow—Absence of application for appointment of next friend—Right of respondent to apply.*

The appellant in an appeal died pending the appeal. His widow and his minor son under the guardianship of the former were then brought on the record in the place of the deceased appellant. Then the widow also died, but no one applied to carry on the litigation on behalf of the minor within a reasonable time.

Held, that under O. 32, R. 9, C. P. Code, further proceedings should be stayed and that it was obviously for the respondents, as persons clearly interested in the matters in issue, to take steps in the matter to get a new next friend appointed; and if they did not do so, the minor on attaining majority would have to elect whether or not to proceed with the appeal. (*Das and Adami, JJ.*) RAMJI DAS *v.* MAHAMAYA PRASAD SINGH. **17 Pat.L.T. 86.**

——Appeal to Privy Council—Death of respondent—Hearing of appeal in ignorance and reservation of judgment—Subsequent discovery of death—Jurisdiction to pronounce judgment. *See* PRIVY COUNCIL—PRACTICE. **38 Bom.L.R. 680 (P.C.).**

——Execution proceedings—Joint decree-holders—Application by—Death of one—Effect—Right to continue. *See* EXECUTION—JOINT DECREE-HOLDERS. **A.I.R. 1936 Cal. 571.**

——*Partition suit—Suit by alienee from Mahomedan co-sharer—Death of defendant claiming interest only in part of the properties—Plaintiff not concerned with such share—Failure to implead legal representatives of deceased defendant—Whole suit—If abates.*

A suit for partition must ordinarily abate as a whole. But in a suit for partition by an alienee from a Mahomedan co-sharer, if a defendant who is interested in a portion of the property, dies and his legal representatives are not brought on the record within the time limited, the suit cannot abate as a whole when the deceased defendant had no interest in the portion of the property to which the plaintiff and his assignor are entitled. The suit as regards the part claimed by the plaintiff can proceed. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) JAMAL BHAWANDAS *v.* MURAD. **30 S.L.R. 142=165 I.C. 91=9 R.S. 75=A.I.R. 1936 Sind 169.**

——*Succession certificate — Application for—Death of applicant—Right—If survives to legal representative.*

The right to present an application for a succession certificate is a personal one and does not survive to the legal representative of the applicant on the latter's death. (*Norman, I.C.S.*) HAMIDA *v.* RABA. **1937 A.M.L.J. 40.**

——*Suit against devastanam—Defendant represented by trustee—Trustee ceasing to be such subsequently — Omission to bring on record another trustee—Effect—If causes abatement.*

When a devasthanam is a party defendant to a suit, represented by a trustee, the fact that that trustee ceases to be such subsequently, does not cause the suit to abate by reason of the omission to bring on record another trustee to represent the devasthanam ; especially when it is the devasthanam that is the party on record and the counsel originally retained for it continues to act on its behalf right down to the end of the action. (*Varadachariar and Mockett, JJ.*) ALAGAPPA CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **1937 M.W.N. 465 (1).**

ABDUCTION. *See* PENAL CODE, Ss. 363, 366 AND 367.

ABETMENT. *See* PENAL CODE, Ss. 34, 109 AND 114.

ABSCONDING. *See* CRIMINAL TRIAL.

ABKARI.

See (1) BOMBAY ABKARI ACT.
(2) MADRAS ABKARI ACT.

ABSENCE. *See* C. P. CODE, O. 17, RR. 2 AND 3.

——From British India. *See* LIMITATION ACT, S. 13.

——Of reasonable and probable cause. *See* Tort—Malicious prosecution.

ABSOLUTE ESTATE.

See (1) Hindu Law.
- (*a*) Stridhana.
- (*b*) Widow.
- (*c*) Wills.

(2) Will—Construction,

ABSOLUTE OCCUPANCY TENANT AND HOLDING.

(1) *See* Landlord and Tenant.
(2) „ C. P. Tenancy Act.
(3) „ Madras Estates Land Act.
(4) „ „ Occupancy Holding.

ABSOLUTE PRIVILEGE. *See* Penal Code, S. 49—Tort—Defamation.

ABUSE. *See* Penal Code, S. 504.

——of process of Court. *See* C. P. Code, S. 151 and O. 21, Rr. 89-91.

ABWAB—*Kathiari* and *Mutarfa*—If illegal exactions. *See* Bihar Tenancy Act (as amended in 1934). **20 Pat L.T. 88=A.I.R. 1939 Pat. 252.**

ACCELERATION OF ESTATE. *See* Hindu Law—Widow—Surrender.

ACCEPTANCE. *See* Contracts.

——Negotiable instruments. *See* Negotiable Instruments Act, S. 7 and Stamp Act, S. 62.

ACCESSION. *See* Alluvion and Diluvion.

ACCOMPLICE.

See (1) Evidence Act, Ss. 111, 114 (*b*) and 133.
(2) Cr. P. Code, S. 337.

ACCORD AND SATISFACTION. *See* Contract Act, S. 62.

ACCOUNTS.

See also (1) Debtor and Creditor.
(2) Hindu Law—Joint Family.
(3) Limitation Act, S. 19.
(4) Mortgage.
(5) Partnership—Dissolution.
(6) Principal and Agent.
(7) Stamp Act, Art. 1.
(8) Trusts and trustees.
(9) Will—Executor.

——*Decree for—Specific directions in decree—Duty of Court.*

In a decree directing accounts to be taken, it should be the practice of the Court to express its directions specifically in the decree rather than to insert a general reference to its judgment in the decree. (*Lord Thankerton.*) Manohar Mukerji *v.* Bhupendra Nath Mukerji. **161 I.C. 927=8 R.P.C. 224=1936 O L.R. 230=1936 A L.R. 415=38 P.L.R. 359=1936 O.W.N. 367=A.I.R. 1936 P.C. 325 (P.C).**

——*Settled accounts—Reopening of—Principles—Settlement between person who has just come of age and person in fiduciary position—Duty of latter—Former dispensing with production of accounts and taking gross sum as balance after taking competent advice—Right to reopen.*

If persons meet and agree not to ascertain the exact balance due on accounts, but agree to take a gross sum as the balance, which one is willing to pay and the other is content to receive, it is obvious that the production of vouchers is entirely out of the question, for the very object of the parties is to avoid the necessity for producing these vouchers. But when one of the parties to

the transaction has just attained the bare age of majority, and the other party stands in a fiduciary relationship, the Court will jealously watch such a transaction, and it is the duty of the party standing in fiduciary relationship to make a full disclosure of the state of the account. The latter must affirmatively prove that the weaker party was a free agent and had independent and disinterested advice. Where it is established that the weaker party had competent and independent advice, and that there was neither importunity nor persuasion on the part of the other party, who was prepared to produce all the accounts, but that the party who had just come of age was, though young, very shrewd and dispensed with the production of the books agreeing to take a gross sum, it must be held that he has waived his right to disclosure. He cannot be permitted to repudiate the settlement afterwards and to claim that the settled accounts should be reopened. Further if he does not come to Court with clean hands, he cannot expect any sympathy from the Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Pethaperumal Chettiar *v.* Ramaswami Chettiar. **181 I.C. 409=11 R.M. 805=1938 M.W.N. 895=A.I.R. 1938 Mad. 919=(1938) 2 M.L.J. 505.**

——*Settled accounts—Reopening of—Permissibility.*

Where accounts have been settled and agreed upon between two parties and one party promises to pay, a suit can be filed on that promise. A settled account gives rise to a cause of action and the creditor need not prove that the balance found is correct provided it is accepted as correct by the debtor. The debtor will not be allowed to reopen the settled account and to defeat the claim of the creditor, based on a pronote by contending that certain account books relating to a particular period have not been produced in Court. For a settled account cannot be reopened except on specific allegations of fraud or mistake. (*Tek Chand and Abdul Rashid, JJ.*) Prem Das Radha Kishen *v* Mahomed Hussain Khan. **162 I.C. 882 (2)=8 R.L. 965=A.I.R. 1936 Lah. 51.**

——*Settled accounts—When re-opened—Specific averment of errors—Necessity for in pleadings.*

Where accounts settled are impeached, if it is shown that they contain errors of considerable extent both in number and amount, whether caused by mistake or fraud, the Court will order such accounts, though extending over a long period of years, to be reopened; and supposing a fiduciary relation to exist between the parties the Court will make a similar order if such accounts are shown to contain a less number of errors, or if they contain any fraudulent entries. When a party seeks to reopen a settled account, there must be in the pleadings some direct, distinct and specific averment of errors to entitle the party to open the account. (*Abdul Ghani and Singaravelu Mudaliar, JJ.*) Anantha Padmanabha Bhatta *v.* Subba Rao. **17 Mys.L.J. 200=44 Mys.H.C.R. 19.**

——Suit for—Accounts forged—Relief. **A.I.R. 1938 Pat. 42.**

——*Suit for—Assignment of definite sum due from principal—Right of assignee to sue for account.*

Where, what is assigned to the plaintiff by the Official Receiver of an ex-broker's assets in insolvency, is a definite sum of money due from the latter's principal and not a right to sue for account, if any, a suit for rendition of account for the recovery of the amount thus assigned is incompetent. (*Addison and Din Mahomed JJ.*) JAINI BROTHERS & CO. *v.* SHANKAR LAL. **178 I.C. 176=A.I.R. 1938 Lah. 270**

———Suit for—Duty of Court to pass preliminary before final decree—Suppression of accounts by defendant—If justifies passing of final decree straightaway. *See* PRACTICE. **1939 M.W.N. 360=A.I.R. 1939 Mad. 671.**

———*Suit for—Interest—Yearly balances—Whether can be allowed.*

The plaintiff in a suit for rendition of accounts relating to a number of properties with which they alleged that the defendant had dealt as manager and co-sharer on behalf of themselves, while setting forth in their plaint the relief asked expressly for future interest only. The defendant had also filed cross-suit against plaintiffs for accounts. Both sides were found liable to account and the defendant was allowed interest to be calculated apparently on balances as they stood from year to year.

Held, that the suit was not one in which interest before date of final settlement ought to have been allowed, assuming that the Court had discretion to allow it, which it was perhaps doubtful. Interest would fairly be payable only on the amount found due on a balance of both accounts. (*Coldstream and Monroe, JJ.*) VIDYA WANTI KAUR *v.* SHAHDEV SINGH. **182 I.C. 426=12 R L. 24=A.I.R. 1938 Lah. 139.**

———*Suit for — Maintainability — Plaintiff knowing state of account.*

The plaintiff claimed a certain sum of money from the defendant as heir of one *L* who had deposited money with the defendant and instituted a suit for an account. The plaintiff knew or could have known what was the state of accounts between *L* and defendant.

Held, that the suit should have been filed on an account and not for an account and even if the plaintiff did not know how much was due to *L* it was open to him to have sued on account valuing his relief according to his estimate.

Held further, after the inspection of all the accounts after filing of the suit he could have applied for amendment of the pleadings. A.I.R. 1933 Lah. 483, Dist. (*Rupchand Bilaram and Mehta, A. J. Cs.*) MULOMAL KHEMCHAND *v.* TARACHAND DASSUMAL. **161 I.C. 505=8 R S. 147=A I.R. 1936 Sind 9.**

———*Suit for—Relief when can be granted.*

A right to claim a statement of accounts is an unusual form of relief only granted in certain specific cases and is only to be claimed when the relationship between the parties is such that this is the only relief which will enable the claimant to satisfactorily assert his rights. According to the terms of a lease the lessees were liable to pay rent at the rate of Rs. 10 per month; but if the lessees were to sub-let and recover more than Rs. 60 per month, they were also liable to pay ¼th of the excess to the lessors. The lessor alleged that the lessees had failed to pay rent according to the terms of this lease and sued to recover certain sum as rent and also claimed rendition of accounts, alleging that the lessees were realizing more than Rs. 60 per month, from their sub-tenants.

Held, that claim for rendition of accounts could be granted. (*Bhide, J.*) PANNA LAL *v.* RAM RICHHPAL. **A I.R. 1940 Lah. 120.**

ACCRETION.

See ALLUVION AND DILUVION.
BENGAL ALLUVION AND DILUVION REGULATION.
HINDU LAW.
LANDLORD AND TENANT.
LAND TENURES.
T P. ACT, Ss. 63, 72 AND 108.

ACCUMULATION. *See* T. P. ACT, S. 18.

ACKNOWLEDGMENT.

See (1) CONTRACT ACT, S. 25 (3).
(2) LIMITATION ACT, Ss. 19 AND 20.

ACQUIESCENCE.

See also (1) EVIDENCE ACT, S. 115.
(2) ESTOPPEL.
(3) LANDLORD AND TENANT—EJECTMENT.

———*Building on the land of another—Acquiescence of owner—Right of builder to remove building—Conditions.*

A party building on the land of another is allowed to remove the building when there has been a *bona fide* belief on the part of the person building that he has title and then it appeared that he had no title but was misled by the acquiescence of the owner. (*Stone, C. J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL. **I.L.R. 1940 Nag. 269=182 I.C. 581=12 R N. 12=1938 N.L J. 317=A.I R. 1938 Nag. 506.**

———Doctrine of—Elements to be proved—Building on land by trespasser—Silence of owner—If raises estoppel—Principles. *See* EVIDENCE ACT, S. 115. **40 C.W.N 1370.**

——— *Essentials of.*

Acquiescence imports full knowledge and it is no more than an instance of the law of estoppel. Apart from the full knowledge required, there must be some lying by to the detriment of the other side (*Stone, C J. and Bose, J.*) KUWARJI *v.* BHURELAL. **182 I C. 527=12 R.N. 9=1939 N.L J 136=A.I.R. 1939 Nag. 163.**

———*Standing by—Decree-holder raising no objections by way of attachment nor asking money to be deposited in Court but allowing judgment-debtor to take it away—Subsequent claim to such money—Maintainability.*

Where a decree-holder knowingly acquiesces in the disbursement of money due to the judgment-debtor, he cannot subsequently claim that such money ought to have been kept for his benefit. Where the decree-holder never asked that certain money to which the judgment-debtor was entitled should be paid into Court nor tried to attach it but stood by and allowed the judgment-debtor to take it;

Held, that it was not open to him subsequently to plead that the money ought to have been kept for his benefit. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **166 I C. 950 (2)=9 R N. 152=A.I R 1936 Nag. 168.**

ACQUISITION.

See HINDU LAW—JOINT FAMILY.

———By Government. *See* LAND ACQUISITION ACT.

ACQUISITION.

——Of easement. *See* Easements Act, Ss. 47 and 15.

——Of Title. *See* Adverse Possession.

——*Compensation—Franchise for public utility granted to private undertakers—Latter under obligation to transfer undertaking to public authorities after expiry of limited period—Assessment of compensation on transfer—Basis of.*

It is a familiar feature common to all cases in which a franchise for a public utility is granted to private undertakers for a limited period coupled with an obligation to transfer the undertaking to a public authority at the conclusion of the period, that the undertakers must look to reap the reward of their enterprise in the profit which they may make during the currency of their franchise and on its expiry shall receive only the value of the structure which they have created without any compensation either for the profits or the losses which they may have made or sustained while in the enjoyment of their franchise. This is plainly just, for which the termination of the franchise the power to make profits or the liability to incur losses simultaneously terminates. The promoters have had their chance to make what they can out of their undertaking in the knowledge that it was of limited duration and that they must part with it at a fixed date. To compensate them on the basis of the profits which they have made and are surrendering, would be to assume that they had a right to go on making profits although *ex hypothesi* the franchise which gave them that right had come to an end. (*Lord Macmillan.*) International Railway Co. *v.* Niagara Parks Commission. **10 R.P.C. 17=169 I.C. 562=A.I.R. 1937 P C. 214 (P.C.).**

——*Compensation—Transfer of public utility undertaking as a going concern—Fixing of compensation—Basis of.*

In the absence of clearest directions to the contrary in the terms of transfer, the compensation payable by the transferee of a public utility undertaking as a going concern to the transferor should not be fixed at the break up value to the transferee. The compensation should be fixed on the basis of reconstruction cost less depreciation. (*Lord Macmillan.*) International Railway Co. *v.* Niagara Parks Commission. **10 R.P.C. 17=169 I.C. 562=A.I.R. 1937 P.C. 214 (P.C.).**

ACQUITTAL.

See (1) Cr. P. Code, Ss. 403, 417 and 439.
(2) Criminal Trial.

ACTIONABLE CLAIM.

See (1) Assignment.
(2) Negotiable Instruments.
(3) Promissory Notes.
(4) T. P. Act, Ss. 3, 6 (e), 130 to 137.

ACTIONABLE WRONG. *See* Tort.

ACTS. *See* Interpretation of Statutes.

ACT OF STATE—*Dismissal of civil servant.*

The dismissal of a civil servant cannot be described as an Act of State of Sovereignty, and an action could be brought against the Secretary of State in respect thereof. (*Bhide and Currie, JJ.*) Girdhari Lal *v.* Secretary of State. **8 R.L. 473=159 I.C. 1107=39 P.L.R. 514=A.I.R. 1937 Lah. 226.**

——*Test—Stolen property recovered from accused's person lost while in custody of police—Administration. Suit by owner for recovery thereof—Liability of Secretary of State—Jurisdiction of Court.*

The Act of State is an act which the King executes in the exercise of his absolute and extraordinary power. If the Secretary of State takes the property in suit by an act of Sovereignty, then no suit will lie: but if, on the other hand, he takes it under the colour of legal title, then his act will be within the jurisdiction of the Courts. Certain stolen property recovered from the accused was lost while it was in the custody of the police. The owner of the property, therefore, filed a suit against the Secretary of State for India for recovery of the property. It was contended on behalf of the Secretary of State that as the property came into his possession in the exercise of a Sovereign right and thus an Act of State, no suit lay against him.

Held, that as the stolen property was recovered from the offenders under the provisions of the Cr. P. Code, and disposed of also under the provisions of the same Code, there was no occasion for the exercise of any absolute power of the Sovereign in this matter and whatever was done, was done under the Municipal law of the land. The liability of the Secretary of State having thus arisen under the Municipal law of the land, the defence that the act was an Act of State, could not be invoked. (*Addison and Din Mohammad, J.*) Uma Prashad *v.* Secretary of State. **18 Lah. 380=172 I.C. 567=10 R.L. 345=39 P.L.R. 845=A.I.R. 1937 Lah. 572.**

ADATHI SYSTEM. *See* Principal and Agent—Adathi.

ADEN CIVIL AND CRIMINAL JUSTICE REGULATION (VI OF 1933), S. 7—*Scope—Order by District Judge in revision—Bombay High Court's powers of interference in revision.*

S. 7 of the Aden Civil and Criminal Justice Regulation confers upon the High Court of Bombay a power of revision where any case has been decided by the District Judge of Aden whether in his original jurisdiction, or in appeal, or in revision. But the High Court should generally be slow to interfere with the exercise by the District Judge of his revisional powers. (*Beaumont, C.J.*) Ahmed Abdulla Rubatti *v.* Ahmed Abdulla Dubaee. **168 I.C. 576=9 R.B. 374=39 Bom.L.R. 110=A.I.R. 1937 Bom. 180.**

——S. 15—*Powers of District Judge—Revision—Admission of new evidence—Jurisdiction.*

The language of S. 15 of the Aden Civil and Criminal Justice Regulation is extremely wide, and the District Judge of Aden has jurisdiction under S. 15 to admit new evidence in revision, although it is obviously rather a dangerous course to admit further evidence in revision. (*Beaumont, C.J.*) Ahmed Abdulla Rubatti *v.* Ahmed Abdulla Dubaee. **168 I.C 576=9 R.B. 374=39 Bom.L.R. 110=A.I.R. 1937 Bom. 180.**

ADJUSTMENT. *See* C. P. Code, O. 21, R. 2, and O. 23, R. 3.

——Executory agreement—If can be adjustment. *See* C. P. Code, S. 47 and O. 21, R. 2. **I.L.R. (1939) Kar. 725.**

ADMINISTRATION—Application for letters with will annexed—Limitation—Long delay—Effect of. *See* Succession Act, S. 217. **41 C.W.N. 1204.**

——*Application for letters by widow—Consent decree providing payments to widow—No payments made even after nine months—Widow with minor children starving—Directions giving relief.*

A widow with five minor children applied for letters of administration of her husband's estate. Her major step-son filed a caveat. A consent decree providing payments to widow was subsequently passed. But though her husband died 16 months ago and the consent decree was passed nine months ago, and though sums amounting to Rs. 3,000 or Rs. 4,000 had been paid out of the estate on account of costs, she and her five minor children were starving. She even sold her ornaments. She was informed by the Administrator-General that there were still adjustments to be made against anything that has in future to be paid to her.

Held, 'there is something wrong with the system of administration of such estates. With regard to possible change of this system it is not a matter for the Court. There are no doubt difficulties. There are vested interests from the revenues of the country down to the smallest law tout against change. But unless changed, the system will be destroyed and it will deserve to be destroyed.' Directions giving relief to the widow were given on consent of parties. (*Ameer Ali, J.*) Probhapati Ray *v.* Gourishankar Ray. **171 I.C. 510=A.I.R. 1937 Cal. 219.**

——Application for letters with will annexed—Scope of enquiry—Considerations. *See* Succession Act, S 217. **41 C.W.N. 1204.**

——*Constructive trustee—Liability of—Extent.*

Even a constructive trustee will not be liable except for moneys which he is proved to have received. (*Mr. Jayakar.*) Atisukhlal *v.* Natvarlal. **183 I.C. 885=12 R.P.C. 78=6 B.R. 26=1939 O.L.R. 586=I.L.R. (1939) Kar. (P.C.) 391=A.I.R. 1939 P.C. 238 (P.C.).**

——Hindu joint family—Death of father—Absence of separate property—Creditor's suit for administration—If lies. *See* C. P. Code, Ss. 50, 52 and 53. **1939 M.W.N. 493=A.I.R. 1939 Mad. 552.**

——*Pleader's fee—Property involved worth Rs.* 1 24,000—*Suit notionally valued at Rs.* 800—*Calculation of fees—Basis of.*

The subject-matter of a suit is the actual value of the property to which the plaintiff would be entitled if the suit succeeds, and not the notional figure at which the plaintiff chooses to value it. For purposes of calculating pleader's fee in taxing the defendants' costs of an administration suit dismissed as bad for multifariousness the basis to be adopted was the value of the property, namely, Rs. 1,24,000, and not the notional value of Rs. 800, which the plaintiff had chosen. (*Broomfield and Macklin, JJ.*) Narhari *v.* Baburao. **41 Bom.L.R. 413=183 I.C. 655=12 R.B. 117=A.I.R. 1939 Bom 299.**

——*Preliminary decree drawn up—Further steps to be taken*

Where a preliminary decree for administration has been drawn up, nothing more is required from the Court beyond giving directions to the administrator or the receiver or whoever it is who is in charge of the estate, as to the lines the administration ought to take; and the only other decree which can be passed in the administration is the final decree, which will declare that the estate had been administered and which will allot out of the assets remaining in the hands of the Court or the administrator the various shares to the parties entitled to receive them. Hence after the preliminary decree, a supplementary decree cannot be passed by the Court on the application of a creditor. (*Baguley and Mosely, JJ.*) A. T. N. A. T. Chockalingam Chettiar *v.* Ko Maung Gyi. **178 I.C. 544=A.I.R. 1938 Rang. 372.**

——*Receiver in administration suit—Status and powers of.*

The receiver appointed in an administration suit has no better status than that of a receiver appointed under O. 40, C. P. Code. He is not on the same footing as a receiver appointed in an insolvency proceeding in whom the estate of the insolvent vests and the insolvent is divested of it. When a Court appoints a receiver, the property comes in the custody of the Court. The possession of the receiver is the possession of the Court. The property passes into legal custody (*custodia legis*) and such custody is for the benefit of the true owner. The receiver thus holds the property for the benefit of the true owners. By the appointment of a receiver the Court takes upon itself the management of the property during the continuance of the litigation, but the proprietary right or interest in the property is not transferred from the rightful owner either to the Court or to the receiver appointed. So where a receiver is appointed to the estate of a certificate debtor, the sale cannot be inoperative against the estate simply because the receiver is not substituted as certificate debtor. (*Mahomed Noor and Rowland, JJ.*) Mangtulal Bagaria *v.* Daya Shanker. **165 I.C. 749=9 R.P. 205=18 Pat.L.T. 301=3 B.R. 73=A.I.R. 1936 Pat. 572.**

——*Suit by creditor on behalf of himself and other creditors—Creditor not coming in and taking dividend—Distribution of assets among creditors coming in—Subsequent suit by former against latter for refund* pro rata—*Maintainability—C. P. Code, O.* 20, *R.* 13.

Where in an administration suit, by a creditor for himself and other creditors, for the administration of the estate of a deceased debtor, the assets which are not sufficient to pay the debts in full are distributed proportionately and rateably among the creditors proving their claims under the suit, a creditor who has neglected to come in at the proper time and to prove his debt in the suit cannot be permitted to disturb the dividend of the other creditors. A suit by him against the creditors who have proved and received dividends for a redistribution of the assets and for a *pro rata* refund by those creditors is not maintainable. (*Rangnekar, J.*) Kissondas Premchand *v.* Jivatlal Pratapshi & Co. **167 I.C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R. 1936 Bom. 423.**

——*Suit for, of estate of deceased person—Duty of Court—If bound to make administration order—Power to refuse order—Practice.*

The Court is clearly not bound to make an order for the administration of the estate of a deceased person, if the questions between the parties can be properly determined without such order. The order may be refused, even if the deceased testator has directed his executors to take proceedings to have his estate administered by the Court. (*Rangnekar, J.*) Kissondas Premchand *v.* Jivatlal Pratapshi & Co. **167**

I.C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R 1936 Bom. 423.

——*Suit for—Disputed debt—Power of Court to direct its payment to administrator.*

No doubt a Court in pursuance of a decree in the administration suit is competent to direct one of the parties to the suit to restore or hand over to the administrator or the receiver assets belonging to the estate in possession of such party, but a debt, specially a debt which is disputed, is not governed by this rule, because the expression "asset" as used above means property which has come in the hands of the representatives of the deceased as such either actually or by implication and a disputed debt cannot be deemed to be an asset which has come in the hands of any person representing the estate. (*Jai Lal, J.*) AHMAD DIN *v.* MAHOMED TAQI. **163 I.C. 363=9 R.L. 6 (2)=38 P.L.R. 284=A.I.R. 1936 Lah. 365.**

——*Suit for—Joint Hindu family—Debts by father—Suit after death against undivided son by creditor for administration—Maintainability—C. P. Code, S.* 53.

S. 53, C. P. Code, extends the meaning of the term "legal representative" as defined by S. 2 (11), by expressly making the son or descendant of a Hindu his legal representative in respect of joint family property in his hands which is liable under the Hindu Law for satisfaction of the debts of the deceased ancestor. The obligations of the Hindu son or other descendant, in respect of ancestor's debts which are not illegal or immoral, are, after the enactment of S. 53, precisely those of an heir, though the undivided son or other descendant gets the property by right of survivorship and takes it in his own right under the Hindu Law. Consequently a suit by a creditor for the administration of the estate of a deceased Hindu against his undivided son is maintainable. (*Lakshmana Rao, J.*) MEENAKSHI ACHI *v.* RAMASWAMI CHETTIAR. **173 I.C. 671=10 R.M. 618=1937 M W.N. 757=46 L.W. 321=A.I.R. 1937 Mad. 785.**

——*Suit for—Maintainability — Debt due by Hindu father—Suit by creditor against undivided son after father's death for administration—Competency—Opposition by some creditors—If a bar.*

A creditor of a deceased Hindu sued his undivided son for an administration of such part of the son's estate as was liable for his father's debts. A number of creditors of the deceased who were also joined as defendants were against the suit for the obvious reason that they had already obtained decrees and were actually executing them.

Held, that though the son was not the legal representative of his deceased undivided father, the debtor, his obligations were nevertheless precisely those of an heir, unless the debts were incurred for illegal or immoral purposes, and the son would be liable for his father's debts, not being illegal or immoral, to the extent of the assets of the joint family property that had come into his hands; and it was equitable and desirable that the creditor should be allowed to bring an administration suit against the undivided son of the debtor. The interested objections of certain defendants-creditors would not be a sufficient ground for not permitting the plaintiff to pursue his remedies in an administration suit. (*Horwill, J.*) ANJAYYA *v.* ANKAMMA. **166 I.C. 866=9 R. M. 405=1936 M.W.N. 1398=44 L.W. 836=A.I. R. 1937 Mad. 99.**

——*Suit for — Maintainability—Suit between rival claimants.*

O. 20, R. 13, Cr. P. Code, makes it clear that administration suits are intended to be filed for the purposes of taking an account of any property and for its due administration under the decree of the Court. A suit between rival claimants to the estate of a deceased person, each one claiming to be his sole heir, is not a suit for an account of any property and for its due administration under the decree of the Court. When, therefore, the main purpose of a suit is to determine who is the rightful heir of a deceased person an administration suit cannot be filed by one of the heirs to obtain possession of the property wrongfully withheld by another person claiming to be the heir. (*Abdul Rashid, J.*) CHAND NARAIN *v.* GHASI RAM. **42 P.L.R. 145=A.I.R. 1940 Lah. 179.**

——*Suit for—Party claiming less share in plaint—Right to proper share.*

In a suit for the administration of the estate, the parties are entitled to obtain the shares of the estate to which they are entitled under the law, and the fact that the plaintiff may in his plaint have claimed a less share than is actually due to him does not prevent his proper share being awarded to him in the judgment. (*Mosely and Dunkley, JJ.*) OON CHAN THWIN *v.* KHOO ZUN. **177 I.C. 501=11 R.R. 134=A.I.R. 1938 Rang. 254.**

——*Suit for—Parties—All creditors, if necessary parties.*

In an administration suit, the object of which always is to obtain an order for the administration of the estate of a deceased person under the supervision of the Court which must necessitate the payments of all the debts from the estate and therefore essentially a representative suit, it is not necessary that all the creditors should be arrayed as parties. All that is necessary in such cases is to call upon all the creditors after the decree has been passed to prove their debts and to pay such debts as have been proved before distribution of the estate to the heirs. (*Jai Lal and Abdul Rashid, JJ.*) MT. SHAHZADI BI *v.* MT. RAHMAT BI. **174 I.C. 893=10 R.L. 616=A.I.R. 1937 Lah. 761.**

ADMIRALTY—*Collision action — Suit for damages—Burden of proof.*

In collision action the burden in the first instance lies on the plaintiff and before he can succeed he must prove loss or damage due to the wrongful acts of the defendants, namely, loss or damage due solely or in part to their negligence or default. When he makes out a *prima facie* case of negligence on the part of the defendant, the burden of proof is shifted, and the defendant will be liable unless he proves that his negligence in no way contributed to the loss. (*Davis, J.C.*) YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA". **(1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.**

——*Collision — Actionability — Carrying of wrong lights by one ship misleading another—Suit by owner of former against latter for damages—Maintainability.*

If a ship by carrying wrong lights, or by navigating in an improper or unusual manner, misleads or embarrasses another, she cannot attribute as fault to the latter any act which was the probable result of her own negligence. *(Davis, J. C.)* YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA". **(1940) I.L.R. Kar. 53=A.I.R. 1939 Sind. 349**

——*Collision—Liability — Contributory negligence—Negligence—Test of.*

In collision actions it may well be that both parties are guilty of a neglect of duty, and that, if either had used reasonable care and skill, the collision would have been avoided. In such a case the maritime law, which is followed in the Admiralty, apportions the joint damage. So far as what constitutes negligence, it may perhaps best be expressed as doing something which ought either to be done in a different way or not at all, or omitting to do something which ought to be done. In collision cases the negligence relied on is generally a failure to exercise the skill, care and nerve which are ordinarily to be found in a competent seaman, or a breach of regulation, either international or local, governing navigation or equipment, or more rarely the inefficient or defective condition of the vessel or her equipment. Extraordinary skill or extraordinary diligence is not expected but that degree of skill, and that degree of diligence, which is generally to be found in persons who discharge their duty. *(Davis, J.C.)* YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA". **(1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.**

——*Jurisdiction—Owner of ship not resident abroad, or dead or bankrupt—Suit against—Maintainability.*

It is true that the Admiralty has jurisdiction *in rem* and that the ship is often spoken of as the wrongdoer and that a ship may be liable in admiralty where no damages could be recovered at law against the general owners. But where the owners of the ship are not resident abroad, dead or bankrupt a suit does not lie against the ship but against the owner. *(Davis, J.C.)* YOOSAF SAGAR ABDULLA *v.* S.S. "ELLORA". **(1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.**

——*Regulations for preventing collisions at sea, Art. 28—Failure to give sound signals to country craft in open sea—Effect of.*

There is nothing in Art. 28 of the Regulations for preventing collisions at sea which exempts a steamer from giving sound signals to a country craft. Failure to give sound signals to country craft in the open sea is breach of the Regulation and a general practice to ignore it in certain cases is no answer to the charge that a breach of the Regulations is *prima facie* negligence. The burden lies upon the party failing to give signals to show that failure to give sound signals did not contribute to the collision. *(Davis, J.C.)* YOOSAF SAGAR ABDULLA *v.* S. S. "ELLORA." **(1940) I.L.R. Kar. 53=A.I.R. 1939 Sind 349.**

ADMIRALTY ACTIONS—*If party can succeed on failure of opposite party to prove his case.*

In admiralty actions if a party fails to prove his case it cannot be said that the other party must succeed or *vice versa*. The case set up by one party may be false. This will disentitle that party to recover, but it does not follow from this that the opposite party must be held to have succeeded. A party in order to be entitled to recover must prove his own case. This principle which is of general application has always been applied in admiralty actions. Again, a party must recover only "*secundum allegata et probata*". The rule that proof must not be at variance materially with pleadings and that a party must state in his pleadings the material facts on which his case rests and in order to succeed must prove those material facts must always remain one of the essentials of legal procedure. *(Sen, J.)* RIVER STEAM NAVIGATION CO *v.* S.S. "JANARDAN". **184 I.C. 724=A.I.R. 1939 Cal. 513.**

ADMISSIBILITY.

See (1) EVIDENCE.
(2) EVIDENCE ACT.
(3) REGISTRATION ACT, Ss. 49 AND 17.

ADMISSION.

See also (1) C.P. CODE, O. 12.
(2) EVIDENCE ACT, Ss.17 TO 30 AND 115.
(3) LEGAL PRACTITIONERS.

——*Gratuitous admission—When can be withdrawn.*

If a person makes a gratuitous admission that the maker has no right in the property in certain estate and that all his rights had been extinguished, there is nothing to prevent him from withdrawing the said admission unless there is some obligation not to withdraw the gratuitous admission made by him. *(Collister and Bajpai, JJ.)* ISHAR FATIMA BIBI *v.* ANWAR FATIMA BIBI. **182 I.C. 801 (2)=12 R.A. 38=1939 A.L.J. 642=A.I.R. 1939 All. 348.**

——*Waiver—Difference between.*

There is a distinction in law between waiver and admission; in the case of waiver a person is not to be held to have waived a right of which he was reasonably ignorant, but in the case of a representation or admission which is acted on, the party making it cannot plead ignorance unless it is induced by the other party, for, if he does not choose to enquire beforehand, he takes the risk of error. *(Lord Thankerton.)* SHYAM SUNDER SINGH *v.* KALURAM AGARWALA. **32 S.L.R. 879=5 C.L.T. 1=176 I.C. 2=42 C.W.N. 1041=19 Pat. L.T. 561=48 L.W. 199=1938 M.W.N. 814=1938 O.L.R. 344=1938 A.W.R. (P.C) 186=68 C.L.J. 145=1938 O.W.N. 883=11 R.P.C. 58=1938 A.L.R. 672=4 B.R. 815=1938 O.A. 780=1938 P.W.N. 612=A.I.R. 1938 P.C. 230=(1939) 1 M.L.J. 147 (P.C.).**

ADVANCEMENT.

See (1) BENAMI.
(2) HUSBAND AND WIFE.

——Doctrine of—Applicability in India—Purchase by father in son's name—Inference. *See* BENAMI—PRESUMPTION. **A.I.R. 1939 Pat. 462.**

ADVERSE POSSESSION.

See also (1) LANDLORD AND TENANT.
(2) LIMITATION ACT, S. 28, AND ART. 144.

Acquisition of title.
Burden of proof.
Co-owners.
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Essentials.
Evidence.
Guardian and ward.
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License.
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Acquisition of title.

——Acquisition of title—Khoti land—Wrong transfer by occupancy tenant— Possession by transferee for over 12 years—Effect of. *See* BOMBAY KHOTI SETTLEMENT ACT, Ss. 6 AND 8. **40 Bom.L.R. 390.**

——*Acquisition of title—Possession in pursuance of settlement of disputes between brothers —No dispute for nearly 50 years—Possession ripening into ownership.*

Where in the settlement of dispute between two brothers as to the succession to an estate, the younger brother was given certain properties by way of maintenance and the elder was recognised as the owner of the remaining estate in his possession and which settlement remained unquestioned and in force for nearly 50 years, it was held that the possession of the elder brother and his representatives had been adverse to the younger brother and his representatives for more than the period of 12 years prescribed by the law of limitation, and had ripened into ownership. (*Sir Shadi Lal.*) KARUNAKAR TIKAIT SAMANTA *v.* PURNA CHANDRA BIDYADHAR. **174 I. C. 128=1938 O W.N. 412=1938 R.D. 438=19 Pat.L.T. 294=1938 A.W.R. (P.C.) 97=47 L.W. 611=1938 O.L.R. 180=1938 P W.N. 384=1938 O.A. 431=1938 A.L.R. 293=10 R.P.C. 256=4 B.R. 505=(1938) M W.N. 620 (P.C.).**

——*Acquisition of title—Possession by tenant.*

If a tenant does not claim in himself proprietary rights but claims only a subordinate right that of tenant, the effect of his possession for more than the statutory period is to make the land so possessed a part of his tenancy. (*Mitter and Sen, JJ.*) ABDUL LATIF *v.* NAWAB KHAJEH HABIBULLA. **69 C L J. 28=185 I.C. 714=12 R.C. 404=A.I.R. 1939 Cal 354.**

——*Acquisition of title—Agent or co-owner—Possession by.*

Ouster apart, a man's possession by his agent is not dispossession by his agent. The like is true between co-owners. (*Sir George Rankin.*) CADIJA UMMA *v.* DON MANIS APPU. **1939 A.C. 136=180 I C. 971=11 R P.C. 204=A.I R. 1939 P.C. 63 (P.C.).**

——*Acquisition of title—Assertion of hostile title by transfers of property.*

The transfers of property by a person in possession constitute a clear assertion of hostile title which is sufficient to make out title by adverse possession. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) SALTANAT BAHADUR KHAN *v.* GAYA BAKHSH SINGH. **13 Luck. 386=168 I.C. 932=1937 O.W. N. 625=1937 O.L.R. 332=9 R. O. 514=1937 R.D. 351=A I.R. 1937 Oudh 397.**

——*Acquisition of title by females—Nature of estate acquired.*

A female who gets into adverse possession of land to which she has no legal right, takes it as full owner at the end of the statutory period. (*Ram Lall, J.*) ZAHARYA MAL *v.* SHIB CHARAN. **41 P.L R. 672.**

——*Acquisition of title—Inclusion of disputed land in prior pre-emption suit—Effect—Starting point.*

The criterion of adverse possession is whether a person possesses land claiming it as his own; if he does he must be held to be in adverse possession. 46 I.C. 964, Rel. on. The defendant built a house in 1919 on the land claimed by the plaintiff as his own and was in possession for over 12 years till date of suit in 1932. In 1920, less than 12 years before date of suit, the defendant sued the plaintiff for possession of certain land by pre-emption. It was discovered subsequently that this land included the land in dispute. In the suit by the plaintiff for possession, it was contended that the defendant had admitted the title of the plaintiff by his suit for pre-emption and this cancelled the effect of overt act of adverse possession.

Held, that the fact that the area in dispute was included in the pre-emption suit did not show that there was any conscious admission by the defendant of plaintiff's title to the area in dispute, and by putting the building on the land in dispute the defendant claimed the site as his own and his adverse possession therefore started from that date and not from the date of the institution of the pre-emption suit. (*Abdul Rashid, J.*) AMAR NATH *v.* RAM RAKHA. **177 I.C. 158=11 R.L. 275=40 P.L.R. 479=A.I.R. 1937 Lah. 811.**

——*Acquisition of title—Mortgagee in possession under invalid sale.*

Where property is sold under an invalid sale deed to a mortgagee already in possession, there can be no adverse possession by the vendee against the real owners, no possession having followed under the sale-deed. (*Addison and Abdul Rashid, JJ.*) LACHHMAN SINGH *v.* NAWAB. **163 I.C. 48=8 R.L. 1025 (1)=38 P.L.R. 716.**

——Acquisition of title—Possession under agreement of sale—Suit for specific performance barred—Effect—Title—If can be acquired by adverse possession. *See* PART PERFORMANCE—SUIT FOR POSSESSION. **64 C.L.J. 115=A.I.R. 1937 Cal. 88.**

——*Acquisition of title—Submergence of land during rainy season—Constructive possession of true owner.*

While the land remains submerged whether it is for the whole year or only for some months during the rainy season, no possession could be deemed to continue with a person who is not the rightful owner so as to be made available towards the acquisition of title by adverse possession. During this period, the possession of the true owner must be deemed to have revived constructively. (*Srivastava and Nanavutty, JJ.*) PARTAB BAHADUR SINGH *v.* JAGATJIT SINGH. **12 Luck.**

371=164 I.C. 118=9 R.O. 40=1936 O.W.N. 784 =1936 R.D. 416=A.I.R. 1936 Oudh 387.

——*Acquisition of title—User of land by granting lease for grazing cattle during rainy season.*

Where, in a claim for title by adverse possession against Municipal Committee, the claimant produced a document purporting to be a rent deed executed in his favour, whereby he had given the property on rent to the lessee to graze his cattle in rainy season,

Held, this was not such a declaration of ownership as would become apparent to the Committee or put them on their guard. User of this sort was common in India and excited no particular attention and it was neither intended to denote nor understood as denoting a claim to the ownership of the land. This obviously was not an act which was sufficient to give title by prescription. (*Addison and Din Mohammad, JJ.*) Dwarka Das *v.* Municipal Committee, Amritsar. **173 I.C. 971=10 R.L. 510=A.I.R. 1937 Lah. 492.**

Burden of proof.

——*Burden of proof—Acts of possession—Nature of.*

Acts indicative of possession must vary with the nature of the land over which possession is to be exercised and asserted. (*Davis, J. C. and Mehta, J.*) Tahilram Tackchand *v.* Mt. Miral. **176 I.C. 549=11 R.S. 22=A.I.R. 1938 Sind 132.**

——*Burden of proof*—Animus—*Permissive possession—Presumption—Property belonging to mother held and enjoyed by son—Inference of enjoyment on behalf of mother.*

The question of adverse possession depends upon *animus*. In the case of property belonging to a mother which is held by her son, having regard to the relationship between the parties, the *prima facie* presumption would be that the possession and enjoyment by the son is on behalf of the mother. (*Venkataramana Rao, J.*) Veerabhadrayya *v.* Seethamma. **1939 M.W.N. 1073 =A.I.R. 1940 Mad. 236.**

——*Burden of proof.*

The burden of establishing adverse possession is on the person setting it up. (*Mitter and Patterson, JJ.*) Biraj Mohini Dassi *v.* Sarala Devi Chowdhurani. **169 I.C. 913=10 R.C. 59= 41 C.W.N. 396=64 C.L.J. 115=A.I.R. 1937 Cal. 88.**

——*Burden of proof.*

Where in a suit for possession of property, the title of the plaintiff, as well as the possession of the defendant for more than 12 years before suit are established and the plaintiff pleads that he has let the defendant in possession as a tenant but that has not been proved and the defendant pleads adverse possession, the burden of proof, in such a case, is on the defendant, and if he does not establish adverse possession, the plaintiff is entitled to a decree for possession. (*Bose, J.*) Meherban Lalli *v.* Yusuf Khan Kallu. **1938 N.L.J. 418=181 I.C. 203=A.I.R. 1939 Nag. 7.**

——*Burden of proof—Female — Possession without right—Presumption.*

The possession of a female, when it is without right is *prima facie*, adverse leaving it to the person alleging that it is not adverse, to prove it. (*Thomas, J.*) Mata Baksh Singh *v.* Ajodhia Bakhsh Singh. **163 I.C. 770=9 R.O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

Co-owners.

——*Co-owners.*

One co-owner cannot hold property adversely to the other co-owner unless he, by means of some overt Act, asserts adverse possession or deals with the property in such a manner that his acts amount to an ouster of the other co-owner. (*Tek Chand and Abdul Rashid, JJ.*) Murli Dhar *v.* Amar Nath. **42 P.L.R. 348.**

——*Co-owners—Ouster—Onus.*

A co-owner is presumed to hold on behalf of all, and if any co-owner asserts ouster, burden of proof lies on the person asserting ouster. (*Vivian Bose, J.*) Khwaja Afzal *v.* Mahomed Saheb. **I.L.R (1936) Nag. 177=165 I.C. 177=9 R.N. 66=A.I.R. 1936 Nag. 214.**

——*Co-owners — Essentials —Co-heirs under Mahomedan Law—Alienee from some—Possession of—If adverse to rest.*

To constitute title by adverse possession in one co-owner as against another, there must be ouster or exclusion; there must be a disclaimer by the one of the other's title by open assertion of a hostile title. It is not sufficient to show acts of possession; the possession required must be adequate in continuity or publicity and in extent to show that it is possession adverse to the competitor. Among co-heirs under Mahomedan Law, each of whom inherits a specific share in the estate of the deceased, mere possession by strangers who become co-owners by a sale from some of the co-owners cannot necessarily be held to be adverse against the rest. (*Davis, J. C. and Lobo, J.*) Mangalmal Aganmal *v.* Haji Mahomed Usif Bhoro. **I.L.R (1939) Kar. 597=185 I.C. 11=12 R.S. 151=A.I.R. 1939 Sind 315.**

——*Co-owners — Hostile possession by one—What amounts to.*

Where one co-owner asserts a title hostile to his co-owners, he must do so by an open and unequivocal assertion of a hostile title. The possession must be actual, visible, exclusive, hostile and continued for the statutory period. Mere intention to possess is not a substitute for actual possession, or actual possession of one survey number would not be possession of say, sixty. (*Davis, J. C. and Mehta, J.*) Tahilram Tackchand *v.* Mt. Miral. **176 I.C. 549=11 R.S. 22=A.I.R. 1938 Sind 132.**

——*Co-owners—Onus—Person becoming co-owner by taking joint possession under decree*

Where under a decree for joint possession a person has taken joint possession the presumption is that all formalities of law prescribed for giving joint possession were observed and he thus became a co-owner in the property thereafter. It therefore lies heavily on the other co-owners to show that after the passing of possession they were so notoriously exclusive in their occupation of the property as to give them a right to say that they had started adverse possession. (*Almond, J. C. and Mir Ahmad, J.*) Muzaffar Sarfraz *v.* Rahim Jana. **A.I.R. 1940 Pesh. 21.**

——*Co-owners—Possession of co-owner—Presumption.*

The possession of one co-owner is in law the possession of all the co-owners and nothing short of ouster or something equivalent to it will put an end to that possession and where a co-owner in possession did not deny the title of the other co-owners and never laid claim to more than his share, it must be presumed that the co-owner in possession was in possession on his own behalf as well as on behalf of his co-owner. **11 Lah. 29,** Foll. (*Skemp, J.*) JAGAN NATH *v.* BEGUM BIBI. **170 I.C. 89=10 R.L. 80=39 P.L.R. 773.**

Co-sharers.

——*Co-sharers.*

Possession can never be considered adverse if it can be referred to a lawful title. There can be no adverse possession by one co-sharer as against others until there is an ouster or exclusion; and the possession of a co-sharer becomes adverse to the other co-sharer from the moment there is ouster, *i.e.*, after there is an assertion of hostile title by one co-sharer against the others and to the knowledge of the latter. In order to succeed on the ground of ouster the person setting up ouster is bound to show that he did set up an adverse or independent title during the period which was beyond the statutory period of 12 years. (*D. N. Mitter and Patterson, JJ.*) NIRMAL CHANDRA DAS *v.* MOHITOSH DAS. **161 I.C. 450=8 R.C. 523 =40 C.W.N. 777=A.I.R. 1936 Cal. 106.**

——*Co-sharers.*

The possession of one co-sharer is the possession of all the co-sharers and in the absence of an ouster or an overt act amounting to ouster, limitation does not run against the co-sharer who is not in actual possession of his share. In order to establish his adverse possession the co-sharer in possession must distinctly deny and repudiate the title of the other co-sharers to their knowledge. It is after a lapse of 12 years from the date of the knowledge of the denial and repudiation that the possession of the co-sharer matures into ownership. Mere fact that the co-sharer in possession effected improvements on the land and the other co-sharers did not object to these improvements, is not sufficient assertion of hostile title to the knowledge of other co-sharers. If the occupant co-sharer does not give any notice of the denial of right of the other co-sharers he must make his possession so visibly hostile and notorious, and so apparently exclusive and adverse, as to justify inference of the knowledge on the part of the persons whom he intends to exclude. (*Janki Nath Wazir, J.*) MUNSHI SINGH *v.* NARAIN SINGH. **39 P.L R. J. & K. 114.**

——*Co-sharers—Co-sharer incurring expenditure on portion of joint property—Decree directing that it could not be partitioned until contribution by others—No time-limit—Possession of co-sharer after decree—If adverse.*

A co-sharer, having incurred some expenditure on certain portion of the joint property, sued for a declaration that that portion was exclusively his and not liable to partition. The decree in the suit rejected his claim but directed that the property could not be partitioned until contribution by other co-sharers to the expenditure incurred by him. No time-limit was mentioned and he remained in exclusive possession of the portion for twelve years after the decree.

Held, that as no time-limit was mentioned for contribution in the decree and as admittedly there was no hostile overt act openly denying the title of other co-sharers before the decree, his exclusive possession for twelve years after the decree could not be adverse. (*Tek Chand, J.*) NARINDAR NATH *v.* JAI NATH. **171 I.C. 757=39 P.L.R. 331= A.I.R. 1937 Lah 65.**

——*Co-sharers—Exclusive possession by one—Effect of.*

Where a co-sharer commits any act showing that he claims a right to exercise proprietary rights over the whole of a joint holding, the general rule is that his possession becomes adverse from the date of that act. (*Middleton, J. C.*) JANG BAHADUR *v.* ABDUL NUR. **160 I.C. 952= 8 R. Pesh. 139=A.I.R. 1936 Pesh. 24.**

——*Co-sharers—Exclusive possession of some—Effect of—Ouster—Partition—If amounts to.*

The exclusive possession of co-sharers cannot be adverse to a person who is also co-sharer with them unless they repudiate his title. Mere partition between them would not imply denial of his title or his ouster. (*Niyogi, J.*) RAMJI *v.* MADKI. **173 I.C. 103=10 R.N. 278=A.I.R. 1938 Nag. 89.**

——*Co-sharers—Exclusive possession by one—Effect.*

Possession should always be referred to a lawful source rather than to an unlawful source where the two alternatives are open to the Court. Where a co-sharer enters into exclusive possession of the land in dispute belonging to a widow co-sharer, paying land revenue for the same but the title of the widow to her shares has all along been recognized, and her name has been shown in the revenue records as a co-sharer, and, where on the death of the widow her share is mutated among all the co-sharers along with the co-sharer in possession, the possession of the latter (co-sharer in possession) cannot be held to have been adverse in the absence of any overt act showing adverse possession and all the reversioners of the widow are entitled to succeed to her share on her death. The mere fact that the co-sharer in possession was in exclusive possession of the widow's share and was paying land revenue for the same, or the fact that the land was partitioned among the sons of the co-sharer does not prove any overt act or adverse possession against the widow. (*Tek Chand and Dalip Singh, JJ.*) CHHITTAR *v.* UDE SINGH. **173 I C. 327=10 R.L. 434=39 P.L. R. 651=A.I.R. 1937 Lah. 430.**

——*Co-sharers—Exclusive possession by one—Effect of—Ouster—Onus of proof.*

Exclusive possession by one co-sharer is not adverse to the others in the absence of proof of ouster. He who claims a title by adverse possession must prove a definite act of ouster. (*Norman, I. C. S.*) FAZAL HUSSAIN *v.* TA SADIQ HUSSAIN. **1936 A.M.L.J. 127**

——*Co-sharers—Ouster—Alienation by one—Possession of transferee—If adverse.*

Where a co-sharer takes an action with respect to a joint holding which transfers right in the whole holding, he thereby by his very act proclaims that he is in adverse possession, and that where that transfer is also a transfer with possession, the possession of the transferee becomes adverse at once. A.I.R. 1925 Lah. 518; A.I.R 1932 P.C. 235; A.I.R. 1931 All 447 and A.I.R. 1924 Mad. 741, Dist.; A.I.R 1922 Lah. 205, Foll. (*Middleton, J. C.*) JANG BAHADUR *v.* ABDUL NUR. **160 I.C. 952 =8 R Pesh. 139=A.I.R. 1936 Pesh. 24.**

——*Co-sharers—Ouster—Essentials—Burden of proof.*

Exclusion or ouster involves not merely the act of the person ousting but the state of mind of the person ousted. Knowledge on the part of the latter is therefore essential. The mere fact of non-receipt of rents is not conclusive proof of ouster by the co-sharer who is in possession. The onus of proving ouster is upon persons who set up adverse title. (*Wort and Rowland, JJ.*) Mt. Bibi Zainab *v.* Muhammad Ayub 161 I.C. 331 (2)= **8 R.P. 443=17 Pat. L.T. 366=1936 P.W.N. 140 =A.I.R. 1936 Pat. 136.**

——*Co-sharers—Ouster—Inference from non-participation of rents and profits.*

Mere non-participation of rents and profits of joint property by a co-sharer for a very long period would not be sufficient to give rise to the inference of ouster. When along with non-participation of rents and profits for a considerable length of time other circumstances concur, an inference of exclusion or adverse possession under hostile title might be drawn. The Court must be satisfied that the taking of the profits is an indication of the denial of rights in the other co-sharers to receive them. Mere long and uninterrupted possession without more, by a co-sharer is not sufficient to constitute adverse possession. (*D. N. Mitter and Patterson, JJ.*) Nirmal Chandra Das *v.* Mohitosh Das. **161 I.C. 450=8 R.C. 523=40 C.W.N. 777=A.I.R. 1936 Cal. 106.**

——*Co-sharers—Ouster—Non-sharing of profits and non-enjoyment of property— Sale by one without objection by other—Effect.*

To establish adverse possession in the case of a co-owner there must be express ouster, and mere non-participation in the profits and non-enjoyment of the property is not enough to destroy title. But where one co-sharer deals with the property as his own for a long time and sells it without any protest from the other co-sharers, coupled with the non-participation in profits and non-enjoyment of the property by the other co-sharers, this is enough to establish ouster of the alleged co-sharers. The length of ouster can make no difference to the principle, provided it is longer than the statutory period of twelve years. It is for a Judge of fact to determine whether the length of exclusive possession in the case before him is enough to establish ouster or not. (*Vivian Bose, J.*) Krishnabai *v.* Parwatibai. **I.L.R. (1937) Nag. 242=9 R.N. 106=165 I.C. 934=A.I.R. 1936 Nag. 282.**

——*Co-sharers —Ouster— Removal of co-sharer's name from revenue records—Non-participation by him in rents and profits for over 80 years —Effect of.*

The removal of a co-sharer's name from the revenue records at the instance of the other co-sharers, can be considered to be an overt act on their part amounting to ouster. If the co-sharer whose name has been removed, and his descendants, do not take any interest in the land for a period of over 80 years and do not receive any share of its rents and profits, the circumstances would not only justify an inference of ouster but are also good evidence of "abandonment" (*i. e.*) an intentional quitting of possession by a proprietor coupled with an intention not to resume it (*Bhide, J.*) Amar Singh *v.* Shiv Datt Kaur. **I. L. R. (1938) Lah. 367=175 I.C. 605=11 R.L. 19=39 P.L.R. 695=A I R. 1937 Lah. 890.**

——*Co-sharers—Plaintiff's co-sharer who is in possession executing sale-deed—Adverse possession against plaintiff—When starts.*

The mere fact that the co-sharer of the plaintiff, who was in permissive possession, executed a sale deed of the plaintiff's share as well will not make adverse possession run against the plaintiff so long as the co-sharer continued in possession. Of course, if the knowledge of the execution of the sale-deed is brought home to the plaintiff, then it must be considered that the possession of the previous co-sharer ceased to be on behalf of the plaintiff and time would begin to run against the plaintiff from the date of such knowledge. In the absence of any such proof, time would begin to run against the plaintiff only from the time when the vendee obtained possession exclusively, overtly and publicly so that if the plaintiff had exercised due diligence he ought to have discovered that a stranger other than the person whom he had allowed to remain in possession was in sole occupation of the property. (*Sulaiman, C.J. and Bajpai, J.*) Ram Manohar *v.* Baboo Singh **167 I.C. 371=9 R.A. 525=1937 A.L.R. 176=1936 A.W.R. 1014=A.I.R. 1937 All. 124.**

——*Co-sharers—Possession of entire property by co-sharers—Presumption of ouster.*

Mere possession of the entire property by a co-sharer unaccompanied by any other circumstance is not sufficient to create a presumption of ouster. (*B.N. Rau, J.*) Bhutnath Bandopadhya *v.* Jagat Tarini Dasi. **71 C.L.J. 200.**

——*Co-sharers—Possession by one—No assertion of exclusive title—Claim made only to share—Effect of—Properties registered in name of one —If conclusive—Respective shares of co-owners—Presumption as to.*

Where a co tenant in possession of joint property does not assert any exclusive title in himself to the knowledge of the others, but claims title only to a share therein, there can be no ouster so as to make his possession adverse to the other co-tenants. No importance can be attached to the fact that the property is registered in the revenue records in a co-tenant's sole name or that the patta has been issued in his name. The presumption in the case of co-owners, in the absence of evidence to the contrary, is that they hold the property in equal shares. (*Varadachariar, J.*) Tirumalappa *v.* Ramappa **1937 M.W.N. 1285=46 L.W. 910 =176 I.C. 639=11 R.M. 140=A.I.R. 1938 Mad. 133=(1937) 2 M.L.J. 511.**

——Co sharers—Possession by one—When adverse—Mortgage of share by one co-sharer with possession—Effect of. *See* Co-sharers— Adverse possession. **1937 A.W.R. 718=A.I.R. 1937 All. 696.**

——*Co-sharers—Proof.*

The party who sets up the plea of adverse possession must prove that the possession was open, notorious, exclusive and hostile. Simply because a party has not been in enjoyment of rents and profits of a property does not *per se* establish a title to it by adverse possession in the co-sharer who has enjoyed such profits. (*Abdul Qayoom, C J. and Kichlu, J.*) Hari Chand *v.* Kaka. **42 P.L.R.J. & K. 68.**

——*Co-sharers—Proof of overt act—If necessary.*

ADVERSE POSSESSION—Co-sharers.

The possession of one co-sharer must be deemed to be the possession of all the other co-sharers, and in order to defeat the title of absentee co-sharers, it is for the co-sharer in possession to prove that by some overt act he converted his possession into adverse possession to the knowledge of the other co-sharers. (*Addison and Din Mohammad, JJ.*) Munshi *v.* Beli Ram. **18 Lah. 618=174 I.C. 942=10 R.L. 637=40 P.L.R. 427=A.I.R. 1937 Lah. 578.**

——*Co-sharers* — Shamilat *land—Village proprietor in possession of a portion.*

Where a village proprietor is in possession of a portion of the shamilat land, such possession must be deemed to be that of a co-sharer, and he cannot claim title by adverse possession unless he can establish that more than 12 years before the suit he had given notice to the other proprietors by some unequivocal declaration or overt act that he denied the title of the other co-sharers and converted his joint possession into exclusive possession. In such cases a claim to hold exclusive possession is distinct from a claim to exclusive title and it is a claim of exclusive title by a co-sharer that converts his joint possession into exclusive possession. (*Jai Lal. J.*) Lakha Singh *v.* Teja Singh. **38 P.L.R. 453.**

——*Co-sharers—Shebaits —Property held in common by persons in capacity of shebaits—Rule regarding co-sharers—If applicable.*

The rule with regard to exclusive possession of a co-sharer in joint properties, to the exclusion of other co-sharers also applies to property which is held in common by persons in their capacity as shebaits. (*D. N. Mitter and Patterson, JJ.*) Nirmal Chandra Das *v.* Mohitosh Das. **161 I.C. 450=8 R.C. 523=40 C.W.N. 777=A.I.R. 1936 Cal. 106.**

——*Co-sharers—Some of co-sharers in joint mahal giving plot to third person in lieu of plot in his own mahal—Nature of possession of such person.*

If some of the co-sharers in a joint mahal give a plot to a third person in exchange for a plot in his own mahal, the possession of such third person is permissive, and so far as the co-sharers who are not parties to the exchange are concerned he must be held to be in possession on behalf of the co-sharers who are parties to the exchange and there can, therefore, be no adversity of possession in such a case. (*Madeley, J.*) Wajid Ali *v.* Mahomed Naziruddin Hussain. **171 I.C. 89 =10 R.O 87=1937 R.D. 528=1937 O.L.R. 520 =1937 O.W.N. 1036=A.I.R. 1937 Oudh 503.**

——*Co-sharers—Things to be proved—Exclusive and hostile possession and ouster.*

There could be no adverse possession where a person is in possession of the property of another with the consent of that person, and this is specially so where the parties happen to be co-sharers. To prove title by adverse possession, one should show that the possession was exclusive and hostile; where co-sharers are concerned ouster must be shown. (*Thomas, C.J.*) Maik *v.* Tulsha. **1939 O.W.N. 1039=1940 R.D. 36=1939 A.W.R. (C.C.) 300.**

——*Co-sharers—Three branches becoming entitled each to certain share in property—Possession of entire property continued by one branch—Nature of.*

ADVERSE POSSESSION—Essentials.

Each of three branches became entitled to certain share in property. Before accrual of this right, one of the branches was in possession of entire property and subsequent to the accrual also it continued to be so in possession.

Held, that its possession subsequently was not in a representative capacity on behalf of the other branches but adverse to them and that the principle that possession of one co-sharer in possession on behalf of the others had no application.

Held also, that a mutation entry in revenue records that each branch is entitled to certain share after the rights of the two branches have been extinguished by adverse possession did not affect the question. (*Jai Lal, J*) Ude Singh *v.* Chittar. **167 I.C. 473=9 R.L. 491=A.I.R. 1936 Lah. 994.**

Co-tenants.

——*Co-tenants—Ouster—Proof.*

The mere fact that a person is tenant in common with others who are in possession of the property is sufficient to show that the person is in possession even if he lived a great distance from where the property is situated and even if he had nothing whatever to do with the property unless it can be shown that other co-tenants had ousted the person from the property. Demand of rent by co-tenant from a lessee of the property is not evidence of ouster by the co-tenant of the other co-tenants whether such demand is made on his behalf or on behalf of the others. (*Wort, J.*) Moti Singh *v.* Deoki Singh. **160 I.C. 1054=8 R.P. 408=17 Pat.L.T. 170=A.I R. 1936 Pat. 66.**

——*Co-tenants—Proof required.*

If there is no definite proof of ouster, adverse possession could not be established against a co-tenant. In the absence of a plea of a definite act of ouster, the co-tenant must be regarded as having been in possession of his share of the property. A.I.R. 1936 Pat. 136, Rel. on. (*James and Rowland, JJ.*) Baijnath Sahu *v.* Jaimangal Prasad Singh. **164 I.C 851=9 R.P. 139=1936 P.W.N. 610=A.I.R. 1937 Pat. 56.**

Essentials,

——*Essentials—Assertion of hostile title—Order in mutation proceedings—Effect of.*

An order made in a mutation proceedings is not a judicial determination of title or proprietary interest, and may not *per se* create any title. But, if accompanied by overt acts of possession, such an order may give rise to an adverse inference of an assertion of a hostile title. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) Nanjappa Setty *v.* Hassain Bee. **17 Mys.L.J. 510.**

——*Essentials.*

When possession can be traced or referred to a lawful origin, it is not adverse. ((*D.R. Norman.*) Umrao *v.* Mahadevi. **1937 A.M L.J. 64.**

——*Essentials—Admission of title of rightful owner—Effect.*

In order that adverse possession should mature into ownership, possession must be held under some claim of right. An adverse holding means an actual and exclusive appropriation of land commenced and continued *under a claim of right.* When the squatter impliedly admits the rightful owner's title to the land in question, his possession cannot be regarded as adverse to the rightful owner. (*Niyogi, A.J.C.*) Ramaji Gujar *v.*

KUARJI GUJAR. 167 I.C. 801=9 R.N. 217=19 N.L.J. 78.

——*Essentials—Claim to proprietary rights against Government—Burden of proof.*

For establishing adverse possession against Government, it has to be proved by the plaintiff that adverse possession was within the knowledge of the Government. Where a person claims against Government proprietary rights in certain land by adverse possession, mere payment by Government of some amount as compensation to the members of the claimant's family at the time when some departments of Government occupied part of such land, does not amount to an admission on the part of Government of the claimant's title to such land, when it is not shown that the payment was merely for the value of the site occupied by Government and not for the value of some building which was standing on the place. (*Sulaiman, C.J. and Bennet, J.*) SECRETARY OF STATE *v* FARID UDDIN. 171 I.C. 381=1937 A.W.R. 814=1937 A.L.R. 831=A.I.R. 1937 All. 622.

——*Essentials—Continuous possession—What is.*

In order to give title as against the rightful owner, adverse possession must, among other things, be continuous. Overt acts of possession are only evidence from which adverse possession has to be inferred. Merely because the acts are separate, it does not follow the possession was not continuous. There is a difference between cessation of user and cessation of possession and the one does not necessarily lead to the other. Where for more than the statutory period, the adverse possessor not only treated the disputed land as his own but intended to exclude the others including the rightful owner from possession, and whenever an occasion arose it was the adverse possessor who exercised possession and not the rightful owner, the facts give rise to an inference of title by adverse possession in spite of the gaps in the evidence as to acts of possession during the aforesaid period. (*S.K. Ghose and Patterson, JJ.*) BHABANI PRASANNA LAHIRI *v.* MANINDRA CHANDRA ROY. 42 C.W.N. 1209.

——*Essentials—Land used by neighbour for over 12 years—Land not of present use to owner but convenient to neighbour—User—If amounts to prescription.*

Where a small piece of land which is of no present use to the owner who is not a resident of the locality, and which is convenient in many ways to his neighbours whose house adjoins the land, is used by the latter in various ways, without objection for over 12 years, such user does not amount to adverse possession against the owner, and is insufficient to give a title to the land by adverse possession. Such acts of possession cannot be effectively taken notice of at once by the owner against whose interest they are exercised. (*Varma, J.*) KALADHARI SINGH *v.* JABACHH MISHRA. 181 I.C. 275=5 B.R. 546=20 Pat.L.T. 415=11 R.P. 580=A.I.R. 1939 Pat. 399.

——*Essentials—Notice of hostile title to owner—Necessity—*Jeroyati *land in zamindari wrongly believed to be inam but later discovered to be* jeroyati*—Non-payment of rent by occupants for 12 years—If creates rent-free title—Belief of occupants of proprietary rights—Effect of.*

Adverse possession in order to become a basis of title must be brought to the notice of the owner. Where certain *jeroyati* land of a zemindar once formed part of a large tope within the limits of a village and was mistakenly believed to be an inam tope, held on rent-free tenure, but at a special survey and settlement before suit, it was discovered that the tope was not inam, but *jeroyati* land, the fact that the occupants of the land were in possession for more than 12 years without paying rent would not prevent the zemindar from levying rent when he comes to know of the occupation of the land, when there is no evidence of an assertion of a proprietary title adverse to the zemindar for twelve years. The fact that the occupants believed that they had the full ownership of the land and enjoyed it as such for over the statutory period would not be sufficient to give them a title by prescription against the zemindar, as such occupation would not affect the landholder with notice of their claim to be proprietors. (*Burn and Stodart, JJ.*) RAMACHANDRA DEO *v.* BALAJI. I.L.R. (1940) Mad. 245=1940 M.W.N. 433=50 L.W. 721=A.I.R. 1940 Mad 91=(1940) 1 M.L.J. 673.

——*Essentials—Openness—If to be brought to the knowledge of true owner.*

The fact of adverse possession in order to be effective need not be brought to the knowledge of the person against whom it operates. It is sufficient that such possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. (*Singaravelu Mudaliar and Venkataranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. 17 Mys.L.J. 510.

——*Essentials — Possession to knowledge of owner—If necessary.*

In order to establish adverse possession, it is sufficient to show that the possession of the trespasser was overt and without any attempt at concealment, so that the person against whom time was running ought, if he exercised due vigilance, to be aware of what was happening. It is not necessary to prove that the possession was to the knowledge of the owner. (*Tek Chand, J.*) SHANTI DEVI *v.* MANI SINGH. 170 I.C. 994=10 R.L. 163=A.I.R. 1938 Lah. 6.

——*Essentials—Possession of one portion of plot—Presumption as to other portion—*Parti *land.*

In order to constitute adverse possession, the possession must be adequate in continuity, in publicity, and in extent of area to show that it was adverse to the real owner. It must be actual, exclusive and uninterrupted. The kind of possession must no doubt depend largely upon the character of the land but no presumption of possession can be made in favour of a trespasser. His possession must be confined to the land actually occupied by him. Though as a general rule possession of part is in law possession of the whole, if the whole is otherwise vacant, but constructive possession of this kind can only be presumed when there is a claim based upon title. It follows from the above that in the case of *parti* land the establishment of adverse possession regarding one portion of the plot cannot lead to any presumption in respect of the other portion. (*Srivastava and Nanavutty, JJ.*) PARTAB BAHADUR SINGH *v.* JAGATJIT SINGH. 12 Luck. 371=164 I.C. 118=9 R.O. 40=1936 O.W.N. 784=1936 R.D. 416=A.I.R. 1936 Oudh 387.

——*Essentials—Right of fishing exercised in beel—Beel drying up in hot seasons—Continuity, if broken.*

In order to acquire title by prescription or adverse possession, the trespasser must show that his possession is adequate in continuity, publicity and extent. The element of continuity is wanting in the case of possession of a beel which dries up in hot seasons every year. During the period when the trespasser is exercising actively the right of fishing to the exclusion of the rightful owner there is continuity but when the lands become dried constructive possession remains with the rightful owner. This is sufficient to break the continuity of the trespass and in the absence of continued possession no title can be acquired by the trespasser on the basis of adverse possession. (*D. N. Mitter, J.*) Shyamadas Mukherjee *v.* Radha Prosanna Gon. **69 C.L.J. 170.**

——*Essentials of—Vacant land—Exclusion of owner—Inference as to adverse possession, when justified—Application of rule as to possession following title.*

Possession cannot be adverse unless it is held in such circumstances as are capable in their nature of notifying mankind that the party is on the land claiming it as his own openly and exclusively. There ought to be nothing equivocal in a possession which is relied on as bar; and possession cannot be adverse unless the owner is in denial of his title excluded from enjoyment. Possession to be adverse must be notorious, exclusive and hostile In the case of a vacant land the same kind of possession cannot be expected as in the case of an occupied land or building and where there is no effective intrusion the Court will be justified in giving effect to the principle of law that possession follows title. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Atchayya Patrudu *v.* Jalaluddin Sahib **178 I.C. 301=1938 M.W.N. 185=47 L.W. 202=A.I.R. 1938 Mad. 454=(1938) 1 M.L.J. 190.**

Evidence.

——*Evidence—Claimant proving exclusive possession.*

A person claiming property by adverse pessession must prove by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of real owner's title to property claimed. He must also prove that the real owner would have, on exercise of due diligence, been aware of possession by him of real owner's property. Even if intention on the part of the claimant to hold adversely to real owner is not proved, it is sufficient if claimant proves that he occupied the property exclusively for himself excluding the real owner definitely and completely. Defendant erected a hut on the portion of the land belonging to plaintiff's predecessors in-title, adjoining a main road and occupied it openly and without any attempt at concealment fenced it in and lived in it for more than 12 years before suit. It was proved that the real owner would have, on exercise of due diligence, discovered that the defendant was occupying a portion of his land.

Held, under the circumstances the defendant's possession was adverse to plaintiff's predecessors-in-title and therefore to the plaintiff. (*Mya Bu and Baguley, JJ.*) Bashir Ahmad *v.* Nederland

Sche Handel. **171 I.C. 643=A.I.R. 1937 Rang. 180.**

——*Evidence—Land passing by revenue sale—Adverse possession set up by old proprietors—Proof by them of receipt of rent—If necessary.*

If it be once shown that the lands in dispute passed by the revenue sale, there can in law be no presumption that, contrary to the purchaser's rights, the old proprietors remained in receipt of rent from the agricultural tenants. Any possession which the old proprietors may have exercised after the sale would no doubt be adverse to the purchaser, but they must prove that they continued in possession and it does not appear that it is possible for them to prove possession save by proving that they received rents from the tenants notwithstanding the sale. No doubt, if at some date rent was received by them in respect of a previous period subsequent to the sale, a question may arise whether this receipt does not evidence possession by the tenants on behalf of the old proprietors since the date of the sale but proof of receipt of rent would seem to be necessary if the old proprietors are to make out a case that the purchaser's title has come to an end by reason of their adverse possession. Proof of receipt of rent may be indirect, for example, public records showing that *A.B.* was in possession of the *maleki* interest may or may not be sufficient in any particular case. (*Sir George Rankin.*) Kesho Prasad Singh *v.* Bahuria. **16 Pat. 258=31 S.L.R 242=1937 A L.J. 638=65 C.L J. 241=1937 M W.N. 593=1937 A.L.R. 252=39 Bom.L.R. 731=18 Pat L.T. 257=1937 O.W.N. 396=1937 R.D. 178=9 R.P.C 199=1937 A.W.R. 459=41 C W.N. 577=45 L W 580=1937 P.W.N. 290=1937 O. L.R. 151=3 B.R. 368=167 I C. 329=A.I.R. 1937 P.C. 69=(1937) 2 M.L J. 631 (P.C.).**

Guardian and Ward

——*Guardian and Ward—Possession of guardian—If adverse to ward.*

Where a guardian is in possession of ward's property the guardian cannot set up any adverse title. His possession would be deemed to have been that of bailiff or agent on behalf of his ward but not hostile to him. (*Niyogi, J.*) Ramji *v.* Madki. **173 I.C. 103=10 R.N. 278=A.I.R. 1938 Nag. 89.**

Hindu widow.

——Hindu widow—Possession adverse to—If adverse to reversioners. *See* Hindu Law—Widow. **39 Bom L.R. 895.**

——*Hindu widow—Possession of mother-in law—When on behalf of widow—If adverse.*

Where a Hindu dies leaving his widow, and her mother-in-law takes possession of the property, it is only when it is proved that the widow was a minor at the time of her husband's death, that the mother-in-law as a lawful guardian under the Hindu law of her widowed daughter-in-law must be presumed to have got into possession only on behalf of her daughter-in-law. (*Varadachariar and King, JJ.*) Ramayya *v.* Lakshmayya. **177 I C 225=11 R.M 276=(1938) M.W.N. 1032=A.I.R 1938 Mad. 513.**

——*Hindu widow—Possession of—If can be adverse to reversioners.*

Where a widow takes possession of the property after the death of the last male holder as a Hindu widow with a limited estate and there is nothing to show that the character of her title or possession was altered at any time, such possession could not be adverse to her husband's reversioners and any rights which she acquires by reason of her possession would be accretions to the estate of her husband to which her husband's reversioners are entitled to succeed. The period of her possession therefore cannot be tacked on to that of her alienee. (*Coldstream and Din Mahommad, JJ.*) GANGA RAM *v.* NAORATA RAM. **178 I C. 946=11 R.L. 509=40 P.L.R. 616=A.I.R. 1938 Lah. 187.**

Interruption.

See BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (XIX OF 1793). **41 C.W.N. 688.**

——Interruption—Attachment—Twelve years' possession not complete on date of attachment of property—Effects—Suit by claimant after expiry of twelve years—Plea by adverse possession—Sustainability. *See* C. P. CODE, O. 21, R. 63. **(1938) 2 M.L.J. 430.**

——*Interruption—Attachment in execution of decree—If interrupts adverse possession of stranger.*

An attachment in execution of a decree does not dispossess the party in possession, and it does not interrupt the adverse possession of a stranger holding adversely to the judgment-debtor, as possession of a stranger is not affected or disturbed by an attachment. (*Varadachariar, Lakshmana Rao and Gentle, JJ.*) DHARAPURAM JANOPAKARA NIDHI LTD. *v.* LAKSHMINARYANA CHETTIAR. **I.L.R. (1939) Mad. 803=182 I C 999=12 R.M. 239=49 L.W. 671=1939 M.W.N 488=A.I.R. 1939 Mad. 456=(1939) 1 M.L.J. 802 (F.B.).**

——*Interruption—Attachment of property—Claim by adverse possessor—Dismissal on ground of delay—Omission to file suit within one year—Effect—Sale afterwards set aside on objection by judgment-debtor—Decree otherwise satisfied—Plea of adverse possession by claimant—If barred—Estoppel.*

Where a person in possession of land adversely to the judgment-debtor prefers a claim to the property which is attached in execution of a decree against the judgment-debtor, and the same is dismissed on the ground of delay in preferring the claim, the omission on the part of the claimant to file a purposeless suit within one year cannot deprive him of the benefit of his prior possession. The finality of the claim order cannot be invoked even by the particular decree-holder who is a party to the claim order and in respect of the very decree which is then under execution unless he is proceeding to bring the properties to sale in pursuance of that very attachment. The conclusiveness of the order dismissing the claim cannot also be availed of by any one other than the person or persons purchasing in a sale held in pursuance of the attachment in connection with which the claim was preferred. Where the sale held after the dismissal of the claim is set aside on the application of the judgment-debtor, and the decree is subsequently otherwise satisfied, so that it becomes unnecessary to take any further steps in execution of that decree, it cannot be held that the prior possession of the claimant is broken or that he is estopped from pleading his prior possession by reason of the order dismissing his claim and his omission to file a suit under O. 21, R.63, C P Code. (*Varadachariar, Lakshmana Rao and Gentle, JJ.*) DHARAPURAM JANOPAKARA NIDHI, LTD. *v.* LAKSHMINARAYANA CHETTIAR. **I.L.R. (1939) Mad. 803=182 I.C. 999=12 R.M. 239=49 L.W. 671=1939 M.W.N. 488=A.I.R. 1939 Mad. 456=(1939) 1 M.L.J. 802 (F.B.).**

——Interruption—Boundary dispute—Decision of Survey Officer—If interrupts adverse possession of unsuccessful claimant—Right of latter to plead adverse possession in subsequent suit. *See* MADRAS SURVEY AND BOUNDARIES ACT, S. 13. **48 L.W. 595.**

——Interruption—Claim to attached property by person in adverse possession—Dismissal—Effect—Attachment subsequently raised after one year from dismissal—Adverse possession—If interrupted. *See* C. P. CODE, O. 21, R. 63. **44 L.W. 617.**

——*Interruption—Declaratory decree—Effect.*

When a person is in adverse possession he is in the wrong and from the date of his possession starts maturing a title, and if a decree is passed against him declaring that his possession is adverse it simply "emphasises the fact that the possession is adverse", and if in spite of the decree the person remains in possession, his possession, if anything, becomes still more adverse. Accordingly a judgment of a Court declaring that a party in possession of immovable property has no title to it has not the effect of interrupting the continuity of his adverse possession as against the real owner. If he continues in possession for 12 years before suit, his title is perfected. (*Bajpai, J.*) MAHOMED TAHIR *v.* BECHEY LAL. **163 I.C. 545 =9 R.A. 37=1936 A.W.R. 458=1936 A.L.J. 583 =A.I.R. 1936 All. 466.**

——*Interruption—Declaratory decree—Effect of.*

A declaratory decree cannot have the effect of causing a break in the continuity of the possession of a person in actual possession of the property, and will not prevent the acquisition of title by adverse possession for the statutory period. (*Nageswara Iyer and Venkataranga Iyengar, JJ.*) SANJEEVA GOWDA *v.* VENKAPPA. **17 Mys.L.J. 403 =44 Mys.H.C.R. 422.**

——*Interruption—Decree declaring right of true owner—Effect of.*

Where a Hindu widow trespasses upon property of the joint family and claims it in her own right as the widow of her husband to the exclusion of his surviving brother, that possession at its inception is adverse to the survivor in the coparcenary unless it is the result of an arrangement between the widow and the surviving coparcener. A mere declaration in a subsequent suit of the surviving coparcener's title does not deprive her of possession and does not alter its character; and does not interrupt the adverse possession. (*Macklin and Wassoodew, JJ.*) BHOGILAL *v.* RATILAL. **183 I.C. 482=12 R.B. 103=41 Bom.L.R. 497=A.I.R. 1939 Bom. 261.**

——*Interruption of—Declaratory suit under O. 21, R. 63, C. P. Code—During its pendency plaintiff wrongly dispossessed of property—Decision in declaratory suit in his favour—If would affect adverse possession.*

Where a person has instituted a suit under O. 21, R. 63, C. P. Code, for a declaration of his title to certain property, and if during the pendency of such suit he is wrongly dispossessed of the property, then it is his duty to protect himself from adverse possession either by amendment of his original suit for declaration or by instituting a fresh suit even though the fresh suit would be decided after the decision of the first suit. If he takes no such steps within twelve years from the date of dispossession, the possession would be adverse and a decision in the declaratory suit in his favour would not affect the adverse possession. (*Addison and Din Mahomed, JJ.*) HAR INDAR SINGH *v.* SHIV RAM. **172 I.C. 259=10 R.L. 292=A.I.R. 1937 Lah. 602.**

——*Interruption—Effect of.*

An interruption in the occupation or possession of the person claiming title by adverse possession is sufficient to break the period of adverse possession. (*Wort and Agarwala, JJ.*) RAM RAMBIJAYA *v.* KRISHNA MADHO. **182 I C. 982=5 B.R. 864=12 R.P. 89=20 Pat.L.T. 677=A.I.R. 1939 Pat. 364.**

——*Interruption—Occasional visits by true owner—If interrupts adverse possession.*

Where another is in adverse possession of a property, such as a house, the true owner cannot keep his rights in the house alive against the accrual of prescription by the fact that, occasionally, he goes and stays in the house as a guest for a few days. That cannot prevent the running of adverse possession. (*Singaravelu Mudaliar and Venkata Ranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. **17 Mys.L.J. 510.**

——*Interruption—Party in adverse possession held to be rightful owner in suit—Effect of—Appellate Court holding possession wrongful—Party continuing in possession—Adverse possession—If interrupted by decree of trial Court.*

Where a person is in wrongful possession of another's land to the latter's exclusion and to his knowledge, the former is in adverse possession of the land. The fact that a subsequent decree of Court declares that the person in possession is the owner of the property is no ground for holding that he is in possession under the decree of Court. Possession which was adverse before that decree still remains adverse. Merely because a wrong order is made by the trial Court recognising his possession—even though that possession is held to be wrongful by the final decision on appeal—the possession which was adverse before does not cease to be adverse by reason of the decree in the trial Court. (*Rangnekar and Wadia, JJ.*) NARAYAN JIVAJI *v.* GURUNATHGOUDA. **I.L.R. (1939) Bom. 173=179 I.C. 178=11 R.B. 222=40 Bom.L.R. 1134=A.I.R. 1939 Bom. 1.**

——*Interruption—Person in possession and enjoyment of whole property without title—Acquisition of right to undivided share subsequently by right of succession—If alters character of possession or arrests course of limitation.*

The adverse character of the possession held by a person is not changed by reason of that person subsequently becoming entitled to a share in the property. Where the person in possession who has been in enjoyment of the whole property, later on becomes entitled to an undivided share in that property under a right of succession, that would not alter the character of his possession or arrest the course of limitation. (*Patanjali Sastri, J.*) ALAGIRI CHETTY *v.* MUTHUSWAMI CHETTY. **50 L.W. 571=1939 M.W.N. 1225=A. I. R. 1940 Mad. 102.**

——Interruption—Suit purporting to be under S. 10, Bengal Regulation XIX of 1793—Suit for resumption of lands on ground that they formed part of mal lands of plaintiff and that defendants were possessing them without any right—Plea by defendants that they were holding them as lakheraj grant from before 1790—Decree in favour of plaintiff—Effect of—Whether interrupts adverse possession of defendants. *See* BENGAL REGULATION (XIX OF 1793), S. 10. **41 C.W.N. 688.**

——*Interruption of—Symbolical possession given where actual possession ought to have been given.*

Symbolical possession given in circumstances in which actual possession ought to have been given is a nullity as symbolical possession is not actual possession nor is it equivalent to actual possession except where the Civil Procedure Code expressly or by implication provides that it should have that effect. The delivery of such possession does not interrupt adverse possession. 36 Bom. 373, Foll. (*Abdul Rashid, J.*) MT. KHAIRAN *v.* RAGHBIR SINGH. **174 I.C. 821=10 R. L. 603=A.I.R. 1937 Lah. 350.**

——*Interruption—What amounts to entries in record of rights or receipt for assessment—Effect of.*

Whether continuity of the possession be broken by flood or by draught, or because the nature of the land itself is such that it is not susceptible of continued acts of user or possession, once there is a breach in the continuity of adverse possession, the chain of years is broken and the land reverts to its rightful owner.

In a suit for adverse possession of certain Mahomedan family lands, which though they were described as waste, were susceptible of agricultural uses, it was found the plaintiff not only appropriated all the proceeds of cultivation, but used the lands, so far as they could be for grazing purposes and appropriated the grazing fees. Such possession by the plaintiff was for more than the statutory period. No ejectment suit was ever brought. But the defendant, who was entitled to such lands by sale, got entries made, got receipts for the payment of assessment, for payment of boundary marks, got compensation money when some land was acquired by Government, and got the entries made in the record of rights.

Held, that the defendant's possession was paper possession only, and the plaintiff had acquired a title by adverse possession. (*Davis, J. C. and Mehta, J.*) TAHILRAM TACKCHAND *v.* MT. MIRAL. **I.L.R. (1939) Kar 18=176 I. C. 549=11 R. S. 22=A.I.R. 1938 Sind 132.**

Landlord and Tenant.

——Landlord and tenant—Payment of rent to zamindar by persons declared to be sub-tenants—If renders their possession adverse. *See* LANDLORD AND TENANT—ADVERSE POSSESSION. **1939 R.D. 540=1939 A.W.R. (B.R.) 240.**

——*Landlord and tenant—Grove-land—Non-payment of rent—Erection of buildings—Inference from.*

In the case of groves, rent occasionally lapses when the grove ceases to be a grove producing fruit. Frequently rent is taken from the grove-holder as long as any produce is forthcoming, and when the grove becomes old and produce ceases, the Zamindar refrains from collecting rent. That is a common case, and does not amount to any exercise of adverse possession on the part of the person holding the grove. Nor does the mere erection of certain buildings on the land which was originally grove amount necessarily to any evidence of adverse title, in the absence of a finding that they were not erected by the Zamindar's permission. (*Sulaiman, C. J. and Bennet, J.*) RAM SEWAK *v.* SUBHADDRA KUAR, **162 I.C. 907=8 R.A. 912=1936 R. D. 141=1936 A.W.R. 390=1936 A.L.J. 472=A.I.R. 1936 All. 381.**

——*Landlord and tenant—Assertion by tenant—Possession for over 12 years under invalid demise—Effect of.*

A mere assertion by a tenant cannot convert the nature of his tenure, but where either the origin of the tenancy is not known or a document purporting to confer a permanent tenure is invalid for want of registration or otherwise and the persons have been holding for a period of 12 years in assertion of a permanent right, they can certainly acquire a right by adverse possession and much more so in the case of an adjudication in their favour. (*Venkataramana Rao, J.*) ATHIRAMANKUTTI *v.* UPPARI. **168 I. C. 101=9 R. M. 525=1936 M.W.N. 1003=A.I.R. 1937 Mad. 126.**

——*Landlord and tenant—Death of a tenant at will—Suit against son for possession—Plea of adverse possession—Starting point.*

In the case of a tenancy-at will, the possession of the tenant becomes that of a wrongdoer as soon as the tenancy terminates. Where such a tenant died and the landlord sued his son it was held that the tenancy was not heritable and that the son's possession was nothing better than that of a wrongdoer's and he had the right to prescribe for any title open to him. (*Stone, C.J. and Bose, J.*) ABDUL RAZAK *v.* SETH NANDLAL. **I.L.R. (1940) Nag. 269=182 I.C. 581=12 R.N. 12=1938 N.L.J. 317=A.I.R. 1938 Nag. 506.**

——*Landlord and tenant—Entry in revenue papers as tenant* bila tasfiya.

Where a person is in possession of a certain plot as tenant, his possession cannot become adverse to the original proprietor merely because he is entered as tenant *bila tasfiya* in the village papers and has held the land for over the statutory period. (*Zia-ul-Hasan, J.*) MATHURA PRASAD *v.* UMA DATT. **179 I. C. 958=11 R. O. 217=1939 R. D. 99=1939 O.L.R. 99=1939 O. A. 212=1939 O. W. N. 171=A I.R. 1939 Oudh 106.**

——*Landlord and tenant—Essentials—Adverse possession against tenant—Effect as against landlord.*

To establish adverse possession against a landlord it is not sufficient to show that the person claiming adverse possession has established by adverse possession a title against a tenant of the landlord, because that might be treated as an incumbrance which can be annulled after a rent sale under S. 167, Bengal Tenancy Act. (*Courtney-Terrell, C.J. and James, J.*) GOPI RAM RAMCHANDRA *v.* NITAI LAL DUTT. **175 I. C. 202=4 B.R. 545=10 R.P. 595=A I.R. 1938 Pat. 220.**

——Landlord and tenant—Khorposhdar adversely enjoying usufruct of adjoining jungle belonging to grantor—Title acquired by. *See* LIMITATION ACT, S. 28. **5 B.R. 676=181 I.C. 777.**

——*Landlord and tenant—Lease for term—Possession of leasehold property by stranger during term—If adverse to lessor.*

Per *Division Bench.*—Possession of leasehold roperty by a stranger cannot be adverse to the lessor as long as there is term outstanding, because the lessor would not be entitled *prima facie* to sue for possession before expiry of the term. Adverse possession can arise only if there has been a trespass against or unlawful interference with the tenant's possession and not where the tenant's rights are acquired by a third person. (*Varadachariar, Burn and Pandrang Row, JJ.*) ARUMUGHAM CHETTI *v.* SUBRAMANIAM CHETTI. **I.L.R. (1937) Mad. 638=171 I.C. 444=46 L.W. 818=A.I.R. 1937 Mad. 882=(1937) 1 M.L.J. 679 (F.B.).**

——*Landlord and tenant—Non-payment of rent.*

Mere non-payment of rent by a tenant to his landlord does not by itself create adverse possession, when there is no assertion by the tenant openly and to the knowledge of the landlord, of a title to hold the land without payment of rent. (*Mohammad Noor and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* RAJENDRA NARAYAN SINGH DEO. **1936 P.W.N. 458=162 I.C. 838=8 R.P. 586=A.I.R. 1936 Pat. 287.**

——*Landlord and tenant—Non-payment of rent.*

The defendants were entered as proprietors of a particular land. The plaintiffs were entered as tenants who did not pay any rent to the landlord. On the basis of this entry, and non-payment of rent for over twelve years, plaintiff claimed title by adverse possession.

Held, that the possession of a tenant was permissive and unless the tenant could prove that he had disclaimed the title of his landlord openly and to his knowledge more than twelve years before the institution of the suit, he could not claim adverse possession against his landlord and that mere non-payment of rent by the tenant could not be treated as adverse possession. (*Agha Haidar, J.*) MT. BHANI *v.* UJAGAR SINGH. **166 I.C. 607=9 R.L. 395=A.I.R. 1936 Lah. 741.**

——*Landlord and tenant—Non-payment of rent.*

The mere non-payment of rent does not cause cessation of the relationship of landlord and tenant, or convert the possession of the tenant into adverse possession. (*Jai Lal, J.*) GIRDHARI RAM *v.* QASIM. **163 I.C. 592=9 R.L. 25=38 P. L.R. 804=A.I.R. 1936 Lah. 461.**

——Landlord and tenant—Non-payment of rent by tenant in possession—Effect. *See* LIMITATION ACT, ART. 131. **17 Pat.L.T. 819=A.I.R 1937 Pat. 96.**

——*Landlord and tenant—Non-payment of rent for over 12 years—If creates rent free title to land.*

The fact that a person in possession of land has not paid any rent for more than 12 years does not create a prescriptive right in him to hold the disputed land rent-free. (*Manohar Lall, J.*) RUP NARAIN PANDEY *v.* SHEO SAGAR TEWARI. **180 I.C. 105=5 B.R. 342=11 R.P. 454=A.I.R. 1939 Pat. 258.**

——*Landlord and tenant—Occupancy tenant—Decree against—Sale of well of tenant in execution—Purchaser using well as owner openly—If acquires title by prescription.*

A person purchasing a well belonging to an occupancy tenant at a sale in execution of a decree against the tenant and using it as owner notoriously and holding it as against the whole world for 12 years acquires absolute title to it by adverse possession as against the Zemindar of the holding. (*Harries, J.*) MAHOMED ASKARI HASAN *v.* SHEO NARAIN LAL. **1936 R.D. 15.**

——*Landlord and tenant—Permanent tenancy—Acquisition of—Essentials—Assertion by tenant—Adjudication in judicial proceeding—Effect of.*

A permanent tenant right can be acquired by adverse possession. In such a case it is enough for the tenant pleading adverse possession to show that he continued in open and hostile possession for over the statutory period after asserting his right in an earlier judicial proceeding, and that the landlord had throughout notice of the claim put forward during the entire period. (*Venkatasubba Rao and Abdur Rahman, JJ.*) ATHIRAMANKUTTI *v.* UPPARI. **180 I.C. 720=11 R.M. 750=47 L.W. 386=(1938) M.W.N. 324=A.I.R. 1938 Mad. 570=(1938) 1 M.L.J. 400.**

——*Landlord and tenant—Person in adverse possession for over 12 years—Subsequent suit for rent against him—If can create relationship of landlord and tenant.*

Where a person has been in adverse possession for more than twelve years his adverse possession is matured into title, and that title cannot be defeated by a subsequent suit for rent against him as a suit for rent by itself cannot create the relationship of landlord and tenant. (*Sen, J.*) MEAH KHA *v.* SERAJUDDIN SARDAR. **A.I.R. 1940 Cal. 65.**

——*Landlord and tenant—Possession by tenant of adjacent accreted land as occupancy raiyat—Annual inundation—Effect of.*

Possession of a limited interest in immovable property may be just as much adverse for the purpose of barring a suit for the determination of that limited interest, as adverse possession of a complete interest in the property operates to bar a suit for the whole property. Where, therefore, a raiyat takes possession of the land which forms adjacent to his holding by the silting up of the backwater of a river, and enjoys such possession for over a period of twelve years against the landlord, the raiyat is not liable to ejectment although he claims no more than the interest of an occupancy raiyat. Annual inundation of the accreted land does not interrupt the raiyat's possession when it does not interfere with the ordinary agricultural operations. (*James and Chatterji, JJ.*) RAMASRAY PRASAD CHAUDHURY *v.* RAMSURAT SINGH. **12 R.P. 282=21 Pat.L.T. 181=6 B.R. 84=184 I.C. 838=A.I.R. 1940 Pat. 131.**

——*Landlord and tenant—Sub-lessee from tenant under unauthorised transfer—Possession of—When adverse to landlord.*

A tenant of surface land transferred his holding without the consent of the landlord to a sub-lessee of underground mining rights. The sub-lessee in the place of growing crops substituted the headworks of a colliery and was in possession of this land for more than twelve years before a rent suit was brought by the landlord against the tenant. In the rent suit, the holding was put to sale and the purchaser instituted a suit for ejectment of the sub-lessee of the mining rights from the land forming part of the tenant's holding.

Held, that the possession of the sub-lessee of the land being open and public was adverse to the landlord and the purchaser had therefore acquired nothing by his purchase. (*Courtney-Terrel, C.J. and James, J.*) GOPI RAM RAMCHANDRA *v.* NITAI LAL DUTT. **175 I.C. 202=4 B.R. 545=10 R.P. 595=A.I.R. 1938 Pat. 220.**

——*Landlord and tenant—Tenant let into possession for limited term—If can prescribe for higher title.*

Whether a tenant who is let into occupation for a limited term can, during the continuance of that term, by mere assertion, acquire a higher title than what was given to him on the date of his entering into possession (*Mohamad Noor and Manohar Lall, JJ.*) SURJA MOHAN *v.* RAMA PRASAD. **A.I.R. 1940 Pat. 37.**

Licensee.

——*Licensee—Cantonment tenure—Possession, if can be adverse.*

The possession of a licensee can never be adverse. Whether or not transfers by a licensee holding under cantonment tenure were reported to the cantonment authorities and sanctioned by them is immaterial. A transfer not known to those authorities can have no effect on title; a transfer reported or otherwise made known to those authorities and to which no objection was taken merely implies sanction. On the other hand, a definite claim to title made known to the cantonment authorities might result in possession becoming adverse. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SUJAN SINGH *v.* SECRETARY OF STATE. **168 I.C. 230=9 R. Pesh. 106=A.I.R. 1936 Pesh. 217.**

Limited interest.

——Limited interest—Landlord and tenant—Suit for rent—Plea of rent-free holding—Decree holding land rent-free—Effect of—Possession by tenant for over 12 years without paying rent—Acquisition of rent-free tenure. *See* C. P. CODE, S. 11. **48 L.W. 701=(1938) 2 M.L.J. 934.**

——*Limited interest—Land within permanently settled estate recorded as* milik *in record-of-rights—Purchase of—Sale deed describing land as* milik *—Possession of vendee claiming as* milikdar*—If assertion of title hostile to landlord—Suit to eject after 12 years—If barred.*

Where a person purchases land within a permanently settled zemindari, which is described in the sale deed as *milik* land, and the land is also entered as *milik* in the record-of rights, the person holding it for twelve years claiming to be *milikdar* would acquire title as *milikdar* by adverse possession as against the landlord. The statement in the sale deed that the land was *milik*, though not admissible to prove that it is *milik*, is certainly admissible to prove that the vendee, when he comes into possession, does so with an assertion that he is holding it as *milikdar*, and he begins to prescribe against the landlord as *milikdar*. A suit by the landlord after 12 years of the commencement of that possession to eject him as being in wrongful possession would be barred by limitation. (*Khaja Mohammad Noor and Madan, JJ.*) SURPAT SINGH *v.* BHUPENDRA NARAYAN SINGH. **16 Pat. 105=166 I.C. 123=9 R.P. 256=3 B.R. 127=17 Pat L.T. 824=A.I.R. 1937 Pat. 165.**

——*Limited interest—Possession under will conferring daughter's estate.*

A Hindu daughter who enters into possession of a property under her father's will which confers upon her a daughter's estate, cannot prescribe for an absolute estate but can prescribe only for such estate as the will gave her. The adverse possession of the daughter, therefore, is good only to the extent of her limited interest, and when this interest vanishes with her death, her son cannot derive any benefit. The adverse possession of a limited interest can only bar a suit for the recovery of that interest. (*Bajpai and Ganga Nath, JJ.*) SURAJ PRASAD *v.* GULAB DEI. **168 I C. 541=9 R.A. 652=1937 A.L.R 377=1936 A.W.R. 1172=A.I.R. 1937 All. 197 (2).**

Mortgage.

——*Mortgage—Possession under invalid mortgage.*

In a mortgage transaction whether the mortgage is valid or not, the position of the mortgagee is that of a mortgagee and nothing more unless some adverse title is set up by him. (*Wort, J.*) BAIJNATH PRASAD SINGH *v* MUNESHWAR SINGH **160 I.C. 1066=8 R P. 410=A.I.R. 1936 Pat. 63.**

——*Mortgage—Usufructuary mortgage—Purchaser in execution sale of equity of redemption—Issue of sale certificate to—Effect of—Change of possession—Claim by mortgagor to title by adverse possession—Sustainability.*

Possession of equity of redemption in property subject to a usufructuary mortgage, in so far as there can be possession, must follow title. When a sale certificate is issued by the Court to the auction purchaser of the equity of redemption, it cannot be said that the original mortgagor remains still in possession, so as to entitle him to acquire title by adverse possession (*Norman, I.C.S.*) DEEP CHAND *v.* CHEWAR CHAND. **1936 A.M.L.J. 136.**

——*Mortgage right—Acquisition by mere oral assertion.*

A contract cannot be brought into existence by prescription, and no one can, by a mere oral assertion, acquire rights as against a true owner as a mortgagee. (*Wort, A.C.J. and Manohar Lall, J.*) BHUKHAN MIAN *v.* RADHIKA KUMARI DEBI. **19 Pat.L.T. 489=176 I.C. 35=11 R.P 38=4 B.R. 667=1938 P.W.N. 789=A.I.R. 1938 Pat. 479.**

Mortgagor and mortgagee.

——*Mortgagor and mortgagee—Gift by mortgagor—Possession of donee—If adverse to mortgagee.*

Where in the case of a mortgage by conditional sale, the mortgagor who remains in actual possession makes a gift of a portion of the mortgaged property, the possession of the donee is adverse to the mortgagee, if he pays no rent to him and does not enter into possession permissively under him. (*Tek Chand, J.*) KISHORE CHAND *v.* BASANT DAS. **170 I.C. 283=10 R.L. 97=39 P.L.R. 282.**

——*Mortgagor and mortgagee—Mortgagee, if can assert adverse possession.*

A mortgagee who enters into possession of the mortgaged property in his capacity as a mortgagee can never during the continuance of the mortgage assert any adverse possession against the mortgagor. The mortgagor's right to redeem remains alive for sixty years and no question of adverse possession arises until after the expiration of that period. (*Rowland and Chatterji, JJ.*) WAJID ALI *v.* ALIDAD KHAN. **184 I.C. 124=12 R.P. 222=6 B.R. 19=A.I.R. 1940 Pat. 45.**

——*Mortgagor and mortgagee—Mortgagee in possession—If can prescribe against mortgagor.*

In certain circumstances a mortgagee in possession can prescribe against the mortgagor, though generally he cannot. (*Fazl Ali and Varma, JJ.*) BALDEO SINGH *v.* MUHAMMAD AKHTAR. **184 I.C. 504=1939 P.W.N. 331=20 Pat.L.T. 399=A.I.R. 1939 Pat. 488.**

——*Mortgagor and mortgagee—Mortgagee in possession of mortgaged property—When can set up adverse possession.*

A mortgagee in possession of mortgaged property cannot set up adverse possession against the mortgagor unless he can prove a subsequent valid sale, in the absence of which his possession must be taken to retain its original character. (*Abdul Qayoom, C.J.*) NATHU RAM *v.* RAM CHAND. **39 P.L.R.J. & K. 7.**

——*Mortgagor and mortgagee—Possession of mortgagee—When adverse.*

In order to deprive the mortgagor of the property the mortgagee should clearly evince his intention of holding the land adversely to the mortgagor and must do some act as a manifestation of that intention to the knowledge of the mortgagor. (*Abdul Qayoom, C.J. and Wazir, J.*) MEHAR SINGH *v.* AMAR NATH MAHAJAN. **42 P. L R.J. & K. 63.**

——*Mortgagor and mortgagee—Proof required.*

In order to deprive the mortgagor of the property, the mortgagee must clearly evince his intention of holding it adversely to the mortgagor and must do some act as a manifestation of that intention to the knowledge of the mortgagor. Where, therefore, a mortgagee by conditional sale subsequently enters into possession of the property under an alleged oral sale, but his conduct does not manifest any intention of holding the property adversely to the mortgagor but on the other hand induces a belief in the mind of the mortgagor that he is merely holding it as a mortgagee, his possession is not adverse to the mortgagor. (*Tek Chand and Abdul Rashid, JJ.*) MT. DHAPAN *v.* SRI RAM. **172 I.C. 449=10 R L. 326=39 P.L.R. 619=A.I.R. 1937 Lah. 837.**

Pardanashin lady.

——*Pardanashin lady—Possession adverse to—If should be brought home to her knowledge.*

To constitute adverse possession it is generally sufficient that the possession is overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises diligence, to be aware of what is happening. A person whose rights have been openly usurped cannot be heard to plead that the fact was not brought to his notice But this cannot apply to the case of a pardanashin woman behind the purdah, who may not be aware of or might not know what was happening notwithstanding the exercise by her of due diligence so far as she could. The Court should be alert to protect the interests of a pardanashin woman and should, in her case, rely more upon facts than presumptions. (*Davis, J.C. and Lobo, J.*) MANGALMAL AGANMAL *v.* HAJI MAHOMED USIF BHORO. **I.L.R. (1939) Kar. 597=185 I.C. 11=12 R.S. 151=A.I.R. 1939 Sind 315.**

Permissive possession.

——*Permissive possession—Entry in revenue papers*—Shamilat deh—Mutwalli *in cultivating possession—No rent paid to proprietary body—Effect on title of latter.*

Where a portion of the *Shamilat deh* was shown in the revenue papers to be in the possession of a *mutwalli* of a *khankah*, who cultivated the land through his tenants paying no rent to the proprietary body because he served the *khankah*.

Held, that the title in the land still vested in the proprietary body who had given the usufruct to the *mutwalli*, for the time being, for the purposes of the *khankah*. (*Tek Chand, J.*) Ghulam Mohy-ud-Din *v.* Mohammad Din. **41 P.L.R. 283=A.I.R. 1939 Lah. 313.**

——*Permissive possession — Inference from facts.*

In a suit for possession of a two-storeyed building in the occupation of defendants, the plaintiffs alleged that they were the owners of the house and the defendants were occupying it as their tenants. The defendants, on the other hand, claimed that they were occupying it as co-sharers in the house. There was in evidence a statement filed by the father of the defendants in guardianship proceedings showing that the defendants must have been occupying the house with the consent of the plaintiffs. The Courts below found that plaintiffs were owners of the house and that the defendants were not co-sharers therein. They, however, held that plaintiffs had failed to prove that the defendants were occupying the portion of the house in dispute as tenants and that the defendants' possession thereof being adverse and over twelve years' duration, the plaintiffs could not recover possession. On second appeal,

Held, that when possession can be lawful, it should be presumed to be so, rather than wrongful and that in view of the relationship of the parties, the statement in the guardianship proceedings, and the fact that only a small room in a two-storeyed building is in the occupation of the defendants, the proper inference is that the defendants' possession is permissive and not adverse to the plaintiffs and on this inference plaintiffs must be held to have been in constructive possession all along and that the fact that the plaintiffs overstated their case in alleging that they were realising rent from defendants should not be considered to be sufficient to defeat the plaintiffs' claim. (*Bhide, J.*) Mahomed Yakub *v.* Abdul Karim. **160 I.C. 1033=8 R.L. 650=A.I.R. 1936 Lah. 673.**

Possession referable to lawful title.

——*Possession referable to lawful title—If adverse.*

Where a person is setting up a hostile title and is in possession, his possession will not be deemed to be adverse to the true owner if it can be referred to a lawful title. But when such possession is asserted in a capacity hostile to the title claimed by another it is adverse to the latter. (*Wadsworth, J.*) Veettil Kelu *v.* Chakkara Chappan. **161 I.C. 999=8 R.M. 935=1936 M.W.N. 399=A.I.R. 1936 Mad. 308.**

——*Possession referable to lawful title—When deemed adverse.*

Where possession can be referred to a lawful title, it will not in the absence of very cogent reasons be deemed to be derived from usurpation. (*Wort and Rowland, JJ.*) Mt. Bibi Zainab *v.* Muhammad Ayub. **161 I.C. 331 (2)=8 R.P. 443=17 Pat.L.T. 366=A.I.R. 1936 Pat. 136.**

——*Possession under agreement to lease land—Nature of—If adverse to proposed lessor—Plea of adverse possession in bar of suit for ejectment—Sustainability.*

A person in possession under an agreement to lease is in a very different position from a person in possession under a lease which has been registered. He has no defence to a claim for ejectment other than a right to insist upon specific performance of the contract to lease. If he is sued for ejectment, he can apply for a stay of proceedings to enable him to institute a suit for specific performance if such is not barred by limitation. He is not a mere trespasser so long as he has a right to sue for specific performance of the agreement to lease, and his possession is therefore not adverse to the owner of the land which is the subject of the agreement. A person who holds under the agreement to lease has no right whatever to apply for specific performance if he has repudiated the agreement to lease and asserted a title adverse to the proposed lessor. But if he has a subsisting right to maintain a suit for specific performance, he is not holding adversely to the proposed lessor, but on the contrary, he is holding the land under the agreement to lease, and that would not give him any title by prescription or adverse possession. Having entered into possession with the consent of the landlord, he does not purport to hold the land under any instrument which gave him no title whatsoever to the property, so as to make time run against the landlord from the date of his taking possession. He is a mere tenant at will or something of that nature pending the execution of a registered lease. (*Harries, C. J. and Manohar Lall, J.*) Shiva Prasad Singh *v.* Mandira Kumari Debi. **21 Pat.L.T. 277=A.I.R. 1940 Pat. 438.**

Possession under invalid title.

——*Possession under invalid title—Exchange neither stamped nor registered—Possession for over 12 years—Effect.*

Where a deed of exchange did not convey any title inasmuch as it was neither stamped nor registered, but a party was in possession undisturbed and for over 12 years, he must be held to be the proprietor of plots concerned. (*Ismail, J.*) Kashi Nath *v.* Makchhed. **184 I.C. 233=13 R.A. 202=1939 A.W.R. (H.C.) 373=1939 A.L.J. 384=A.I.R. 1939 All. 504.**

——*Possession under invalid title—When adverse*

Where though a transfer from one of the joint owners may not have transferred a good title to the transferee, yet if he is in possession of the property under the transfer for over 12 years, he could claim ownership by adverse possession. (*Ismail, J.*) Kirpa Ram *v.* Dwarka Pershad. **1939 A. W. R. (H.C.) 408=1939 R. D. 365=A.I. R. 1939 All. 518.**

Possession by wrongdoer.

——*Possession for less than statutory period—Heritability of right.*

The possession of a wrongdoer held for a term less than the period of limitation is a good title against the whole world with the exception of the true owner. This possessory right even though it has not ripened into ownership by lapse of the statutory period, is a right in immovable property which is heritable and transmissible according to law. On the death of such wrongdoer, therefore, whatever right he has in the property devolves upon all his heirs. If possession is continued only by some of his heirs, it would be regarded as possession on behalf of the whole unless and until it is shown that there is an exclusion or ouster of the other co-sharers. (*Mukherjea and Latifur Rahman, JJ.*) KITAL ALI *v.* ANIL BEHARI DUTTA. **185 I.C. 408=12 R.C. 361=43 C.W.N. 877=70 C.L.J. 93=A.I.R. 1939 Cal. 723.**

Presumption as to.

——*Presumption as to.*

Possession is *prima facie* adverse and exclusive and is presumed to be as of right until such presumption is rebutted by evidence. It is a settled rule of law that possession should be deemed to be adverse, unless it is shown that at the time of its entry there was an agreement or arrangement, express or implied, to the effect that it was to be permissive. (*Singaravelu Mudaliar and Venkataranga Iyengar, JJ.*) NANJAPPA SETTY *v.* HASSAIN BEE. **17 Mys.L.J. 510.**

Principal and Agent.

——*Principal and agent—Trespass by agent—If can benefit principal.*

An act of trespass is an individual act of the trespasser and unless there is clear and cogent evidence to show that the trespass was committed by an agent in the interest of his principal, the principal cannot in any way be benefited by it. (*Addison and Din Mahomed, JJ.*) ZAFFAR HUSSAIN *v.* MAHOMED GHIAS-UD-DIN. **18 Lah. 276=172 I.C. 37=10 R.L. 259=39 P.L.R. 749 =A.I.R. 1937 Lah. 552.**

Religious endowment.

——*Religious endowment—Possession purporting to be as mutwalli of waqf found to be invalid —If adverse as against waqif's heirs.*

Where a mutwalli purports to be in possession as a mutwalli under a waqf deed which later on is found to be invalid, he does not prescribe a title adverse to that of the heirs of the waqif. In a suit for possession by the heirs of the waqif in such a case, the decision that it is not barred by limitation is based not upon the fact that no demand for possession had been made but on the fact that the nature of the mutwalli's possession had never changed. (*Thom, C.J. and Ganga Nath, J.*) SHER ALI *v.* HAMID ALI. **1940 A.L.J. 373=1940 A.W.R. (H.C.) 343=A.I.R. 1940 All. 365.**

Reversioner.

——*Reversioner—Possession, if can be adverse against him during female's lifetime.*

A reversioner is never barred by adverse possession during a female's lifetime, but in all cases he has 12 years from her death; and it is immaterial under what circumstances adverse possession was acquired or continued. Possession can be adverse against a person only if he has the immediate right to possession, and during widow's lifetime a reversioner has no immediate right to recover possession. 23 Bom. 725, Rel. on. (*Fraser, J.C. and Saad-ud-Din, A.J.C.*) AHMAD KHAN *v.* MT. HAYAT BIBI. **A.I.R. 1936 Pesh. 119.**

Rival landlords.

——*Rival landlords—Land in possession of tenants—Proof required.*

Where the land was in the possession of the tenants in order that there may be adverse possession against the rival landlords, the plaintiffs must show that they have intercepted rents payable by the tenants to the rival landlords for a period of 12 years prior to the institution of the suit. (*Mukherjea, J.*) KALIMUDDIN MIA *v.* EAKUTENNESSA BIBI. **71 C.L.J. 232.**

Service tenure.

——Service tenure—Non-performance of service for over 12 years—Effect of. *See* GRANT—SERVICE GRANT. **1939 P.W.N. 99=A.I.R. 1939 Pat. 362.**

Trustee.

——Trustee—Hereditary archaka right in temple—Exclusive right to be in possession and management—Acquisition against trustees—Inference from open enjoyment for long time. *See* RELIGIOUS ENDOWMENT—PUBLIC TEMPLE. **1939 M.W.N. 1143.**

——*Trustee—Religious endowment—Exclusion of shebait by person having no title—Physical presence of idol or performance of puja by wrongdoer—If material.*

An idol acts through its shebait, prosecutes and defends suits through its shebait. Its shebait is its protector and defender of its rights. An exclusion of the shebait accordingly from the endowed properties can have the effect of excluding the idol from it. In all cases of adverse possession, the extent of the interest acquired by adverse possession depends upon the assertion of intention expressed or necessarily implied of the wrongdoer when dispossessing and keeping out of possession the rightful owner. When therefore a shebait is turned out and kept out of the endowed properties by a person who has no title on the assertion that the property is his and not of the idols, the adverse possession is against the idol also and if its duration is sufficiently long, the idol loses the right to the property. The physical presence of the idol on the property or the fact that pujas were performed by the wrongdoer are not material. Nor would the mere fact that in law the wrongdoer would become the idol's shebait on the existing shebait's death, prevent the wrongdoer from prescribing against the idol. (*M. C. Ghose and R. C. Mitter, JJ.*) PANNA SUNDARI *v.* BENARES BANK, LTD. **176 I.C. 695=11 R. C 151=42 C.W.N. 469=66 C.L.J. 388=A.I.R. 1938 Cal. 81.**

——Trustee — Void alienation — Possession under—Nature of. *See* LIMITATION ACT, ART. 144. **A.I.R. 1938 Mad. 60.**

Wakf property.

——*Wakf property.*

Per *Bhide, J.*—When it is said that "wakf property" is "extra commercium" according to Mahomedan Law, all that is meant is that such property cannot be dealt with or alienated like ordinary property according to that law—the reason apparently being that according to that law human ownership in such property ceases and it vests in the Almighty. This feature of 'wakf' or dedicated property is not peculiar to Mahomedan Law and the position as regards dedicated property is practically the same under

Hindu Law. But this does not mean that no one can acquire a valid title to dedicated property by adverse possession over twelve years. The title of a person claiming such adverse possession over dedicated property rests not on Mahomedan or Hindu Law but on the Law of Limitation and Prescription as it prevails in British India. (*Young, C.J., Bhide and Din Muhammad, JJ.*) MASJID SHAHID GANJ *v.* SHIROMANI GURDWARA PRABANDHAK COMMITTEE, AMRITSAR. **175 I.C. 945=11 R.L. 91=40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).**

Waste land.

——*Waste land—Assertion of hostile title—What amounts to—Sale of waste land by stranger—Trespass by vendee—Suit by owner within 12 years of trespass—Maintainability—Burden of proof.*

In the case of waste land, the owner is only bound to prove that it belongs to him; it is not necessary to support his case by evidence of overt acts of possession. He need only prove such possession as the property is capable of and that done, in the absence of any proof as to entry by some other person on this land beyond the twelve years' period, the owner is entitled to succeed. The owner starts with the presumption that the waste land is in his possession, and where it is clear that he is dispossessed within 12 years before suit by the defendant trespassing on it, he is entitled to succeed unless it is shown that he discontinued possession at some time more than 12 years before suit. The fact that some other person has sold the land as his to the defendant is not an assertion of title in the absence of evidence that the owner was ever aware of the sale. (*Beasley, C.J. and Stodart, J.*) PERIA KARUPPAN *v.* MADURA KAJIMARTHERU PALLI VASAL. **1937 M.W.N. 533.**

——*Waste land — Construction of temporary chhappars.*

The construction of some temporary chhappars on a land which is lying waste is not sufficient in law to establish adverse possession, although such chhappars have been surrounded by an enclosure consisting of bushes. (*Bhide, J.*) SHAH NIWAZ *v.* GHULAM SHAH. **40 P.L.R. 91=176 I.C. 930 =11 R.L. 251 (1)=A.I.R. 1938 Lah. 324.**

——*Waste land—Tying of cattle and storing of wood on land for over 12 years—If sufficient for acquisition of title by adverse possession.*

A person who for more than 12 years has been tying his cattle on a plot of waste land and has also stored logs of wood thereon, the logs merely lying on the open ground, does not acquire a title to such land as against the owner by adverse possession. (*Bennet, J.*) RAM CHANDER *v.* ASA RAM. **169 I.C. 962=10 R.A. 87=1937 A.L.R. 607=1937 A.L.J. 384=1937 A.W.R. 391=1937 R.D. 220=A.I.R. 1937 All. 429.**

What constitutes.

——*What constitutes—Hindu in possession of mosque for over 12 years—User inconsistent with the character of the building—Abandonment—Plea of ignorance—If available.*

Where a Hindu has been in possession of the building of a mosque for over 12 years and has been exercising acts of adverse possession by using the building of the mosque for his own purposes, in a manner inconsistent with the purposes for which a mosque is constructed and the Mahomedans owing to their abandonment of this mosque had been unaware of these acts of user by the Hindu, the fact of ignorance based upon practical abandonment could not be a defence to the plea of adverse possession. 'It is sufficient that the possession be overt and without any attempt at concealment so that the person against whom time is running ought, if he exercises due vigilance, be aware of what is happening'. *Ex hypothesi* any mosque is a building in respect of which the local Mahomedan worshippers are expected to be continuously aware of its condition and use or misuse. If by many years of practical abandonment they remain unaware of acts of misuse by the owner of the premises in which the mosque is situated, it is not possible for them to say that by the exercise of due vigilance they could not be aware of what is happening. (*Thomas, C.J. and Yorke, J.*) MUSAHEB KHAN *v.* RAJ KUMAR BAKHSHI. **1938 O.A. 722=177 I.C. 718=11 R.O. 62=1938 O.L.R. 435 =1938 O.W.N. 937=A.I.R. 1938 Oudh 238.**

Miscellaneous.

——*Encroachment pending suit*—Lis pendens.

Where the plaintiff was in possession of land in dispute and the defendant, subsequently to the institution of the suit, made encroachment upon it, the principle of *lis pendens* applies and the defendant cannot be allowed to set up adverse possession against the plaintiff. (*Ranjitmal, J.*) ALLABUX *v.* ISSAKH MAHOMED. **1939 Mar.L.R. 176 (Civ.).**

——*Nature of possession—Decree for possession—Defendant continuing in possession after a subsequent compromise—Such possession if can be presumed to be adverse.*

Where after a decree for possession, an appeal by the defendant therefrom is compromised and the defendant thereafter continues in possession of the property concerned, in the absence of any proof as to the terms of the compromise, it could not be presumed that the defendant's possession following the compromise was adverse to the plaintiff. (*Pollock, J.*) TRIMBAK NARAYAN *v.* YADORAO. **186 I.C. 851=12 R.N. 260=1940 N.L.J. 85=A.I.R. 1940 Nag. 116.**

——Office of mutawalli of mosque—Acquisition of by prescription—Society registered under Societies Registration Act—Management of mosque as mutawalli adversely to person claiming to be mutawalli—Effect. *See* SOCIETIES REGISTRATION ACT, S. 20. **50 L.W. 734.**

——*Open and continuous enjoyment—Property of tarwad set apart for maintenance—Property in possession of tenant of tawazhi—Sale by karnavan of tarwad—Purchaser not taking possession—Possession of tawazhi—If adverse.*

Certain property belonging to the tarwad which was set apart for maintenance of a tawazhi, was in possession of the tenants of the tawazhi. The karnavan of the tarwad sold the property. The purchaser did not care to reduce the property to his possession or call upon the tenants to attorn to him. The tenants continued to pay the rent to the representative of the tawazhi. Thus the possession of the property was with the tawazhi for over twenty years without interruption. The purchaser brought a suit to recover possession of the property.

Held, there was an open and adverse enjoyment of the property by the tawazhi for over a period of twelve years by receipt of rent and the purchaser's rights were barred. (*Venkataramana Rao, J.*) Krishna Kurup *v.* Razhukkath. **167 I.C. 594=9 R.M. 471=A.I.R. 1936 Mad. 598.**

——Under inam grant of soil—Trees on land occupied by khots, dharekaris and permanent tenants prior to grant—Latter cutting, selling and removing trees for over thirty years openly, constantly and without inamdar's consent and without protest from him—Effect of. *See* Grant—Construction. **41 Bom.L.R. 805.**

ADVOCATES.

See (1) Bar Councils Act.
(2) Legal Practitioner.

AGENCY.

See also (1) Election—Candidate and Agent.
(2) Principal and Agent—Relationship.
(3) Contract Act, S. 182, etc.

——Election agent—Creation of agency—Proof—Actual employment and express entrustment—If necessary—Liability for misdeeds of election agent. *See* Election—Candidate and Agent and Principal and Agent—Relationship. **40 C.W.N. 741.**

AGENCY RULES (MADRAS) — Scope — Decree of Agency—District Munsif's Court—Revision—Powers of High Court—Government of India Act, S. 107—Letters Patent, Cl. 14. *See* Government of India Act (1915), S. 107. **43 L.W. 237=1936 M.W.N. 81=A.I.R. 1936 Mad. 187=70 M.L.J. 204 (F.B.).**

AGENT.

See (1) Contract Act, Ss. 187 and 237.
(2) Principal and Agent.

AGRA PRE-EMPTION ACT (XI OF 1922) —*Scope—Recourse to former rules of pre-emption—If permissible.*

The Agra Pre-emption Act was intended to consolidate and amend the law relating to pre-emption and therefore it purports to contain the whole of the law of pre-emption in Agra and the Act does not intend that the Courts should have recourse to former rules of pre-emption which find no mention in the Act. (*Bennet and Verma, JJ.*) Bhola Nath *v.* Shiva Singh. **I.L.R. (1939) All. 286=181 I C. 625=11 R.A. 593=1939 A.W.R. (H.C.) 110=1939 A.L.J. 253=A.I.R. 1939 All. 253.**

——S. 1 (3)—*Applicability—Property lying within municipal limits—Right of pre-emption—Custom as to.*

It is not correct to hold that because a property lies within municipal limits there is no question of pre-emption at all. If the area within which the property sold is situate lies within the municipal limits, then the Agra Pre-emption Act does not apply in the sense that no right can be claimed under it independently of any custom or contract of the Muhammadan law. But it does not follow that no right of pre-emption can at all be exercised. A custom of pre-emption can be established by evidence. (*Sulaiman, C.J.*) Fasahat Ali Khan *v.* Ashfaq Ali Khan. **1937 A L.J. 790=171 I.C. 354=1937 A.L R. 828=1937 A.W.R. 639=A.I.R. 1937 All. 620.**

——Ss. 3 and 5—*Mahomedan Law of pre-emption—How far abrogated.*

The proviso to S. 3 of the Act must be read as part and parcel of that section, and the effect of the whole section is that where there is no right

of pre-emption under S. 5 of the Act, the provisions of Mahomedan Law of pre-emption are not affected in case the vendor and pre-emptor are both Mahomedans. A right to pre-empt a house under the Mahomedan Law cannot be said to be a right to which a pre-emptor is entitled under the Act. (*Sulaiman, C.J. and Bennet, J.*) Zainab Bibi *v.* Umar Hayat Khan. **58 All. 873=161 I.C. 753=8 R.A. 780=1936 A.W.R. 492=1936 A.L.J. 456=A.I.R. 1936 All. 732.**

——S. 4(1)—*"Co-sharer"—Meaning of—Person holding possession as mutwali of waqf—If co-sharer.*

To sustain a claim as co-sharer it must be shown that the claimant is entitled as proprietor to a share or part of a mahal. The fact that he is in possession in a different capacity, *e.g.*, as mutwali of a waqf, cannot suffice. (*Sulaiman C.J. and Bennet, J.*) Mahomed Bakhsh *v.* Ram Prasad. **171 I.C. 367=1937 A.L.J. 726=1937 A.L.R. 827=1937 A.W.R. 626=A.I R. 1937 All. 581.**

——S. 4 (1)—*"Co-sharer"—Proof—Entries in* khewat—*Admissibility.*

A plaintiff in a suit for pre-emption has to prove that he is a co-sharer: entries in the *khewat* are, however, admissible in evidence for the purpose of proving that the plaintiff is a co sharer. (*Sulaiman, C.J. and Bennet, J.*) Prahlad Prasad *v.* Chameli Kuar. **170 I.C. 769=10 R.A. 203=1937 A.L.J. 751=1937 A.L.R. 774=1937 A.W.R. 500=A.I.R. 1937 All. 529.**

——S. 4 (1)—*Co-sharer—Who is—Entry in Revenue papers—Effect on right of pre-emption.*

In order to be a co-sharer within the meaning of the definition in S. 4 (1) of the Agra Pre-emption Act, a person must be 'entitled' as proprietor to some share in the mahal. Where a person has not the shadow of a title to any portion of the mahal, his position is that of a complete stranger. The mere entry of the name of a person in the Revenue papers, does not entitle him to exercise the right of pre-emption unless he is as a matter of fact the rightful owner of some share in the mahal. (*Iqbal Ahmad, J.*) Phul Chand *v.* Dharam Chand. **175 I.C. 603=10 R.A. 698=1938 A.L.R. 463=1938 A.W.R. (H.C.) 164=1938 R.D. 491=1938 A.L.J. 325=A.I.R. 1938 All. 314.**

——S. 4 (1)—*Proof as to—Onus—Plaintiff and defendant claiming equal right of pre-emption.*

The burden must be laid on the party that asserts that in spite of the fact that he is the proprietor merely of a specific plot or plots of land, he is a co-sharer. Where one claims to have right of pre-emption equal to that of the other, it is on him to prove that. (*Bennet and Verma, JJ.*) Munnalal *v.* Bahadur Lal. **1939 A.L.J. 337=1939 A.W.R. (H.C.) 303.**

——S. 4 (1) and (7)—*'Co-sharer'—'Petty proprietor'—Owners of specific plots of resumed* muafi—*When 'co-sharers'.*

Owners of certain specific plots of resumed *muafi* in a village are 'co-sharers' within the meaning of the definition of that word in S. 4 (1) of the Agra Pre-emption Act, they not being 'petty proprietors' within the meaning of that term as defined in S. 4 (7) of the Act. In cases where they have a voice in the appointment of the lambardar and of the patwari of the mahal, they must be deemed to be entitled to take part in the administration of the affairs of the mahal in question. (*Iqbal Ahmad and Bajpai, JJ.*) BAJRANGI LAL *v.* SHAHARYAR KHAN. **I.L.R. (1940) All. 35=186 I.C. 838=12 R.A. 455=1939 A.W.R. (H.C.) 863=A.I.R. 1940 All. 83.**

——**S. 4 (1) and (7)**—*Owners of specific plots of resumed* muafi—*If 'co-sharers'—Taking part in administration of the affairs of the mahal—Meaning of.*

Where the owners of specific plots of resumed *muafi* are found to have an interest in the joint lands of the mahal and also to have a voice in the administration of the affairs of the mahal, they cannot be regarded as 'petty proprietors' as defined in the Agra Pre-emption Act, S. 4 (7), but must be held to be 'co-sharers' as defined in S. 4 (1) of the Act. Such proprietors of a mahal who have a voice in the appointment of a lambardar or of a patwari do take part in the 'administration of the affairs of the mahal'. (*Iqbal Ahmad and Bajpai, JJ.*) CHIRANJI LAL *v.* CHHEDA LAL. **185 I.C. 861=12 R.A. 362=1939 A.W.R. (H.C.) 722=A.I.R. 1940 All. 8.**

——**S. 4 (1) and (7)**—*'Petty proprietor'—Who is—If a co-sharer.*

Where by a deed of exchange a person acquires only a particular number, that is a particular field in a mahal, he comes under the definition of 'petty proprietor' in S. 4, sub-S. (7) of the Agra Pre-emption Act. He cannot claim to be a 'co-sharer' in the mahal. (*Bennet and Verma, JJ.*) DIN DAYAL *v.* SHEO PRASAD. **I.L.R. (1938) All. 623=11 R.A. 93=176 I.C. 386=1938 A.L.R. 610=1938 A.W.R. (H.C.) 348=1938 A.L.J. 534=A.I.R. 1938 All. 382.**

——**S. 4 (1)**—*Mahomedan* waqf—*Right of pre-emption, if can be claimed by.*

Where a *waqf* represented by the mutwalli sued for pre-emption, on a contention that the suit is not maintainable as the plaintiff is not a person contemplated by S. 4 (1) of the Pre-emption Act.

Held, that for purposes of procedure, in the case of *waqf* the mutwalli represents the *waqf* property and estate under O. 31, C. P. Code; there is no defect or difficulty in the conception of God Almighty as a juristic person in the case of a Mahomedan *waqf*.

Held, further, that the plaintiff had a perfect right of pre-emption and that no disability whatever, attaches to the juristic rights in the case of a *waqf*. (*Bennet and Ismail, JJ.*) WAKF BANAM KHUDAWAND KARIM *v* RAJ KALI. **I.L.R. (1938) All. 206=10 R.A. 553=1938 A.L.R. 255=174 I.C. 241=1937 A.L.J. 1337=1938 A.W.R. (H.C.) 15=A.I.R. 1938 All. 157.**

——**S. 4 (3)**—*'Land'—Whether includes house.*

Houses are not land within the meaning of the Agra Pre-emption Act. (*Sulaiman, C.J. and Bennet, J.*) ZAINAB BIBI *v.* UMAR HAYAT KHAN. **58 All. 873=161 I.C. 753=8 R.A. 780=1936 A.W.R. 492=1936 A.L.J. 456=A.I.R. 1936 All. 732.**

——**Ss. 4 and 12**—*Resumed* muafidar—*Status of*—Wajib-ul-arz—*Construction—Right to pre-emption.*

Where the whole scheme of the *wajib-ul-arz* of a village unmistakably indicates that a resumed *muafidar* is not treated on the same footing as a co-sharer and that his status was in no case better than that of a petty proprietor without the right of having any interest in the joint lands of the mahal or in the administration of its affairs, such a person has no right of pre-emption. It was considered not necessary in view of the entries in the *wajib-ul-arz,* to decide as to whether the joint responsibility of revenue is a relevant factor in deciding the status of such a person. (*Iqbal Ahmad and Bajpai, JJ.*) MANGAN LAL *v.* BRAHM DUTT. **I.L.R. (1939) All. 969=187 I.C 147=12 R.A. 476=1940 A.W.R. (H.C.) 1=A.I.R. 1940 All. 88.**

——**S. 5**—Wajib-ul-arz *contemplated by.*

Where in a suit for pre-emption the plaintiff produced a *wajib-ul-arz* which purported to be a *wajib-ul-arz* of all the villages in the pargana, which recited a custom of pre-emption, while the defendants relied upon a *wajib-ul-arz* of the village in which the plot in question was situated, which did not mention any right of pre-emption, it was held that the *wajib-ul-arz* relied upon by the plaintiff was not such a *wajib-ul-arz* as was contemplated by S. 5 of the Agra Pre-emption Act and as such the record of the custom of pre-emption in that *wajib-ul-arz* could not be made the basis of a finding that a custom of pre-emption prevailed in the village. (*Iqbal Ahmad, J.*) MOHAN SINGH *v.* SHIV CHARAN SINGH. **1940 A.L.J. 370=1940 A.W.R. (H.C.) 347.**

——**Ss. 5 and 3**—*Agreement conferring right of pre-emption not embodied in* wajib ul arz—*Such right, if enforceable.*

A right of pre-emption given by an agreement amongst the co-sharers of a village, but which is not incorporated in the *wajib-ul-arz,* is excluded from the purview of S. 5 of the Agra Pre-emption Act, as S. 3 of the Act prohibits the enforcement of a right of pre-emption, otherwise than in accordance with the provisions of the Act. Such a right cannot be enforced after the passing of Pre-emption Act. (*Iqbal Ahmad, J.*) AMBIKA PRASAD *v.* MST. NAZIRAN BIBI. **180 I.C. 361=11 R.A. 451=1938 A.W.R. (H.C.) 736=1938 A.L.J. 1066=A.I.R. 1939 All. 64.**

——**S. 6**—*Sale under S. 5 of U. P. Regulation of Sales Act—Nature of—If gives rise to right of pre-emption.*

A sale by the collector of zamindari property under the provisions of S. 5 of the U. P. Regulation of Sales Act, is not a voluntary sale by the judgment-debtor, but is a sale in the course of execution proceedings and as such no right of pre-emption can arise therefrom. (*Iqbal Ahmad, J.*) SHEO BANDHAN PANDE *v.* KISHAN PRASAD PANDE. **179 I.C. 238=11 R.A. 364=1938 A.W.R. (H.C.) 767=A.I.R. 1939 All. 45.**

——**Ss. 6 and 11**—*Transfer under S. 5 of the Regulation of Sales Act—Nature of—Right of pre-emption, if arises.*

The transfer of land by the Collector under S. 5 of the Regulation of Sales Act, is a transfer in execution of a decree and hence a co-sharer has no right of pre-emption in respect of such a transfer. (*Thom, C.J. and Ganga Nath, J.*) SHEO BANDHAN PANDE *v.* KISHAN PRASAD PANDE. **1940 A.W.R. (H.C.) 284=1940 A.L.J. 325=1940 R.D. 182=A.I.R. 1940 All. 323.**

——**S. 9**—*Construction—'Which', if refers to 'land' or 'mahal'.*

The word 'which' occurring in S. 9 of the Agra Pre-emption Act can refer only to 'mahal' and not to 'land' in the section. Apparently the intention of the legislature in making the provision in S. 9

of the Act is that a person who had at one time been a proprietor in a mahal and who still held an ex-proprietary tenancy in any part of the mahal should not be prevented by a suit for pre-emption from again acquiring the status of a proprietor in the mahal. (*Bennet and Collister, JJ.*) Kuber Singh *v.* Jai Nath. **I.L.R. (1939) All. 750=184 I.C. 502=1939 A.L.J. 818=1939 A.W.R. (H.C.) 496=A.I.R. 1939 All. 618**

——S. 11—*Foreclosure decree—Money payable by pre-emptor.*

The pre-emptor claiming pre-emption on the passing of a foreclosure decree, cannot be made to pay anything more than the amount entered in the decree for foreclosure for a period prior to the passing of this decree. (*Sulaiman, C.J. and Bennet, J.*) Mustafai Begam *v.* Raghuraj Singh. **169 I.C. 577=10 R.A. 28=1937 A.L.R. 544=1936 A.W.R. 1191=A.I.R. 1937 All. 108.**

——S. 11—Sale by rent-free grantee—If can give rise to a right of pre-emption. *See* Agra Tenancy Act, Ss 186 and 192.
1939 A.W.R. (H.C.) 99=A.I.R. 1939 All. 226.

——S. 11—*Scope and applicability—Right of pre-emption, if accrues on the exercise of the right of repurchase by the original owner.*

The right of pre-emption recognized by the Agra Pre-emption Act does not accrue on the exercise of the right of repurchase by the original owner. S.11 of the Act is exhaustive of the cases in which the right of pre-emption accrues and is confined in its operation to cases where a co-sharer *sells* any proprietary interest in land, etc. The right of re-purchase when exercised is not tantamount to the sale of the property within the meaning of S. 11. The section applies only to cases of voluntary sales and not to transfers in pursuance of agreement to re transfer. (*Iqbal Ahmad, J.*) Chunni Lal *v.* Ram Prasad. **185 I.C. 665=12 R.A. 435=1939 A.L.J. 1147=1939 A.W.R. (H.C.) 815=A.I.R. 1940 All. 90.**

——S. 11—*Scope—Party paying cash and giving property as well in lieu of property acquired—Right of pre-emption.*

There can be no right of pre-emption contrary to the provisions of S. 11 of the Agra Pre-emption Act which confines the right to a case where the proprietary interest has been sold and not to a case where the property has been merely exchanged. Where a party not only pays cash, but also gives some property in addition in lieu of the property acquired by him the transaction is not sale but is an exchange. Such a transaction does not give rise to a right of pre-emption. (*Sulaiman, C.J. and Bennet, J.*) Randhir Singh *v.* Randhir Singh. **171 I.C. 577=1937 A.L.R. 863=1937 A.W.R. 762=1937 A.L.J. 743=A.I.R. 1937 All. 665.**

——Ss. 11 and 4 (2)—*Foreclosure decree based on preliminary decree passed as result of compromise—Right of pre-emption—If accrues.*

The words "foreclose" and "foreclosure" in S. 4 (2) of the Agra Pre-emption Act refer to the passing of a final decree for foreclosure under O. 34, R. 3, C. P. Code. There is no mention there that such a decree should be passed only in a suit which has been brought on the basis of such a mortgage, and that if a preliminary decree which for all practical purposes is a decree under O. 34, R. 2 is passed on the basis of a compromise in a pending mortgage suit for foreclosure, the definition would exclude such a case. The mere fact, therefore, that the foreclosure decree is based on a preliminary decree which had been passed as a result of a compromise in a pending suit for foreclosure, does not prevent the accrual of the right of pre-emption under S. 11 of the Act. (*Sulaiman, C.J. and Bennet, J.*) Mustafai Begam *v.* Raghuraj Singh. **1936 A.W.R. 1191=169 I.C. 577=10 R.A. 28=1937 A.L.R. 544=A.I.R. 1937 All. 108.**

——Ss. 11 and 20—*Scope—Exchange—If can defeat right of pre-emption.*

There is nothing illegal in a purchaser acquiring property by way of exchange which cannot be pre-empted, so as to be able successfully to defeat a claim for pre-emption brought against him with respect to subsequent sale deed to be taken by him. If the transaction of exchange is a real one and is part and parcel of the same transaction there can be no right of pre-emption. If, on the other hand, the transaction of exchange is not real, but fictitious or unreal, there would be a right of pre-emption in respect of the sale, but the claim to pre-empt the property covered by the exchange transaction would fall to the ground. (*Sulaiman, C.J. and Bennet, J.*) Randhir Singh *v.* Randhir Singh. **171 I.C. 577=1937 A.L.R. 863=1937 A.W.R. 762=1937 A.L.J. 743=A.I.R. 1937 All. 665.**

——S. 12—*Arazidari—Co-sharer in the same* khewat—*If has the right of pre-emption.*

By S. 12 of the Agra Pre-emption Act a coparcener in a petty proprietary interest has the right of pre-emption. Where a plaintiff is a co-sharer in the same *khewat* in which the arazidari in dispute is situated he has a right of pre-emption. (*Iqbal Ahmad, J.*) Jagdish Rai *v.* Suraj Kumar Singh. **180 I.C. 525=11 R.A. 472=1938 A.W.R. (H.C.) 847=A.I.R. 1939 All. 113.**

——S. 12—*'Sub-division of mahal', meaning of.*

The expression 'sub-division of mahal' occurring in S. 12 of the Agra Pre-emption Act connotes the idea of division of some sort between the co-sharers of the village or mahal. It is impossible to have a sub-division without a division of a mahal or a village. Where all the co-sharers of a mahal jointly own all the plots in the village, there is no division or sub-division of that village. (*Iqbal Ahmad and Bajpai, JJ.*) Mahabir Rai *v.* Rajendar Rai. **1940 A.L.J. 391=1940 A.W.R. (H.C.) 349=A.I.R. 1940 All. 368.**

——S. 12 (1) (v)—*'Co-sharers in the village'—If includes owner of a share in the mahal.*

The intention of the legislature in enacting the words 'co-sharers in the village', in S. 12 (1) (*v*) of the Agra Pre-emption Act was that the owner of a share in a mahal or the sole proprietor of a mahal should have a right of pre-emption in a different mahal in the same village. Hence an owner of a half share in a mahal can claim to pre-empt property which is in another mahal in the same village. (*Bennet and Verma, JJ.*) Din Dayal *v.* Sheo Prasad. **I.L.R. (1938) All. 623=176 I.C. 386=11 R.A 93=1938 A.L.R. 610=1938 A.W.R. (H.C.) 348=1938 A.L.J. 534=A.I.R. 1938 All. 382.**

——S. 12, Classes 3 and 4—*Determination of class of pre-emptors—Rules governing.*

The provisions of S. 12, class 3 of the Agra Pre-emption Act come into play only when on the date of the sale there are divisions and subdivisions in a mahal and has no application to a case when the property sold is a mahal whose component parts have not been divided and subdivided. The class of pre-emptors provided for by S. 12 must be determined with reference to the constitution of the mahal on the date of the sale and not with reference to the constitution of the mahal on some earlier date. (*Iqbal Ahmad, J.*) PRAN SINGH *v.* MANGAL SINGH. **174 I.C. 914=10 R.A. 638=1938 A.L.R. 347=1938 A.L.J. 156=1938 A.W.R. (H.C.) 133=A.I.R. 1938 All. 208.**

———**Ss. 14 and 15**—*Scope—If exhaustive of modes of destroying right of pre-emption—Notice, if obligatory—Oral communication and refusal to purchase—If enough.*

Ss. 14 and 15 of the Agra Pre-emption Act only prescribe the procedure by which a vendor may put an end to a co-sharer's right of pre-emption. But it is not exhaustive of all the modes open for destroying such a right. It is not obligatory on a vendor to give the notice prescribed by S. 14. It is open to a vendor to orally inform a co-sharer having a right of pre-emption of his intention to sell and if such co-sharer refuses to purchase the property, then he will not be entitled to exercise the right of pre-emption. (*Iqbal Ahmad, J.*) BHORA SINGH *v.* FORA. **182 I.C. 319=11 R.A. 649=1939 A.W.R. (H.C.) 254=A.I.R. 1939 All. 347.**

———**S. 15**—*Hindu manager's refusal to purchase property—If affects right of pre-emption of other members.*

Where the manager of a joint Hindu family refuses to purchase the property, his refusal disentitles the other members to enforce the right of pre-emption. His refusal to take the property in the exercise of the right of pre-emption is binding upon all the members of the family. (*Iqbal Ahmad, J.*) BHORA SINGH *v.* FORA. **182 I.C. 319=11 R.A. 649=1939 A.W.R. (H.C.) 254=A.I.R. 1939 All. 347.**

———**S. 15**—*Refusal to purchase by manager of joint Hindu family—Suit by any other member for pre-emption—Maintainability.*

The exercise of the right of pre-emption by the manager of a joint Hindu family must necessarily be on behalf of the members of the family. Hence the refusal by the manager of a joint Hindu family to purchase certain property is binding on all the members of the joint family and after such a refusal no member of the joint family is entitled to institute a suit for pre-emption. (*Iqbal Ahmad, J.*) KRISHNA KUMAR *v.* MAN SINGH. **186 I.C. 845=12 R.A. 453=1939 A.W.R. (H.C.) 834=A.I.R. 1940 All. 86.**

———**S. 16**—*Partial pre-emption—Extent of prohibition.*

S. 16 of the Pre-emption Act embodies the principle of the prevention of partial pre-emption. Under this section, it is only incumbent upon the pre-emptor to include in his claim all such property as he is entitled to pre-empt under the Act. He is not compelled to include in his claim properties to which he may be entitled under some law or custom outside the Act. Where, therefore, the pre-emptor is not entitled under the Act to pre-empt a house which has been included in the sale-deed, then neither the omission to pre-empt it nor the disqualification in pre-empting the same is fatal to his claim as regards the properties which he is entitled to pre-empt under the Act. (*Sulaiman, C.J. and Bennet, J.*) ZAINAB BIBI *v.* UMAR HAYAT KHAN. **58 All. 873=161 I.C. 753=8 R.A. 780=1936 A.W.R. 492=1936 A.L.J. 456=A.I.R. 1936 All. 732**

———**S. 17**—*Actual price—Items of consideration paid in fact—Pre-emptor, if can question.*

The right of pre-emption is a right of substitution for the buyer and it is not open to a plaintiff in a pre emption suit, while enforcing this right of substitution, to take exception to the validity of the items of sale consideration when as a matter of fact those items of consideration have changed hands. Where one of the items of consideration for the sale is the payment and discharge of a mortgage debt incurred by the vendor during his minority, it is not open to a plaintiff in a pre-emption suit to attack that item of consideration on the ground that ratification by a minor after attaining majority is void and that hence the debt is unenforceable. (*Iqbal Ahmad and Bajpai, JJ.*) ANANT RAI *v.* BHAGWAN RAI. **187 I.C. 4=12 R.A. 461=1939 A.W.R. (H.C.) 741=1939 A.L.J. 935=A.I.R. 1940 All. 12.**

———**S. 17**—*Actual price—Onus.*

Where the circumstances attending a sale are such as to cast a doubt on the genuineness of the price as entered in the sale deed, the burden of proving that the ostensible consideration was the real consideration is on the vendee. (*Iqbal Ahmad and Bajpai, JJ.*) ANANT RAI *v.* BHAGWAN RAI. **187 I.C. 4=12 R.A. 461=1939 A.W.R. (H.C.) 741=1939 A.L.J. 935=A.I.R. 1940 All 12.**

———**S. 19**—*Defendant becoming co-sharer before suit—Decree, if could be passed.*

Where before the date of a suit for pre-emption the defendant vendee had become a co-sharer in the mahal by reason of a deed of gift executed before the date of the suit no decree for pre-emption can be passed in favour of the plaintiff because he has not a subsisting right of pre-emption at the time of the decree. (*Iqbal Ahmad and Bajpai, JJ.*) SHIAM SUNDER *v.* SARMADI BEGAM. **188 I.C. 386=1940 A.W.R. (H.C.) 262=A.I.R. 1940 All. 171.**

———**Ss. 19 and 20 (as amended)**—*Gift by vendee to preferential pre-emptor during pendency of suit for pre-emption—Plaintiff's right, if affected.*

Where during the pendency of a suit for pre-emption, the vendee makes a gift of the property to an idol of whom he is the manager and who happens to have a superior right of pre-emption to that of the plaintiff, but the deed of gift does not mention any question of pre-emption having been raised or the transfer being in recognition of any such preferential right, the plaintiff's right of pre-emption could not be affected by the gift. (*Bennet and Verma, JJ.*) BHOLA NATH *v.* SHIVA SINGH. **I.L.R. (1939) All. 286=181 I.C. 625=11 R.A. 593=1939 A.W.R. (H.C.) 110=1939 A.L.J. 253=A.I.R. 1939 All. 253.**

———**S. 19 and U. P. Land Revenue Act, S. 131**—*Suit for partition—Effect of partition proceedings—Loss of right subsequent to decree by trial Court—Effect—Partition proceedings when complete.*

According to S. 19 of the Agra Pre-emption Act a pre-emptor is entitled to a decree if his right of pre-emption subsists till the date of the decree by the trial Court. If follows that the loss of the right of pre-emption after the date of the decree of the trial is immaterial. Where it appeared that the vendor had filed an application in the Revenue Court for partition and either before the institution of a suit for pre-emption or during its pendency in the trial Court the partition proceedings was drawn up and confirmed by the Collector according to S. 114 of the Land Revenue Act as a result of which the share of the plaintiff in the pre-emption suit and the pre-empted share were allotted to different pattis and as a result of which the plaintiff lost his preferential right of pre-emption, it was held that the plaintiff's right was not affected at all, because prior to the decree in his suit, the partition proceedings had not become complete as the Collector had not passed an order under S. 131 of the Land Revenue Act and that a decree for pre-emption was not affected by any loss of right subsequent to its date. (*Iqbal Ahmad, J.*) Jairaj Singh *v.* Har Narain Singh. **1940 A.L. J. 360=1940 A.W.R. (H.C.) 341.**

——**Ss. 20 and 22**—*Defence based on S. 20—If open in a suit under S. 22.*

The defence of S. 20 of the Agra Pre-emption Act is not technically barred in the case of a suit brought under S. 22 of the Act. (*Bennet and Verma, JJ.*) Mohib Ali Khan *v.* Baldeo Prashad **I.L.R. (1939) All. 305=183 I.C. 572=12 R.A. 148=1939 A.W.R. (H.C.) 157=1939 A. L.J. 344=A.I.R. 1939 All. 380.**

——**S. 20**—*Gift by manager of joint Hindu family to co-vendee to avoid decree for pre-emption—If a benefit to the estate—Co-vendee, if acquires indefeasible interest—Suit for pre-emption, if can lie.*

Where the manager of a joint Hindu family who was a joint vendee with another, with a view to prevent a threatened suit under S. 22 of the Agra Pre-emption Act being decreed, and to save the family from the costs of such a suit and the reduction of the face value of the sale, transfers a minute portion of the joint family property to his co-vendee, the sale is for the benefit of the family and as such the co-vendee acquires an indefeasible right in the mahal and a suit for pre-emption cannot lie as provided by S. 20 of the Agra Pre-emption Act. (*Bennet and Verma, JJ.*) Mohib Ali Khan *v.* Baldeo Prashad. **I.L.R. (1939) All. 305=183 I.C. 572=12 R.A. 148=1939 A.W.R. (H.C.) 157=1939 A.L.J. 344=A.I.R. 1939 All. 380.**

——**S. 20**—*Indefeasible, meaning of.*

The word 'indefeasible' in S. 20 cannot be taken to have the restricted meaning of 'not being liable to pre-emption' but has its ordinary though wider meaning of 'incapable of being defeated, or not liable to be defeated'. A.I.R 1934 All. 343 (F.B.), Rel. on. (*Iqbal Ahmad and Bajpai, JJ.*) Shiam Sunder *v.* Sarmadi Begam. **188 I.C. 386=1940 A.W.R. (H.C.) 262=A.I.R. 1940 All. 171.**

AGRA TENANCY ACT (II OF 1901)—*Superimposition of a different tenure on a tenant—Effect—If amounts to merger.*

When a tenure different in character from the one which was enjoyed is super-imposed on a tenant then under the old Act there was no question of merger but of suspension or keeping the right in abeyance. Hence where a person entered as a non-occupancy tenant just before the Act of 1926 came into force, takes on a *zar-e-peshgi* lease, there is no question of merger and on the determination of the *zar-e-peshgi* lease the right which had remained dormant, namely, that of a non-occupancy tenant, revived under the new Act. (*Marsh, S. M. and Mehta, J.M.*) Jai Kishun Dass *v.* Tulsi Ram. **1939 R.D. 536=1939 A.W.R. (B. R.) 236.**

——**S. 11**—*Landholder agreeing to acknowledge status of person as occupancy tenant—Binding nature of arrangement.*

Where a landholder or some one authorised on his behalf has definitely and with full knowledge and consent agreed to acknowledge the status of a person under Act II of 1901 as possessing all the rights of an occupancy tenant, the arrangement is binding on him. (*Drake Brockman, S.M. and Knox, J.M.*) Moola *v.* Rafiq Fatima. **1936 R.D. 90=1936 A.W.R. 246.**

——**S. 20 (3)**—*Construction—Interpretation—'Subject to the terms of his lease'—Meaning and effect of.*

The Agra Tenancy Act of 1901 and that of 1926 show clearly that it may be provided in the theka that the interest of a thekadar is transferable and there is no doubt that in S. 20 (3) of the Act of 1901, the same provision was intended. The natural construction according to the rules of grammar implies that the clause 'subject to the terms of his lease' shall also apply to the words 'not transferable' and is not limited to the word 'heritable'. (*Sulaiman, C. J. and Bennet, J.*) Lachmi Narain *v.* Batuk Singh. **I.L R (1937) All. 588=171 I.C. 203=10 R.A. 239=1937 A.L. R. 813=1937 R.D. 425=1937 A L.J. 656=1937 A.W.R. 699=A I.R. 1937 All. 561.**

——**S. 201 (3)**—*Presumption under—Applicability—New Act coming into force while case is in appeal.*

Where a suit is filed before the new Act but the new Act comes into force when the case is before the appellate Court, the appellate Court cannot apply the presumption under S. 201 (3) of the old Act which has been deleted by the new Act as the rule of presumption is only one of procedure. (*Sulaiman, C.J. and Bajpai, J.*) Bhawani Prasad *v.* Bahal Singh. **163 I.C. 767=9 R.A. 76=1936 A.L.J. 801=1936 A.W.R. 611=1936 R.D. 246=A.I.R. 1936 All. 492.**

——**(III OF 1926)**—*Fixed rate tenancy—Orchards of lemons and guavas—Orchards treated as grove under Act of 1901—Change in the law—Liability of sub-tenant of ejectment—Compensation.*

Where the plots in question comprised an orchard of lemons and guavas and was treated as a grove prior to new Tenancy Act, and the fixed rate tenant sued the sub-tenant for ejectment, it was held that the plots do not constitute groves under the present Act and whatever protection he till then enjoyed has been removed by Act of 1926 and as such the tenant is liable to be ejected. Compensation cannot be given under S. 78 but defendant may apply under S. 98 of Act of 1926. (*Darling S. M. and Bomford, J. M.*) Mahesh Singh *v.* Mt. Moola. **1938 R.D. 656=1938 A.W.R. (B.R.) 239=1938 A.L.J. (Supp.) 86.**

——*Co-tenants—Position of—Summary of conclusions based on the provisions of the Act.*

S. N. DAR, B.A. LL.B.,
Vakil High Court.
SRINAGAR (Kashmir)

Summary of conclusions on co-tenants based upon a consideration of the several relevant provisions of the Agra Tenancy Act: (1) A number of persons holding a tenancy are co-tenants. (2) These co-tenants are joint tenants and not tenants in common, except for succession. (3) Each co-tenant is jointly and severally responsible for the whole rent of the holding and entitled to share in the joint cultivation of the holding. (4) If one co-tenant loses his interest in the holding by surrender, abandonment or in any other way except by death, the rights of the remaining co-tenants are not affected but they remain as joint tenants of the whole holding. (5) If one co-tenant dies, his interest does not pass by survivorship to the other co-tenants, whether they are joint in estate with him or not, but it passes to his successors according to the order of succession in S. 24. (6) If there is no such heir, the interest passes by survivorship to the remaining co-tenants. (*Bennet and Verma, JJ.*) DWARKA DAS *v.* RAFIUDDIN. **I.L.R. (1940) All. 159=188 I.C. 389=1940 A.W.R. (H.C.) 188=1940 R.D. 123=1940 A.L.J. 310=A.I.R. 1940 All. 218.**

——*Licensee, if recognized under the Act—Entry as sub-tenant* bil ewaz sood—*Status of tenant—Entry of word* 'Marfat'—*Meaning.*

Licensee is nowhere defined in the Agra Tenancy Act. That word so far as the cultivator is concerned, is not a term with which the Revenue law has anything to do. A person whose name is entered as sub-tenant *bil ewaz sood* is as a matter of fact a sub-tenant (*i.e.*) a non-occupancy tenant. Such a person, is treated as a sub-tenant, which he is, and not as a licensee, unless there is a document to show that the holding has been hypothecated as a security. If the recorded tenant has put any person in cultivating possession on his behalf except as usufructuary mortgagee or sub-tenant then the name of the cultivator will be shown in the remarks column of the *khasra* with the word *Marfat*. *Marfat* means that the licence can be withdrawn and the licensee removed at the sweet will of the recorded tenant. (*Mehta, J.M.*) HARI NATH SINGH *v.* SATYADEO SINGH. **1939 R.D. 533=1939 A.W.R. (B.R.) 233.**

——*Applicability—Widow succeeding to husband under Act of* 1881 *and dying after* 1926—*Succession to—Law applicable.*

The law of succession to be followed in the case of a tenancy is the law as it stands on the date when the succession opens. In the case of widow tenant who succeeds under Act XII of 1881, but who dies after the enactment of Act III of 1926, it is the latter Act that governs succession to the widow. (*Darling, S.M. and Bomford, J.M.*) RAMDAYAL *v.* BINDESHWARI PRASAD. **1938 R.D. 121=1938 A.W.R. 72 (B.R.).**

——*Interpretation—Reference to former Act—Permissibility.*

Per *Iqbal Ahmad, J.*—Agra Tenancy Act of 1926 is a consolidating and amending Act as is apparent from its preamble. In order to appreciate the full significance and import of an amendment introduced by the Act reference must of necessity be made to the provisions of the former Act. (*Bennet, Ag. C.J., Iqbal Ahmad, Collister, Bajpai and Ganga Nath, JJ.*) DULAR PANDEY *v.* NANDA BUDHAI. **I.L.R. (1938) All. 563=11 R.A. 61=1938 A.L.R. 578=1938 A.L.J. 585=1938 A.W.R (H.C.) 385=176 I.C. 226=1938 R.D. 628=A.I R. 1938 All. 396 (F.B.).**

——*Suits under—Technicalities—Reliance upon—Principle as to.*

It is a sound principle that technicalities should not be pressed too far in suits under Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) TIKORI *v.* HARAKH CHAND. **1938 R.D. 1=1938 A.W.R. (B.R.) 13.**

——**S. 3 (1)**—'Improvement'—Building of a temple by fixed rate tenant on agricultural holding—If amounts to. *See* AGRA TENANCY ACT, Ss. 12 AND 109. **1940 A.L.J. 261.**

——**S. 3 (2) and (15)**—*'Agricultural land'—Government Notification—Garden and grove—Distinction.*

Grove-land has been defined in S. 3 (15) of the Tenancy Act. If a piece of ground comes within this definition, then under S. 3 (2) the land is agricultural land and cannot be sold through the Civil Court Amin according to Government Notification, dated March 26, 1932. If on the other hand the land is not agricultural land but is a garden, then it may be sold through Civil Court Amin. The Act draws a distinction in regard to the kind of fruit trees. Certain fruit trees such as guavas, peaches, plaintains, papitas, etc., are trees which do not constitute a grove, but on the other hand mangoes, jack fruit, etc., which occupy the land for a long period do constitute a grove. (*Sulaiman, C.J. and Bennet, J.*) NANDU MAL *v.* PANNA LAL. **163 I.C. 823=9 R.A. 78=1936 A.L.J. 576=1936 A.W.R. 524=1936 R.D. 189=A.I.R. 1936 All. 436.**

——**Ss. 3 (3) and (4) and 132**—'Sayar'—*Weighment dues—Suit for—Jurisdiction—Civil or Revenue Court.*

Arrears of weighment dues can properly be regarded as *'sayar'* within the meaning of the definition of the term in S. 3 (4) and S. 132 of the Act also applies to the recovery of *'sayar'* or arrears of *sayar*. A suit to recover weighment dues is therefore cognizable by the Revenue Court. Such a suit need not be instituted in the Small Cause Court. (*Harries, J.*) GULZARI LAL *v.* PHOOL CHAND. **1936 R.D. 14.**

——**S. 3 (4)**—'Sayar'—*Claim for a share in weighing charges—Jurisdiction of Revenue Court.*

Where the case of the plaintiffs amount to a claim for a share of the weighing charges realised by the defendants as licensees of the plaintiffs, the claim will come within the definition of 'sayar' in S. 3 (4) of the Act and so a suit for it will lie in a Revenue Court. (*Bennet and Verma JJ.*) NOOR MOHAMMAD *v.* LALLOO. **I.L.R. (1939) All. 760=184 I.C. 572=1939 R.D. 389=1939 A.L.J. 890=1939 A.W.R. (H.C.) 475=A.I.R. 1939 All. 614**

——**S. 3 (4)**—Sayar—*Weighment dues and* parjot—*If* sayar.

Weighment dues being mostly connected with agricultural produces weighed by the weighment should be classed as *sayar* as defined by S. 3 (4) of the Act. But *parjot* which is a kind of ground-rent paid by persons who are not agriculturists must be excluded from the definition of *sayar*. (*Drake Brockman, S.M. and Knox, J.M.*) ASFIA BEGUM *v.* DUKHIA. **1936 R.D. 520.**

——**S. 3 (6)**—*Tenant—Grove-holder, if a tenant.*

It is clear from the definition in the Tenancy Act that a grove-holder is included in the definition of tenant. (*Marsh, S.M.*) BOBDEE *v.* RAGHUBIR SINGH. **1939 R.D. 602=1939 A.W.R. (B.R.) 272.**

——**Ss. 3 (7) and 21**—*Applicability—Lessee in sir land—Status of—Liability to ejectment on expiry of lease.*

A lessee in *sir* land is not a sub-tenant within the meaning of S. 3 (7) of the Agra Tenancy Act. Statutory rights cannot accrue in *sir* land: the rights which accrue to the lease holder under the lease are non-occupancy. On the termination of the lease, if he has not been re-admitted to the holding as a statutory tenant, he is still a tenant not coming within any of the clauses of S. 21 of the Act, and as a non-occupancy tenant he is liable to ejectment. (*Darling, S.M.*) KUREY *v.* ZAHARIYA MAL. **1937 R.D. 45.**

——**S. 3 (7)**—*"Sub-tenant"—Grantee of* muafi khidmati—*Person holding under—Status of—Ss. 187 and 188.*

It cannot be held that there can be no sub-tenant of a rent-free grantee holding a *muafi khidmati.* A service grant is liable to have rent fixed under S. 187 of the Agra Tenancy Act, though it may also be resumed under S. 188. A person holding from such a grantee is a sub-tenant as defined by S. 3 (7) of the Act. (*Darling, S.M. and Bomford, J.M.*) BADRI TEWARI *v.* BECHAI CHANAR. **1938 R.D. 160=1938 A.W.R. (B.R.) 91.**

——**S. 3 (14)**—*"Decree"—Order of remand.*

An order of remand passed by a District Judge on appeal is not a 'decree' as defined in the Act. (*Sulaiman, C.J. and Bennet, J.*) PANCHAM *v.* RAMESHWAR. **162 I.C. 954=8 R.A. 919=1936 R.D. 144=1936 A.W.R. 393=1936 A.L.J. 337=1936 All. L.R. 522=A.I.R. 1936 All. 376.**

——**S. 3 (14)**—Decree—Meaning of—If includes determination of any question under S. 47, C. P. Code. *See* AGRA TENANCY ACT, Ss. 249 AND 3, CL. (14). **1938 A.L.J. 63.**

——**S. 3 (15)**—*Grove—Area of 7 biswas containing 10 full grown mango trees—If grove.*

Where in a small area of 7 biswas there are 10 full grown mango trees, the plot is certainly a grove, however those trees are arranged. The fact that some casual cultivation is possible does not matter, when the trees preclude any considerable portion of the land being used primarily for any other purpose. (*Darling, S.M. and Bomford, J.M.*) SARDHA DIN *v.* MASURIADIN. **1938 R.D. 147=1938 A.W.R. (B.R.) 80.**

——**S. 3 (15)**—*Grove—Meaning of definition.*

Grove means a specific piece of land having trees planted thereon so as to preclude the area when the trees are full grown from being used for any other purpose. The trees on such an area, which is grove land, constitute grove. It is only those trees which are grown on a grove land, which is land specifically let out for the purposes of planting trees, that constitute grove-scattered trees are not grove. (*Mehta, S.M. and Harper, J.M.*) NARBADESHWAR MAHADEOJI *v.* BISHAMBHAR RAM. **1940 R.D. 24=1940 A.W.R. (B.R.) 47.**

——**S. 3 (15)**—*Grove—Nature of—Character, if destroyed by portion becoming bereft of trees—Test to be applied—Finding of trial Court—Interference in appeal.*

A grove is one unit and if a portion is bereft of trees the unit character of the holding cannot be destroyed by treating that denuded portion as one to which the definition of grove under S. 3 (15) of the Tenancy Act could not apply. Mere number of trees would not constitute an area as grove. No hard and fast rule could be laid down. It is the peculiar case-figuration of land and the trees on this land that would form the data from which the Court is in a position to draw the inference whether the major portion of the area could be put to any other use except the use of growing trees. In each case there must be a local inspection and after hearing the evidence, the Court must give a clear finding, and when the trial Court has so done, it would be unsafe for an appellate Court to interfere with that finding of fact. (*Mehta, S. M. and Harper, J. M.*) BECHAN SINGH *v.* RAM SAGAR SINGH. **1940 R.D. 14=1940 A.W.R. (B.R.) 21.**

——**S. 3 (15)**—*Grove land—Plots occupied by guavas and plum trees.*

Plum trees though not specifically mentioned in the explanation to the definition, are similar to guavas and peaches. Hence plots occupied by guavas and plum trees are not grove land within the definition of the Act. (*Darling, S. M.*) MASIT ULLAH *v.* SARDAR SINGH. **1938 A.W.R. (B.R.) 237 (1)=1938 R.D. 659=1938 A.L.J. (Supp.) 81.**

——**S. 3 (15)**—*Grove—Retention of character, as such—Test to be applied.*

Whether a grove area has lost its character or not has to be decided in each case with the guidance of the definition of grove given in S. 3 (15) of the Agra Tenancy Act. In such cases the Court has to determine whether the major portion of the land constituting the grove can be put to any other use, and if it comes to the conclusion that it cannot be put to any other use considering the *tout ensemble,* then the grove has maintained its grove character. It is not the number of trees that would matter but it is their location that would go to indicate whether the land can be put to any other use. (*Marsh, S. M. and Mehta, J. M.*) MANOHAR DAS *v.* SYED KAZIM HUSAIN. **1939 R.D. 326.**

——**Ss. 3 and 23**—*Applicability—Permanent lease with right of transfer, planting grove and building houses—Lessee not planting grove—Land—If grove—Liability to be sold in execution—T. P. Act, S. 117.*

Some plots were leased out to the lessee by a permanent lease. It was stated therein that the lessee was a tenant of the said plots and the lease was heritable. The lessee was also given the right of transfer whether by way of gift or sale or otherwise. The lessee was also permitted under the lease to plant groves or to construct buildings on the leased land. The lessee did not however plant any grove on such land.

Held, that the land being agricultural land and not grove land under S. 3, Agra Tenancy Act, S. 117, T. P. Act, applied to the lease of such plots. The interest of the tenant of such land was therefore not transferable in execution of a decree of a Civil Court by virtue of S. 23 of the Tenancy Act. (*Sulaiman, C. J. and Bennet, J.*) LACHMI NARAIN *v.* BATUK SINGH. **I.L.R. (1937) All. 588=171 I.C. 203=10 R.A. 239=1937 A.L.R.**

813=1937 R.D. 425=1937 A.L.J. 656=1937 A.W.R. 699=A.I.R. 1937 All. 561.

——**Ss. 3 and 242**—*Order under S. 144, C. P. Code—If a decree under Tenancy Act—Appeal, if lies.*

An order under S. 144, C. P. Code, is not an order in a suit and does not dispose of a suit and hence is clearly excluded from the definition of 'decree' as given in S. 3 (4) of the Tenancy Act. S. 242 speaks only of suits and decrees in suits. So an appeal does not lie to the District Judge under S. 242 from an order under S. 144, C. P. Code. (*Misra, J.*) Sheo Nandan Singh *v.* Suraj Prasad Singh. **179 I.C. 39=11 R.A. 348=1938 A.L.J. 988=1938 A.W.R. (H.C.) 682=1938 R.D. 829=A.I.R. 1939 All. 22.**

——**S. 4 (b) and (d)**—*Land taken up for grove or cultivation but planted with fruit trees—Absence of proof of cultivation by landlord—Entry as* khudkasht *and* bagh—*Ex-proprietary rights—If can be claimed.*

The ancestor of the respondents took up a plot of land in 1297 F, either with the intention of planting a grove in it or with the intention of cultivating it with ordinary crops, but he changed his mind and planted fruit-trees in it. Up to the revision of records in 1336 F., the land had been continuously recorded as *khudkasht* for a period of 30 years. There was however no evidence to show that the land was continuously cultivated by the landlord for 12 years preceding the 1st January, 1902, as required by S. 4 (*b*) of the Agra Tenancy Act. In 1334 it was not being cultivated by the proprietor and was shown as uncultivated *bagh*.

Held, the claim of the respondents for ex-proprietary rights could be maintained in respect of the land in question. (*Drake Brockman, S.M. and Knox, J.M.*) Murari Lal *v.* Joti Prasad. **1936 R.D. 87.**

——**S. 4 (d)**—*Land entered as* khudkasht *from 1924-25—Management by trustees of joint family—Father one of trustees—Land, if becomes* sir *of joint family or of father alone.*

Where land had been entered as *khudkasht* from before 1924-25 and it was managed by certain trustees who were appointed to manage the whole of a joint family estate, the land becomes the *sir* of the joint family. The fact that the father was one of the trustees and his name was entered in the Revenue papers in addition to the trustees would not make the land the *sir* of the father alone, and not of the joint family. (*Bennet and Smith, JJ.*) Inderjit Singh *v.* Gir Raj Singh. **164 I.C. 913=9 R.A. 209=1936 A.L.J. 993=1936 A.W.R. 651=1936 R.D. 285=A.I.R. 1936 All. 671.**

——**S. 4 (d)**—*Land if* 'sir'—*Test.*

Unless a plot of land is recorded as *khudkasht* in 1333 F. it cannot become '*sir*' under S. 4 (*d*) of the Agra Tenancy Act. (*Darling, S. M. and Marsh, J.M.*) Sarbeshwari Debi *v.* Harnam Singh. **1938 R.D. 661=1938 A.W.R. (B.R.) 329 (1)=1938 A.L.J. (Supp.) 113.**

——**S. 4 (d)**—*Mortgage by co-sharer—Mortgagee taking land into* khudkasht *and acquiring* sir *rights—Second mortgage by mortgagor—Prior mortgagee paid off—Subsequent mortgagee if can claim to be recorded as co-sharer in* sir *acquired by the prior mortgagee—His remedy.*

Where one of the two co-sharers executes a mortgage in favour of the other with full rights to admit and eject tenants and such mortgagee by taking land into *khudkasht* acquires *sir* rights in such land under S. 4 (*d*) of the Agra Tenancy Act, a subsequent mortgagee from the same mortgagor who pays off the prior mortgagee, cannot claim to be recorded as co-sharer in the *sir* acquired by the earlier mortgagee, for, when the co-sharer of the joint *sir* parted with his share without claiming ex-proprietary rights in the *sir*, the *sir* became the *sir* of the remaining co-sharer. If the earlier mortgagee has acquired more than his proportionate share of *sir*, then the remedy of the subsequent mortgagee is to sue for partition. (*Darling. S.M. and Bomford, J.M.*) Punjab Sugar Mills *v.* Lachman Prasad Tewari. **1938 R.D. 416=1938 A.W.R. (B.R.) 286=1938 A.L.J. (Supp.) 98.**

——**S. 4 (d)**—Sir *land—Land not recorded as* sir *in 1333 F—Person recorded as non-occupancy tenant* bila tasfia lagan—*Claim to land as* sir—*Sustainability.*

A person who is not the sole proprietor but who is recorded as non-occupancy tenant *bila tasfia lagan* of certain land cannot claim that land as his *sir*, when the land is not recorded in 1333 F, as his *khudkasht*. Such land is not *sir*. (*Knox, J.M.*) Ram Das *v.* Sarup Singh. **1936 R.D. 117.**

——**Ss. 4 (d) and 14 (2)**—*Construction—'Cultivated'—Meaning.*

Whether it is with reference to S. 4 (*d*) or S. 14 (2) of the Agra Tenancy Act the word 'cultivated' does not mean the same thing as 'ploughed' and provided that no other party is put in possession of the land, it is difficult to see why cultivation should not cover a normal period of fallow, more especially where the fields are included in a farm, the whole of which will not normally be under the plough every year without a rest. (*Darling, S. M. and Bomford, J. M.*) Jugul Kishore Tandon *v.* Rao Narsingh Rao. **1938 A.W.R. (B R.) 35=1938 R.D. 306.**

——**Ss. 4 (d) and 14**—Sir *land or land equivalent of* sir *being also grove land—Ex-proprietary rights in—When arise—Principles.*

It is beyond question that ex-proprietary rights will arise under S. 14 of the Agra Tenancy Act in *sir* land, which is also grove land, when the *sir* holder retains the property in the trees and is in possession of the grove standing on his *sir* after sale of his proprietary right. All area of such land will form his ex-proprietary holding and will be liable to be assessed to rent as it formed portion of his *sir* holding before transfer of his proprietary rights. But where the *sir* holder has transferred the property in the trees before parting with his proprietary rights, or when the property in the trees is transferred at an auction sale at the express wish or with consent of the proprietor along with the proprietary rights or because of a general condition in the sale certificate that the property in the trees also "is passed" to the auction-purchaser, no ex-proprietary rights can arise in favour of the ex-proprietor. If, however, the property in the trees purports but vaguely to be transferred at the auction sale along with the proprietary rights, such a transfer being inconsistent with the right of occupancy reserved to the ex-proprietor by law, his ex-proprietary rights are not lost in any way and extend to the trees. This principle applies also to land which is the equivalent of *sir* under S. 4 (*d*) of the Act. (*Drake Brockman, S.M. and Knox, J. M.*) NAIM CHAND *v.* MALKHAN. **1936 R.D. 493.**

——S. 5—*Last male owner having only Zamindari rights*—Sir *and* khudkasht *rights not possessed by him—Reversioner's right to possession of* sir *and* khudkasht.

Where the last male owner had only zamindari rights and had no rights of *sir* and *khudkasht*, and no such rights came into existence when the last limited owner died, the reversioner is not entitled to the possession of the *sir* and *khudkasht*. A distinction has been drawn between the rights in *sir* and *khudkasht* and the proprietary rights in S. 5 of the Agra Tenancy Act. (*Bennet, J.*) KALI CHARAN RAM SAITHWAR *v.* BANKA CHAND. **168 I.C. 694=9 R.A. 675=1937 A.L.R. 399=1937 A.L.J. 147=1937 R.D. 50=1937 A.W.R. 49=A.I.R. 1937 All. 348.**

——S. 6—*Joint* sir—*Mortgage of part with possession by one only—Absence of proof of formal division—If binds other co-sharers—Status of mortgagee — Application by for mutation—Competency.*

It is not open to one co-sharer to mortgage with possession certain plots which are recorded as joint *sir*, on the allegation that he and his co-sharers have divided up the *sir* among themselves. Such a transfer in the absence of proof of a formal division is no transfer. The mortgagee in possession under such a mortgage can only be regarded as being in possession by the licence of the co-sharers, which is liable to be revoked at any time. He must be regarded as a tenant of the *sir* as a whole and no mutation can be effected in his favour. (*Drake Brockman, S.M. and Knox, J.M.*) RAGHUPAT *v.* SANMAN. **1936 R.D. 369.**

——Ss. 6 and 14—*Joint* sir *in* khata *owned jointly by five brothers—Mortgage of* sir *by three only—No ex-proprietary tenancy—Effect*—Sir *character—If lost*—Sir *entry—If to be corrected.*

Five brothers were recorded jointly as owners of a certain *khata* and of joint *sir*. Three of them mortgaged certain *sir* plots in the *khata* but no ex-proprietary tenancy was created.

Held, a proportionate area of the *sir* land did not lose its character of *sir*, but the *sir* reverted to the other two co-sharers. Consequently the *sir* entry should continue unchanged. (*Drake Brockman, S.M. and Knox, J.M.*) NAGESHWAR SHAH *v.* BHULAI. **1936 R.D. 110 (2).**

——Ss. 7 and 17—Sir *land—Granting of occupancy rights and transferring of possession—Subsequent sale of proprietary rights—Claim to ex-proprietary rights on the ground of the invalidity of the grant of occupancy rights.*

Where a person confers occupancy rights on another in respect of his own *sir* land and transfers possession to him and requests by an application that his *sir* rights be expunged from the *khatauni* and his request is granted, he cannot after the sale of the proprietary rights turn round and claim ex-proprietary rights when it is found for some reason that the conferment of the occupancy rights is invalid. (*Darling, S. M.*) HANS RAM *v.* GAINDA LAL. **1939 R.D. 43=1939 A.W.R. (B.R.) 131.**

——Ss. 7 (b) and 17 (1) (j)—Sir *land in possession of Hindu widow—Alienation of—Alienee's right to admit persons to tenancy—Limits of—Status of persons admitted by alienee.*

Admission to tenancy as a tenant with a right of occupancy is equivalent to the conferment of such rights; and as a Hindu widow having only a life estate can only confer occupancy rights with the written consent of the nearest reversioner or the sanction of the District Judge, under S. 17 (1) (*j*) of the Agra Tenancy Act, an alienee from the widow would, as regards admission of tenants with rights of occupancy, would be subject to the same restrictions. A person admitted by the alienee to other than *sir* land cannot be more than a statutory tenant. As for *sir* land, the conferment of occupancy rights brings *sir* to an end, under S. 7 (*b*), provided that the right is conferred in accordance with S. 17. When such rights are not conferred in accordance with S. 17, the *sir* character does not come to an end, and the holder of that land can only remain a tenant of *sir*. (*Drake Brockman, S.M. and Knox, J.M.*) RABAL SINGH *v.* RISAL SINGH. **1936 R.D. 355.**

——Ss. 8 and 14—*Private agreement as to ex-proprietary rent—Enforceability.*

Under S. 8 (1) of the Agra Tenancy Act parties could not contract themselves out of the provisions of law and it follows that parties cannot by private agreement seek to override the express provisions of law contained in S. 14 (1) as to the rent of ex-proprietary tenants. (*Mehta, S.M. and Harper, J. M.*) PARMARTHI RAI *v.* NAGESAR RAM. **1940 A.W.R. (B.R.) 61=1940 R.D. 165.**

——S. 8 (2) (c)—*Applicability—Enhanced rent as a result of a new contract—Right to impugn.*

S. 8(2) (*c*) of the Agra Tenancy Act would only apply to an agreement where the rent is allowed to be enhanced on any holding beyond the limit to be put down by S. 50 (2) of the Act. But where as a result of a compromise of a suit under S. 82 of the Act, two of the three tenants enter into a new contract as regards the rent, the third one cannot be allowed to come forward and impugn the transaction and seek a declaration under S. 123 of Act. (*Mehta, J.M.*) MUNESHAR *v.* OUDH NARAIN DHAR DUBE. **1939 R.D. 247=1939 A.W.R. (B.R.) 215.**

——S. 8 (3)—*Lease of* nautor *land—Construction—If constitutes reclamation contract—Accrual of statutory rights—If barred.*

Where it is stated in the body of a lease of *nautor* land that it is given to the tenant for cultivation, and there are no special conditions of any kind in the kabuliyat executed by the tenant, the lease cannot be said to be a reclamation contract, by virtue of which the accrual of statutory rights is barred. (*Darling, S.M.*) TUFAIL HASAN *v.* BHAGWANT SINGH. **1937 R.D. 485.**

——Ss. 8 and 73—*Lease by Zamindar to thekadar—Covenant contrary to S. 73—Validity.*

The word "tenant" in S. 8 of the Agra Tenancy Act does not include a thekadar and a zamindar can grant a "theka" which contains provisions contrary to the provisions of Act III of 1926 in regard to tenants. It follows, therefore, that a covenant in a lease by a zamindar to a thekadar, which provides that the thekadar would not be entitled to make any deductions even if remissions of rent be allowed by Government on account of terrestrial or celestial calamities, is not affected by the privisions of S. 73 of the Act. (*Bennet and*

Smith, JJ.) Makhan Lal *v.* Mahomad Tawassul Hussain. **58 All 998=164 I.C. 600=9 R.A. 172=1936 A.W.R. 728=1936 A.L.J. 828=1936 R.D. 315=A.I.R. 1936 All 628.**

——**Ss. 12 and 109 and C. P. Code, S 9**—*Fixed rate holding—Rights of landholder—Invasion of proprietary right—Remedy—Building of temple by tenant—If an 'improvement'—S. 109, if helps tenant*

The proprietary right in a fixed rate holding continues to vest in the landholder and any act of the tenant which constitutes an invasion of such right must, therefore, constitute a wrong. A fixed rate tenant, who puts his holding to a use which is inconsistent with the purpose for which the holding was let, may thereby jeopardize the rights of the landholder to realise the rent of the holding as and when it falls due and such an act would, therefore, constitute an invasion of the proprietary right of the landholder. There must be a remedy either in the Civil or Revenue Court for the landholder. Though the remedy by way of ejectment is not available against a fixed rate tenant there is no provision in the Tenancy Act barring suits for injunction or compensation against a fixed rate tenant. Where a fixed rate tenant to whom land was originally let for agricultural purposes proposes to build a temple thereon, it amounts to an act inconsistent with the purpose for which the holding was let and hence the landholder can sue the tenant for compensation or for an injunction and such a suit is neither barred by the Tenancy Act, nor is it by the Act made cognizable by the Revenue Court. Such a suit in view of S. 9, C. P. Code, lies in the Civil Court. The building of the temple is not an 'improvement' within the meaning of S 3 (11) of the Tenancy Act and hence S. 109 of the Act cannot be pleaded in defence of such suit. *(Iqbal Ahmad and Bajpai, JJ.)* Ashrafi Singh *v.* Rajmata Chandrika Prasad Kuari **1940 A L J 261=1940 A.W R (H.C.) 248=1940 R.D. 175=A I R. 1940 A. 389.**

——**S. 13**—*Break of one year in possession—If bars claim to benefit of the section.*

Where there is a definite break in cultivation for one year as the tenant was out of possession for the full year, the advantage of S. 13 of the Agra Tenancy Act (1901) could not be claimed. *(Marsh, S.M. and Mehta, J.M.)* Indrajit Pratab Bahadur Sahi *v* Rama Lagan. **1939 R.D 313=1939 A.W R. (B.R) 263.**

——**S 13**—*Fixed rate holding—Finding by settlement officer—Misdescription of a plot—Correction.*

Where a settlement officer has found the holding to be a fixed rate holding and it is in the possession of the zamindar as fixed rate holding, but one number alone is misdescribed, *i.e.*, as in the possession of the defendant as mortgagee, but who in fact claims it as heir to her mother, a fixed rate tenant and the zamindar is aware of the fact that it was part of the fixed rate holding, there would be doing no violence to the language of S. 13 of the Agra Tenancy Act, if the misdescription is allowed to be corrected and in sustaining the plea of the defendant that she is holding it as heir of her mother. *(Marsh, S.M and Mehta, J.M)* Sukhdei *v* Mahadeo Prasad. **1939 R.D. 206=1939 A W R (B R) 204.**

——**S 13**—*Scope of—Entry as to cultivation—If conclusive as to period put in as tenant—Holding on after ejectment—Period of trespass, if can be counted in his favour.*

S. 13 of Agra Tenancy Act of 1901 clearly refers to being put in possession in a rightful manner so as to bridge over the previous period before dispossession and the subsequent period put in after dispossession. The section confers no benefit on a trespasser. Mere entry of a period of cultivation is not conclusive evidence as regards the period actually put in as a tenant. The presumption arising out of the entry can be rebutted by other cogent evidence. Where there is evidence to show that the defendant was only trying to hold on after ejectment and had kept the patwari on his side, he is in reality only a trespasser and counting the period of trespass in his favour is not justified. *(Bomford, S.M. and Mehta, J.M.)* Pasupat Pratap Singh *v.* Sheo Shanker. **1939 R.D. 132=1939 A.W.R. (B.R.) 159.**

——**Ss. 13 and 14**—*Occupancy rights—Acquisition of—Proof of continuous possession—Shifting of onus.*

In a suit to eject the defendant as heir of a statutory tenant, proof of continuous possession from 1319 F. onward throws on the plaintiff the burden of proving in his turn that the tenure before 1323 F. could not be reckoned towards the acquisition of occupancy rights under Ss. 13 and 14 of the Agra Tenancy Act of 1901. *(Darling, S.M and Bomford, J.M.)* Sheo Saran Koeri *v.* Ram Rao Krishna Jatar. **1938 R D. 667=1938 A.W.R (B R.) 350=1939 A.L.J. (Supp.) 65.**

——**S. 14**—**Applicability—Ex-proprietary tenant—Determination of rent of—Holding in village not subject to settlement operations—Basis of valuation.** *See* U. P. Land Revenue Act, S. 36. **1936 R.D 82.**

——**S 14**—*Ex-proprietary rights accruing in* sir *while in possession of trespasser—*Sir *holder recovering possession of his* sir *from trespasser within 12 years—Right to claim ex proprietary rights.*

A *sir* holder who recovers possession of his *sir* from a trespasser within 12 years from the date of his adverse possession can as against the transferee claim ex-proprietary rights which had accrued in the *sir* while it was in the possession of the trespasser. *(Darling, S.M. and Bomford, J M.)* Bhairo Prasad Singh *v.* Bhirgunath Singh. **1937 R.D. 451.**

——**S. 14**—*Ex-proprietary rights—Accrual—How lost.*

Ex-proprietary rights accrue in the area which is in the possession of the vendor of the anna pie share to which the *sir* is appurtenant. But if he has lost possession when the sale takes place, then unless he gets back possession within six months, he loses his ex-proprietary rights. *(Mehta, J M)* Chandi Prasad Tewari *v.* Gaya Prasad **1939 A.W.R. (B.R.) 75=1939 R.D. 272=1939 A.L.J. (Supp.) 76.**

——**S. 14**—*Father and son of joint family constituting themselves co-sharers by agreement—Agreement to an exchange of* sir *and* khudkasht*—Ex-proprietary rights, if arise.*

Where the father and the son agree that the property of the joint family should be divided equally between them and that the lands which were *sir* and *khudkasht* of the joint family should become the *sir* and *khudkasht* of the party who owned a particular lot in which that *sir* and *khudkasht* was situate, it is a clear case of exchange between the co-sharers in the *mahal* within the meaning of S. 14 of the Tenancy Act, and no ex-proprietary rights will, therefore, arise. (*Bennet and Smith, JJ.*) INDARJIT SINGH *v.* GIR RAJ SINGH. 164 **I.C.** 913=9 **R.A.** 209=1936 **A.L.J.** 993=1936 **A.W.R.** 651=1936 **R.D.** 285=**A.I.R.** 1936 **All.** 671.

——S. 14—*Land with trees which make it grove land—Proprietor parting with property in land as well as trees—Ex-proprietary rights—If can arise.*

A man who has parted with his proprietary rights in his land as well as his property in his trees thereon which brings it within the definition of a "grove land," has nothing further left in which ex-proprietary rights can arise in his favour. (*Drake Brockman, S.M. and Knox, J.M.*) BISHAMBHAR SAHAI *v.* RATI RAM. **1936 R.D. 480 =1936 A.W.R. 1098.**

——**S. 14**—*Mandatory, character of—Effect—Rent agreed to privately.*

In the face of the mandatory provisions of S. 14 of the Tenancy Act, any rent arrived at by private agreement regardless of the provisions of law is against the rent fixed under S. 36 of the Land Revenue Act. Relief cannot be granted on the basis of such rent. (*Mehta, J.M.*) NABIULLAH *v.* LACHHMI PRASAD. **1939 A.W.R. (B.R.) 69 (1)= 1939 R.D. 298=1939 A.L.J. (Supp.) 64.**

——**S. 14 (1)**—*Ex-proprietary rent—If can include extra charge for sugar-cane cultivation.*

Under the Agra Tenancy Act, S. 14 (1), the ex-proprietary tenant holds at a rent which is calculated on certain fixed rates. Unless they included provision for extra rent on the ground of sugar-cane cultivation, the ex-proprietor cannot legally include such extra charge. (*Bennet and Verma, JJ.*) PAUHARI BISHUNATH JATI *v.* RAMLAGAN JATI. **183 I.C. 471=12 R.A. 143=1939 A.L.J. 617 =1939 R.D. 234=1939 A.W.R. (H.C.) 313=A.I.R. 1939 All. 500.**

——**S. 14**—Sir *land constituting grove—Sale of land as well as trees—Claim to ex-proprietary rights—Maintainability.*

Where *sir* land is occupied by trees, which constitute a grove, and both the proprietary right in the land and the right in the trees is sold, there is no basis left for the vendor to claim ex-proprietary rights, and such rights do not arise. (*Drake Brockman, S.M. and Knox, J.M.*) MURARI LAL *v.* JOTI PRASAD. **1936 R.D 87.**

——S. 14—Scope—Ex-proprietary rights—*Sir* land also grove—Transfer of proprietary rights—Accrual of ex-proprietary rights in favour of *sir* holder—Conditions of. *See* AGRA TENANCY ACT, Ss. 4 (*d*) AND 14. **1936 R.D. 493.**

——S. 14 (2)—Construction — 'Cultivated'—Meaning. *See* AGRA TENANCY ACT, Ss. 4 (*d*) AND 14 (2). **1938 A.W.R. (B R.) 35.**

——**Ss. 14 and 15(2)**—*Promissory note—Defendant agreeing to pay money to plaintiff, if X does not relinquish her ex-proprietary rights—Sale deed by X in favour of plaintiff—X not applying for surrender of ex-proprietary rights under S. 15 (2)—Liability of defendant to pay agreed amount.*

The defendant executed a promissory note in favour of the plaintiff agreeing to pay him a certain amount if *X*, the wife of his brother, did not execute a relinquishment of her ex-proprietary rights. *X* executed a sale deed in favour of the plaintiff and ex-proprietary rights arose in her favour in accordance with the provisions of S. 14 of the Agra Tenancy Act. *X* did not apply under S. 15 (2) of that Act for surrender of those ex-proprietary rights. The plaintiff sued the defendant on the promissory note.

Held, that there would have been nothing illegal in *X* in doing all that she could do in accordance with S. 15 of the Agra Tenancy Act to give effect to the contract, that is, she could have made an application asking that her ex-proprietary rights should be relinquished, and that as she made no such application, the defendant became liable to pay the plaintiff the agreed amount. (*Bennet, J.*) BARAMDIN *v.* JAMUNA. **167 I.C. 320=9 R.A. 540 =1937 R.D. 40=1937 A.L.J. 15=1937 A.L.R. 173=1936 A.W.R. 1282=A.I.R. 1937 All. 123.**

——**Ss. 14 and 15**—*Scope*—Sir *land—Grant of occupancy rights in—Sale of proprietary rights subsequently—Death of transferor—Claim by widow to ex-proprietary rights—Suit under S. 99 —Maintainability.*

One *D.S.* conferred occupancy rights in 12 plots of *sir* land on *K.M.* The next day he sold his proprietary rights to *C.* Two days later *K.M.* applied to be recorded as occupancy tenant, and was so entered with the consent of *D.S. D.S.* died shortly after and his widow *W.K.* brought a suit three months later under S. 99, and another under S. 121 of the Agra Tenancy Act, claiming ex-proprietary rights in the lands in which *K.M.* was conferred occupancy rights.

Held, that the conferment of occupancy rights offended against S. 15 of the Act and was void; that *W.K.* as the widow and heir of *D.S.* inherited whatever interest he had in the potential ex-proprietary rights, and that as she exercised her rights to claim them within the period limited, she was entitled to be restored to possession, and the suit under S. 99 was maintainable and should be decreed. (*Drake Brockman, S.M. and Knox, J.M.*) KRISHNA MURARI LAL *v.* UTTAM KUER. **1936 R.D. 488.**

——**S. 14 and U P. Land Revenue Act, S 39**—*Two co-sharers dividing their* sir *land—Transfer of share by one of them—Both relinquishing their* sir *rights—Application by transferee for expunction of entry of* sir *from the* khatauni—*Right of other co-sharer.*

Two co-sharers *D* and *N* came to an amicable arrangement for the division of their *sir* land and one of them, *N*, sold his share to *K*. Subsequently both the co-sharers relinquished all claim to ex-proprietary rights in their *sir* and *khudkasht* in the plots specified in the sale deed. The transferee asked for the expunction from the *khatauni* of the *sir* and *khudkasht* in the cultivation of *N*; *D* contended that his *sir* rights still subsisted.

Held, it is no longer open to *D* to claim that his *sir* rights still subsisted. The entry of *sir* should be expunged from the *khatauni* and the plots should be recorded as the *khudkasht* of the transferee. (*Darling, S.M. and Bomford, J.M.*) KANHAIYA SINGH *v.* NATHU SINGH. **1937 R.D. 522 (2).**

——**S. 14 (8)**—*Applicability to* sir *land.*

S. 14 (8) of the Agra Tenancy Act only refers to land continuously cultivated for 10 years mentioned in S. 14 (1) and not also to *sir*. (*Drake Brock-*

man, S.M. and Knox, J.M.) NAIM CHAND *v.* MALE KHAN. **1936 R.D. 493.**

——S. 15 (2)—*Surrender of ex-proprietary rights not completed—Effect—Rights of vendor of sir plots.*

Where an application under S. 15 (2) of the Tenancy Act for surrender of ex-proprietary rights by a vendor of *sir* plots is dismissed, there is in law no valid surrender of such rights. As such the vendor, if he is so minded, can insist on his ex-proprietary holding being demarcated and rent fixed thereon. If he happens to be not in possession, he has his remedy under S. 99 of the Tenancy Act. The vendee in such a case has only himself to blame for not having insisted on the completion of the surrender prior to the completion of the sale (*Darling, S.M. and Mehta, J M.*) SURTI *v.* KUNJI MAL. **1938 R.D. 885=1938 A. W.R. (B R.) 416.**

——S 15 (3)—*Surrender by mortgagor of ex-proprietary rights—Awarding of ex-proprietary rights by S D.O. in spite of surrender—Remedy, if can be had under the correction section of Land Revenue Act or by regular suit.*

Where though a mortgagor had surrendered his ex-proprietary rights, nevertheless the S. D. O. rightly or wrongly awards ex-proprietary rights, it cannot be abrogated by summary proceedings under the correction sections of Land Revenue Act. Any party who wishes to question those rights must have recourse to a regular suit. (*Darling, S.M. and Mehta, J.M.*) LAKHPAT SINGH *v.* UMRAO SINGH. **1938 A.W.R. (B.R.) 294=1938 R.D. 775.**

——S. 15 (5)—*Applicability—Recital in mortgage as to delivery of possession to mortgagees—Effect—Waiver.*

Where a proprietor executes a mortgage of certain *sir* plots and makes a statement therein that he has delivered possession to the mortgagees he must be taken to have deliberately waived his ex-proprietary rights in accordance with S. 15 (5) of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) GHURANANDEY *v.* HIRA LAL. **1938 R.D. 391=1938 A.L.J. (Supp.) 52=1938 A.W.R. (B.R.) 223.**

——S. 16—*Company, if could acquire occupancy right—Mere shareholders in business rather than actual cultivators.*

The question whether a recorded tenant, a company can acquire occupancy rights, depends upon whether the partners regarded themselves as a number of partners cultivating as partners and co-tenants under the Act or an association engaged in the business of cultivating not in any personal capacity but as shareholders in a business. When their whole conduct suggests that they were shareholders in a business rather than actual cultivators in any personal capacity, such a company cannot acquire occupancy rights (*Darling, S.M. and Bomford, J.M.*) MACKINNON *v.* SAMPAT KUMAR SINHA. **1938 R.D. 4=1938 A.W R. 16 (B.R).**

——S. 16—*Occupancy rights—Determination as to—Implications behind Ss. 14 to 17 of Tenancy Act of 1901—Ejectment or surrender and fresh admission—Tacking of former period of cultivation.*

Ss. 14 to 17 of the Tenancy Act of 1901 implied that if there is a surrender of land with implied agreement and within a year, the tenant is admitted to some other land, he shall be deemed to have been given the land in exchange and it would be treated for all purposes identically as the land surrendered (*i.e.*) it would take the same character. So in a case where there has been a surrender and fresh admission within one year then the period of cultivation put in in the area from which surrender has taken place will be added to the period put in, in the plot to which the tenant has been admitted. (*Mehta, S.M. and Harper, J.M.*) NAMDAR *v.* MAHADEO SINGH. **1939 A.W. R. (B.R.) 5=1939 R.D. 83.**

——S 16—*Parties—Occupancy holding—Suit by recorded tenant to eject sub-tenant—Plea of acquisition of part of holding at partition as tenant and payment of rent to zamindar—Joinder of zamindar—If necessary.*

In a suit by a recorded occupancy tenant to eject his cousins as sub-tenants, the latter pleaded that the plot in suit was half one field which fell to their share at a partition of the family holding and that they had paid rent direct to the zamindar.

Held, that the zamindar should be made a party to the suit, as it was impossible to come to a final decision as to the status of the defendants until the zamindar had been made a party. (*Darling, S.M. and Bomford, J. M.*) SARJU KURMI *v.* BINDHYA CHAL. **1937 R.D. 23 (1).**

——Ss. 16 and 86—*Occupancy rights—Determination as to its acquisition—Seven years' leases—Period if to be deducted—Status of such tenants.*

Where seven years' leases are executed in favour of persons already in possession and the leases are given effect to by the Patwari and otherwise acted upon by the parties, the period under such leases cannot count towards occupancy. It has to be deducted from the period claimed towards the acquisition of the occupancy rights. Such tenants can be ejected under S. 86 as heirs of a statutory tenant. (*Mehta, S. M.*) JHINKAI *v.* BHUNESHAR RAI. **1939 A.W.R. (B. R.) 7=1939 R D. 18.**

——Ss. 16 and 197— *Person declared grove-holder by High Court— Subsequent ceasing of land to be grove—Effect—Status of occupant—Land in Government estate—Correction of papers —Proper entry.*

When a person has been declared by the High Court in a suit to be a grove-holder, if the land subsequently ceases to be a grove, the holder becomes a non-occupancy tenant under S. 197 of the Agra Tenancy Act; if the land be Government land, he becomes under S. 16 of the Act, an occupancy tenant. He must, therefore, be recorded as such if he applies for correction of papers under the Land Revenue Act. (*Knox, J.M.*) MATTOO BIBI *v.* RAJA RAM. **1936 R.D. 359.**

——S. 17—*Occupancy rights—Claim to on ground of conferment on payment of* nazrana—*Burden of proof.*

The Court would require strict proof in support of the claim of a new comer to have been admitted to share in occupancy rights. When there is no written agreement of recognition by the landlord of the new comer as an occupancy tenant, the interested oral evidence of the new comer in support of an alleged payment of *nazrana* to the zamindar is not sufficient proof of such recognition. (*Darling, S. M.*) BHARTU *v.* MOHAMMAD YUNUS. **1937 R.D. 47.**

— —S. 17—*Occupancy rights—Grant of—Lambardar admitting persons as joint in tenancy with female occupancy tenant—If confers rights on persons so admitted.*

The fact the lambardar admits some persons as joint in tenancy with a female occupancy tenant, cannot have the effect of extending the occupancy rights of the female which are only good for her life to the persons admitted by the lambardar. (*Darling, S M*) Komil *v.* Sanwal Singh. 1938 R.D. 114=1938 A.W.R (B.R) 53.

———S. 17—*Right of occupancy—Power of lambardar to confer on person who had not co-shared—Consent of co-sharers—Necessity.*

A lambardar has no right to accept as an occupancy tenant, a daughter's son when legally he could not possibly succeed to his maternal grandfather as he was too young to have co-shared in cultivation with him during his lifetime, without the consent of the co-sharers. (*Marsh, S.M and Mehta, J.M.*) Mumtaz Husain *v.* Chidda. 1939 R D 526 (2).

———Ss. 17 (1) (a) and 18 (5)—*Applicability—Occupancy rights—Surrender of in one plot in consideration of conferment of such rights in other plots—Conferment of rights by plot proprietor only—Plots forming part of undivided* khewat—*Right to occupancy rights in exchanged plots—Remedy of tenant surrendering rights.*

A deed of surrender of occupancy rights in respect of a certain plot recited that the surrender was made in consideration of the conferment of occupancy rights in certain other plots. The plots were part of an undivided *khewat* in which the person who conferred the occupancy rights was only a plot-proprietor.

Held, that the tenants could not claim occupancy rights in the other plots by way of exchange, as under S. 17 of the Agra Tenancy Act. Occupancy rights could not be conferred by a single co-sharer and the whole body of co-sharers had an interest in the undivided *khewat* of which the plots in question were a part. The tenants had their remedy against the plot proprietor under S. 18 (5) for damages for loss of occupancy rights in the plot surrendered, but so far as the other plots were concerned, they were only trespassers so long as they were not formally admitted as tenants of the same. (*Darling, S.M and Bomford, J.M.*) Shib Chunder *v.* Rama Chander. 1937 R.D. 46.

———Ss. 17 (1)(b) and 265 (2)—*Perpetual lease by lambardar conferring occupancy rights—All co-sharers not concurring—Effect—Position of lessee.*

A lambardar without the written concurrence of all co-sharers has no authority to confer occupancy rights on any one as laid down in Cl. (1) (*b*) of S. 17, but under Cl. (2) of S. 265 of the Tenancy Act a lambardar is 'entitled to settle and eject tenants'. So where a lambardar executes a perpetual lease conferring occupancy rights and where the co-sharers have not concurred, that portion of the lease conferring occupancy rights is inoperative: but the admission of lessees as tenants of the holding is not thereby rendered null and void. The lessees having been duly admitted by the lambardar to the tenancy are not liable to ejectment as trespassers. (*Darling, S. M. and Bomford, J. M.*) Kharag Singh *v.* Ishri Singh. 1938 A.W.R. (B.R.) 189=1938 R.D. 325.

———S. 17 (1) (d)—*Co-sharer mortgaging his share—Right to confer occupancy rights during subsistence of mortgage.*

A co-sharer who has transferred his share in simple mortgage has no authority to confer occupancy rights over the plots covered by the mortgage during the subsistence of the mortgage. (*Darling, S. M*) Kishori Lal *v.* Kashi Ram. 1937 R. D. 255.

———S. 17 (1) (d)—*Occupancy rights—Competency to confer—When should be present.*

The competency to confer occupancy rights contemplated by S. 17 (1) (*d*) of the Agra Tenancy Act must be present when the occupancy rights are conferred (*Mehta, J. M.*) Abdul Rauf *v.* Abdul Ghani 1939 R D 323.

———Ss. 17 and 19—*Each co-sharer collecting rent from tenants according to his share—Lambardar's right to admit a person to a tenancy.*

Where the system in a village is for each and every co-sharer to collect rent according to his share from tenants, the lambardar has no authority as sole collector of rent to admit a person to any tenancy. (*Darling, S M. and Bomford, J. M*) Sitla Bux Singh *v* Wazir Jolaha 1937 R.D. 71.

———Ss 17 and 21—*Person recorded along with widow of occupancy tenant—Zamindar also suing him for rent—Status of such person on death of widow.*

Where the name of a person was recorded in the *khatauni* along with that of the widow of the occupancy tenant with the knowledge of the Zamindar, and the Zamindar also treated him as tenant not merely in suing him for rent but in arresting him in the course of execution of the decree, such a person is not, on the death of the widow, liable to be ejected as a trespasser but as a non-occupancy tenant. The fact that the Zamindar treated him as a joint tenant constitutes no recognition of him as entitled to any occupancy rights in the holding. Under S. 45 of the Agra Tenancy Act, he has three years from the death of the widow in which to apply for fixation of rent and consolidation of his status as a statutory tenant. If he fails to do that, he will be liable to ejectment as a non-occupancy tenant. (*Darling, S M. and Bomford, J M*) Jafar Ali Khan *v.* Maiku. 1937 R.D. 560.

———Ss 17 and 122—*Scope—General attorney of zamindar consenting to entry of persons as co-tenants in occupancy holding in 1920—Entry in* khatauni *not challenged by zamindar at subsequent settlement—Zamindar getting rent enhanced as against new persons also as tenants—Subsequent suit by zamindar to declare added persons not occupancy tenants—Maintainability—Estoppel.*

In 1920, when the Agra Tenancy Act of 1901 was in force, the names of three persons were added and entered in the *khatauni* as co-tenants in the occupancy holding along with that of the recorded occupancy tenant with the consent and on the authority of the zamindar's general attorney. The terms of the power-of-attorney did not of course include any provision for the conferment of occupancy rights, as under the Act of 1901, no occupancy rights could be conferred. Subsequently a settlement intervened; the zamindar did not question the correctness of the entry. The land revenue was enhanced and the zamindar brought a case and had the rent enhanced and all the four men recorded in the *khatauni* were treated as tenants of the occupancy holding. After the lapse of 16 years the zamindar brought a suit under S. 122 of the Agra Tenancy Act for a declaration that the three persons whose names were entered as co-tenants in 1920 were not occupancy tenants in the holding with the original recorded tenant and for expunging their names from the *khatauni.*

Held, that the zamindar should not be allowed to turn round after the lapse of 16 years and deny the claim of the three men to be recognised as co-tenants in the occupancy holding and disown the action of the general attorney who derived his authority from the zamindar and that the facts relating to the holding from 1920 constituted such a cumulative chain of evidence that they operated as estoppel, especially in view of the fact that occupancy right could now be conferred under S. 17 of the new Act of 1926. (*Darling, S. M.*) PERBAL PERTAP SINGH *v.* HIRA LAL. **1937 R. D. 1.**

——**Ss. 17 (5) and 127**—*Registration under S. 17 (5)—Requirements—If satisfied by attestation before Qanungo.*

Where an occupancy tenant admits other persons as co-tenants in the occupancy holding by means of an agreement which is attested before the Qanungo the attestation is not sufficient under S. 127 of the Agra Tenancy Act because it relates to an occupancy tenancy, which necessarily exceeds a term of 10 years. Hence such an agreement does not satisfy the requirements regarding registration laid down in S. 17 (5) of the Act. (*Harper, S.M. and Sathe, J.M.*) SHEO NARAIN *v.* PHUL SRI. **1940 R.D. 224=1940 A.W.R. (B.R.) 85.**

——**Ss. 18 and 121-123**—*Applicability—Occupancy holding—Plot becoming grove—Status of grove-holder—Disappearance of grove—Effect—Occupancy rights retained by tenant after disappearance of grove—Transfer of—Validity—Right and status of transferee—Application to establish occupancy rights by means of application for correction of* khatauni *—Maintainability—Proper remedy—Liability to ejectment.*

Occupancy rights lapse in any plot of an occupancy holding which becomes a grove, the occupancy rights therein are superseded by grove rights, and when the grove disappears the grove-holder becomes a non-occupancy tenant in the plot, the former occupancy rights not reviving on the plot ceasing to be grove. Where, however, the former occupancy tenants manage to retain their occupancy rights in spite of the disappearance of the grove plot, a transferee from them is not entitled to claim the same rights. Occupancy rights are not transferable and the transferee does not acquire any such rights from the recorded occupancy tenants. All that the transferee can acquire are grove rights which are extinguished on the disappearance of the grove Thereafter the transferee is either a sub-tenant or a trespasser who has never been admitted, or at best a non-occupancy tenant. He is not entitled to apply for correction of the *khatauni* to establish his claim to occupancy rights. His proper remedy is to bring a regular suit under Ss. 121-123 of the Agra Tenancy Act, if he is not content with the

entry as a sub-tenant. But if he fails to establish his claim to be an occupancy tenant and is declared a mere non-occupancy tenant under S. 21 of the Act, he is liable to be ejected forthwith by the zamindar. (*Darling, S. M.*) BANWARI *v.* ABID HUSAN. **1938 R.D. 124.**

Admission to tenancy.

——**S. 19**—*Admission to tenancy—Acceptance of rent.*

It is now established law that the acceptance of rent is not necessarily a recognition of tenancy. (*Darling, S. M. and Bomford, J. M.*) SHAHID HUSAIN *v.* HARBANSA. **1937 R.D. 161.**

——**S. 19**—*Admission to tenancy—Question of fact.*

S and *H* were recorded as tenants in 1342 F, with 16 years which means that their tenancy began in 1326 F. In 1333 F., the name of *L* appeared in the papers as *qabiz* and *S* as *ghair qabiz.* *S* had all along been asserting his rights against *L.*

Held, that it is a question of fact whether *L* was or was not admitted by the Zamindar. (*Bomford, J. M.*) LALWA *v.* SURAJ DIN. **1937 R.D 83.**

——**S. 19**—*Re-admission of ejected tenant—Burden of proof.*

When a tenant has been ejected, it is for him to prove that he has been re-admitted. If he retains possession, the mere acceptance of rent from him does not constitute admission of tenancy, nor can a mistake committed by the zamindar in misdescribing him as an occupancy tenant in a suit for arrears of rent be construed as an act of re-admission. (*Darling, S. M. and Bomford, J. M.*) MOHAMMAD ASGHAR *v.* MANNA. **1937 R.D. 378.**

——**S. 19 (b)**—*Admission to tenancy—What constitutes—Acceptance of rent from person in possession—Describing defendant in suit for arrears of rent as tenant—Effect of.*

Mere acceptance of rent from a person in possession or even describing him as a tenant in a suit for arrears of rent cannot, of itself, be sufficient to prove that he was admitted to tenancy. (*Drake Brockman, S. M. and Knox, J. M.*) RAM LALJEE BALJI *v.* GAJRAJ SINGH. **1936 R.D. 542.**

Construction and scope.

——**S. 19**—*Construction and scope—Retrospective effect—Non-occupancy tenants holding leases whose term has not expired—If become statutory tenants.*

S. 19 of the Agra Tenancy Act of 1926 provides that "every person" who is a tenant of land (not being of the excepted class of sub-tenant) at the commencement of the Act, shall be called a statutory tenant. The section cannot be construed as if containing restrictions against those persons who were holding under leases for a term at the time when the Act came into force. In the case of land held by persons as non-occupancy tenants under the prior Tenancy Act of 1901, liable to be ejected on the expiry of their leases, when the leases have not expired at the time when that Act ceased to operate and the new Act of 1926 came into operation, the tenants would become statutory tenants The lessor at the time would have no right to present possession of the lands. That right, being one which would in due course have accrued. was not one which he had at the time when the new Act came into force. The new

Act has not taken away any right which he had prior to the date when it came into operation, but only those which would have accrued to him in due time, but which had not in fact then accrued. In such a case the question whether the Act has retrospective effect is irrelevant.

Rowland, J.—The words of the statute are wide, and they apply not only to tenancies in existence at the commencement of the Act but to affect contracts entered into before the Act and intended to be fulfilled after its commencement. (*Agarwala and Rowland, JJ.*) Ram Ranbijaya Prasad Singh *v.* Deoki Ahir. **15 Pat. 619=18 Pat.L.T. 84=167 I.C. 865=9 R.P. 438=3 B.R. 357=A.I.R. 1937 Pat. 180.**

Fallow land.

——**S. 19**—*Fallow land—Accrual of statutory rights.*

A person who has taken a lease of old fallow land but has never cultivated it cannot become a statutory tenant, and a mere misdescription of such a person as *'haqdar'* tenant in a receipt for rent does not constitute a grant of statutory rights. (*Bomford, J.M.*) Ram Adhin *v.* Narain Rao Patnis. **1937 R.D. 456.**

Statutory tenant.

——**S. 19**—*Statutory tenant—Person in possession as tenant at time of coming into force of Act and becoming statutory tenant—Status of his sons—Liability to ejectment under S. 44.*

In a suit for ejectment by a lambardar under S. 44 of the Agra Tenancy Act, it was found that the defendants' father was in possession as tenant when the Tenancy Act of 1926 came into force, he having begun to hold as tenant in chief in his own right from 1325 F.

Held, that the father of the defendants became a statutory tenant in course of law, and the defendants, his heirs, were the heirs of a statutory tenant; and therefore the suit for ejectment should be dismissed. (*Drake Brockman, S.M. and Knox, J.M.*) Avdesh Rai *v.* Sheo Bhawan. **1936 R.D. 538 (2).**

——**Ss. 19 and 86**—*Statutory tenancy—When can arise—Tenant of sir, subject of transfer—Status of—Absence of claim of ex-proprietary rights.*

According to S. 19 of the Agra Tenancy Act, without actual admission to tenancy nobody can become a statutory tenant by merely coming face to face with the landholding body and paying rent as from before. A tenant of *sir*, which is subject of transfer and in which ex-proprietary rights are not claimed, cannot, for that very reason, become the statutory tenant of the holding. He continues to be a non-occupancy tenant and as such his ejectment will have to be sought under S. 86 of the Tenancy Act. (*Mehta, J.M.*) Jagrottam *v.* Kailas Sahi. **1939 R.D. 395.**

——**S. 20 (2)**—*Ejectment of heir of statutory tenant—Suit brought in fifth year of his tenancy—If premature.*

A suit for the ejectment of the heirs of a statutory tenant is not necessarily premature because it is brought in the fifth year of their period of tenancy. Under S. 20 (2) of the Tenancy Act, an heir is entitled to retain possession of the holding of the deceased statutory tenant for a period of five years from the latter's death and there is no reason why a suit should not be brought before the end of the period, so long as five years will have elapsed before ejectment actually takes place. (*Darling, S.M.*) Rameshwar Das *v.* Debi Singh. **1937 R D. 254.**

——**S. 20 (2)**—*New contract of tenancy conferring statutory rights—What amounts to—Essentials of.*

On the death of a statutory tenant, his widow who was recorded as his heir was sued by the zamindar for arrears of rent. The parties came to a compromise under which a new rent, at a much lower rate was fixed and the suit was decreed in terms of that compromise.

Held, that the compromise did not constitute a new contract of tenancy conferring statutory rights on the widow so as to protect her from ejectment. In the absence of a definite admission of the tenant to statutory rights by the landlord in writing the heir of a statutory tenant would be liable to ejectment. (*Darling, S.M. and Bomford, J.M.*) Aziz Fatima *v.* Mukand Lal. **1936 R. D. 586.**

——**S. 20 (2), Proviso (1) (b)**—*'Proceedings', meaning of.*

'Proceedings' in S. 20 (2), proviso 1 (*b*) must be taken to mean effective proceedings. (*Darling, S. M. and Bomford, J.M.*) Kalka Prasad *v.* Rahua. **1938 A.W.R. (B.R.) 167=1938 R.D. 551.**

——**S 20 (2), Proviso (1) (b)**—*'Proceedings' if refers only to effective proceedings—Holding mortgaged with possession—Landholder, if in a position to assert his authority before redemption.*

The words 'no proceedings have been taken' occurring in S. 20 (2), Proviso (1) (*b*) of the Tenancy Act refers only to effective proceedings being taken. Where the holding has been mortgaged with possession the landlord is not in a position to take effective proceedings in assertion of his right till after redemption. (*Mehta, S. M.*) Rajeshwari Prasad Singh *v.* Sarjoo Singh. **1939 A.W.R. (B.R.) 26=1940 R.D. 76.**

——**S. 20 (2), Proviso (b)**—*Heir to statutory tenant—Failure to eject within time allowed—Effect.*

According to the provisions of S. 20 (2), Proviso (*b*) of the Agra Tenancy Act if an heir of a statutory tenant is not ejected, within the time fixed by S. 20 (2), by the landlord, by appropriate proceedings, he shall be considered to have been admitted to the holding and shall be deemed to be a statutory tenant. The admission need not be an open one and the heir by sheer lapse of time owing to the negligence of the landlord, glide into tenancy. (*Mehta, S.M. and Harper, J. M.*) Ram Dular Teli *v.* Raj Bahadur Singh. **1939 A.W.R. (B.R) 4=1939 R.D. 80.**

——**Ss. 20 (2) and 86 (2)**—*Scope—Ejectment of heirs of statutory tenant—Suit for before expiry of five years of death of statutory tenant—Maintainability.*

Although under the law it is intended that the heir of a statutory tenant should have five years' possession, there is no reason why a suit to eject him should not be brought before the end of that period, so long as the five years' period would elapse before the ejectment is really made effective. To hold otherwise would involve allowing the heir of statutory tenant to hold for more than five years. (*Knox, J.M.*) Ganga Pasi *v.* Gaya Prasad Sahi. **1936 R.D. 329.**

——S. 21—*Applicability—Sir land—Old proprietor holding at privileged rent and receiving percentage as* malikhana—*Status of—Sub-proprietor or non-occupancy tenant—U. P. Land Revenue Amendment Act, S. 3.*

Before the British occupation the revenue of a certain village was assigned by the Maharaja of Gwalior to a temple at Muttra. Subsequently the British made a settlement with the representatives of the temple, and the old proprietors of the village were declared entitled to hold the land in their own cultivation at a privileged rent and to receive 10 per cent. of the rental of the rented lands as *malikana*. The rent was payable by them to the temple.

Held, the old proprietors were necessarily non-occupancy tenants of the temple, in accordance with S. 21 of the Agra Tenancy Act, the temple obviously being their landholder, and that they were not sub-proprietors as defined by S. 3 of the U. P. Land Revenue Amendment Act of 1932. (*Drake Brockman, S. M. and Knox, J. M.*) GATSARAM NARAYANJI *v.* JAGAT SINGH. **1936 R. D. 180.**

——S. 22 — *Scope—If retrospective — Sudra widow inheriting occupancy holding under Act XII of* 1881—*Remarriage—Forfeiture of rights—If caused—Act II of* 1901—*If retrospective.*

A Sudra widow inheriting the occupancy holding of her husband on his death while the N. W. P. Rent Act of 1881 was in force would not lose her occupancy rights so inherited, because she would inherit under her personal law which does not entail forfeiture rights on remarriage. Nor would such rights be forfeited on remarriage after the coming into force of the Agra Tenancy Act of 1901, as that Act is not retrospective in operation. (*Drake Brockman, S.M and Knox, J. M.*) GAYA SINGH *v.* BANDHU. **1936 R D. 446.**

——S. 23—Land held by lessee under permanent lease with right to transfer, build and to plant grove—Lessee not planting grove—Land—If grove land—Liability to be sold in execution. *See* AGRA TENANCY ACT, Ss. 3 AND 23. **1937 A.L. J. 656=1937 A.W.R. 699=A I.R. 1937 All. 561.**

——S. 23—*Mortgagee of occupancy holding—Suit for rent against tenant—Facts to be proved—Plea as to mortgagee's defective title—If sustainable.*

When a mortgagee of an occupancy holding sues his sub-tenant for rent, he has to prove the contract of tenancy. If such a contract existed or by a course of conduct the sub-tenant was paying rent to the mortgagee in possession, in that case, the fact that the mortgagee had derived his title under a voidable or even void transfer would not be a plea that could be sustainable against the plaintiff. (*Mehta. J.M.*) MATHURA RAM *v.* JAN KHAN. **1938 A.W.R. (B.R.) 353=1938 R.D. 851.**

——S.23—*Scope—Mortgage by occupancy tenant—Validity—Suit by mortgagee for rent due by sub-tenant—Maintainability—Sub-tenant admitted by mortgagee but paying rent to occupancy tenant—Effect of—Inference.*

Under the Agra Tenancy Act of 1926, it is quite clear that mortgages of occupancy tenancies are *ab initio* void; and the mortgagee, being a party to an illegal contract cannot invoke the aid of the Courts to realise any rent due to him. Such a man has no *locus standi* in the Courts. When a sub-tenant who has taken the land from the mortgagee of the occupancy tenant has paid rent to the occupancy tenant, it has to be inferred that the occupancy tenant has resumed possession of the holding, in effect dispossessing the mortgagee, and the mortgagee cannot sue the sub-tenant for rent, he being the holder of an illegal mortgage. (*Drake Brockman, S.M. and Knox, J.M.*) PUTTI LAL *v.* LODI. **1936 R.D. 384.**

——Ss. 23, 24 and 25—*Applicability—Occupancy tenant—Succession to—Original tenant dying when Act XII of 1881 was in force—Widow succeeding and dying in 1900—Daughter succeeding and dying after 1926—Law governing succession.*

According to the Tenancy Act, 1926, S. 23 (1), the interest of an occupancy tenant is heritable. In general the personal law will apply for purposes of inheritance, and it is not to have application only where it has been modified by statute. The burden of proving that it has been so modified is on the person who so pleads. When an occupancy tenant died in 1882 while Act XII of 1881 was in force, under which succession was to be according to the personal law, and was succeeded by his widow who died in 1900 and who in turn was succeeded by the daughter who died after the Tenancy Act of 1926 came into force (*i.e.*) in 1933, succession was held to be governed by personal law, as it was not shown that the Tenancy Act of 1926 had modified the personal law in a case like that of the one before the Court and that it was not necessary for the claimants to show that they had shared in the cultivation with the last male owner. (*Bennet and Verma, JJ.*) HAR NARAIN SINGH *v.* NAND RAM. **181 I.C. 33=11 R.A. 544=1939 R D. 61=1939 A W.R. (H.C.) 27=1939 A. L.J. 199=A.I R. 1939 All. 197.**

—— S. 23 (1)—*Execution sale of occupancy holding—Tenant not bound by decree or sale if can sue to declare sale void.*

Where in execution of a decree against some of the occupancy tenants the holding is sold and purchased by the decree holder, one of the tenants not bound either by the decree or the execution sale, can sue to declare the sale void as being contrary to S. 23 (1) of the Tenancy Act and can eject the purchaser as a mere trespasser and obtain his relief with reference to the entire property and not only with reference to his share of the property. (*Bennet and Verma, JJ.*) DWARKA DAS *v.* RAFIUDDIN. **I.L.R. (1940) A. 159=188 I.C. 389=1940 A.W R (H.C.) 188=1940 R.D. 123=1940 A.L J. 310=A.I.R. 1940 All. 218.**

——S. 23 (2) (b)—*Division of holding under S. 37—Death of one of the holders—Zamindar, if can introduce new tenant under S. 23 (2) (b).*

When a holding which stood jointly in the name of two brothers is divided under S. 37 of the Tenancy Act, on the death of one of them his widow has a life interest and the other brother being a co-tenant is entitled as reversioner to his deceased brother's share in the tenancy. As long as the holding is not completely divided into two holdings the zamindar cannot introduce a new tenant under S. 23 (2) (*b*) of the Act so as to defeat the rights of the survivor in the holding and against his wishes. (*Mehta, J.M.*) NAUJADI *v.* MUNESAR AHIR. **1939 R.D. 248=1939 A.W.R. (B.R.) 256.**

——S. 23 (2) (b)—*Mortgage of occupancy rights by one co-tenant to another—Absence of entry—Inference.*

Under S. 23 (2) (*b*) one co-tenant is competent to transfer to another co-tenant his occupancy rights by mortgage. If a mortgagee is in possession of an occupancy holding, the standing orders are that his possession is entered. Where there was no such entry it was held it gave rise to a suspicion that for some reason or other the mortgage had not been acted upon. (*Mehta, S.M.*) GAYA DIN *v.* BABUA. **1940 R.D. 56=1940 A.W.R. (B.R.) 46.**

Applicability and scope.

——S. 24—Applicability and scope—Tenant under Act XII of 1881—Widow succeeding and completing 12 years—Right of occupancy—Death of widow after 1926—Daughter's son not co-sharing in cultivation with grandfather—Right to succeed to tenancy. *See* N.W.P. RENT ACT (XII OF 1881), S. 8 **1938 R.D. 121=1938 A.W.R. (B.R.) 72.**

Co-sharing.

——S. 24—*Co-sharing.*

It is necessary for co-sharing in cultivation, that there should be pooling of one's own cattle and the implements of cultivation. (*Darling, S.M. and Bomford, J.M.*) REOTI PRASAD *v.* MANGALI. **1937 R.D. 443=1937 A.W.R. 1028.**

——S. 24—*"Co-sharing"—Meaning of—Proof.*

Co-sharing involves a pooling of cattle and the implements of husbandry; and in the absence of evidence that the claimant had pooled his cattle and implements of husbandry along with those of the person with whom he claims to have co-shared the mere fact that he may have helped the latter over the holding would not amount to co-sharing. (*Darling, S.M. and Bomford, J.M.*) PEAREY LAL *v.* KUNJAL. **1937 A.W.R 869=1937 R.D. 397.**

——S. 24—*Co-sharing—What constitutes.*

Mere management does not imply co-sharing; there must be some measure of pooling of resources to justify a finding to that effect. From the facts that a daughter's son born and bred up in his grandfather's house, looked after the management, collected rent and performed his funeral obsequies, it cannot be said that there was co-sharing. (*Darling, S.M. and Bomford, J.M.*) SRI THAKURJI *v.* LALTA PRASAD. **1938 R.D. 378=1938 A.W.R. (B.R.) 165.**

——S. 24— *Co-sharing— What constitutes—Minority of one of the parties, if affects the question.*

To constitute co-sharing, there should be pooling of resources, and this requirement applies whatever may be the age of one of the parties. In the absence of evidence that daughters' sons living with and helping the grandfather had any holdings of their own or agricultural stock which they pooled with that of their grandfathers', it cannot be held that they co-shared with their grandfather, however much they helped in the agricultural duties which boys of their age could perform. (*Darling, S.M. and Bomford, J.M.*) TIKORI *v.* HARAKH CHAND. **1938 R.D. 1 =1938 A.W.R. (B.R.) 13**

——S. 24—*Co-sharing in cultivation—Burden of proof—Suit by landlord to eject daughter's sons of deceased tenant—Plea of inheritance by co-sharing in cultivation—Proof of definite acts of co-sharing—Necessity.*

The burden of proving co-sharing in cultivation with the last male tenant lies on those who claim the tenancy by inheritance on that ground; it is not enough to prove that the claimants lived with the late male tenant, that they helped him in cultivation, and that he was too old to manage the holding lately at the time of his death. What constituted the alleged co-sharing must be definitely made clear. In a suit for ejectment of the maternal grandsons of the last male tenant, the defendants cannot be entitled to succeed on their plea of co-sharing with the last male tenant, by merely producing evidence which amounts to no more than a vague statement that they gave assistance to the last tenant; that is not sufficient to establish co-sharing. (*Drake Brockman, S.M. and Knox, J.M.*) GOPISHWAR PRASAD MAN TEWARI *v.* BALDEO BARAI. **1936 R D. 190**

——S. 24—*Co-sharing in cultivation—What constitutes—Proof—Sub-tenancy—If co-sharing—Co-sharing in part of holding—Sufficiency.*

It is a mistake to assume that because a collateral is entered as a sub-tenant in a part of the holding, he must be taken to have been co-sharing. On the other hand that distinctly contradicts the claim of co-sharing. Co-sharing in cultivation means and implies that the co-tenants pool their agricultural stock and the implements and become a complete partnership. Further co-sharing in a part of the holding does not lead to the conclusion that there is co-sharing as regards the whole holding. Where the collaterals of the deceased tenant are shown to have been separate from him and carrying on their respective cultivations separately for a long time, and to have kept separate agricultural stock, the claim of co-sharing in cultivation must be negatived (*Drake Brockman, S. M and Knox, J.M.*) SARJOO KOERI *v.* JOGI RAM. **1936 R D 118.**

——S. 24—*Sharing in cultivation — Proof—Holding sub-let at the time of death of tenant and for a long time before—Effect.*

A person cannot claim to have shared in the cultivation when the plots comprising the holding were so sub-let when the tenant died, and had been sub-let for a long time before that. (*Darling, S.M. and Bomford, J.M.*) BRIJ BHUSHAN SARAN *v.* GAINDA MAL. **1937 A.W.R. 872=1937 R.D. 414.**

Succession.

——S 24—*Succession—Death of one of several brothers—Right of joint brothers in preference to separated brothers—Proof of separation.*

On the death of one of several brothers who are entitled to a tenancy, the brothers who are joint with him are entitled to the share of the deceased brother to the exclusion of the divided brothers. But in the absence of definite and strong evidence of such separation, all the brothers would be entitled. The fact that some of the brothers are sons of a different mother by the same father is not conclusive of the fact of separation (*Bomford, J.M.*) MANNU TEWARI *v.* INDERJEET TEWARI. **1938 A.W.R. (B.R.) 103 =1938 R D 166.**

——S. 24—*Succession — Daughter's son not sharing in cultivation—Right of.*

A daughter's son has no right to succeed to the occupancy holding of his grandfather unless he has co-shared in the cultivation. The fact that his grandfather made him his heir will not by itself give him the right to succeed. (*Darling, S.M. and Bomford, J.M.*) REOTI PRASAD *v.* MANGALI. **1937 R.D. 443=1937 A.W.R. 1028.**

———**S. 24**—*Construction—"Lineal male descendants"—Meaning of—Sons—If exclude grandsons —Rule.*

Per *Drake Brockman, S.M.*—S. 24 of the Agra Tenancy Act does not say that in succession to tenancy the son is to exclude the grandson. Both father and son have an equal interest in the holding to the extent of the father's share 'Lineal male descendants' mean sons, grandsons and great grandsons alive at the time.

Per *Knox, J.M.*—According to the natural interpretation of S. 24, the succession is *per stirpes*, and while the father is alive, the grandsons have only a presumptive or contingent, but not a vested interest. If the father predeceased his father, the grandsons will inherit equally the share of their branch. (*Drake Brockman, S.M. and Knox, J.M.*) LAYAQ *v.* MEGHA. **1936 R.D. 575.**

———**S. 24**—*Succession to occupancy holding—Chela's right to succeed a mahant.*

A chela has no right whatever to succeed to the occupancy rights of a mahant, whatever his rights may be in connection with the math. (*Bomford, J.M.*) HAR NANDAN GIR *v.* BAWAN SINGH. **1938 R.D. 456=1938 A.W.R. (B.R.) 336.**

———**S. 24**—*Succession to occupancy holding—Rights of daughter.*

It is clear that a daughter cannot succeed to the occupancy rights of her father. (*Darling, S.M. and Bomford, J.M.*) MOHAMMAD SIDDIQ *v.* AISHA BIBI. **1938 A.W R (B.R.) 290=1938 R.D. 480.**

———**S. 24**—*Occupancy rights—Collateral succession—Uncle and nephew—Priority.*

In the matter of collateral succession to an occupancy tenant, an uncle of the late tenant is nearer collateral than his nephew, and the latter therefore has no rights as against the former. (*Drake Brockman, S.M. and Knox, J.M.*) SARJOO KOERI *v.* JOGI RAM. **1936 R.D. 118.**

———**S. 24**—*Occupancy tenant—Succession to—Nearest collaterals in possession and sharing in cultivation—Rights of.*

The interest of an occupancy tenant devolves on his death on his nearest collaterals who have been in possession and have shared in the cultivation of the holding during the lifetime of the deceased tenant. (*Drake Brockman, S. M. and Knox, J.M*) DHANNI *v.* SARJU PRASAD SINGH. **1936 R.D. 202.**

———**S. 24**—*Right of collateral to succeed under—Conditions to be proved or fulfilled.*

It is not necessary that the collateral who is claiming to succeed under S. 24 of the Tenancy Act should not have a separate holding from the deceased from whom he is claiming inheritance. It is not necessary that he should be staying with him all the time. There might be jointness in the beginning followed by cesser of commensality and later on, one of the members of the family becoming effete there may be a reunion, so that assistance would be available to the members of the joint family in a newly set up commensality. All that is necessary is that the collateral should have co-shared in the cultivation. (*Mehta, J.M.*) RADHA KRISHNA *v.* GAYA DIN. **1939 A.W.R. (B.R.) 23=1939 R.D. 408.**

———**S. 24**—*Succession under—Rule as to sons and grandsons*—Stirpital *or* per capita.

Revenue Courts, including the Board of Revenue, have, in deciding cases of succession to tenancies by sons and grandsons, generally decided on the basis of succession *per stirpes* and not *per capita*. Male lineal descendants in the male line succeed *per stirpes* and not *per capita* That is the normal law for direct descendants, whether in the Hindu, Mahomedan or English systems. It is inconceivable that the Legislature should have intended to lay down a novel or different rule in regard to succession to a tenancy. (*Drake Brockman, S.M. and Knox, J.M.*) KESHO SARAN *v.* RAGHUNATH DAS. **1936 R.D 568.**

———**S. 24**—*Separated sons of occupancy tenant—Right of succession.*

Quaere.—Whether the separated sons of an occupancy tenant have a right to share in their father's inheritance. (*Darling, S.M. and Bomford, J.M.*) SUKHDEO *v.* KRISHNA LAL. **1938 R.D. 177 =1938 A.W R. (B.R.) 110.**

———**S. 24**—*Succession to tenant— Undivided holding—Uncle and uncle's son—Rights of.*

On the death of a tenant of an undivided holding, his uncle takes the whole of his share as against his another uncle's son. (*Darling, S.M. and Bomford, J.M.*) CHANDRIKA DUBE *v.* BANSDEO MISRA. **1937 R.D. 454.**

———**S. 24**—*Succession—Tenant separated from his brothers—Co sharing in cultivation with descendants of one of brothers—Heir of such tenant.*

Where a tenant who is separate from his brothers is at death co-sharing in cultivation with the descendants of one of his brothers, the nearest of these collaterals is his heir. (*Darling, S.M. and Bomford, J.M.*) ASHARFI *v.* RAMJI. **1937 R.D. 596.**

———**S. 24**—*Succession to tenant—Holding undivided.*

Where the holding of a deceased tenant is undivided, all the co-tenants alive on his death must be presumed to have co-shared in cultivation with him. Succession in such a case is governed by S. 24 of the Agra Tenancy Act and not by survivorship. (*Bomford, J.M.*) KUBER *v.* MUNESHWAR. **1937 R.D. 94.**

———**S. 24**—*Succession in twice-born caste—Illegitimacy, if a bar.*

It is not correct to say that illegitimacy as a bar to inheritance is a matter of personal law and that it is not provided for in the strict wording of S. 24 of the Tenancy Act, for the simple reason that the section does not at all contemplate the succession of a person and related by legitimate descent in a twice-born caste. (*Harper, J.M.*) DELA *v.* DAYA NAND. **1940 R.D. 156=1940 A.W.R. (B.R.) 73 (1).**

———**S. 24**—*Succession—Widow leading immoral life—If entails loss of rights.*

Where after the death of an ex-proprietary tenant, his widow was leading a loose life and had a child, on an application by the mother of the deceased tenant to have her name recorded in the *khatauni* in the place of her son's widow, it was held that in the absence of re-marriage it could not be done and that the law only penalised re marriage and not living in sin by a widow. (*Darling, S.M. and Mehta, J.M.*) MST. MURTI *v.* MST. JEO. **1938 A.W.R. (B.R.) 293=1938 R.D. 773.**

——**S. 24**—*Widow succeeding to husband under Act of 1881—Death of—Claim by grandson to succeed—Sharing in cultivation with last male tenant—If necessary.*

The last male tenant of an occupancy holding died while Act XII of 1881 was in force, and his widow inherited the holding under the Mahomedan Law and became an occupancy tenant in her own right. On the death of the widow, her grandson claimed to succeed to the holding,

Held, that he could inherit provided he could show that he shared in cultivation with his grandmother, and that he need not prove that he shared in cultivation with the last male tenant. (*Drake Brockman, S.M. and Knox, J.M.*) DOST MOHAMMAD *v.* JAI LAL SINGH. **1936 R.D. 50.**

——**S. 24**—*Widow tenant — Remarriage—Re-admission to tenancy—Proof of—Mere acceptance of rent—Effect of.*

Mere acceptance of rent from a widow tenant who has remarried cannot amount to an admission to tenancy or re-admission so as to afford protection from ejectment, when there is no fresh contract of re-admission. (*Darling, S.M. and Bomford, J.M.*) MUST. TETRA *v.* ZAHID ALI. **1938 A.W.R. (B.R.) 2=1938 R.D. 130.**

——**S. 24**—*Widow—Re-marriage of—Effect—Life estate, if* ipso facto *determined.*

There is no doubt a liability on the part of a widow after re-marriage to lose the life estate in the occupancy holding of her husband but the life-estate does not determine *ipso facto* on her re-marriage. (*Darling, S.M. and Mehta, J.M.*) KOMIL *v* JOGESHWAR PRASAD. **1938 R D. 940=1939 A.W.R. (B R.) 50 (2).**

——**S 24, Proviso**—"*Sharing in cultivation*"—*Meaning of.*

In a case where the deceased tenant and the persons claiming as having shared in the cultivation of the holding have not done the actual work of cultivation themselves, it has to be shown, in order to prove the fact of sharing in cultivation that they have made some positive contribution towards the expenses of cultivation, such as the supply of seed, upkeep of cattle or hiring the same, hiring of ploughman, irrigation, watching and so forth. (*Drake Brockman, S M.*) MAHOMED MUSTAFA ALI KHAN *v.* MAHOMED MOAZZAM ALI KHAN. **1936 R.D. 349.**

——**Ss. 24 and 25**—*Re-marriage of widow of occupancy tenant—Proof—Necessity for evidence of ceremonies—Widow living in concubinage—Liability to ejectment.*

To prove the remarriage of a widow there must be evidence of some ceremony of some sort so as to signify some sort of religious or legal contract, even among communities in which re-marriage is not a very formal ceremony. Granting that the widow of an occupancy tenant has been living in concubinage with another man, that does not entitle the landlord to eject her from the holding because what the law penalises is the re-marriage of the widow and not her "living in sin". (*Drake Brockman, S.M. and Knox, J.M.*) RAM DEI *v.* RAGHUVANSH NARAIN SINGH. **1936 A.W.R 364=1936 R.D. 123.**

——**Ss. 24 and 26**—*Succession to tenancy—Survivorship under Hindu Law—Applicability—Divided brother and undivided nephews—Preferential right.*

To hold that a joint Hindu family is a single "tenant" and that so long as a portion of this 'tenant' survives no outsider can have a claim to succession is foreign and contrary to the specific provisions of S. 26 of the Agra Tenancy Act. S. 26 no doubt leaves it open to the landholder to lease a holding to a joint family. But if he does so, succession to members of that joint family, will be as provided in S. 24 and the principle of inheritance by survivorship will only apply in the case of (*a*) widows, and (*b*) when a co-tenant dies leaving no heir entitled to succeed him under S. 24. A separated brother of the deceased tenant is entitled to succeed to the tenancy under S. 24 in preference to his nephews though the latter may have been joint with him. (*Drake Brockman, S.M. and Knox, J.M.*) DUDH NATH KOERI *v.* CHAUTHI. **1936 R.D. 573 (2).**

——**Ss. 24 and 26**—*Succession to tenant—Holding undivided—Collaterals of equal degree—Rights of.*

Where the holding of a deceased tenant is undivided, it must remain a single holding until a new contract is made with the zamindar; and when the claimants to the tenancy are collaterals of equal degree sharing in cultivation, they take equal shares in it under S. 24 of the Agra Tenancy Act. Succession in such a case does not go by survivorship under S. 26, as it is not a case of there being no heir to succeed. (*Drake Brockman, S.M. and Knox, J. M.*) AMJAD *v.* MOHAMMAD MUSTAFA. **1936 R.D. 177.**

——**Ss. 24 and 44**—*Joint family—Entry of holding in the name of one of the members—Not treated as separate—Effect—Death of that member—Proof of co-sharing, if necessary, to resist ejectment.*

Where the members of a joint Hindu family live together and manage the commensal affairs of the family, though a particular holding might be entered in the name of one of the members, so long as there is evidence that it was not treated as a severalty and there is evidence that it was treated as joint and that the family was also joint, the holding is practically a joint family holding. As such on the death of that member it is not necessary for the other members to prove co-sharing in cultivation with the deceased, in order to resist a suit for ejectment under S. 44 of the Act. (*Bomford, S M. and Mehta, Offg. S. M.*) KAMLA PRASAD *v* PASHPAT PRATAP SINGH. **1939 R.D. 41=1939 A.W R. (B.R.) 143.**

——**Ss 24 and 44**—*Widow occupancy tenant—Re-marriage Zamindar not terminating occupancy rights—Status of widow—Death of widow—Sons by re-marriage—Liability to ejectment—Claim to statutory rights—Sustainability.*

If a widow's occupancy rights are allowed to continue for her lifetime by the zamindar in spite of her re-marriage, such rights are extinguished on her death, and her sons by her second husband in occupation are liable to ejectment under S. 44 of the Agra Tenancy Act. Occupancy rights cannot be extended by re-marriage though they may be extinguished by it; and a widow continues to be an occupancy tenant with a life-interest only if such rights are not terminated by the zamindar on her re-marriage. If the widow fails to claim statutory rights herself during her life, her sons by the second husband cannot claim such rights and plead that in bar of ejectment. (*Darling, S. M.*) RAM PERSHAD *v.* MOHAMMAD SHAFI. **1937 R.D. 44.**

——**S. 25**—*Applicability—Widow of deceased occupancy tenant recorded in more numbers of plots than her husband—Presumption as to extra plots—Succession to—If governed by S. 25.*

Where it is found that a widow succeeding to the interest of her husband is recorded as occupancy tenant in a larger number of plots than her husband, it does not lead to the conclusion that she took up the additional plots for cultivation on her own account and in her own right. In the absence of evidence to show that she took them upon her own account, the balance of probability is in favour of the view that her husband took them up rather than his widow. Consequently the additional numbers cannot descend according to S. 25 of the Agra Tenancy Act. (*Drake Brockman, S.M.*) HAR KESH *v.* MUMTAZ ALI KHAN. **1936 R.D. 381.**

——**S. 25**—*Widow of occupancy tenant remarrying—Ejectment—Limitation.*

Where a widow of an occupancy tenant remained in possession and subsequently remarried, if the landlord wants to eject her, he must sue her within 12 years of the date of the knowledge of the landholder of the fact of re-marriage. (*Darling, S.M. and Bomford, J.M.*) MUSST. TETRA *v.* SYED ZAHID ALI. **1938 A.W.R. (B.R.) 2=1938 R.D. 130.**

——**S. 25**—*Grove land devolving on widow—Re-marriage—Effect—If incurs liability to ejectment—Grove and tenant land—Distinction.*

A grove descends on the holder's widow as personal property, while the succession of a widow comes to an end with her re-marriage under the Tenancy Law. The widow succeeding to the grove does not render herself liable to ejectment by re-marriage. (*Drake Brockman, S. M. and Knox, J.M.*) SHEO BARTI *v.* HANSRAJ. **1936 R D 431.**

——**S. 25**—Sir *land in possession of Hindu widow—Alienation of—Subsequent setting aside—Effect—*Sir *land—If reverts to reversioners—Ex-proprietary tenancy—If extinguished—Status of tenants admitted by alienee.*

When a Hindu widow in possession of *sir* land as a life-estate holder alienates her proprietary rights and the alienation is subsequently set aside on a suit by the reversioners, all *sir* land in the possession of the widow at the time of the alienation must revert as *sir* to the reversioners at her death or on the alienation being set aside. If the alienee has admitted any person to tenancy of *sir* land otherwise than as occupancy tenant, such persons will become tenants of *sir*. The ex-proprietary tenancy of the widow must be deemed to come to an end with her death or with the setting aside of the alienation. Otherwise her tenancy would be one falling under S. 25 (2) of the Agra Tenancy Act, and there is no valid reason why her heirs to the exclusion of her husband's reversioners should come into possession of land which she would be entitled to hold and enjoy only for her life. (*Drake Brockman, S.M. and Knox, J.M.*) RABAL SINGH *v.* RISAL SINGH. **1936 R.D 355.**

——**Ss. 25 (1) and (2)**—*Applicability—Occupancy tenant dying while Act of 1901 was in force and succeeded by widow—Death of widow after Act of 1926 came into force—Devolution of tenancy.*

Per *Bennet, Ag.C.J.*—Where an occupancy tenant died while the Agra Tenancy Act of 1901 was in force, and was succeeded by his widow under S. 22 of that Act, and the widow died after the Agra Tenancy Act of 1926 had come into force the tenancy devolves upon the nearest surviving heir of the last male tenant in accordance with the table of succession for occupancy tenancies and does not devolve upon the heirs of the widow under S. 25 (2), Agra Tenancy Act of 1926. The widow cannot come under S. 25 (2) because she has "acquired the right" under S. 22, Tenancy Act of 1901, to hold the tenancy of her husband "till her death or re-marriage"; and the "right" she acquired had the "liability" to forfeiture on her re-marriage. To put this widow under S. 25 (2), Tenancy Act of 1926, would "affect her right and liability" which thing is prohibited by S. 6, U. P. General Clauses Act. Moreover, the words in S. 24, Tenancy Act, 1926: "When a male .... tenant dies" mean "in the case of a male tenant's death" and the words do not imply that the male tenant should die when the new Act is in force, but the section will apply in the case of a widow dying after the new Act who has succeeded under the former Act. The case therefore comes under S. 24 of Act III of 1926 and the collaterals who shared in the cultivation are entitled to succeed, and the widow comes in under S. 25 (1) as a "widow of class 2 in S. 24."

Per *Iqbal Ahmad, J, concurring on different grounds.*—S. 6, U. P. General Clauses Act, cannot be invoked in support of the conclusion that the succession to the holding in the case is governed by S. 25 (1) of the present Tenancy Act. S. 6 is confined in its operation to right, privilege, obligation or liability acquired, accrued or incurred under any enactment that is repealed. S. 6, General Clauses Act, has no application to contingent rights. Further, though according to S. 22, the interest inherited by the widow was terminable on her death or re-marriage, it cannot be said that by succeeding to the holding she "incurred" any "liability" under the former Act. Neither death nor re-marriage is a liability though both, because of the provisions of S. 22, had the effect of terminating the interest of the widow in the holding. Further, S. 24 is not applicable to a case in which a male tenant died before the present Act came into force and was succeeded by his widow who died after the passing of the present Act. However the case is governed by S. 25 (1) as the words "an interest in a holding under S. 24" mean an interest in a holding analogous to or similar to the interest prescribed by S. 24.

Collister, J., concurring.—S. 25 (1) applies to the present case, as words in S. 25 (1) "who has inherited an interest under S. 24" must be deemed to mean "who has inherited an interest which can be held under S. 24."

Per *Ganga Nath, J., concurring.*—The case is governed by S. 25 (1) as the words "under S. 24" in S. 25, Cl. (1) mean "from a male tenant." In order to attract the application of S. 24, the only condition that is necessary, is that the tenancy should have belonged to a male tenant.

Per *Bajpai, J., dissenting.*—The succession to the tenancy under the circumstances of the case would be governed by S. 25 (2) of the Act. (*Bennet, Ag.C.J., Iqbal Ahmad, Collister, Bajpai and Ganga Nath, JJ*) DULAR PANDAY *v.* NANDA BUDHAI. **I.L.R. (1938) All. 563=11 R.A. 61=1938 A.L.R. 578=1938 A.L.J. 585=1938 A.W.R. (H.C.) 385=176 I.C. 226=1938 R.D. 628=A.I.R. 1938 All. 396 (F.B.).**

———**Ss. 25 (1) and (2)**—*Applicability—Widow succeeding to husband as co-tenant under Act of 1901—Death of after 1926—Succession—Daughter's son not co-sharing with grandfather—Rights of.*

The son of the daughter of a widow who succeeded her husband as co tenant in an occupancy holding is not entitled to be recorded as co tenant in succession to the widow when he has never co shared with his grandfather, S. 25 (1) of the Agra Tenancy Act govern the case, and not S. 25 (2). The fact that the widow succeeded under the Act of 1901, would not make S 25 (2) applicable. (*Bomford, J.M.*) MAHADEO MALLAH *v.* RUM DAS MALLAH. **1938 R.D. 123=1938 A.W.R. (B.R.) 84.**

———**S. 26**—*Co-tenancy—Proof—Claim to share holding with paternal cousin—Proof required of claimant.*

Mere jointness in business or indeed in living generally does not connote co-tenancy. A person claiming a right to share a holding with his paternal cousin must prove that the holding descended from his grandfather. (*Bomford, J.M.*) BARHARI SONAR *v.* BUNNI LAL. **1937 R.D. 100.**

———**S. 26**—*Inheritance — Competition between separated brother and nephew.*

Under the tenancy law as amended by S. 26 of the Agra Tenancy Act, when one of the separated brothers die, the other must be regarded as the heir of the deceased brother and he would take the occupancy holding of the dead brother, in preference to the nephew. But in the case of fixed rate holding it would devolve according to Hindu Law. (*Darling, S.M. and Bomford, J.M.*) UDIT NARAIN AHIR *v.* RAM HARAKH AHIR. **1938 R.D. 429=1938 A.L.J. (Supp.) 46=1938 A.W.R. (B.R.) 231.**

———**S. 26**—*Object and scope of.*

The whole object of the legislature in enacting S. 26 of the Tenancy Act is to make it clear that even in the case of persons who are joint in estate, they shall be deemed to be tenants in common for the purposes of succession so far as the tenancy rights dealt with by the Agra Tenancy Act are concerned It cannot be read in any way to mean that even in the case of persons among whom there is no jointness in estate, for (*e.g.*), members of a Mahomedan family, any of the occupancy tenants will have rights in the occupancy holding which can in any way be analogous to the rights of co-parceners in a joint Hindu family. (*Bennet and Verma, JJ.*) DWARKA DAS *v.* RAFIUDDIN. **I.L.R. (1940) All. 159=188 I.C. 389=1940 A.W.R. (H.C.) 188=1940 R.D. 12=1940 A.L.J. 310=A.I.R. 1940 All. 218.**

———**S. 26**—*Scope and effect—Tenant of holding being head of joint Hindu family—Presumption that whole family is the tenant or that Zamindar contracted with whole family—If arises.*

As between a Zamindar and his tenant, who happens to be the head of a joint Hindu family there can be no general presumption that the Zamindar has made his contract with the whole family; and there is no burden cast on the Zamindar to prove that he made his contract only with the head of the family acting as an individual and not as representative of a joint family. To hold otherwise would render meaningless the provisions of S. 26 of the Agra Tenancy Act. There is no tenancy existing between the Zamindars and the other members of the family. (*Drake Brockman, S.M. and Knox, J.M.*) RAM OUDH DAS *v.* KAULESHAR. **1936 R.D. 444.**

———**S 26**—*Uncle's grandson—Right to succeed as a co-sharer.*

A grandson of the paternal uncle of the deceased cannot claim to succeed as co-sharer. (*Darling, S.M. and Bomford, J.M.*) SARJU KUMAR MUKERJI *v.* INDERJIT SINGH. **1937 R.D. 166 (2).**

———**S. 27**—*Scope—Sub-lease of holding— Consideration received in advance—Validity.*

A sub-lease of a holding executed by the tenant in consideration of money paid in advance is one in contravention of S. 27, Agra Tenancy Act, and is void. (*Drake Brockman, S.M. and Knox, J.M.*) PARBHU SHANKER *v.* SUKHA. **1936 R.D. 108.**

———**S. 27**—*Sub-lease in contravention of—If void or voidable.*

A sub-lease in contravention to S. 27 of the Agra Tenancy Act is voidable and *locus penitentiae* is always given to the tenant to enable him to eject the sub-lessee within the time to be fixed by Court. (*Marsh, S.M. and Mehta, J.M.*) JAMUNA MISRA *v.* JAI GOVIND RAM TEWARI. **1939 R.D. 538=1939 A.W.R. (B.R.) 238.**

———**S. 27**—*Void sub-lease by one of the co-tenants—Others, if affected.*

The action of one of the co-tenants would bind the other co-tenants and hence it is up to the latter to see that he does not enter into void leases. When there is an illegal sub lease by one, it would entail an ejectment of all. (*Marsh, S.M. and Mehta, J.M.*) KISHEN *v.* KAMTA PRASAD. **1939 R.D. 309.**

———**Ss. 27, 34 (1), 82 (1) and 83**—*Scope—Occupancy tenant—Transfer of plots to creditor in consideration of loan by way of mortgage—Validity—Ejectment—Right of landlord—Suit by tenant to eject mortgagee as sub tenant—Competency—Maxim,* in pari delicto, *etc.—Applicability—Status of mortgagee.*

An occupancy tenant borrowed a sum of Rs. 300 from a person and admitted the lender to the occupation of three plots of land by an agreement in writing under which the lender was to pay a certain sum to the Zamindar by way of rent and to appropriate the balance of the yield towards his interest. The lease was for five years. But even after the lapse of years the lender continued in possession and the borrower-tenant sued to eject him as a sub-tenant.

Held, that the transfer was really a mortgage, and having been made in consideration of a loan was prohibited by S. 27 of the Agra Tenancy Act; and that the illegal transfer enabled the landholder under S. 34 (i) and S. 82 (1) to eject both the transferor and the transferee without mercy and without giving them an opportunity for repentance under the proviso to S. 83.

Held, further, that the mortgagee was in effect a non-occupancy tenant, but not one whose period expired at the end of the agricultural year; it would expire only when he had been paid back his money; and that as between him and the transferor the maxim "*in pari delicto*, etc." applied, and the Revenue Court would not help the transferor to eject his transferee as a sub tenant. (*Drake Brockman, S.M. and Knox, J.M.*) Tofa *v.* Kacheru. **1936 R.D. 474.**

——**Ss. 27, 34 (1) and 882**—*Scope—Sub lease by tenant to another to pay creditor of tenant of annual sum and rent to zamindar—Validity of sub-lease—Tenant—Liability to ejectment.*

A tenant, in order to pay up a debt due by him to his creditor, gave a registered sub-lease to a third person, an agent of his creditor, the arrangement being that the sub-lessee should pay annually a certain sum to the creditor of the tenant, as well as the rent to the zamindar. The tenant-lessor was not to get anything at all.

Held, that the sub-lease being a transaction prohibited by Ss. 27 and 34 (1) of the Agra Tenancy Act, was illegal and the fact that it was not in favour of the creditor did not make it legal. The tenant was consequently liable to ejectment under S. 82 of the Act on the ground of illegal sub-letting. (*Knox, J.M.*) Lachhman Singh *v.* Kunji Kuer. **1936 R.D. 318 (2).**

——**S. 28**—*Former or lessee of proprietary rights—Holding over—Fictitious admission of son as sub tenant—Status of latter—If* co thekadar *or sub tenant or non occupancy tenant.*

Where a person takes a farm or lease of proprietary rights and acts as a *thekadar* for several years, and towards the expiry of his *theka* pushes in his own son or other near relation as a tenant or sub-tenant under him, at an inadequate rent in the hope of retaining a hold on a substantial area of the land covered by his *theka*, and holds over after the expiry of the term, the sub-letting must obviously be held to be fictitious. He cannot be regarded either as a sub-tenant or as a *co-thekadar* with his father. Both of them should be recorded as non-occupancy tenants under head 10 of the *khautani bila tasfia lagan*. (*Drake Brockman, S. M. and Knox, J.M.*) Radhey Mohan Lal *v.* Mohammad Usman Khan. **1936 R.D. 133.**

——**S. 29 (1) and (4)**—*Occupancy tenant mortgaging and sub-letting his plots—Liability to ejectment.*

Where the occupancy tenant of a holding of 4 numbers has mortgaged with possession two plots and illegally sub-let the other two, he deserved to be ejected. (*Darling, S M. and Mehta, J M.*) Vindhyachal Rai *v.* Mahomed Husain. **1939 A.W.R. (B.R.) 13=1939 R.D 305.**

——**Ss. 29 and 32 (3)**—*Widow holding as heir of occupancy tenant—Sub-lease by—Duration of.*

A sub-lease granted by a widow holding as heir to an occupancy tenant under S. 29 of the Agra Tenancy Act, subsists after her death for five years as laid down in S. 32 (3) of the Act. (*Darling, S M. and Bomford, J.M*) Kuldip Singh *v.* Rafiq Husain. **1937 A.W.R. 620=1937 R.D. 286.**

——**S. 29 (4)**—*Sub-lease of five years—Need for registration.*

Under S 29 (4) of the Agra Tenancy Act, a sub-lease of five years must be registered. The fact that the Government in 1885 exempted five years agricultural leases from the necessity of being registered cannot be invoked in face of the clear requirements of a subsequent law. (*Darling,*

S.M. and Bomford, J.M.) Mangru Ram *v.* Chhedi. **1937 R.D. 334.**

——**S. 29 (4)**—*Unregistered lease—Possession in pursuance of—Admissibility of document*

Where a lease required to be registered by S. 29 (4) of the Agra Tenancy Act, is not so registered, though it might not protect parties, if the zamindar had come down on them for illegal sub-letting, is certainly evidence as to the nature of the transaction between the parties. (*Darling, S. M. and Bomford, J.M*) Nandan *v.* Zahur. **1938 R D. 381=1938 A.W.R. (B.R.) 166.**

——**S. 29 (6)**—*Benefit under—Person nearly blind—If entitled to.*

A tenant who was not a blind man, but was only a weak-sighted man is not entitled to the benefits of Cl. (6) of S 29 of the Tenancy Act which applies only to blind persons. (*Darling, S.M. and Bomford, J.M*) Mukarram Ali Khan *v* Puran. **1938 R.D. 421=1938 A.W.R. (B.R.) 179=1938 A.L J. (Supp) 29.**

——**S. 32 (1) and (3)**—*Widow of occupancy tenant—Sub lease by—Validity—Duration of—Ejectment of sub tenant—Landlord's right.*

A sub-lease granted by a widow of occupancy tenant is valid only for her life and will not continue to be effective after her death. After the death of the widow the sub-tenant cannot be regarded as holding under a valid sub-lease under S. 32 (3) of the Agra Tenancy Act. S. 32 (1) would apply to the case and the landlord has the option to allow the sub tenant's interest to continue or to eject him under S. 44, as holding without valid admission. No suit will lie under S. 86. (*Drake Brockman, S.M. and Knox, J.M.*) Mahomed Sajjad Ali *v.* Bishambhar Das. **1936 R.D. 496.**

——**S. 32 (2)**—*Applicability—Benefit under—Right to claim—Extent of and limits to.*

The benefit of S. 32 (2) of the Agra Tenancy Act is limited to the lifetime of the tenant or for 10 years whichever is shorter. The section cannot be read as covering the lifetime of the successors of the original mortgaging tenant. The fact that a person holds under a valid mortgage is not by itself a ground on which he can claim the benefit of S. 32 (2). (*Darling, S.M. and Bomford, J. M*) Balgovind *v.* Satnarain Lal. **1938 R.D. 174=1938 A L J. (Supp.) 2=1938 A W R. (B.R.) 93**

——**S. 32 (2)**—*Conduct of tenant tantamount to abandonment—Mortgagee or lessee—If entitled to benefit of S. 32 (2).*

If the conduct of the tenant in-chief is such as to suggest that he is abandoning his holding to the detriment of a mortgagee or lessee, then the mortgagee or lessee is entitled to the benefit given to him by S. 32 (2) of the Agra Tenancy Act. (*Darling, S M. and Bomford, J. M.*) Nazeer Haider *v.* Badri Singh. **1937 R D. 85.**

——**S 32 (2)**—*Benefit of—When available—Usufructuary mortgage by occupancy tenant—No term fixed in mortgage—Surrender to landlord by representative of mortgagee.*

Where an occupancy tenant executes a usufructuary mortgage in which no term is fixed and later on the representatives of the occupancy tenant surrenders the holding to the zamindar and the mortgagee is sued under S 44 for ejectment by the zamindar, he is entitled to the benefit of the provisions contained in S. 32 (2) of the Agra

Tenancy Act for the mortgage is a subsisting one and is in force and no question of the term or 'the remainder of the term of the mortgage' having expired can arise. (*Bennet and Verma, JJ.*) MAHARAJA OF BENARES *v.* BAULESHWAR SINGH. **181 I.C 852=11 R.A. 619=1939 R.D. 101=1939 A.L.J. 120=1939 A.W.R. (H.C.) 150=A.I.R. 1939 All. 210.**

——Ss. 32 and 99—*Tenant filing surrender but not paying process-fee and resiling from same—Effect—Landlord ejecting sub-tenant–Right of tenant to sue under S. 99, for illegal ejectment.*

Under S. 32 of the Agra Tenancy Act to constitute a surrender which would extinguish the interest of the tenant, there must be cessation of cultivation. A mere notice of surrender does not constitute surrender. A tenant who files a surrender but who never pays the necessary process-fees and resiles from his wish to surrender,—the file of the case being ordered to be deposited—remains liable for the rent of the holding and there is no change in his status. He must be regarded as remaining in possession at least constructively of the holding. If the landholder ejects the sub-tenant acting on the alleged surrender, that amounts to illegal ejectment of the tenant giving the latter a right to sue under S. 99 of the Agra Tenancy Act. (*Darling, S. M. and Bomford, J. M*) SARUP KOHAR *v.* PARBHU SHANKAR. **1938 R.D. 13=1937 A.W.R. 1205.**

——S. 34—*Mortgage of tenancy—If void.*

Mortgage of a tenancy may be illegal and result in justifying ejectment by the landlord, but as between the mortgagor tenant and his mortgage, the Board will not treat the contract void. 17 R. D. 370, Ref. to. (*Darling, S. M. and Bomford, J. M.*) HARSARAN PATHAK *v.* ABDULLAH KHAN. **1937 R D. 58.**

——Ss 34 and 82—*Mortgage of occupancy holding—Possession through Civil Court on the basis of—Title of person in possession—Liability for ejectment.*

Where a mortgagee of an occupancy holding obtains possession though it be through Civil Court, but only on the basis of his mortgage, he cannot be said to derive any title on the basis of a decree passed on a void deed of transfer, so far as the rent Court is concerned. The transfer being void, the transferee is liable to be ejected and the Agra Tenancy Act does not provide any period for the ejectment of a transferee under a void transfer. (*Mehta, S. M.*) KUBER UPADHYA *v.* GANGA PRASAD GIR. **1939 R.D. 34 (2)=1939 A.W.R. (B.R.) 144.**

——Ss. 34 and 86—*Mortgage executed by occupancy tenant—Last legitimate occupancy tenant dying without heirs—His mother recorded as occupancy tenant—Suit by her to eject mortgagee as sub-tenant—Status of mortgagee—Mother if bound by the liability on the holding.*

An occupancy tenant executed a mortgage of his holding in favour of the defendant who was allowed to remain in possesion. He was succeeded by his son and grandson. After the death of the latter without heirs, his mother was recorded as an occupancy tenant in his place. There was no formul re-admission of the woman to the tenancy, as a statutory tenant, but the Zamindar accepted her as tenant. She sued to eject the defendant as a sub-tenant.

Held, the plaintiff though she was not heir to her son in the technical sense, took the holding as if she was heir. The defendant is not a sub-tenant. He held on as a mortgagee of the occupancy holding, with her consent. He is therefore only a licensee and not a trespasser. So he cannot be ejected as a sub-tenant. The plaintiff must be held to have accepted the liability on the holding. (*Darling, S. M. and Bomford, J. M.*) GOBINDI KUNWAR *v.* SURJAN SINGH. **1937 R.D. 525.**

——S. 34 (1)—Applicability—Occupancy tenant—Transfer to creditor in consideration of loan—Landlord's right to eject tenant and transferee. *See* AGRA TENANCY ACT, Ss. 27, 34 (1), 82 AND 83. **1936 R.D. 474.**

——Ss. 34 (1), 82 (1) and 85 (3)—*If applies to fixed rate tenant.*

Ss. 34 (1), 82 (1) and 85 (3) of the Tenancy Act can have no application to a fixed rate tenant, as such a tenant is given the right of transfer by the Act. (*Iqbal Ahmad and Bajpai, JJ.*) ASHRAFI SINGH *v.* RAJMATA CHANDRIKA PRASAD KUARI. **1940 A.L.J. 261=1940 A W.R. (H.C.) 248=1940 R.D. 175=A.I.R. 1940 A. 389.**

——S. 35—*Scope—If exhaustive—Purchaser of proprietary right in land from widow with life-estate—Land being* sir *of purchaser—Transfer of proprietary right by purchaser—Declaration of exproprietary tenancy—Death of widow and setting aside of sale by reversioners in Civil Court—Effect—Proprietary and ex-proprietary rights—If terminate.*

A purchaser of certain lands from a widow with a life-estate subsequently sold his proprietary rights in the lands to the appellant. At the time of the latter sale the transferor held certain lands as *sir,* and proceedings were taken to demarcate this *sir* and to declare his ex-proprietary rights. After the death of the widow, the reversioners sued in the Civil Court and got the sale by the widow set aside.

Held, that the proprietary right transferred to the appellant by his transferor having been only a limited right, the ex-proprietary tenancy terminated when that interest came to an end, the proprietary interest of the appellant having itself terminated S. 35 of the Agra Tenancy Act is not necessarily exhaustive and it is not the law that a tenancy can only be extinguished in the manner laid down in S. 35. (*Drake Brockman, S. M.*) SHIB CHARAN *v.* SURAJ PRASAD. **1936 R.D. 345.**

——Ss. 35 and 107—*Succession—Widow tenant acquiring rights of occupancy—Sub-letting of entire holding and retirement to another village—Right of daughter's son to succeed as heir.*

Where a widow tenant who has acquired occupancy rights in a holding in her own right leaves the village and retires to another village after sub-letting her whole holding, her daughter's son who does not even allege co-sharing with his grandfather cannot succeed to the widow on her death and is not entitled to be recorded as occupancy tenant in succession to the widow. (*Darling, S. M. and Bomford, J. M.*) RAM DAYAL *v.* BINDESHWARI PRASAD. **1938 R.D. 121=1938 A. W.R. 72 (B.R.).**

——Ss. 35 (1) (f) and 99—*Scope—Lands submerged in river—Reformation—Claim to as forming part of occupancy tenancy—Dispossession by* *landlord—Remedy of claimant—Failure to take action within six months—Effect.*

A person who claims that certain plots of land which were submerged in a river for some years formed part of his occupancy tenancy and that on their reformation his right has revived, must on dispossession by the landholder, must seek his remedy under S. 99 of the Agra Tenancy Act within 6 months of such dispossession. His remedy lies under S. 99, and if he fails to enforce the claim within that period, his rights, if any, would be extinguished by S. 35 (1) (*f*) of the Act. (*Drake Brockman, S.M. and Knox, J.M.*) RAM SANEHI MISRA *v.* LAKHRAJ SINGH. **1936 R.D. 336.**

——**Ss. 36 and 44**—*Merger of occupancy rights in the proprietary rights—No new contract of tenancy brought into existence—Status of sub-tenants—Suit for their ejectment.*

The plaintiffs were the occupancy tenants, and the defendants were sub-tenants. Subsequently the occupancy rights of the plaintiffs merged in their proprietary rights by virtue of a partition of the mahal. The plaintiffs brought a suit to eject the defendants as trespassers under S. 44.

Held, the defendants now occupy the position of the tenants in chief of the holding. But in the absence of a new contract of tenancy, they can only be treated as non-occupancy tenants who are liable to ejectment as such. (*Darling, S. M.*) UMRAO SINGH *v.* DINA SINGH. **1937 R.D. 522 (1).**

——**S. 37**—*Applicability and scope—Partition of rent-free tenure—Jurisdiction of Civil Court—If excluded.*

There is no warrant for holding that S. 37 of the Agra Tenancy Act extends to all lands held under one tenure, lease, engagement or grant. The section is confined to land held by tenants. It is only in the cases of suits in which rent paying tenancy lands are sought to be partitioned that the jurisdiction of Courts other than Revenue Courts acting under S. 37 is excluded. The object of the section is to confer exclusive jurisdiction on Revenue Courts where rent payable by a tenant is to be split. In the case of rent-free tenures the jurisdiction of the Civil Court is not excluded and the Civil Court is competent to divide specific plots constituting a proprietary tenure. A rent-free tenure can therefore be partitioned by a Civil Court, otherwise than under S. 37. (*Niamatullah J.*) GAYA MISRA *v.* RAMMANOG MISSER. **172 I.C. 646=10 R A. 405=1938 A. L.R. 13=1938 R.D. 20=1937 A.W.R. 949=1937 A.L.J 943=A I.R. 1937 All. 794**

——**S. 37**—*Applicability—Transfer of a portion of the holding by a fixed rate tenant.*

S. 37 of the Agra Tenancy Act does not apply to the case of a transfer of a portion of his holding by a fixed rate tenant. (*Iqbal Ahmad and Bajpai, JJ.*) ASHRAFI SINGH *v.* RAJMATA CHANDRIKA PRASAD KUARI. **1940 A.L.J. 261=1940 A.W.R. (H.C.) 248=1940 R.D. 175=A.I.R. 1940 A. 389.**

——**S. 37**—*Co-tenants — Private partition—Finality—Suit for partition—If barred.*

Under the Agra Tenancy Act, 1926, co-tenants can divide up their holding by agreement; and provided that the agreement is definite and clear, and intended to provide for a permanent division, none of them can afterwards challenge it and sue for partition. But in the absence of sufficient

evidence to prove that there had been a permanent partition of the holdings, a suit will lie for partition. The mere fact that some of the fields have been separately mortgaged by the respective tenants does not prove that there has been a final or definite partition. Such mortgage transactions are by no means unknown in joint holdings. (*Knox, J.M.*) ANANT MUNI DUBE *v.* RAM SARUP DUBE. **1936 R.D. 30 (1).**

——**S. 37**—*Co-tenant—Suit for division of tenancy—Plaintiff absent from village for over 40 years—Plaintiff's name entered in papers throughout—Presumption—Abandonment — Burden of proof.*

Possession by one co-tenant is, as a general rule, possession on behalf of all the co-tenants. The mere fact that a co-tenant has been absent from the village for 40 or 50 years cannot lead to the presumption that he has abandoned or surrendered his interest in the tenancy, when his name has been throughout consistently entered in the papers. In a suit by him under S. 37 of the Agra Tenancy Act the defendant, if he wants to non-suit the plaintiff must prove that the papers are wrong and that the plaintiff had abandoned or surrendered, and that his own possession was adverse to the plaintiff for 12 years. (*Drake Brockman, S.M. and Knox, J.M.*) DEBI DIN AHIR *v.* BECHU AHIR. **1936 R.D. 342.**

——**S. 37**—*Division of ancestral holding—Proof—Holdings recorded in names of members—If they are still joint.*

Members of a family partitioned their ancestral holding and separate holdings were recorded in the names of separate members, at the settlement of 1320 F. There was no suggestion that the partition was not acquiesced in by the Zamindars. The question arose about the rights of survivors in regard to the holdings of a member who died.

Held, the members are not co-tenants in the holdings and cannot claim that the interests of all of them survive in the whole holding. (*Darling, S.M. and Bomford, J.M.*) SARJU KUMAR MUKERJI *v.* INDERJIT SINGH. **1937 R.D. 166 (2).**

——**S. 37**—*Division of holding—Duty of Court—Remedy of co-tenant claiming to be in possession as mortgagee.*

In dividing up a holding the Court must act within the four corners of S. 37 of the Agra Tenancy Act leaving a co-tenant who claims to be in possession as a mortgagee to get his rights asserted and an entry made in the papers. (*Mehta, S.M.*) GAYA DIN *v.* BABUA. **1940 R.D. 56=1940 A.W.R. (B.R.) 46.**

——**S. 37**—*Division of holding—Right to—Donee from widow of joint Hindu family in possession after mutation.*

Where a widow of a member of a joint Hindu family, applies for mutation soon after her husband's death, and the remaining members do not intervene and object, and the widow thereafter continues in possession and executes a deed of gift in favour of her daughter's sons, they are entitled to ask for a division under S. 37 of the Agra Tenancy Act. (*Mehta, J.M.*) JAGANNATH *v.* JEOT TELI. **1940 R.D. 81=1940 A.W.R. (B.R.) 37.**

——**S. 37**—*Division from part of a holding—If open.*

A suit under S. 37 of the Agra Tenancy Act cannot be maintained for a division from part of a holding. (*Mehta, J.M.*) DULESARA *v.* RUPAN RAJ. **1939 R D 23=1939 A.W R (B R) 120.**

——S 37—*Division of holding—Effect—If can affect succession.*

A division of holding under S. 37 of the Tenany Act cannot affect a person's right of succession. (*Bennet and Verma, JJ.*) MAHRAJI KUER *v* MANGAI PANDE. **188 I.C 310=1940 A.W R. (H. C.) 11=1940 R D. 9=1940 A.L.J. 21=A.I.R. 1940 All 199**

——S 37—*Division of holding—Absence of landlord's consent—Binding character.*

A division of a holding among the tenants without the landlord's consent in writing is not binding either on the landlord or on the tenants in their relation with the landlord; it would be binding only on the tenants *inter se.* (*Drake Brockman, S M. and Knox, J.M*) DHANNI *v.* SARJU PRASAD SINGH. **1936 R.D. 202.**

——S 37—*Division of holding—Successive suits for—Maintainability.*

It is impossible to hold that a fresh suit for division of a holding cannot lie, merely because a previous suit has been dismissed for default or withdrawn; so long as it is admitted that the parties are co-tenants in the holding, there is a continuous cause of action and it would be open at any time for a co-tenant to claim a division. (*Drake Brockman, S.M. and Knox, J.M.*) AMJAD *v.* MOHAMMAD MUSTAFA. **1936 R.D. 177.**

——S 37—*Division of tenancy—Proof of—Grouping of fields as separate holdings in settlement record and separate enhancement of rent—If evidence of final division.*

The mere fact that groups of fields are recorded as separate holdings at settlement or that rent is enhanced on them separately would not be sufficient evidence to prove a definite final division made with the consent of the landlord. (*Drake Brockman, S M. and Knox, J.M.*) DHANNI *v.* SARJU PRASAD SINGH. **1936 R.D. 202.**

——**S. 37**—*Division of holding—Who can ask for—Joint grove-holders—Acquisition of muqarrardari rights by one—If can affect the right of others to ask for division of holding.*

S. 37 of the Agra Tenancy Act does not lay down what type of tenants could ask for division of the holding. If one of several joint grove-holders *qua* tenants subsequently acquires muqarrardari rights, that could not enable him to stand in the way of the other co-sharers getting their shares defined on the ground that the grove had lost its character *qua* one of the co-tenants his interests should be in the maintenance of the holding. But if he proves that the grove had lost its character, then under S. 197 read with S. 86, the muqarrardar can get rid of his co-tenants. (*Mehta, S. M. and Harper, J.M.*) BECHAN SINGH *v* RAM SAGAR SINGH **1940 R D. 14=1940 A.W.R. (B R.) 21**

——S 37—*Division of holding—Entry in village papers from 1272 onwards—Effect—Plea of withdrawal—Onus—Facts to be proved*

Where as early as from 1272 a person's name is entered in the village papers as tenant and the entry has continued in the last settlement in 1319 and also continues up to the present day in 1343 and the entry is in favour of several tenants, then the onus lies very heavily on that co-tenant, who alleges that the other co-tenant had withdrawn from that holding. He will have to show that some overt act was committed by which the co-tenant's right was denied and that 12 years have passed since that period. Else he cannot resist a suit under S. 37 of the Agra Tenancy Act for the division of the holding. (*Mehta, J.M.*) BHARAT SINGH *v.* PATHAK HAR SAHAI. **1939 R.D. 105=1939 A.W R. (B.R.) 167.**

——S. 37—*Division of a holding—Right to—Entry in last settlement as occupancy holding in name of a woman—Reversion to family on her death—Inference.*

Where there is no explanation as to how a holding became the sole possession of a woman and reliance is placed solely on the settlement entry in 1308 in the name of the woman as an occupancy holding and where the previous entry shows that the holding belonged to the family of which the woman was a member and the subsequent entries bear out the view that it reverted to the family on her death, a son of that woman could not resist a division of the holding on the ground that it descended to him from his mother. (*Mehta, S.M. and Harper, J.M.*) BHAGWAN PRASAD *v.* BINDESHWARI PRASAD. **1939 A.W.R. (B.R.) 34=1939 R D 177.**

——**S. 37**—*Private division—If and when can affect law of succession.*

A private division of a holding cannot supersede the law of succession unless the division is definite. clear and intended to provide for a permanent division. (*Harper, J.M.*) ABDUL GAFOOR *v.* ALI ABBAS. **1940 R.D. 157=1940 A.W.R. (B. R.) 74.**

——S 37—*Right to apply for division of holding—Dismissal of a prior suit* bila tajwis—*If bars right.*

Under S. 37 of the Agra Tenancy Act one or more co-tenants of a holding can apply for division thereof. The fact that a prior suit for division of the holding was in fact compromised, but the suit was dismissed *bila tajwis* cannot deprive a plaintiff of his right under the Act. (*Darling, S M*) NAIN SUKH *v.* SUKHI. **1938 A.W.R. (B. R.) 351=1938 R.D. 849.**

——S. 37—*Suit under—Widow inheriting joint share of her husband in occupancy holding and remarrying—Absence of any recognition of her as tenant—Right to ask for division of holding.*

Where a widow inheriting from her husband the joint share in an occupancy holding, remarries another co-tenant, she is not entitled to ask for a division of the holding under S. 37 of the Agra Tenancy Act, when she is unable to establish that she was at any time after her remarriage recognized as a tenant. (*Harper, J.M.*) KALAWATI *v.* HORI LAL. **1940 R.D. 196 (1)=1940 A.W.R. (B.R.) 72.**

——S 37—*Transfer contrary to—Suit for ejectment—Forum.*

Where area of the fixed rate tenancy is held by a single individual without any co-tenant, a transfer by him of portions of his holding is clearly contrary to S. 37 of the Tenancy Act which only allows a division in two particular cases. Hence the suit for ejectment under S. 82 or for injunction under S. 85 (3) would lie in the Revenue Court. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH **I.L R. (1938) All. 754=1938 A.L.J 720=177 I.C. 458=11 R.A. 199=1938 A.L R. 747=1938 A.W R (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

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——**S. 37, Proviso**—*Suit for division of ex-proprietary holding—Landholder not appearing in Court though served—Division, if effective.*

A suit under S. 37 of the Tenancy Act is a matter between tenants and it is not obligatory on the tenants to join the landholder as a party. But under the proviso to the section, a division of the holding is not binding on the landholder unless he agrees thereto in writing. This is a mandatory provision which cannot be ignored. Where therefore in a suit for a division of an ex-proprietary holding, the landholder, though served personally with a notice, took no part in the proceedings, the division of the holding is ineffective for want of the landholder's formal consent in writing. (*Darling, S.M. and Bomford, J.M.*) TOLARAM *v.* MULCHAND. **1937 R.D. 206.**

——**S. 37**—Division of holding—Effect—Mortgage by co-tenant of his share after division—Liability to ejectment. *See* AGRA TENANCY ACT (1926), Ss. 82 AND 37—LIABILITY TO EJECTMENT. **1939 R.D. 267.**

——**S. 37 and Land Records Manual, para. 80**—*Division of holding—Requirements of law as to—Private division—Effect—Consent of landlord when can be presumed.*

The law requires that for a division of holding to be binding on the landlord, he must give his assent in writing. The mere division of holding for convenience would not necessarily raise a presumption that the holding has been formally divided up and the joint responsibility of co-tenants to pay the rent has been put an end to. The provisions in para. 80 of the Land Records Manual require that if there has been no writing, then an entry to this effect must be made in the khatauni. This entry should be made even if there has been an oral agreement. The implication of the rule thus is that if all the circumstantial evidence indicates a division with consent and if there is no entry in the khatauni, the fact of consent being in writing may be presumed. (*Mehta, S.M. and Harper, J.M.*) GAZI *v.* RAM GOPAL SINGH. **1940 A.W.R. (B.R.) 57=1940 R.D. 166.**

——**Ss. 37 and 3(14)**—*Suit under S. 37—Appeal—Limitation—Starting point—Analogy of preliminary and final decree, if applies.*

In a suit under S. 37 of the Tenancy Act the final adjudication takes place only when the division is complete and limitation for appeal starts only from that date. The Agra Tenancy Act does not contemplate the existence of a preliminary and a final decree as understood by O. 20, R. 18, C P. Code. (*Mehta, J.M.*) DULESARA *v.* RUPAN RAI. **1939 R D. 23=1939 A.W.R. (B.R.) 120.**

——**Ss. 37 and 44**—*Joint living and cultivation by brothers—One of them recorded as occupancy tenant—Disputes—Proper remedy of recorded occupancy tenant.*

Where the plaintiffs and defendants were the sons of the same father and mother and all lived jointly and cultivated jointly and one of them is recorded as occupancy tenant, his remedy, in case of disputes, is under S. 37 of the Agra Tenancy Act and not by a suit under S. 44 against his brothers. (*Marsh, S.M. and Mehta, J.M.*) RAJA RAM *v.* PANCHAM SINGH. **1939 R.D. 492=1939 A.W.R. (B.R.) 217.**

——**Ss. 37 and 99**—*Recorded co-tenant—Right to apply for partition under S. 37—Zamindars supporting defendants—If affects plaintiff's right.*

A suit by a recorded co-tenant under S. 37 of the Tenancy Act, cannot be met by the plea that the suit ought to be under S. 99 as the zamindars are supporting the defendants, for the possession of one co-tenant is the possession of all co-tenants and as the defendants have not been ousted, it cannot also be said that the plaintiff has been ousted. (*Bomford, J.M.*) RAM AUTAR *v.* GANESH. **1938 R.D. 282=1938 A.W.R. (B.R.) 45.**

——**Ss. 37 and 121**—*Application by recorded tenant for partition under S. 37—Possibility of opposition from landlord—Suit under S. 121, if necessary.*

A tenant who has been recorded as a co-tenant in proceedings under S. 42 of the Tenancy Act, is entitled to sue under S. 37 for partition of his share. The necessity of filing a suit under S. 121, in case of opposition from the landlord, does not apply to the suit of such a recorded co-tenant. (*Bomford, J.M.*) RAN AUTAR *v.* GANESH. **1938 R.D. 282=1938 A.W.R. (B.R.) 45.**

——**Ss. 37 and 121**—*Co-tenant seeking possession against tenants in possession—Proper remedy.*

A co-tenant who is out of possession and desires possession should bring a case under S. 37 of the Tenancy Act. If, however, the zamindar has challenged his status as tenant, he is entitled to bring a declaratory suit under S. 121 of the Act in the first instance. (*Darling, S.M. and Bomford, J.M.*) CHHATARDHARI AHIR *v.* GANESH. **1937 R.D. 584.**

——**Ss. 37 and 121**—*Procedure—Simultaneous under, involving identical questions—Decreeing of one and dismissal of other—Appeal in both—Proper procedure—Decree allowing appeal in one and order of remand in other—Propriety.*

Where a suit is filed by a tenant against his landlord under S. 37 of the Agra Tenancy Act, and the landlord files a suit against the tenant under S. 121, and the former suit is decreed and the latter dismissed, if appeals are filed in both suits, the appellate Court should refrain from passing any final order in one of them, when he remands the other suit to the lower Court for further inquiry, when the same questions are exactly in issue in each case. To allow the appeal in one and to remand the other is not the correct or proper procedure. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. **1938 R.D. 133=1938 A.W.R. (B.R.) 81.**

——**Ss. 37 and 123**—*Applicability — Dispute between plaintiff and defendant claiming share in tenancy—Suit under S. 123—Maintainability — Proper remedy.*

When it is clear that the dispute between the parties is as to a share in the tenancies in dispute, both the plaintiff and the defendant claiming a share in the tenancies, the proper remedy is a suit for partition under S. 37 of the Agra Tenancy Act, as the plaintiff's title can perfectly well be decided in such a suit. A suit for declaration of joint tenancy-in-chief with the defendant is not the proper remedy. (*Knox, J.M.*) ANMOL PANDE *v.* RAM LAL. **1936 R.D. 371.**

——**Ss. 38 and 265**—*Scope—Co-sharer landlords—Exchange of* khudkasht *land by some with occupancy tenant without consent of new co-sharer*

—Validity—If can be given effect in correction of papers.

The conferment of a right of occupancy is a thing which even a lambardar cannot do except as provided by S. 265 of the Agra Tenancy Act. An exchange by some of the co-sharers with an occupancy tenant of *khudkasht* lands without the consent or knowledge of another new co-sharer operates as a sort of conferment of occupancy rights under S. 38 of the Act, and is therefore not valid so far as the tenants are concerned and cannot therefore be given effect to in proceedings for correction of papers under the Land Revenue Act. *(Drake Brockman, S.M. and Knox, J.M.)* Gurdial Singh *v.* Madho Singh. **1936 R.D. 136.**

———**S. 40**—*Application under—Duty of Collector —Local inspection—Necessity.*

When an application under S. 40 of the Tenancy Act is made for the acquisition of certain lands, it must be treated by the Collector as judicial proceedings. A local inspection by the Collector is absolutely necessary. *(Darling, S.M. and Marsh, J.M.)* Raj Kumar Prasad *v.* Mansab. **1938 A.W.R. (B.R.) 327=1938 R.D. 620.**

———**S. 40**—*Application under—Local inspection —Necessity.*

Where an applicant asks for acquisition of certain land in order to enable him to run compact and consolidated farms, the Collector should make a local inspection of the land. If the applicant has already the existing *khudkasht* which he genuinely cultivates himself, he is justified in asking for his *khudkasht* to be consolidated, if he can give reasonable grounds for his request. That can only be settled by a local inspection. *(Marsh, S.M. and Mehta, J.M.)* Ghulam Mujtaba Beg *v.* Jhanjhan. **1939 R.D. 528=1939 A.W.R. (B.R.) 228.**

———**S. 40**—*Acquisition—Justification—Negativing circumstances—Object of S. 40.*

Where the applicant lives in a different tahsil twenty miles away from the village in question and has himself allowed a compact block of his to be sliced away and has never systematically carried *khudkasht* cultivation in the real sense of the term, there is no justification for acquiring a compact block of tenants in order to make a compact block for such an applicant. One of the reasons for enacting S. 40 of the Agra Tenancy Act was that a genuine *khudkasht* holder wanting to secure a compact block should be assisted in his desire of acquiring as enclaves, all other owned plots, remove the chess board pattern of the area and secure compactness. *(Bomford, S. M. and Mehta, J.M.)* Mangal *v.* Surat Narain Pandey. **1939 R.D. 125=1939 A.W.R. (B.R.) 168.**

———**Ss. 40 and 41**—*Application under—Summary dismissal on applicant's failure to appear in person—Propriety.*

Where an application under Ss. 40 and 41 of the Agra Tenancy Act for the acquisition of certain occupancy and statutory holding is summarily dismissed by the Collector on the ground that the applicant has failed to appear in person, though he is represented by his own general attorney and by a Court Mukhtar, the summary dismissal is for no adequate reasons and the order of the Collector is, therefore, liable to be set aside. *(Darling, S.M. and Bomford, J.M.)* Hargur Dass Rao *v.* Mulaim Singh. **1937 R.D. 457.**

———**S. 40 (2)**—*Compensation for improvements —Planting of trees on field boundary—Whether an improvement.*

Under S. 40 (2), it is not possible to decide whether any compensation is due for improvements, except with reference to the definition of improvement and the sections dealing with a tenant's right to make improvements. The planting of a few trees on a field boundary which does not add to the letting value of a holding, is not an "improvement" as defined in the Tenancy Act. *(Knox, J.M.)* Tulain *v.* Mata Din. **1936 A.W.R. 177=1936 R.D. 59.**

———**S. 41**—*Land held by statutory tenant—Application by landlord for acquisition alleging desire to cultivate himself—When to be allowed —Considerations for the Court.*

When a landlord who is a petty plot proprietor, naturally wanting to cultivate his own land, asserts that he wants the land for his own cultivation, and finding it difficult to get hold of other land applies for acquisition of his land from his statutory tenant, the acquisition has to be allowed. Whether the landlord is fit for doing the work of cultivation or whether it will be worth his while to take it or not is not a relevant consideration. But if the landlord, after the acquisition, fails to take the land into his own cultivation, the tenant will have a remedy in law. *(Drake Brockman, S. M.)* Bhimma *v.* Inait Ullah Khan. **1936 R. D. 536.**

———**S. 41 (b)**—*Scope and object of—Waste land re-claimed by tenant by own industry and enterprise—Application by landlord to acquire hoping to get same at less than cost of re-claiming—If to be granted.*

S. 41 (*b*) of the Agra Tenancy Act should be worked with some regard for equity. The section was not intended to allow zamindars to appropriate the fruit of a tenant's labours. Where a landlord applies under the section for acquiring a certain area, which till recently was waste, but which the tenant has, by his industry and enterprise, re-claimed, hoping to getting it at less than the cost of re-claiming the waste, the application cannot be allowed. It would be extremely hard in a case of this kind to calculate the compensation to be paid to the tenant. *(Darling, S.M. and Bomford, J.M.)* Kripa Shankar *v.* Bhawani. **1937 R.D. 19.**

———**S. 43**—*Rent, if can be attached before it falls due.*

Under S. 43 of the Agra Tenancy Act, the liability for the rent opens from the day of admission to tenancy and hence it is certainly open to a landholder to attach the rents before the date on which they fall due. *(Darling, S.M. and Bomford, J.M.)* Ram Chandra *v.* Raghunath Singh. **1938 R.D. 175=1938 A.W.R. (B.R.) 42.**

———**S. 44**—Abatement—Suit for ejectment and damages against several persons—Dismissal by trial and appellate Courts—Second appeal—Death of two defendants-respondents—Omission to add legal representatives—Whole appeal—If abates. *See* C. P. Code, O. 22, R. 4. **1936 R.D. 473.**

———**S. 44**—*Admission to tenancy—Acceptance of rent on mistaken view as to heirship—If would amount to—Liability to ejectment.*

Where certain persons have been recorded as occupancy tenants in the place of a deceased person, though as a matter of fact they were not his heirs, the fact that the rent was accepted from such persons under the mistaken impression as to heirship, that cannot amount to an admission to tenancy. It is the person who claims to have been admitted as tenant that must prove that there was the intention to create a new contract of tenancy on the part of the landholder. (*Bomford, S.M. and Mehta, J.M.*) Ram Charan Lal *v.* Laloo Lal. **1939 R.D. 59=1939 A.W.R. (B.R.) 155.**

——S. 44—*Applicability — Attachment of property in execution—Lease by proprietor pending attachment—Validity—Lease at low and inadequate rent with fraudulent intent—Purchaser of property in execution—Suit to eject lessee—Liability of lessee to ejectment.*

The existence of an attachment or injunction restraining the judgment-debtor from disposing of his property in any manner would not prevent him *qua* proprietor from making leases of the property in a prudent manner for the due management of the property. But he is not justified in granting a lease which is fraudulent and for a low and inadequate rent. If he does so, it is liable to be set aside by the Civil Court, and the lessee is liable to ejectment under S. 44 at the instance of the purchaser of the property in execution. (*Drake Brockman, S.M. and Knox, J.M.*) Brij Behariji Maharaj *v.* Bohra Fateh Chand. **1936 R.D. 373.**

——S. 44 — *Applicability — Co-sharer—Joint* khewat khata—*Tenant admitted by some—Ejectment suit by others—Competency.*

A suit for ejectment as trespasser and for damage under S. 44 of the Agra Tenancy Act is not maintainable at the instance of one co-sharer in a joint *khewat khata* as against a tenant admitted to occupation by another co-sharer. Such a suit is barred under S. 266 (1) of the Act. The landholder in such a case is the whole proprietary body and the tenant admitted by one co-sharer is not the tenant of the whole proprietary body. Since the right to eject is also vested in the whole proprietary body as a body, the dissatisfied co-sharer or co-sharers cannot by themselves sue to eject him. There is no remedy in the Revenue Courts at all. The remedy of the dissatisfied co-sharers is to bring a suit in the Civil Court to have the lease set aside. (*Drake Brockman, S.M. and Knox, J.M.*) Seelo *v.* Kurya Singh. **1936 R.D. 114.**

——S. 44—*Applicability—Co-sharer in possession and cultivating land without objection by other co-sharers—Suit to eject as trespasser—Maintainability*

Where a co-sharer takes possession of land and remains in peaceful possession for a number of years, cultivating the same without any objection by the lambardar or the general body of co-sharers, it has to be inferred that he occupies and cultivates it with the consent of the coparcenary body or of the lambardar. He is not a trespasser or a person occupying the land in contravention of the Act within the meaning of S. 44 of Agra Tenancy Act, and cannot be ejected as such under S. 44. He can of course be made to account to the other co-sharers for the rental of the land. (*Harries, J.*) Bal Singh *v.* Nawab Singh. **171 I.C. 795=1937 A.L.J. 707=1937 R.D. 407=1937 A.W.R. 816=A.I.R. 1937 All. 688.**

——S. 44—*Applicability—Co-widows—Remarriage of on death of other co-widow—Suit by zamindar against remarried widow for ejectment —Maintainability.*

Where one of two co-widows left by a deceased tenant remarries, the occupancy tenancy continues to subsist so long as the other co-widow who has not remarried is alive, notwithstanding the remarriage of one of them. On the death of the co-widow who has not remarried, the zamindar is entitled to assert his rights by treating the re-married widow as a trespasser on the ground of her remarriage which comes to his notice. (*Darling, S. M.*) Bundi Begam *v.* Mustafa Husain Khan. **1937 A.W.R. 871=1937 R.D. 413.**

——S. 44 — *Applicability — Disappearance of tenant-in-chief—Payment of tenant-in-chief rent by sub-tenant—No new contract of tenancy—Sub-tenants if can be ejected as trespassers.*

Where the occupancy tenant disappeared from the village and his sub-tenants continued to pay the zamindar the tenant-in-chief rent, but with whom the zamindar did not enter into any new tenancy.

Held, that the sub-tenants are trespassers and could be ejected. (*Darling. S.M. and Bomford, J.M.*) Kanhai Lal *v.* Nokhey. **1937 A.W.R. 1096=1937 R.D. 558.**

——S. 44—*Applicability—Ejectment of one co-sharer by another, as a trespasser—If possible—Proper remedy—Suit under S. 44—Duty of plaintiff to prove title.*

One co-sharer cannot get rid of another co-sharer by suing for his ejectment as a trespasser. In a case where a co-sharer has taken possession of land and has been permitted to cultivate it for a number of years, the obvious inference is that he has been in occupation with the consent of the coparcenary body. As such the remedy of the other co-sharers is to sue him for profits. As a suit under S. 44 of the Agra Tenancy Act can only be brought by the landholder, where the plaintiffs in a suit under that section claim to be the sole *sirdars* of the plot in question, it is incumbent on them to establish their claim to the hilt. (*Darling, S.M.*) Nirmal *v.* Sagwa. **1939 A.W.R. (B.R.) 16=1940 R.D. 44.**

——S. 44—*Applicability—Grove land ceasing to be such and being assessed to revenue —Lease of —Suit by landlord to eject lessee on ground that latter is only lessee of produce of trees and is cultivating—If lies.*

When land with trees on it is let out for cultivation after the land has ceased to be a grove and after it has been assessed to revenue, the lessor is not competent to sue the tenant under S. 44 of the Agra Tenancy Act, alleging that he leased the produce of the trees and that the lessee has started cultivation. (*Knox, J.M.*) Karamat Ali *v.* Mangoo Lal. **1936 R.D. 486 (2).**

——S. 44—*Applicability — Joint holding—One tenant getting share divided by suit under S. 37—Others keeping him out of possession and not giving him physical possession—Liability to be sued in ejectment as trespassers.*

If a tenant in a joint holding gets his share divided off by means of a suit under S. 37 of the Agra Tenancy Act, the other tenants are no longer the co-tenants of that tenant. If these other tenants do not allow the tenant getting his share divided to take physical possession of his share, but flout the orders of the Revenue Court by keeping him out of possession, they are trespassers pure and simple and can be ejected as such. (*Bomford, J. M.*) Chittar *v.* Jhunva. **1938 R D. 110=1938 A W.R. (B R.) 50.**

———**S. 44**—*Applicability—Joint mahal—Waste land—Co-sharer taking into separate possession and cultivating without consent of other co-sharers —If liable to ejectment as trespasser.*

Where land in a joint mahal is waste, and there is no competition among the co-sharers for the same, a co-sharer is entitled to bring it under cultivation without reference to the lambardar or other co-sharers. A co-sharer so taking the waste land into his separate possession and cultivating is not liable to ejectment under S. 44 of the Agra Tenancy Act at the instance of the lambardar. (*Drake Brockman, S.M. and Knox, J.M.*) Ram Sarup *v.* Munna Lal. **1936 R.D. 561.**

———**S. 44**—*Applicability—Mortgage of* sir *land —Mortgagor retaining possession and becoming ex proprietary tenant—Sale of equity of redemption—Vendee failing to pay mortgage-debt—Ejectment.*

The proprietor of a plot of *sir* land mortgaged it to another, but remained in cultivating occupation of the land and paid rent therefor to the mortgagee. He was declared an ex-proprietary tenant of the lands, but subsequently sold his equity of redemption to two persons who entered into possession. The mortgagee sued on his mortgage impleading the vendees, got a decree, brought the land to sale in execution and purchased it himself at the auction-sale. The vendees did not pay the mortgage-debt and the mortgagee purchaser sued to eject them under S. 44, Agra Tenancy Act.

Held, the vendees, by substituting themselves for their vendor in occupation of the land became *khudkasht* holders of the land vice the ex-proprietary tenant, were liable to ejectment under S. 44, as persons taking possession without the consent of the landholder. (*Drake Brockman, S. M. and Knox, J.M.*) Asharfi *v.* Sri Ram. **1936 R.D. 126.**

———**S. 44** — *Applicability — Mortgagee from tenant retaining possession after tenant's death—Liability to ejectment—Mortgagee recorded as sub-tenant, but not properly admitted to tenancy.*

A mortgagee from an occupancy tenant who holds and retains possession after the tenant mortgagor's death, but who fails to prove any definite or proper admission to tenancy by the landlord, is not a person holding the land "in accordance with the provisions of the Agra Tenancy Act", and is therefore liable to ejectment as a trespasser, notwithstanding that he is recorded as a sub-tenent. (*Drake Brockman, S.M. and Knox, J.M*) Soorajpal Singh *v.* Munshi Lal. **1936 R D. 225.**

———**S. 44** —*Applicability — Mortgagor leasing mortgaged property to wife at low rent on eve of mortgage suit— Intention to decrease value of property to purchaser—Purchase by mortgagee in sale in execution of mortgage decree—Right to eject lessee.*

Where a mortgagor who is unable to pay the mortgage money due by him and who is confronted with a suit, executes within a few days of a suit being actually instituted on the basis of the mortgage, a lease of his land in favour of his wife, a *pardanashin* lady, for a definitely and consciously inadequate rent, with the intention of decreasing the value of the property for his successor-in-interest and the lessee does not cultivate the land, there are grounds for suspecting that the mortgagor wishes to retain possession of the land control over which will pass to the mortgagee or another as a result of the impending suit. When further there is evidence to show that the land is subsequently sub-let for nearly double the rent fixed in the lease to the wife, the lease has to be regarded as fraudulent. The mortgagee who subsequently purchases the land in execution of the decree in his suit is entitled to sue to eject the lessee, wife of the mortgagor, under the provisions of S. 44 of the Agra Tenancy Act, (*Drake Brockman, S.M. and Knox, J.M.*) Ram Narain *v.* Gokul Chand. **1936 R.D. 182.**

———**S. 44**—*Applicability—Ouster of recorded tenant by persons claiming to exclude former under family partition — Remedy of recorded tenant—Suit under S. 44—If lies.*

Where a recorded tenant has been ousted from a plot by persons claiming to be tenants and claiming to hold possession of the plot in virtue of a family partition to the exclusion of the recorded tenant, such claim being supported by the landlord, the remedy of the ousted recorded tenant is to bring a suit under S 99 of the Agra Tenancy Act against the landlord and the rival claimants in possession of the plot. A suit under S. 44 is not maintainable. (*Drake Brockman, S. M. and Knox, J.M.*) Ram Lal *v.* Dharmi. **1936 R.D. 33.**

———**S. 44** — *Applicability — Person paying* nazarana *and allowed to plant grove—If trespasser —Ejectment.*

Where a zamindar accepts a *nazarana* from a person and grants him a field to plant a grove, the zamindar is not competent to eject that person as a trespasser under S. 44 of the Agra Tenancy Act such a person cannot be held to be a trespasser. (*Knox, J.M.*) Jai Devi Kuer *v.* Tota Ram. **1936 R.D. 234 (1).**

———**S. 44**—*Applicability —Purchaser of land from widow proprietor having life-estate—Planting of grove by purchaser—Sale set aside by Civil Court after death of widow at instance of reversioners—Purchaser—If trespasser liable to ejectment—Groves—If pass.*

When a purchaser of proprietary rights in land from a widow having a life-estate develops groves on the land, and after the death of the widow the reversioners get the sale set aside by a Civil Court, the reversioners are entitled to eject the purchaser as a trespasser. The trees planted by the purchaser are an improvement and pass to the reversioners along with the land. The purchaser is not a groveholder in the sense of the law; nor is he a proprietor. (*Drake Brockman, S. M.*) Shib Charan *v.* Suraj Prasad. **1936 R.D. 345.**

———**S. 44**—*Applicability—Rent decree against privileged tenant—Execution under S. 79—Tenant continuing in possession and allowing proceedings to go by default—Position of—Liability to ejectment.*

A landholder obtained decrees for arrears of rent against certain tenants who were holding *sir* land at a privileged rent and attacked them in execution under S 79 of the Agra Tenancy Act by way of ejectment and obtained formal possession. The tenants allowed the proceedings in ejectment to go against them by default, but retained possession as if nothing had happened. They were since recorded as non-occupancy tenants *bila tasfia lagan.*

Held, that the tenants could not remain *sir*-holders still, but that they were nothing but trespassers and liable to ejectment under S. 44 of the Act. (*Drake Brockman, S. M. and Knox, J. M.*) GATSARAM NARAYANJI *v.* JAGAT SINGH. **1936 R.D. 180.**

——S. 44—*Applicability—Tenant admitted by agent of collecting co-sharer of* pattidari mahal—*Liability to ejectment.*

Where a co-sharer in a *pattidari mahal* is, by arrangement amongst the co-sharers, recognised as collecting co-sharer of the *patti* and as such entitled to do all acts which the landholder or the landlord can do, and that co-sharer executes a *mukhtarnama* in favour of an agent giving him wide powers to act on behalf of his principal, and the agent misuses and utilises those powers to admit to tenancy his own relations at inadequate rents, the landholder has the option either to accept those persons as tenants and get the contracts set aside in the Civil Court and then sue for fixation of proper rent, or to eject them as persons holding without the consent of the landholder under S. 44 of the Agra Tenancy Act. (*Drake Brockman, S. M.*) BHUP SINGH *v.* DEBI SINGH. **1936 R.D. 295.**

——S. 44—*Applicability—Usufructuary mortgage—Subsequent* theka *by mortgagee to mortgagor—Admission of tenants by latter—Cancellation of* theka *and mortgagee standing out as landholder—Right to eject tenants admitted by mortgagor—Such tenants, if grove-holders—Liability to ejectment—Mortgagee accepting some tenants admitted by mortgagor—If estopped from ejecting others.*

Plaintiff who took a usufructuary mortgage of the suit property executed the next day a *theka* of the property in favour of the mortgagor. The latter as *thekadar* admitted tenants, collected rents and so forth as a *thekadar* could do. The *thekadar* having failed to abide by the terms of the *theka*, plaintiff cancelled the *theka* and ejected the mortgagor *thekadar* and stood forth as the landholder of the property. He accepted certain tenants admitted by the mortgagor and sued to eject the others under S. 44 of the Agra Tenancy Act. There was no evidence that he authorised the mortgagor, in the manner enjoined by law to act as his agent or give up his rights to object to any arrangement purporting to be made on his behalf by the mortgagor.

Held, (1) that the tenants admitted by the mortgagor were holding without the consent of the landholder who was the plaintiff, and therefore liable to ejectment under S. 44 of the Act; (2) that they were not grove-holders, as the land was not let or granted to them by the landlord; and merely because they had planted a few trees they were not exempt from ejectment when they had no right to be in occupation; and (3) that the fact that the plaintiff accepted admission of some tenants made by the mortgagor did not estop him from ejecting the others whose admission he was not prepared to accept. (*Drake Brockman, S. M. and Knox, J. M.*) KRISHNA SAHAI *v.* KUNWAR SEN. **1936 R.D. 339.**

——S. 44—Applicability—Sub-lease by widow of occupancy tenant—Suit by landlord to eject sub-tenant—Competency. *See* AGRA TENANCY ACT, S. 32 (1) AND (3). **1936 R.D. 496.**

——S. 44—*Auction purchase of mortgagee's right*—Dakhal dehani *beyond time—Mortgagee in possession—If can be used as trespasser.*

Where a person purchases another's mortgagee rights at a public auction but takes *dakhal dehani* beyond the time allowed, it has not the effect of bringing about the actual dispossession of the original mortgagee. Hence the auction purchaser cannot sue the mortgagee as trespasser as there has been no dispossession. (*Mehta, S.M.*) JAIDIRI SINGH *v.* BAJRANG SINGH. **1940 A.W.R. (B.R.) 60=1940 R.D. 164.**

——S. 44—*Ejectment—Allegation that defendant's mother was not legally married to late occupancy tenant—Onus.*

In a suit for ejectment of the defendant on the ground that his mother was not properly married to his father, *i.e.*, the late occupancy tenant, when it is not disputed that his father and mother had lived together as husband and wife for about 18 or 20 years, the burden of proving that there was no valid or proper marriage is on the plaintiff-landlord. (*Knox, J. M.*) PARMESHWARI NARAIN CHADDA *v.* MAGAN. **1936 R.D. 110 (1).**

——S. 44—*Ejectment—Cause of action—Sale of occupancy holding—Starting point—Damages—Measure of.*

The mere execution of a deed of sale of an occupancy holding does not give rise to a cause of action to eject the vendee; it only arises on the actual transfer to the vendee. A claim to be in possession from a date prior to that mentioned in the papers, has to be proved by the vendee. As regards damages it must be remembered that a trespasser is not entitled to any remission. (*Darling, S. M. and Bomford, J.M.*) NARAINI PRASAD SINGH *v.* MAKUND. **1938 R.D. 455=1938 A.W.R. (B.R.) 323.**

——S. 44—*Ejectment —Coparceners —One of them when can eject trespasser.*

Where one of the coparceners by virtue of a mutual agreement among themselves, collects the rent of a particular land, he is the landholder thereof and as such he can eject anybody taking possession as trespasser under S. 44 of the Agra Tenancy Act. (*Mehta, J. M.*) QUDRAT ALI *v.* MUNESHWAR TEWARI. **1939 A.W.R. (B.R.) 118 (1)=1939 R.D. 439=1939 A.L.J. (Supp.) 90.**

——S. 44—*Ejectment—Co-sharer taking possession on the death of tenant of occupancy holding heirless—Suit against, by lambardar for ejectment.*

A tenant of an occupancy holding died heirless. A co-sharer in the khewat to which the holding belonged, took possession of the holding, without the consent of the lambardar. The lambardar brought a suit to eject him as a trespasser.

Held, the lambardar is a landholder and is at liberty to eject the co-sharer defendant. The accident that the defendant is a co-sharer cannot protect him. (*Darling, S. M.*) MAREY *v.* NIADAR SINGH. **1937 R.D. 524.**

——S. 44—*Ejectment—Grant of pattas by mortgagor in possession —Subsequent purchase by* *creditor—Plea of fraudulent transfer —Test—Status of tenants.*

Where a mortgagor in possession grants pattas which purport to create occupancy rights but which do not conform to the requirements as laid down in S. 17 (1) (*b*) and (5) and the creditor purchases the property subsequently and seeks to eject the tenants on the ground of the lease being fraudulent, it is the conduct of the parties that would primarily go to decide the issue whether the document confers a statutory right or not. Whether it is an act in the ordinary course of zamindari management or one of a fraudulent nature and void under S. 53, T. P. Act, depends on the circumstances attending on the transaction. Where the *nazarana* was not excessive and the interval between the patta and sale was fairly long, the patta mnst be taken to have been granted in the ordinary course of management of zamindari property and the tenants could not be treated as trespassers. (*Mehta, S. M.*) SUNDER LAL *v.* SUKDEO. **1939 A.W.R. (B.R.) 31=1940 R.D 45.**

——S. 44—*Lease by co-sharer, pending partition proceedings—Leased plots falling to share of another co-sharer—Lessee, if can be ejected as trespasser.*

Where partition proceedings were pending, a co-sharer leases certain plots at a time when the proceedings were practically coming to an end and the co-sharer should have been in a position to know that the particular plots would fall to share of another co-sharer, the lessee of such plots is only in the position of a trespasser and cannot resist ejectment at the hands of the co-sharer to whose share the plots ultimately fall on partition. (*Darling, S.M. and Bomford, J.M.*) MOOL CHAND *v.* JITENDRA PRASAD. **1938 R.D. 346=1938 A.W.R. (B R.) 192.**

——S. 44—*Lease by mortgagee—Lessee, when protected from ejectment.*

When a lease by a mortgagee is found to be neither fraudulent, collusive or unreasonable, the Court must hold that the admission of the lessee is not fraudulent and as such he cannot be ejected as a trespasser and must be accepted as a tenant by the mortgagor or his transferee after redemption. (*Marsh, S.M.*) GHASITA *v.* AMAN SINGH. **1939 R.D. 278=1939 A.W.R. (B.R.) 255.**

——S. 44—*Liability to ejectment—Absence of any contract of tenancy—Plaintiff sole proprietor of* khewat *to which the plots in dispute belong.*

Where the plaintiff is the sole proprietor of the *khewat* to which the plots in suit belong and of which the defendant a neighbouring zamindar is in possession and there is no contract of tenancy, the defendant is liable to ejectment as a trespasser. (*Darling, S.M. and Mehta, J.M.*) GANGA PRASAD SINGH *v.* GIRWAR SINGH. **1938 R.D. 937 =1939 A.W.R. (B R.) 58.**

——S. 44—*Liability to ejectment—Acceptance of enhanced rent—Occupation for over 12 years—Estoppel.*

Where enhanced rent is being taken from some persons treating them as tenants and where those persons have been in occupation for over 12 years, though it be under a void compromise, they cannot be treated as trespassers and ejected, for the zamindar is estopped by his own conduct. (*Darling, S.M. and Mehta, J.M.*) KOMIL *v.* JAGESHWAR PRASAD. **1938 R.D. 940=1939 A.W. R. (B.R.) 50 (2).**

——S. 44—*Liability to ejectment—Person not a grove-holder planting trees without permission.*

Land may be a grove, without the owner of the trees being a grove-holder. If such person plants without permission, he remains a trespasser on the land and he can be ejected therefrom under S. 44 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) RAM NARAIN RAI *v.* RAM RAN BIJAI PRASAD SINGH. **1938 R.D. 545=1938 A. W.R. (B.R.) 247.**

——S. 44—*Limitation—Suit to get rid of person staying on against consent of recorded tenant.*

Where the ejectment is not by the zamindar, then the tenant has 12 years to get rid of a person who is staying on against the consent of the recorded tenant. (*Mehta, S.M.*) PUTTOO LAL *v.* SARDAS SINGH. **1940 A.W.R. (B.R.) 63=1940 R.D. 211.**

——S. 44—*No contract of tenancy proved between zamindar and sub-tenant—Liability of sub-tenant to be ejected as trespasser.*

Where the zamindar has been recognising the recorded tenant as the occupancy tenant of the holding although the rent was paid by the sub-tenant, and there is no adequate evidence to establish a new contract of tenancy between the zamindar and the sub-tenant, the latter is liable to be ejected as a trespasser, even though the patwari had struck out the name of the recorded occupancy tenant on the ground that he was no longer the cultivator of the plot, and had entered the name of the sub-tenant as the tenant-in-chief. (*Darling, S.M. and Bomford, J.M.*) SHIB SARAN SAHAI *v.* AZMAT ULLAH KHAN. **1937 R D 149.**

——S. 44—*Person holding land in khudkasht at the time of partition, and not admitted as a tenant —Suit for his ejectment as trespasser—Limitation, when begins to run.*

The limitation for a suit for ejectment as trespasser, of a person who was holding land in khudkasht at the time of partition and who was not admitted as a tenant, begins to run not from the date of confirmation of partition but from the date from which the partition was to take effect. (*Darling, S.M. and Bomford, J.M.*) BADRI NATH TEWARI *v.* KASHI PRASAD SINGH **1937 R.D. 140.**

——S. 44—*Person settled on land by* thekadar *after expiry of* theka—*Status of—Right of landlord to eject.*

A person settled on the land by a *thekadar* after the expiry of the period of his *theka* has no right to be treated as a tenant and can be ejected by the landlord under S. 44 of the Agra Tenancy Act. (*Drake Brockman, S.M. and Knox, J.M.*) RAM PIYARI *v.* RAM BHAROSE. **1936 R.D. 229.**

——S. 44—*Re-admission—Written consent to—Receipt for rent, for period of time subsequent to the alleged re-admission—If enough to prove written consent for re-admission.*

Where in a suit for ejectment filed under S. 44 of the Agra Tenancy Act, brought on a plea that there had been no written consent to re-admission as required by S. 95 of the Act, the defendant filed a receipt for arrears of rent and also a document according to which the tenant was paid a particular sum on account of the sale of a tree to the servant of the plaintiff, both having reference to a period of time three years subsequent to the alleged re-admission, it was held that they were no proof of a written consent to re-admission. (*Harper, J.M.*) JUKHU RAM *v.* LAL MAHADEO PRASAD SINGH. **1940 R.D. 195=1940 A.W.R. (B.R.) 70.**

——S. 44—Sir *holder—Order of ejectment—Persistence in trespass—Damages—Measure of.*

If *sir* holders persist in trespass after an order of ejectment against them, damages may be awarded as against themat full rental permissible. (*Drake Brockman, S.M. and Knox, J.M.*) GATSARAM NARAYANJI *v.* JAGAT SINGH. **1936 R.D. 180.**

——S. 44—*Ejectment suit by one co-sharer—Maintainability.*

Ordinarily a suit for the ejectment of a trespasser can only be brought by the whole coparcenary body. Where, however, in a suit by the plaintiff for the ejectment of the defendant as a trespasser, the defendant claimed full occupancy rights from the plaintiff's immediate predecessor-in-interest and thus recognised the plaintiff as the landholder even to the extent of the conferment of occupancy rights, and when he found it impossible to maintain this claim applied for an amendment of his pleadings to the effect that the plaintiff was not entitled to sue alone as there were other co-sharers in the joint *khewat.*

Held, that the defendant could not amend his pleas and that the plaintiff was entitled to a decree. (*Darling, S.M.*) KISHORI LAL *v.* KASHI RAM. **1937 R.D. 255.**

——S. 44—*Ejectment—Suit by a co-sharer lambardar—Applicability by the other co-sharer to be made a party—Dismissal of suit, in spite of—Propriety.*

Where a suit for ejectment under S. 44 of the Tenancy Act is filed by one of the co-sharers lambardar and where the other co-sharer applies to be made a party, it is not proper to dismiss the suit on the ground that the plaintiff could not sue alone. The proper course is to add the other co-sharer and proceed with the suit. (*Darling, S.M. and Bomford, J.M.*) RAM DAYAB *v.* BUDH SINGH. **1938 A.W.R. (B.R.) 175=1938 R.D. 323.**

——S. 44—*Ejectment of trespasser—Joint holding—Suit by single co-sharer—Competency.*

The test to determine whether one of several proprietors in a joint mahal can by himself sue to eject a trespasser under S.44 of the Agra Tenancy Act is whether the rent in respect of the land in suit is payable to the plaintiff alone. Where the rent is not payable to the plaintiff alone, the latter cannot be allowed to get rid of the trespasser against the wishes and without the assistance of the other co-sharers. The fact that the defendant was let in by the plaintiff alone cannot give him the right alone of ejecting the defendant. (*Drake Brockman, S.M. and Knox, J.M.*) MAHADEO SINGH *v.* KULWANTA. **1936 R.D. 187.**

——S. 44—*Ejectment of trespasser—Suit by one of co-sharers—Maintainability.*

One of several co-sharers in a joint *khewat* is not entitled to bring a suit for the ejectment of a trespasser. The right to eject is vested in the whole coparcenary body, and if the other co-sharers would not agree to the ejectment, an individual co-sharer must seek his remedy in the Civil Courts. (*Darling, S.M. and Bomford, J.M.*) BAKHTAWAR *v.* SHANKAR SINGH. **1937 R.D. 265 (2).**

——S. 44—*Ejectment under S. 79 and obtaining of possession—Restoration to possession in respect of another decree—Status of tenant.*

Where a tenant has been once legally ejected under S. 79 of the Tenancy Act and the landlord has obtained possession, though thereafter he might have been formally restored to possession when he paid up the arrears when execution was taken in respect of another rent decree, yet the ejectment as the result of the rent decree is binding on the tenant and he is only a trespasser in the holding. (*Marsh, S.M.*) NANHEV *v.* MAHOMED UNUS AHMAD. **1939 A.W.R. (B.R.) 182 (2)=1939 R.D. 417=1939 A.L.J. (Supp.) 92.**

——S. 44—Ejectment of licensee—Suit under S. 44, when proper remedy—Such suit, if can be converted into one under S. 86. *See* AGRA TENANCY ACT, Ss 86 AND 44—EJECTMENT OF LICENSEE. **1939 R.D. 533.**

——S. 44—*Lambardar—Power to eject co-sharer taking possession of abandoned holding without his consent.*

A lambardar can eject a co-sharer who without his consent takes possession of land vacated by a tenant, or a holding abandoned. (*Darling, S.M. and Bomford, J.M.*) BIJAI BAHADUR *v.* CHIRANJI. **1938 R.D. 379=1938 A.L.J. (Supp.) 37=1938 A.W.R. (B.R.) 218.**

——S. 44—*Limitation—Burden of proof of suit being in time.*

In a suit under S. 44 of the Agra Tenancy Act, it is for the plaintiff to prove that his suit is brought within limitation when it appears that the defendant has held for over 12 years by the time the suit is brought. (*Darling, S.M. and Bomford, J.M.*) AMINUDDIN *v.* ZAHIR HASAN KHAN. **1938 R.D. 190 (1)=1938 A.W.R. (B.R.) 119.**

——S. 44—*Limitation—Starting point—Knowledge, possession of defendant—If means personal knowledge of zamindar.*

In the case of large estates the knowledge of possession of the defendant required for the period of limitation for a suit under S. 44 of the Agra Tenancy Act cannot be taken as the knowledge of the landlord personally. The period of limitation must be reckoned from the date of knowledge by the estate. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. **1938 R.D. 133=1938 A.W.R. (B.R.) 81.**

——S. 44—*Limitation—Partition of* sir *land—Holder of divided plot—Suit for ejectment of trespasser—Defendant in possession as mortgagee—Limitation—Starting point—Plaintiff's knowledge of mortgage right prior to confirmation of partition—Effect.*

A suit to eject the defendants from a field which the plaintiff has received in partition as his share of the joint *sir* on the ground that the defendants were holding as trespassers without the plaintiff's consent has to be brought within 12 years from the date when the partition was confirmed. It is only from that date that the plaintiff becomes entitled to sue, and the fact that the defendant is a mortgagee in possession and that the plaintiff knew that the defendant was a mortgagee before that date cannot affect the period of limitation for the suit under S. 44 of the Agra Tenancy Act. (*Bomford, J.M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. **1938 R.D. 125=1938 A.W.R. (B.R.) 70.**

——S 44—*Limitation—Starting point—Lease by Hindu widow with life-interest—Ejectment suit by reversioner—Starting point of limitation.*

In the case of a lease given by a Hindu widow holding a life-interest, it is not open to a reversioner of her husband to attack the lease so long as the lessor-widow is alive; and the limitation of twelve years for a suit by the reversioner to eject the lessee under S. 44 of the Agra Tenancy Act commences to run only from the date of death of the widow and not before that date. (*Darling, S.M.*) PITAM SINGH *v.* LILADHAR SINGH. **1938 R.D. 181=1938 A.L.J. (Supp.) 8=1938 A.W.R. (B.R.) 98.**

——S. 44—*Limitation—Suit to eject widow on ground of remarriage—Starting point of limitation—Date of remarriage or date of knowledge of landholder.*

In a suit to eject as trespasser a widow tenant who has remarried the period of limitation runs from the date on which the plaintiff-landholder obtains knowledge of the remarriage. (*Darling, S.M. and Bomford, J.M.*) MT. TETRA *v.* ZAHID ALI. **1938 R D. 130=1938 A.W.R. (B.R.) 2.**

——**S. 44**—*Limitation—Allotment at a partition—If opens a fresh period.*

The allotment of a plot to the patti of a plaintiff at a recent partition, cannot have the effect of opening out a fresh period of limitation, for the purpose of ejecting as a trespasser, a person in possession of the plot long prior to the partition. (*Darling, S.M. and Mehta, J.M.*) MAN SINGH *v.* MALKHAN. **1938 R.D. 872=1938 A.W.R. (B.R.) 418=1939 A.L.J. (Supp.) 29.**

——**S. 44**—*Purchaser's right— Purchaser of proprietary share—Demarcation of vendor's* sir *land and fixing of separate rent—Rights of vendee, on ejectment of ex-proprietary tenant.*

Where a vendee of proprietary share has the *sir* land of the vendor demarcated and rent fixed on the same, and subsequently ejects the ex-proprietary tenant for failure to pay the rent, the vendee becomes the landholder of that ex-proprietary holding: thereafter as the landholder, he is entitled to sue for the ejectment of the trespassers. (*Darling, S.M.*) RAMPHOOL *v.* KUNDAN LAL. **1938 R.D. 601=1938 A.W R. (B.R.) 299=1938 A.L.J. (Supp.) 117.**

——**S. 44**—*Father transferring his* sir *land to his sons—Latter cultivating it as their* khudkhast *—Transfer declared by Civil Court as fraudulent and land sold at auction sale—Purchaser's right to eject the sons as trespassers.*

The plaintiff sued under S. 44 of the Agra Tenancy Act for the ejectment of the sons of one *X*, whose share he had bought at an auction-sale. This share had been previously transferred by *X* to his sonsbut that former transfer had been declared by the Civil Court to have been fraudulent, the object of which was to defraud creditors. Since the execution of the earlier deed by *X* in favour of his sons, the latter had been entered in the *khatauni* as being in possession of their father's *sir* as their *khudkasht*.

Held, that the sons of *X* who were holding the land without the consent of the plaintiff who was the new proprietor, were undoubtedly liable to ejectment as trespassers. (*Darling, S.M. and Bomford, J.M.*) BAKHTAWAR *v.* SHANKAR SINGH. **1937 R.D. 265 (2).**

——**S. 44**—*Transferee from Hindu widow of fixed rate tenant—Status and rights of—Landlord, if can challenge transfer.*

Where a Hindu widow of a fixed rate tenancy transfers it without legal necessity, the proprietor of the parent holding out of which the tenancy was carved out as a subordinate tenure, would be in a position to challenge the transfer. Where the transferor dies without leaving heirs, the tenancy reverts to the landholder and the transferee without legal necessity cannot enjoy the position higher than that of a trespasser. (*Mehta, S.M.*) GANGA *v.* RAJDEO. **1940 R.D. 18=1940 A.W.R. (B.R.) 18.**

——**S. 44**—*Mortgage—Defendant in possession as mortgagee—Mortgage executed by plaintiff's mother during his minority—Defendant, if can be ejected.*

Where the defendant is in possession in virtue of a mortgage executed by the plaintiff's mother during his minority as his guardian and there is no doubt that the defendant did not enter into possession without the consent or knowledge of the landholder at the time, the defendant cannot be ejected in a suit under S. 44 of the Agra Tenancy Act until the money transactions between the parties have been settled, and that is a matter for the Civil Courts. (*Darling, S.M. and Bomford, J.M.*) BHAGAUTI SINGH *v.* RAM NATH SINGH. **1937 R.D. 135.**

——**S. 44**—*Mortgagor leasing mortgaged property pending mortgage suit—Mortgagee purchasing the property in execution of his decree—Suit by him for possession and mesne profits—Proper forum—Civil Court, if competent to grant declaration that lease is void—T. P. Act, S. 52.*

A mortgagee brought a suit on the footing of his mortgage, obtained a decree, and purchased the property mortgaged in execution. Prior to the auction sale, the mortgagor executed a *theka* whereby he leased the property in suit, and the lessee also obtained mutation in his favour. The mortgagee filed a suit against the mortgagor and the lessee for possession of the property and for mesne profits. The Subordinate Judge held that the plaintiff must have recourse to the Revenue Court for possession of property purchased by her and for the mesne profits due to her. He, however, granted a declaration in favour of the plaintiff that the lease was not binding upon her by virtue of S. 52 of the T. P. Act, having been executed during the pendency of the mortgage suit. On appeal, it was contended that the proper form to decide the validity of the lease in question was the Revenue Court which alone could grant possession and award mesne profits.

Held,that the plaintiff must have recourse to the Revenue Court for possession of the property in suit and for mesne profits, but that the Civil Court could grant a declaration that the lease was void, as the general power which the Civil Courts have to give effect to the provisions of S. 52 of the T.P. Act could not be inferentially cut down because the Revenue Court in a suit for a declaration and mesne profits might have to record a decision as to whether the lease was invalid under S. 52 of the T. P. Act. (*Thom and Rachhpal Singh, JJ.*) ABDUL MUGHNI KHAN *v.* MST. FARKHUNDA BIBI **164 I.C. 762=9 R.A. 204=1936 A.L.J. 1256=1936 R.D. 303=1936 A.W.R. 717 (2)=A.I.R. 1936 All. 661.**

——**S. 44**—*Mortgage—Purchaser of equity of redemption taking possession of mortgaged land* *from mortgagor's sub-tenants—If liable to be ejected as trespasser.*

While a mortgagor may retain proprietary rights as against his co-sharers in an undivided *mahal*, he cannot retain any proprietary right in the share which he has transferred by mortgage. Until the mortgage is redeemed, the mortgagor is not a proprietor, though he may be recorded in the *khewat*, and he has no right to take into his cultivation any portion of the mortgaged land. A purchaser of the equity of redemption cannot have more right than his vendor, and if therefore, the sub-tenant in *sir* of the mortgagor surrender and hand over the fields to the purchaser, the mortgagee can sue to eject him as a trespasser on the ground that he has no right to take land in the *patti* mortgaged to the plaintiff without his consent. (*Darling, S.M. and Bomford, J.M.*) Chintamani Singh *v.* Basawan Singh. **1937 R.D. 339.**

——**S. 44**—*Usufructuary mortgage of* khudkasht *plot under old Act—Mortgagor simultaneously executing deed of relinquishment of ex-proprietary right—Effect—Mortgagor losing cultivating possession of plot—Right of his sons to revive ex-proprietary rights—Liability to ejectment.*

Where while the old Tenancy Act of 1901 was in force a person executed a usufructuary mortgage of his *khudkasht* plot and simultaneously on the same day executed a deed of relinquishment of all ex-proprietary rights, the surrender of ex-proprietary rights was null and void having been made before their accrual. If the mortgagor, in whose favour ex-proprietary rights might have accrued, lost cultivating possession of the plot, his sons who subsequently come to be recorded as holding *bila tasfia* cannot revive these ex-proprietary rights and are liable to be ejected as trespassers. (*Darling, S.M. and Bomford, J. M*) Bilasi Singh *v.* Ram Chander Singh. **1937 R.D. 462.**

——**S. 44**—*Scope— Co-tenants — Division of holding—One co-tenant taking possession of portion of another—Suit by latter for ejectment of former—Maintainability.*

There is no legal bar to a suit under S. 44 of the Agra Tenancy Act by one co-tenant of a holding against the other co-tenants who have taken possession of the former's portion of the holding after a formal partition of the holding under S. 37 of the Act, whether the landholder has or has not agreed to the division. His rights are still unaffected (*Drake Brockman, S.M. and Knox, J.M.*) Kartari *v.* Umrao Singh **1936 R D. 525.**

——**S. 44**—*Scope of—Trespasser in possession—Remedy of owner—Option as to.*

It is open to the proprietor of agricultural land either to sue a trespasser for ejectment in the Civil Court or to avail himself of the speedier remedy provided by S. 44 of the new Tenancy Act and to file a suit for ejectment and for damages in the Revenue Court. (*Iqbal Ahmad and Varma, JJ.*) Lachhmina Kunwari *v.* Makfula Kunwari. **I.L.R. (1938) All. 441=175 I.C. 902=11 R.A. 17=1938 R.D. 463=1938 A.L R. 497=1938 A.W.R. (H.C.) 199=1938 A.L.J. 333=A.I.R. 1938 All. 316.**

——**S. 44**—*Suit under—Abatement—Fresh suit by successor in interest—If lies.*

Where a suit under S. 44 of the Agra Tenancy Act abates owing to the death of the plaintiff, O. 22, R. 9, C. P. Code, bars a subsequent suit by the successor in interest of the deceased plaintiff for the same relief and against the same defendant in respect of the same land. (*Marsh, S M.*) Murli Dhar *v.* Raghubir. **1939 R.D. 476=1939 A.W.R. (B.R.) 219.**

——**S. 44**—*Suit under—Claim as mortgagee made with reference to a wrong plot—Liability to ejectment,*

Where owing to a clerical mistake, the tenant in a suit for ejectment, pleads that he held one of the plots from the zamindar and the other as a mortgagee but gave the wrong numbers with reference to the plots, his ejectment from the field which he really held as a mortgagee cannot be upheld. (*Bomford. S.M. and Mehta, J.M.*) Gur Dial *v.* Moti. **1939 R.D. 131=1939 A.W.R. (B.R.) 194.**

——**S. 44**—*Suit under—Defendants retaining land without consent of proprietor for over 12 years—Liability to ejectment—Limitation.*

Persons who retain possession of land without the consent of the proprietor for 12 years, cannot be ejected by a suit under S. 44. When the defendants are shown in 1340 F., as non-occupancy tenants *bila lagan* with a period of 13 years, having been recorded as *khudkasht* holders of one year at settlement in 1326 F., and when soon after settlement, a partition takes place as a result of which the land of the said *khudkasht* holders fall into another *mahal* or *patti*, they become non-occupancy tenants of it without fixation of rent pending arrangements with the landholder. A suit to eject such persons under S. 44 more than 12 years after such partition is barred by limitation. (*Drake Brockman, S.M. and Knox, J.M.*) Fatima *v.* Sirajuddin. **1936 R.D. 85.**

——**S. 44**—*Suit under—Damages—Measure of—Discretion of Court—Limits.*

In a suit for trespass under S. 44 of the Agra Tenancy Act damages do not necessarily depend on the number of years during which the trespass has taken place. Damages are in the discretion of the Court. But they should not exceed four years annual rental calculated in the manner laid down in S. 44. (*Drake Brockman, S.M and Knox, J.M.*) Kartari *v.* Umrao Singh. **1936 R.D. 525.**

——**S. 44**—Suit under—If barred by admissions in suit under S. 106 by the landholder. *See* Evidence Act, S. 31 and Agra Tenancy Act, S 31. **1939 R.D. 299.**

——**S. 44**—*Who can sue—Suit by some only of the co-parcenary body—Maintainability.*

An ejectment suit under S. 44 of the Tenancy Act can only be brought by the landholder and the landholder has been held to mean the whole co-parcenary body. So a suit by some only of the members is not maintainable. (*Darling, S.M. and Bomford, J.M.*) Mewa Ram *v.* Sukhey Singh. **1938 A W.R. (B.R.) 137=1938 R.D. 267.**

——**S. 44**—*Suit under, by a zamindar, one of several co-sharers—Maintainability— Refusal of others to join—Remedy.*

A suit under S. 44 of the Tenancy Act can only be brought by the landholder and the landholder is the entire co-parcenary body. So one or more of the co-sharers only cannot bring a suit under S. 44. If a plaintiff cannot induce his co-sharers to join in the suit, then his remedy lies by way of partition under the Land Revenue Act. (*Darling, S.M. and Mehta, J.M.*) PARBHOO *v* CHARTAR SEN. **1938 A.W.R. (B.R.) 321=1938 R.D. 789=1938 A.L.J. (Supp.) 110.**

———**S. 44**—*Suit under—Maintainability—Plaintiff collecting rent and obtaining possession under S. 79—Ejectment, if can be resisted.*

In a suit under S. 44 of the Agra Tenancy Act by a person who has been collecting rent of the plots in question for over 25 years and who had also obtained possession under S. 79 of the Act, ejectment cannot be resisted by the defendants on the ground that the plaintiff was only the mortgagee of half the *khewat* and that until the half shares have been definitely demarcated by a regular partition through Revenue Courts the whole *khewat* must be presumed to be joint and that as such the suit is not maintainable under S. 44. (*Marsh, S. M.*) BARE LALL *v.* UMRAO SINGH. **1939 A.W.R. (B.R.) 93=1939 R.D. 397.**

———**S. 44**—*Suit under—Plea in defence—Failure to prove title set up—Plea of limitation, if available thereafter.*

In a suit under S. 44 of the Agra Tenancy Act, it is always open to a defendant to plead a title and on his failure to prove that, to plead limitation. (*Harper, J. M.*) BIJAI BAHADUR *v.* CHOORAMAN. **1940 R. D. 192=1940 A. W. R. (B.R.) 69 (2).**

———**S. 44**—*Suit under—Pleadings—Contents.*

When a landlord brings a suit under S. 44 of the Agra Tenancy Act he must be certain of the position that he has to take. His pleading must contain a clear statement that the area has been settled with no one and that the person proceeded against has come in as a trespasser. He cannot plead that some one else is in possession and a third person has trespassed on the plot. In that case the trespass would be against the person who is in possession and as such the suit would have to be dismissed. (*Darling, S.M. and Mehta, J.M.*) AMARJIT SINGH *v.* THAGRAM. **1938 R.D. 836=1938 A.W.R. (B.R.) 432.**

———**S. 44**—*Suit under—What are proper issues.*

In a suit under S. 44 of the Tenancy Act, the proper issues to be framed are firstly as to the existence of the contract of tenancy, secondly, if the former issue is decided against the defendant, whether they are liable to ejectment as trespassers and lastly, if the prior issue is decided in favour of the plaintiff, to what damages is he entitled? (*Darling, S.M. and Bomford, J M.*) HARDAN SINGH *v* SHIB KARAN. **1938 R.D. 347=1938 A.W.R (B.R.) 224.**

———**S. 44**—*Suit by recorded* sir *holders for ejectment of defendants as trespassers—Joint mahal—Existence of other co-sharers—Existence of* sir *rights—Materiality.*

The existence or otherwise of *sir* rights is a very material question in a case where the plaintiffs sue as recorded *sir* holders for the ejectment of the defendants under S. 44 of the Tenancy Act as trespassers. For it the land is *khalsa* the suit would be bad, if it is only by some of the co-sharers. (*Darling, S.M. and Bomford, J.M.*) RAM KARAN SINGH *v.* RAM BARAN DUBE. **1938 R.D. 376=1938 A.W.R. (B.R.) 217=1938 A.L.J. (Supp.) 56.**

———**S. 44**—*Suit under—Defences open—Onus.*

In contesting a suit under S. 44, Tenancy Act, the written statement may take one of two shapes —either the defendant will urge that he is in possession as a trespasser and it is then for the plaintiff to show that the suit is within time; or the defendant will urge that he has been admitted to the tenancy, in which case the onus is on him to show that he has been so admitted. When a tenancy in chief determines and a sub-tenant claims that he has been accepted by the zamindar as tenant, then the novation of the contract has to be specifically proved by the defendant urging the novation of the contract. (*Marsh, S.M. and Mehta, J M.*) RAJENDRA PRASAD SINGH *v.* SHANTA UPADHYA. **1940 R.D. 16=1940 A.W.R. (B.R.) 12=1940 A.L.J. (Supp.) 5.**

———**S. 44**—*Suit under—Plea of admission to tenancy—Onus.*

Where a defendant in a suit for ejectment under S.44 of the Agra Tenancy Act sets up a plea of an admission to tenancy by the plaintiff, the onus is on him to prove the contract of tenancy. Where he has discharged it and the plaintiff did not care to go into the box and the only other evidence that of the patwari was negative in character, the Board will not interfere with the finding of the Commissioner as to admission to tenancy. (*Darling, S.M. and Mehta, J.M.*) KHEM CHAND *v.* BUDHA. **1938 R.D. 938=1939 A.W.R. (B.R.) 57.**

———**S. 44**—*Suit under—Proof of possession for over 12 years without payment of rent—Starting point for adverse possession—Onus.*

When once the trespassers, in a suit under S. 44 of the Tenancy Act have shown that they are in possession without payment of rent for over 12 years, the onus lies very heavily on the landholder as regards fixing of the terminus from which according to him adverse possession began and that it has not been long enough to constitute 12 years. (*Mehta, S M.*) ADITYA NARAIN SINGH *v.* JANGI. **1939 R.D 3=1939 A.W.R. (B.R.) 103.**

———**S. 44**—*Suit under, against ejected tenant—Defence of re-admission—Burden of proof.*

If in a suit to eject the defendant under S. 44, the plaintiff proves that he had ejected the defendant about 10 years ago, the defendant claims that he was re-admitted and has been cultivating for about 4 years, the burden of proving re-admission to the holding lies on the defendant. The law allows a limitation of 12 years in cases coming under S. 44, and it is not reasonable to draw an inference adverse to the landlord merely because he takes no action for three or four or more years. (*Drake Brockman S.M. and Knox, J.M.*) LALU CHAUDHRI *v.* SAKALRAJ CHAUDHRI **1936 A.W R. 60=1936 R.D. 22.**

———**S 44**—*Suit under—Burden of proof—Defendant admitting possession—Effect.*

In a suit under S. 44 of the Agra Tenancy Act, once the defendant admits that he is in possession, the burden of proving that he was admitted to tenancy lies on him. The only case, in which the onus might lie on the plaintiff is when the defendant denies that he is in possession of the land in suit at all. (*Drake Brockman, S.M. and Knox, J.M.*) JAGDISH MANI *v.* KANDHAI BHAR. **1936 R.D. 330.**

———**S. 44**—*Procedure—Suit by holder of* sir *plot allotted on partition—Defendant proved to be mortgagee of plot—Procedure—Remedy of defendant—Right of plaintiff to possession.*

Where in a suit for ejectment under S. 44, by a person who gets *sir* land on partition, the defendant pleads and proves that he is a mortgagee of the plot that has been allotted to the plaintiff, the claim of the plaintiff for possession of his plot should not be dismissed. The mortgagee has his remedy against the other party of the original mortgagor and must pursue his remedy in that direction. (*Bomford, J. M.*) Sachitanand Pandey *v.* Shiva Saran Rai. **1938 R. D. 125=1938 A.W.R. (B.R.) 70.**

———**S. 44**—*Suit under—Prior ejectment in suit under S. 58—Absence of actual demarcation—Suit, if to be dismissed.*

In a suit under S. 44 of the Agra Tenancy Act after ejectment of the defendant in a prior suit under S. 58 of the Act, as long as the land is identifiable there is no necessity of actual demarcation; and the suit cannot be dismissed on the ground that there is no specification as to the position of the area from which ejectment was ordered in the prior suit. (*Knox, S.M. and Grant, J.M.*) Benoy Ratna Banerji *v.* Mannu. **1936 R.D. 32.**

———**S. 44**—*Suit under—Plea of ownership as donee under gift deed—Claim referred to Civil Court and found against—Subsequent plea of rent-paying tenant—If open.*

In a suit for ejectment under S. 44, Agra Tenancy Act, the defendant claimed to be an out-and-out proprietor, as a donee under a deed of gift. The claim was referred to the Civil Court and decided against the defendant. Later he claimed to be a tenant paying rent.

Held, the defendant should not be allowed to turn round and put an entirely inconsistent defence and claim that he was a rent-paying tenant. (*Drake Brockman, S.M. and Knox, J.M.*) Mahadeo Prasad *v.* Bandhan. **1936 R.D. 365 (2).**

———**S 44**—*Tenant admitted by some only of the co-parcenary body—If only a trespasser.*

Where a person has not been admitted to tenancy by the whole co-parcenary body, the lease is invalid and such a person is only a trespasser and not a tenant. (*Darling, S.M. and Bomford, J. M.*) Mangli *v.* Bhawani. **1938 A.W.R. (B.R.) 139=1938 R.D. 269.**

———**S. 44**—*Tenant persisting in holding after formal ejectment—Zamindar's right to eject when estate is under attachment by Collector—U. P. Land Revenue Act, S.* 151.

If a tenant persists in holding on to the tenancy even after a formal ejectment in a proceeding under S. 79 of the Tenancy Act, the Zamindar is entitled to bring another suit for his ejectment as trespasser under S. 44 of the Act, although the Collector has attached his estate for default in paying the land revenue. (*Darling, S.M.*) Pahlad Singh *v.* Seth Bansidhar. **1937 R.D. 581.**

———**S. 44**—*Tenant ousted by some of landholders—Right to sue them as trespassers.*

Where some of a body of landholders have ousted the tenant, in pursuance of some supposed right, the tenant has the right to sue them for ejectment under S. 44 as trespassers. (*Darling, S.M.*) Dular Singh *v.* Gajraj Singh. **1937 R. D. 449.**

———**S. 44**—*Suit to eject defendant from part of field belonging to more than one* mahal—*Previous demarcation of plot—If essential—Plaintiff share shown to be specific part and area known—Ejectment—If can be ordered.*

Where a field cultivated by the defendant belongs to more than one *mahal*, and there is nothing to show which part of the field is in which *mahal*, ejectment cannot be ordered without previous demarcation of the part from which ejectment is sought. But when there is evidence to show that the plaintiff's share of the field is a specific part of it, and the area is known, there is no difficulty about ejecting the defendant from the plaintiff's share of the field. (*Bomford, J. M.*) Munir Khan *v.* Gur Dayal. **1937 R.D. 11.**

———**S. 44**—*Suit for ejectment—Defendant in possession for* 34 *years,* bila lagan—*Suit, if barred.*

Where in a suit by an occupancy tenant for the ejectment of the defendants as trespassers under S. 44 of the Tenancy Act, the Court finds that the defendant had been in possession for 34 years, *bila lagan* and that it is quite impossible to believe that the plaintiff was not aware of this possession for the greater part of this period, though he was in the army for 19 years, the suit is liable to be dismissed as barred by limitation of 12 years. (*Darling, S. M.*) Pem Singh *v.* Inder Singh. **1937 R.D. 270.**

———**S. 44**—*Suit and decree for ejectment under—Subsequent suit for declaration of tenant right by nephew of ejected tenant—Bar of—* Res judicata.

A zemindar sued one M. T. for his ejectment under S. 44, Agra Tenancy Act, and got an order for his ejectment from the Board of Revenue in second appeal. Subsequently S. T., nephew of M., sued for the zamindar and M. T. for a declaration that he was the tenant of the land in suit, alleging that though he and his uncle were living separate, they were cordial and cultivated jointly.

Held, though S. T. was not a party to the prior suit for ejectment, yet he could not be held to be ignorant of the decree for ejectment of his uncle from the land in suit. and must therefore be held bound by that decree, and the suit must therefore be dismissed as not maintainable in view of the prior decree. (*Drake Brockman, S. M. and Knox, J. M.*) Harakh Chand *v.* Sumer Tewari. **1936 R.D. 119.**

———**S. 44**—Suit to eject maternal grandsons of last male tenant—Plea of co-sharing in cultivation—Burden of proof. *See* Agra Tenancy Act, S. 24. **1936 R.D. 190.**

———**S. 44**—*Transferee from co-sharer in exclusive possession—If can be ejected.*

Where a co-sharer in undivided property is in enjoyment of a definite share by arrangement with the other co-sharers, it is not permissible for him to alienate to a third person as his exclusive property the portion which he has been thus occupying by agreement with his co-sharers. Any transferee from him acquires no right by the transfer and is not entitled to any relief in a suit against him under S. 44 of the Tenancy Act. (*Bennet and Verma, JJ.*) Ram Kripal *v.* Abdul Wahid. **1940 A.W.R (H.C.) 199=1940 R.D. 132.**

———**S. 44**—*"Trespasser"—Mortgagee from tenant holding after termination of tenancy—Status of—Mortgage over* 60 *years old—Effect of.*

A mortgagee from a tenant whose tenancy has expired by surrender or by death is a trespasser and can be ejected by the zamindar as such. The fact that the mortgage is over 60 years old makes no difference. (*Darling, S. M. and Bomford, J. M.*) BALGOVIND *v.* SATNARAIN LAL. **1938 R.D. 174=1938 A.L.J. (Supp.) 2=1938 A.W.R. (B. R.) 93.**

———**S. 44 (1)**—*Object and effect of—Suit by some co-sharers to eject trespasser—Plea by defendant that he holds under lease granted by other co-sharers with consent of plaintiffs—Plaintiffs not accepting lease but challenging its validity—Jurisdiction of Civil Court—If barred.*

A suit by some of the Zamindars of a village to eject a trespasser is perfectly maintainable in a Civil Court; the fact that the defendant pleads that he holds under a lease by the plaintiffs' co-sharers, which has been concurred in by the plaintiffs does not deprive the Civil Court of its jurisdiction. Jurisdiction is determined primarily by the allegations in the plaint; and when the plaintiffs allege that the defendant is a trespasser and that the lease under which he holds invalid, the suit is cognizable by a Civil Court, although, S. 44 of the Agra Tenancy Act would also give the plaintiffs a remedy in the Revenue Court to a limited extent. S. 44 was enacted in order to allow facility to an owner of an agricultural land in seeking a speedy remedy through the Revenue Court, if the defendant has taken possession without the consent of the landlord and if the landlord is prepared to accept damages up to the maximum prescribed in the section. But the section does not and cannot deprive the landlord of his right to eject the defendant through the Civil Court on the ground that he is a trespasser. (*Niamatullah, J.*) JAGADAMBA SINGH *v.* RAM SARUP. **I.L.R. (1937) All. 570=170 I.C. 477=10 R.A. 111=1937 A.L.R. 668=1937 A.L.J. 329=1937 R.D. 176=1937 A.W.R. 320=A.I.R. 1937 All. 415.**

——— **Ss. 44 and 36**—Suit for ejectment of sub-tenants—Merger of occupancy rights in proprietary rights—No new contract of tenancy brought into existence. *See* AGRA TENANCY ACT, SS. 36 AND 44. **1937 R.D. 522 (1).**

———**Ss. 44 and 45**—*Acceptance of rent on behalf of deceased recorded tenant—Person paying rent, if can be ejected under S. 44.*

Where the defendant has been making payments on behalf of long deceased recorded tenants and they had been accepted by the plaintiff's agents and the usual receipts had been given, such a defendant cannot be ejected under S. 44 of the Tenancy Act as a trespasser. But fresh rent can be assessed under S. 45. (*Marsh, S.M. and Mehta, J. M.*) CHITESAR RAI *v.* RAM RAN BIJAI PRASAD. **1939 A.W.R. (B.R.) 139=1939 R.D. 472=1939 A.L.J. (Supp.) 84.**

———**Ss. 44 and 45**—*Applicability—Tenants holding on in possession in spite of ejectment for over 12 years—Effect—Suit by landlord under S. 44 if lies—Proper remedy.*

The defendants who were formally ejected in 1923 managed to hold on to the plots and to retain possession for more than 12 years; there was no evidence of any regular re-admission to the tenancy. The names of the defendants continued in the *khatauni* even after the ejectment, and there was a settlement the very next year. In a suit by the zamindar for ejectment under S. 44 of the Agra Tenancy Act,

Held, that it was impossible to believe that the plaintiff-zamindar had no knowledge of the entry in the settlement, that the defendants had acquired statutory rights and that they were therefore protected from ejectment.

Held, further, that it was open to the zamindar to bring a suit under S. 45 of the Act for the assessment of rent on the holding. (*Darling, S.M. and Bomford, J.M.*) PULANDER SINGH *v.* DAULI SINGH. **1937 R.D. 442=1937 A.W.R. 1027.**

———**Ss. 44 and 45**—*Suit for ejectment—No prayer for fixation of rent—Subsequent prayer for fixing rent—Absence of sufficient material on record—Relief—If can be granted.*

Though under S. 192 of the Agra Tenancy Act, a Court can, in a suit under S. 44 of the Act, grant any relief to which the plaintiff may be found entitled, though he may not have asked for it in the plaint, yet when there is no sufficient material to fix the rent under S. 45, a plaintiff who asks for fixation of rent in a suit for ejectment under S. 44, at a late stage, cannot be granted that relief. (*Drake Brockman, S.M. and Knox, J.M.*) FATIMA *v.* SIRAJUDDIN. **1936 R.D. 85.**

———**Ss. 44 and 45**—*Trespasser—Ejectment—Delay in suing for—Effect—Inference of admission of defendant to tenancy—When justified.*

The zamindar generally has 12 years in which to make up his mind whether or not he will eject a trespasser, *i.e.*, a man who has taken possession of his land without his consent. Mere delay in suing without more is no bar to ejectment of the defendant. If the zamindar, however, delays for a considerable time and if in regard to acceptance of rent and other matters he acts in such a way that it may be inferred that he has in fact admitted the defendant to tenancy, it would be reasonable to draw the conclusion that the defendant has been admitted to tenancy. Where there has been no payment of rent at all, there can be no such inference. (*Drake Brockman, S.M. and Knox, J.M.*) JAGDISH MANI *v.* KANDHAI BHAR. **1936 R.D. 330.**

———**Ss. 44, 45 and 192**—*S. 192, when could be invoked—Rent, if can be fixed in a suit under S. 44—Separate suit, when necessary.*

The whole object of S. 192 of the Agra Tenancy Act is to avoid multiplicity of suits, and it could be invoked only where a defendant claims to hold the land as rent-free grantee. Even though a suit is under S. 44, if there is a prayer for fixation or rent it could be fixed in the same suit. But if a defendent pleads that he is holding the land adversely and that adverse possession has ripened by prescription, in that case a separate suit under S. 45 would have to be filed. (*Mehta, J.M.*) ADITYA NARAYAN SINGH *v.* RAM CHARITTRA TEWARI. **1938 R.D. 918=1938 A.W.R. (B.R.) 406.**

———**Ss. 44 and 82**—*Applicability—Land validly let to tenant and transferred by him to another—Remedy of landlord—Suit by landlord to eject transferee as trespasser—Maintainability*

S. 44 of the Agra Tenancy Act only applies to a case where a person has taken possession of the landholder's land without his consent and in contravention of the provisions of the Act. It is only then that the landholder can treat the occupier as a mere trespasser and sue him in a Revenue Court for ejectment. Where, however, the land had been validly let to a tenant who was in lawful possession thereof, and the latter has transferred it to another person, S. 44 cannot apply. To such a case S. 82 is the special section applicable. The proper course for the landlord in such a case is to bring his suit under S. 82, because the cause of action for his suit is the illegal act of his tenant and not the occupation of the land by the transferee. (*Sulaiman, C.J. and Harries, J.*) Ram Chandra Singh *v.* Misrilal. **I L R (1937) All. 958=172 I C. 629=10 R A 418=1938 A.L.R. 18=1937 A.W.R. 888=1937 R D. 532=1937 A.L.J. 1204=A I.R. 1937 All. 790.**

———**Ss. 44 and 86**—*Trees disappearing from portion of grove land—Suit to eject grove-holder from that portion—If lies.*

Even though the trees may have disappeared from a portion of a grove land, the whole plot should still be treated as grove land, and a suit for ejectment of the grove-holder or his transferee from that portion is bad whether it be laid under S. 44 or S. 86 of the Agra Tenancy Act. (*Darling, S.M.*) Raghubir Singh *v.* Ghulam Qadir Khan. **1937 R D. 166 (1).**

———**Ss. 44 and 86**—*Applicability—No ex-proprietary rights claimed on mortgage of* sir—*Suit to eject non-occupancy tenant in* sir—*Section applicable.*

Where no ex-proprietary rights are claimed on the mortgage of *sir* land, the non-occupancy tenant in *sir* continues to be non-occupancy tenant and a suit to eject him should be brought under S. 86 and not S. 44 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) Baldeo Prasad Pande *v.* Lalta. **1938 R.D. 549=1938 A.W.R. (B.R.) 244.**

———**Ss. 44, 86 and 92**—*Prior suit under Ss.* 86 *and* 92 *against defendant as sub-tenant—Dismissal for default—Subsequent suit against same person under S.* 44 *as trespasser—If maintainable.*

Where an earlier suit under Ss. 86 and 92 of the Agra Tenancy Act in which the defendant was sued as a sub-tenant, was dismissed for default, a subsequent suit under S. 44 of the Act against the same defendant treating him as a trespasser after the tenant in chief had abandoned his interest in the holding, is not barred, for there has been a change in the position giving rise to a fresh cause of action. (*Darling, S.M. and Bomford, J.M.*) Badu *v.* Hulasi. **1938 R.D. 57=1938 A W.R. (B.R.) 29.**

———**Ss. 44, 86 and 92**—*Suit under—Defendants being non-occupancy tenants—Treatment of suit as one under Ss.* 86 *and* 92.

A suit lodged under S. 44 can be decreed, as if it had been brought under Ss 86 and 92, if the defendants be found to be non-occupancy tenants. 18 R.D. 618, Foll. (*Darling, S.M*) Umrao Singh *v.* Dina Singh. **1937 R.D. 522 (1).**

———**Ss. 44, 86, 205 (1) (d) and (e) and 218**—*Co-sharers—Form or* theka *share by one*—Thekadar *holding over and admitting relation as tenant—Suit to eject such tenant by co-sharer singly—Maintainability.*

Where one of several proprietors in a joint mahal gives a form or *theka* of his share gives up possession in favour of the *thekadar*, and the latter holds over and admits a relation of his as tenant, the co-sharer who grants the *theka* cannot go behind these arrangements and sue to eject the tenant without the concurrence of the other co-sharers as plaintiffs, in the absence of evidence to show that the admission of the tenant by the *thekadar* was fraudulent, which might support a suit under S. 44 of the Agra Tenancy Act. (*Drake Brockman, S.M. and Knox, J.M.*) Mahadeo Singh *v.* Kulwanta. **1936 R.D. 187.**

———**Ss. 44 and 95**—*Ejectment—Plea of admission—Onus—Re-admission—Oral evidence—Admissibility—Ejected person re-entering into occupation—Position of.*

In a suit for ejectment if the defendant pleads that he is not a trespasser as he has been admitted to tenancy, the onus is on him to prove the admission. As regards re-admission, it is the intention of the Act that there should be written consent in such cases and oral evidence is inadmissible. A person who re-enters into occupation after ejectment, without the written consent of the landlord remains liable to ejectment for 12 years as a trespasser. He takes possession at his own risk. (*Darling, S.M. and Bomford, J.M.*) Badri Narain Lal *v.* Surja Ram. **1938 A.W R. (B.R.) 206=1938 R.D. 652.**

———**Ss. 44 and 99**—*Applicability and scope—Co-sharer admitting tenant—Ouster of tenant by stranger claiming admission under another co-sharer—Ejectment of stranger by first co-sharer—Latter admitting another to tenancy over the head of tenant without terminating tenancy—Suit by tenant against co-sharer and new tenant under S. 99—Maintainability—Limitation.*

The plaintiff-appellant was admitted to tenancy by a co-sharer *H*, he having authority to do so under the village custom. He was admitted in 1339 F.; but was ousted in 1340 by one *R*, who claimed to have been admitted by another co-sharer. *H* then ejected *R* as a trespasser at the end of 1341 but admitted *B* into possession over the head of the plaintiff, *H* himself having become landholder in 1340. In 1342 plaintiff-appellant brought a suit against *H* and *B* under S. 99 of the Agra Tenancy Act, within six months of the date on which *B* entered into possession.

Held, that though plaintiff could have brought a suit against *R* under S. 44 of the Act to eject him, the fact that he did not do so, and that *H* ejected *R* under S. 44, did not put an end to the contract of tenancy between *H* and the plaintiff; that plaintiff could not have sued *R* under S. 99; but having been admitted to tenancy by *H* plaintiff could eject *R* as a trespasser within 12 years from 1339 F.; and that the act of *H*, in letting the land to *B* over the head of the plaintiff without legally extinguishing the plaintiff's tenancy, amounted to an ejectment of the plaintiff, who thereupon became entitled to sue *H* and *B* under S. 99 of the Act within six months from the date on which *B* was put into possession. (*Drake Brockman, S.M. and Knox, J.M.*) Ganga Ram *v.* Hira Lal. **1936 R.D. 477.**

———**Ss. 44 and 99**—*Applicability—Suit under S. 44—Plea of surrender and new admission by zamindar—Zamindar's support, if converts suit into one under S. 99—Effect on limitation—Procedure to be followed.*

Where a suit is filed under S. 44 of the Tenancy Act and the defendant pleads that there was a surrender by plaintiff and that he got the lands from the zamindar, then if such plea is supported by the zamindars, the suit becomes one under S. 99 and ought to be changed accordingly and fresh issue framed as to limitation. In such a case where the plaintiff became aware of the hostile attitude of the zamindars only after filing of his suit under S. 44, the suit as filed was held to be within time. (*Darling, S. M. and Bomford, J.M.*) Badri Prasad *v.* Bindraban. **1938 A.W R. (B.R.) 159=1938 R.D. 339.**

———**Ss. 44 and 99**—*Applicability—Forcible possession by co-sharer—Ejectment—Section applicable—Facts to be proved by tenant.*

Where one of several co-sharers takes forcible possession over a holding of a tenant, then the section under which his ejectment has to be sought is not under S. 99 but S. 44 of the Agra Tenancy Act. It is for the plaintiff tenant to prove in such a case that the suit lay and that he has come within 12 years of dispossession. (*Marsh, S. M. and Mehta, J.M.*) Rajjab Hussain *v.* Alopi. **1939 R. D. 202=1939 A.W.R. (B.R.) 187.**

———**Ss. 44 and 99**—*Scope—Co-sharers—Ejectment by some only illegally and dispossession of tenant—Suit by latter under S. 99—Subsequent suit by same co-sharers for ejectment of heir of tenant—Plea by latter that plaintiffs are not landlords entitled to sue—Estoppel—If arises.*

A tenant who is illegally dispossessed by some only of the co-sharers of the joint patti has a right to sue such co-sharers under S. 44 of the Agra Tenancy Act. But the fact that he sues them under S. 99 of the Act instead of under S. 44, cannot estop him or his heir in a subsequent suit by those co-sharers for his ejectment from pleading that the plaintiffs co-sharers are not his landlords and that they are not competent to eject him as not being the whole body of co-sharers. (*Darling, S. M. and Bomford, J. M.*) Bharosa *v.* Bijai Bahadur Singh. **1938 R.D. 163=1938 A. W.R. (B.R.) 99.**

———**Ss. 44 and 99**—*Suit by tenant to eject trespasser—Limitation—Starting point.*

Where a tenant sues to eject a person as a trespasser, time for such a suit begins to run only from the time the tenant is ousted from possession either by the zamindar or the trespasser claiming under the zamindar.. The mere giving of a receipt for rent to the trespasser by the zamindar after the filing of the suit could not amount to an overt act to oust the tenant from possession. (*Bomford, J. M.*) Bhagirath Tewari *v.* Atiraji. **1938 A. L.J. (Supp.) 77=1938 R.D. 778.**

———**Ss. 44 and 99**—*Suit to eject trespasser—No plea as to non-joinder of recorded tenants-in-chief—Later objection—Procedure to be followed.*

Where in a suit to eject as a trespasser a person recorded as *quabiz*, no plea was specifically taken as to the non-joinder of all the recorded tenants-in-chief but later on the objection is raised, it is unnecessary to make them parties. If the recorded tenants-in-chief have any rights there is nothing to prevent them from asserting their rights under S. 99, if after ejecting the trespasser, the plaintiff either takes the fields into his own cultivation or puts in another tenant. (*Darling, S.M. and Bomford. J M.*) Sheo Narain *v.* Sheo Ratan. **1938 A.W.R. (B.R.) 156=1938 A.L.J. (Supp.) 18=1938 R D. 248.**

———**Ss. 44 and 107**—*Occupancy tenancy—Mortgage—Tenant not recorded as 'Mafrur' but mortgagee recorded as mortgagee—Surrender by tenant—Mortgagee, if can be ejected.*

Where an occupancy tenant who leaves the village is not shown as 'Mafrur' while a mortgagee of the tenancy is shown as a mortgagee, on the formal surrender by such a tenant in favour of the zamindar, the mortgagee is liable to be ejected. (*Darling, S. M. and Marsh, J.M.*) Ram Sankar Singh *v.* Raghubir Khagi. **1938 R.D. 619=1938 A.W.R. (B.R.) 331=1938 A.L.J. (Supp) 112.**

———**Ss. 44 and 107 (2)**—*Applicability—Occupancy holding—Tenant permitting his sons to divide it amongst themselves—Father receiving rent and remaining liable to landlord—Notice to quit on one of the sons—Refusal—Suit under S. 44, if maintainable.*

Where an occupancy tenant permitted his sons to divide the holding between themselves and received the rent from them and continued to be responsible to the landlord, and where after several years he served a notice to quit on one of the sons and on his refusal to leave filed a suit under S. 44 of the Agra Tenancy Act.

Held, that the case was covered by S. 44, for the son was obviously retaining possession without the consent of the immediate landholder and against the provisions of the statute.

Held further, that S.107 (2) might only apply if the whole holding had been left in the charge of the son concerned, but as in fact only a portion was left in his charge, the section had no application. (*Darling, S.M. and Bomford, J.M.*) Govind Das *v.* Ajodhia Prasad. **1938 R.D. 58=1938 A. W.R. 20 (B.R.).**

———**Ss. 44 and 132**—*Distinction—Proof that no third party interests affected—Necessity for, in suits under S. 44.*

It is necessary to distinguish cases under S. 44 from those under S. 132. In cases under S. 44 it is necessary for Courts to call on plaintiff to prove that the interests of no third party are affected. (*Marsh, S.M. and Mehta, J.M.*) Mukat Singh *v.* Jagannath Prasad. **1939 A. W. R. (B.R.) 50 (1)=1940 R.D. 48 (1).**

———**Ss. 44 and 205**—Theka—*Collaterals of* thekadar *in possession—Expiry of* theka—*Liability of the collaterals to ejectment.*

Where collaterals of a *thekadar* have been put in possession of lands, on the expiry of the *theka* they can all be ejected as trespassers. (*Darling, S. M. and Marsh, J.M.*) Masuda Bibi *v.* Azimullah. **1938 R.D. 621=1938 A.W.R. (B.R.) 268=1938 A.L.J. (Supp.) 102.**

———**Ss. 44 and 205**—*Applicability—Person admitted to possession under lease conferring rights of landlord—Holding over after expiry of term—Status of—If statutory tenant or* thekadar *or trespasser—Ejectment—Remedy of lessor.*

A person coming into possession of lands leased to him under an instrument which gives him all the usual rights of a landholder, and holding over after the expiry of the term of the instrument under which he comes into possession is not a *thekadar* in the legal sense, in view of S. 200 of the Agra Tenancy Act, but is either a tenant or a trespasser in the loose sense of that term. He cannot, however, claim the rights of a statutory tenant. He has to be classed as belonging to the category of "other non-occupancy tenants," his actual status as tenant or trespasser being left to be determined on the merits of each case. The landlord can only bring a suit against him for ejectment under S. 44 of the Agra Tenancy Act and not under S. 205 of the Act. (*Drake Brockman, S.M. and Knox, J.M.*) Radhey Mohan Lal *v.* Mohammad Usman Khan. **1936 R.D. 133.**

———**S. 45**—*Applicability—Person occupying land without permission of landlord—Landlord accepting as tenant—Suit for arrears of rent without fixation of rent—Maintainability—Proper procedure.*

A landlord wishing to treat as tenant a person who has occupied his land without his permission must ordinarily sue for fixation of rent under S. 45, Agra Tenancy Act, if they cannot agree upon the rent. He cannot miss out this step and sue straightaway for arrears of rent. But if both the parties accept the rent claimed in the plaint as correct, it is not necessary to insist upon the landlord plaintiff taking proceedings under S. 45 before he can obtain a decree for arrears.

Per *Drake Brockman, S. M.*—This rule holds good only if the plaintiff accepts the person admitted to tenancy of the lands to which he alone has the right to admit, as tenant. If he does not, his course would be to eject the person admitted under S. 44 of the Act. (*Drake Brockman, S. M. and Knox. J. M.*) Pitam Ram *v.* Rahim. **1937 R.D. 20.**

———**S. 45** –Fixation of rent—Procedure—If can be done in a suit under S. 132. *See* Agra Tenancy Act, Ss. 132 and 45. **1938 A.W.R. (H.C.) 634 (2).**

———**S. 45**—Separate suit under—When necessary. *See* Agra Tenancy Act, Ss. 44, 45 and 192. **1938 R.D. 914.**

———**S. 45**—Suit under—Court-fee payable. *See* Court-Fees Act, S. 7 (*xi*). **1936 R.D. 390.**

———**Ss. 45 and 123**—*Fixing rent in suit under S. 123—Power of Court.*

It is not open to a Court to fix rent under S. 45 when the suit is brought under S. 123 of the Agra Tenancy Act. (*Bomford, S. M. and Mehta, Offg. S.M.*) Mangal Chand *v* Raham Ali Khan. **1939 R.D. 162=1939 A.W.R. (B R.) 161.**

———**S. 47**—*Agreement to pay enhanced rent under compromise in ejectment suit—Absence of registration—Acted upon—Binding nature—Onus.*

Where an ejectment suit is dismissed in terms of a compromise under which the tenant agreed to pay enhanced rent in return for the granting of occupancy rights, such a compromise though unregistered, will become binding on the parties, if it has been acted upon. Hence it is the duty of the zamindar who bases his cause of action on such a compromise to prove that the agreement was in fact acted upon. (*Darling, S. M. and Bomford, J.M.*) Rangai Chamar *v* Jogi Singh. **1938 A. W.R. (B.R.) 153=1938 R.D. 303.**

———**S. 47**—*Applicability—Tenant of* sir *land—Rent—Enhancement—Oral agreement—If sufficient.*

"Tenant" in S. 47 of the Agra Tenancy Act includes also a tenant of *sir* land; and the rent of a tenant of *sir* land cannot be enhanced otherwise than by registered agreement or order of Court as laid down by S. 47. It cannot be enhanced by oral agreement. (*Drake Brockman, S. M. and Knox, J. M.*) Manna Singh *v.* Sri Ram. **1936 R.D. 362.**

———**S. 47**—Scope—Rent suit—Compromise varying cash rent into *batai rent*—Rate of commutation not stated and no change made in the papers—No bargain in compromise and tenant getting no benefit—Decree by tahsildar on basis of—Legality of—If *res judicata*. *See* C. P. Code, S. 11. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

———**S. 47**—*Scope—Variation of rent agreed on—Conditions of.*

The rent originally agreed on cannot be varied without an order of Court or a registered agreement. (*Drake Brockman, S.M. and Knox, J.M.*) Mazhar Khan *v.* Sheikh Inayat. **1936 R.D. 121.**

———**S. 47**—*Scope and effect—Rent—Fixation of—Procedure — Variation of rent—Proper procedure—Proceedings under Tenancy Act—Necessity for—Agreement as to rent—If to be registered.*

The rent of a tenant cannot be decided in proceedings under the Land Revenue Act. It can only be decided under the Agra Tenancy Act; and under S. 47 of the latter Act, the rent payable by a tenant is presumed to be a rent or rate of rent previously payable by him until a registered agreement or a decree or order of a Court is proved varying the same. The rent of a tenant can be varied by way of enhancement or abatement, but that has to be made in proceedings under the Agra Tenancy Act. The order of a Collector or any other Court or a Revenue Officer directing that a certain rent, even if it has been agreed to before him whether in proceedings under the Land Revenue Act or out of Court, be recorded as the rent payable, is in no sense an order varying the rent. The law must be interpreted strictly; if the parties agree to a certain rent, there must be a registered agreement or an order of a Court in proceedings under the Tenancy Act varying the same. (*Drake Brockman, S.M.*) Har Pershad *v.* Savant. **1936 R.D. 565.**

———**S. 58**—*Suit under—Compromise admitting contesting defendant to occupancy holding—Effect on subsequent suit for division of holding by member of another branch.*

Where on the death of the holder of an occupancy holding, the zamindar filed a suit under S. 58 of the Old Tenancy Act against all his presumptive heirs, but it was contested only by a member of one branch and was eventually compromised by him by which he was admitted to the occupancy holding and where later on the members of another branch of the original holder sued for partition of the holding it was held that in view of the decision in the prior suit, it was for the plaintiffs in the later suit to prove possession, if they wished to prove their co-tenancy. (*Darling, S.M. and Bomford, J M.*) Ram Sumar Misra *v.* Ram Niranjan Misra. **1938 A.W.R. (B.R.) 209=1938 R.D. 670.**

———**S. 59**—*Roster rates —How fixed.*

Roster rates are fixed not on the basis of the rents of one village which may be unduly high or even imaginary, but on the rents paid by the villages of the circle, *i.e.*, similar villages with similar advantages. (*Bomford, J.M.*) Nanhoo Singh *v.* Manmohan Das. **1937 R.D. 331.**

———**S. 59 (4)**—Applicability —Ex-proprietary holding—Fixation of rent—Absence of settlement operations and absence of sanctioned rates—Procedure for determining rent. *See* U. P. Land Revenue Act, S. 36. **1936 R.D. 82.**

———**S. 67**—*Applicability—U. P. Land Revenue Act, S. 87—"Determine and fix" — Meaning—*

Settlement Officer—Rejection of application for abatement or enhancement—Effect of.

An order of the Settlement Officer rejecting abatement of rent is as equally effective as a definite order of enhancement or abatement under S. 87 of the Land Revenue Act. Where the rent payable is brought to the notice of the Settlement Officer by definite application of the tenant or landholder, the rejection by the Settlement Officer of an application for enhancement or abatement has the effect of "determining and fixing" the rent and such rent is equally not liable to enhancement or abatement for a period of 20 years or longer with rents which had been enhanced or abated. (*Drake Brockman. S.M.*) HAR PRASHAD *v.* SAVANI. **1936 R.D. 565.**

———S. 72—*Covenant overriding provisions of—Validity.*

It is not the intention of the Legislature to allow any covenant in a lease to override the provisions of S. 72 of the Tenancy Act. Hence any covenant against remission of rent in the kabuliyat is void. (*Ganga Nath, J.*) MAHARAJAH OF BENARES *v.* RAM NARAIN. **1938 A.W.R. (H.C.) 293=1938 R.D. 550=1938 A.L.J. 464.**

———S. 73—*Remission in contravention of—Zamindar's remedy.*

Where the remissions of rent are in violation of the provisions of S. 73 of the Agra Tenancy Act, the zamindar is entitled to treat them as *ultra vires* and proceed straightaway to realise the rents by suits. If he fails to do so the loss he thereby incurs is directly attributable to his own inaction in not taking the proper proceedings. A suit against the Secretary of State for damages is not maintainable in respect of such a loss. (*Thom and Iqbal Ahmad, JJ.*) ABDUL QAIYUM *v.* SECRETARY OF STATE. **I.L.R. (1938) All. 114=174 I.C. 505=10 R.A. 588=1938 R.D. 274=1938 A.W.R 126 (H.C.)=1938 A.L.R. 288=A.I.R. 1938 All. 158.**

———S. 73—*Remission slip—Entry in—If can be altered in judicial proceeding.*

The entry of a particular figure in the remission slip, if it remained unobjected to on the executive side by either party concerned, is not susceptible of being altered on any *a priori* grounds in a judicial proceeding before the Assistant Collector, the Collector, the Commissioner or the Board. The entry of the figure in the remission slip represented what should be allowed by way of abatement on account of slump in prices. (*Marsh, S.M. and Mehta, J.M.*) RAMCHARAN *v.* DAMODAR PRASAD. **1939 R.D. 520=1939 A.W.R. (B.R.) 220.**

———Ss. 73 and 74—*Remission of rent under S. 73—Conditions to be observed—Non-compliance with—Validity of remissions—Suit regarding—If barred by S. 74.*

According to S. 73 of the Agra Tenancy Act, the remission or suspension of revenue is to precede the suspension or remission of rent and further the proportion of the rent remitted or suspended must not be in excess of the proportion of the revenue remitted or suspended. Where these two requisites are not complied with the remission is not one under S. 73, though it might purport to be one under S. 73 of the Act. S. 74 of the Act cannot be invoked to bar a suit in respect of such a remission. (*Thom and Iqbal Ahmad, JJ.*) ABDUL QAIYUM *v.* SECRETARY OF STATE. **I.L.R. (1938) All. 114=174 I.C. 505=10 R.A. 588=1938 R.D. 274=1938 A.W.R. 126 (H.C.)=1938 A.L.R. 288=A.I.R. 1938 All. 158.**

———S. 74—Bar of suit under—Remission contravening provisions of S. 73. *See* AGRA TENANCY ACT, Ss. 73 AND 74 **1938 A.W.R. 126 (H.C.).**

———S. 78 (1)—*Claim for compensation made after close of evidence—Entertainability*

A claim for compensation for trees which is not put forward in the reply to the plaint but is advanced at a very late stage when the evidence has been closed will be entertained, as such a claim is not "duly" made within the meaning of S. 78 (1) of the Agra Tenancy Act. (*Darling, S.M.*) GAJRAJ SINGH *v.* PHUL KUNWAR. **1937 R.D. 380 (2).**

———S. 79—*Applicability—Agreement conferring status of fixed rate tenant and agreeing not to eject—Legality—Subsequent application for ejectment for arrears of rent—Maintainability.*

There is nothing illegal in a zamindar entering into a contract with a person conferring upon the latter the status of a fixed rate tenant and in agreeing for valuable consideration that he would not be ejected. Where a zamindar has agreed to such terms, he cannot later on seek or apply to execute a decree for arrears of rent by ejectment of the tenant under S. 79 of the Tenancy Act. (*Bennet and Verma, JJ.*) SITAL DIN DUBE *v.* SRIPAL SINGH. **186 I.C. 611=12 R. A. 427=1939 A.W.R. (H.C.) 716=1939 R D. 564 =1939 A.L.J. 932=A.I R. 1940 All. 44.**

———S. 79—*Application under — Limitation—Decree for arrears of rent—Application for arrest, unsuccessful—Subsequent application for action under S. 79 after time allowed—Limitation, if extended by prior application.*

Where after obtaining a decree for arrears of rent, the decree-holder applies to have the judgment-debtor arrested in execution of his decree, but fails to get him arrested, such an application cannot be considered as one which would keep alive the right to have the decree executed within the period of limitation, if it is followed by an application beyond time for action being taken under S. 79 of the Agra Tenancy Act. The two types of applications are not the same and cannot prop up each other and extend the period of limitation. (*Marsh, S.M and Mehta, J.M.*) DWARKA PRASAD *v.* KHARGA. **1939 A.W.R (B.R.) 91=1939 R D. 399=1939 A.L.J. (Supp.) 69**

———S. 79—*Decree against ex-proprietary tenant for arrears of rent—Ejectment in execution—Extinguishment of all ex-proprietary rights.*

Where in pursuance of a decree for rent against an ex-proprietary tenant, an order in ejectment is passed in execution, all the ex-proprietary rights of the tenant are lost, for no such rights can exist after such formal ejectment, (*Darling, S.M. and Bomford, J.M.*) RAJADEI *v.* THAKUR DAS. **1938 R D. 360=1938 A.W.R. (B.R.) 161 (2).**

———S. 79—*Ejectment—Review proceedings in connection with—Use of, as lever to obtain satisfaction of* takair *claim—Propriety—Revision.*

In proceedings for review of order of ejectment, it is most improper for a Court to bring pressure on the ejected tenants to satisfy the *takair* claims against one of them, before proceeding with the application on its own merits. Where it had been used as a lever for collecting the *takair* due, it is such a grave irregularity, that the Board should exercise its revisional powers to set it right. (*Darling, S.M. and Mehta, J.M.*) KHACHEROO *v.* MOHAMMAD HASHIM. **1938 R.D. 918.**

———**S. 79**—Proceedings for ejectment of tenant—Applicability of S. 7 of the U. P. Encumbered Estates Act. *See* U. P. ENCUMBERED ESTATES ACT, Ss. 6, 7 AND 2 (*g*). **1937 R.D. 510.**

———**S. 79**—Rent decree—Execution by ejectment—Tenant allowing ejectment to go by default but retaining possession—Delivery of formal possession to land-holder—Effect—Status and rights of tenants continuing after ejectment. *See* AGRA TENANCY ACT (1926), S. 44. **1936 R.D. 180.**

———**S. 79**—*Zamindars refusing settlement but retaining possession — Liability to ejectment under.*

Where zamindars of certain village, who refused settlement first offered to them are allowed to retain possession of plots which they are in cultivatory possession, on a rental to be fixed by their settlement officer, they are excluded proprietors within the meaning of S. 74, Land Revenue Act, and must be regarded as rent paying ex-proprietors on the land held by them. Their position thus being clearly analogous to that of ex-proprietary tenants, they are tenants within the meaning of the Agra Tenancy Act and as such liable to ejectment under S. 79. (*Bennet and Collister, JJ.*) GATASRAN NARAYANJI MAHARAJ *v.* GHANSHIAM. **184 I.C. 577=1939 R.D. 428=1939 A.L.J. 910=1939 A.W.R. (H.C.) 523=A.I.R. 1939 All. 533.**

———**S. 79**—*Service of notice—Personal effort of decree-holder—Necessity.*

Even when the defaulter judgment-debtors are evading service, the decree-holder must really make some personal effort to get personal service on them. (*Marsh, S.M.*) KRISHNA KUMAR *v.* TEJI. **1939 R.D. 526 (1)=1939 A.W.R. (B.R.) 226.**

———**Ss. 79 and 80**—*Decree for arrears—Execution proceedings—Court unable to take up case on date of expiry of third extension granted to judgment-debtor for payment of decree amount and adjourning case—Payment of balance due on adjourned date—If sufficient compliance—Effect on ejectment proceedings.*

A decree for arrears of rent passed on 10-12-1934 was put into execution under S. 79 of the Agra Tenancy Act on 17-1-1935. Three extensions were given to the judgment-debtors, the last of which would expire on 25-5-1935. In the course of this period two payments of Rs. 20 were paid by the judgment-debtors. On 25-5-1935, one of the judgment-debtors asked for one more month's grace. The Court having no time to deal with the case ordered that the case should be put up for orders on 6-6-1935. On 6-6-1935 another of the judgment-debtors deposited the balance of the decretal amount and on 26-6-1935, the Court dismissed the proceedings and refused to take any further action in ejectment.

Held, that though under S. 80, not more than three extensions could be granted to the judgment-debtors to pay up the decree amount, there having been no order of ejectment actually passed the effect of the adjournment order passed on 25-5-1935, postponing the case to 6-6-1935, was

to advance the date of the third extension for payment till 6-6-1935; and the judgment-debtor having made full use of this *locus penitentiae* and paid up the balance of the decretal sum on that date, which was the adjourned date fixed for the hearing, the ejectment proceedings were rightly dismissed. (*Darling, S.M.*) GHASI RAM *v.* PIRANA. **1937 R.D. 3.**

———**Ss. 79 and 80**—*Decree for arrears of rent—Order for ejectment in execution—Application by tenant for review on ground of want of knowledge of proceedings— Landlord making four attempts to serve summons and failing and then publishing in newspaper—Inference—Review—If to be allowed.*

Where it appears from the records that the zamindar made four efforts to serve a summons on his tenant, and failed, and after that he resorted to publication of the summons in a local newspaper, it cannot be supposed that the tenant had no knowledge of the proceedings so as to entitle him to apply for review of an order of ejectment in execution of a decree for arrears of rent. (*Bomford, J.M.*) KRISHNA DUTT *v.* RAM KUMAR. **1936 R.D. 573 (1).**

———**Ss. 79 and 80**—*Ejectment in execution of decree for arrears of rent—Tenants given every consideration and grace but proving regular defaulters and failing to appear on date of hearing without adequate reason—Plea of illness disbelieved—Court ordering ejectment and rejecting application for review—Appeal to Collector—Order on appeal allowing appeal and allowing tenant to deposit amount—If justified.*

A zamindar applied on 29-10-1934 for execution of his decrees for arrears of rent by ejectment of the tenants under S. 79 of the Agra Tenancy Act on 7-12-1934, the tenants applied for grace for settlement of the decrees and were allowed grace till 10-1-1935. On that date small payments were made and further time was granted till 26-1-1935, when further payments were made. The Court again allowed grace till 26-2-1935, but on that date the tenants were absent. The Tahsildar waited again till 28-2-1935, but again the tenants failed to appear. Since the decrees were not fully satisfied, the Tahsildar ordered the ejectment of the tenants. On 2-3-1935, one of the tenants applied for a review alleging that he was prevented from appearing in Court on 26-2-1935, by illness. The Tahsildar after due enquiry foundthat the plea of illness was not made out and on 26-5-1935 rejected the application for review. The tenants appealed to the Collector, who, while holding that there was no satisfactory proof of the alleged illness, allowed the appeal and proceeded to pass orders on the ground that the days were hard days for agriculturists; and he allowed them to deposit the balance of the decretal amounts.

Held, that the interests of the zamindars had to be protected as much as those of the tenantry; that the tenants who appeared to be regular defaulters had been shown every possible consideration in the Court of the Tahsildar, but yet they failed to appear on 26-2-1935, for no adequate reason; that their only possible plea of illness was disbelieved both by the Tahsildar and the Collector; and therefore the Tahsildar was fully justified in refusing to review his ejectment orders passed on 28-2-1935. The order of the Collector was therefore wrong and must be set aside.

Held, further, that the Collector had no business to pass orders in the case allowing deposits, but he was only entitled, if at all, to allow the review application and then to send the case back to the original Court for disposal according to law. (*Darling, S. M. and Bomford, J. M.*) RANCHHOR SINGH *v.* BIR SAHAI. **1937 R.D. 24.**

——**Ss. 79 and 80**—*Ejectment under S. 80—Tenant undischarged insolvent during period for which decree was obtained—Legality of ejectment—Tenancy, if vests in receiver—Provincial Insolvency Act* (1920), *S.* 28 (2) *and* (5).

An order for ejectment in respect of an unsatisfied decree for rent is not illegal merely because one of the tenants was an undischarged insolvent during the period in respect of which the decree for arrears of rent was passed. There is no landed property in question but only a tenancy. This is not 'real' property which can vest in an Official Receiver. (*Darling, S.M.*) BHOOREY *v.* QAMAR-UL-HASSAN KHAN. **1938 R.D. 787.**

——**S. 80**—*Alleged payment and extension of time—Finding of fact—If revisable.*

Where a tenant alleged a payment and applied for extension of time, when the payment is denied by the decree-holder, a decision thereon though a question of fact, can be considered in revision. It is wrong to suppose that a question of fact could not be considered in revision. (*Marsh, S.M. and Mehta, J.M.*) AJUDHIA PERSHAD *v.* KEWAL. **1939 R.D. 523=1939 A.W.R. (B.R.) 223.**

——**S. 80**—*Costs not deposited owing to a misunderstanding—Ejectment, if justified—Concurrent findings—Interference in second appeal.*

Per *Mehta, J.M.* and *Marsh, S.M.*, contra.—Where owing to a misunderstanding, the deposit of the decree amount in respect of a decree for arrears of rent, did not include the costs, it cannot entail the ejectment of the tenant. Where there were concurrent findings of two Courts on the above point, the Board refused to interfere with the finding. (*Marsh, S.M. and Mehta, J.M.*) BISHNATH SARAN SINGH *v.* PARSIDH NARAIN SINGH. **1939 R.D. 569=1939 A.W.R. (B.R.) 245.**

——**S. 80**—*Decree for arrears of rent—Judgment-debtor paying small portion of amount within the period of grace and asking for further grace—Discretion of Court—Interference.*

Where a judgment-debtor pays only a small portion of the amount due under a decree for arrears of rent within the period of grace given to him and asks for further grace, it is within the discretion of the Court to refuse to grant a further extension, and if it rejects the application of the judgment-debtor for a further extension and orders his ejectment, the Board will not interfere in revision. (*Darling, S.M.*) SURJA *v.* PANNA LAL. **1937 R.D. 374.**

——**S. 80**—*Ejectment—Payment of decree amount alone—Costs of ejectment, not paid—Liability to ejectment.*

A tenant is not liable to ejectment if he pays the decree amount alone without the costs of the ejectment proceedings. (*Bomford, J.M.*) NEWAL DUBE *v.* BHOLANATH. **1938 R.D. 395 (2)=1938 A.W.R. (B.R.) 335.**

——**S. 80**—*Ejectment proceedings under—Defence by one of several co-tenants—Application for review of order by another on ground of non-service of notice—Competency.*

Where ejectment proceedings are taken against several co-tenants, it is a common practice for one of them to be sent and act on behalf of all; and when one of them has had an opportunity of defending and showing cause against ejectment, it is not open to another to apply for review of the order of ejectment on the ground that he was absent from the village and that notice was not served on him. In such cases, even if there is some doubt about the due service of notice on one of them, the review is usually refused the case having been actually defended by one of a number of defendants having a common interest. (*Drake Brockman, S.M.*) BHOLA SINGH *v.* RAM DEVI. **1936 R.D. 331.**

——**S. 80**—*Extension of time—Scope of—Tenant, if entitled to whole of last day—Order for ejectment on such last day—Legality—Review of order—Grounds.*

A tenant is entitled to have the whole of his last day of extension at his disposal for the satisfaction of the decree. Though an order for ejectment on such last day is not necessarily illegal, yet if the debtor appears on the following day and satisfies the Court that he did appear with money within the time allowed by law, the Court should review its order for ejectment. (*Darling, S.M. and Bomford, J.M.*) DURGA *v.* CHARAN SINGH. **1938 A.L.J. (Supp.) 31=1938 A.W.R. (B.R.) 152=1938 R.D. 301.**

——**S. 80**—*Judgment-debtor failing to appear on last day allowed for payment—Order of ejectment—Duty of Court to pass.*

If judgment-debtors fail to appear on the last day allowed by the law for payment of the decretal amount, the order of ejectment should necessarily follow and Courts should be chary of accepting the many and varied excuses made for failure to meet their obligations by defaulting tenants. (*Darling, S.M. and Bomford, J.M.*) RAM DHARI SINGH *v.* TAHSILDAR AHIR. **1937 R.D. 472.**

——**S. 80**—*Order of ejectment passed on date fixed for payment by tenant—Legality.*

An order of ejectment passed on the date fixed for payment of the decree amount by the tenant is not *per se* illegal. If a tenant is given time for payment till a certain day, he has no doubt time till midnight to pay the money. But a Court works in Court hours and is fully justified in passing orders on the day fixed, though it is bound to review its order if the tenant satisfies it that he has appeared with the money within the time allowed by law. (*Darling, S.M. and Bomford, J.M.*) DURGA PRASAD *v.* CHHANGAN LAL. **1937 R.D. 336.**

——**S. 80**—*Order of ejectment passed on judgment-debtor failing to appear on day fixed for payment—Judgment-debtor applying to set aside order on next day alleging illness—Order setting aside ejectment order—Revision.*

Where a judgment-debtor against whom a decree for arrears of rent was passed failed to appear on the last day fixed for payment and an order of ejectment was passed, and on the very next day he applied for that order to be set aside on the ground that he had been taken ill the day before and so had arrived later and the ejectment order was thereupon set aside, there is no illegality or material irregularity such as would justify interference in revision. (*Darling, S.M. and Bomford, J.M.*) Beni Madho Prasad *v.* Jasai. 1937 **R.D 453.**

——S. 80—*Order of ejectment passed on judgment-debtor failing to appear on last day—Order subsequently set aside on judgment-debtor's application—Court, if can order damages to decree-holder.*

Where an order of ejectment passed on the failure of the judgment-debtor to appear on the last day fixed for payment of the decretal amount is subsequently set aside on the application of the judgment-debtor giving a satisfactory reason for his failure to appear, the Court cannot order compensation in the form of damages to the decree-holder. (*Darling, S.M. and Bomford, J.M.*) Ram Dhari Singh *v.* Tahsildar Ahir. **1937 R.D. 472.**

——S. 80—*Notice under—Some of the co-tenants contesting—Presumption of knowledge as regards others.*

When some of the co-tenants have appeared and contested a suit for ejectment for arrears of rent, it must be presumed that the co-tenants who remained silent were well aware of the ejectment proceedings. (*Darling, S.M. and Marsh, J.M.*) Bhola Nath Srivastava *v.* Ali Shah Khan. **1938 R.D. 617=1938 A.W.R. (B.R.) 279.**

——S. 80—*Order under, when to be made—Order of ejectment before expiry of full period allowed for payment.*

It is illegal to pass an order of ejectment under S. 80 of the Agra Tenancy Act before the expiry of the time given for payment. The proceedings should be allowed to remain pending for the whole of the last day of the period allowed for payment, and if at any time on that day payment be made, no order of ejectment ought to be made. (*Niamatullah, J.*) Aisha Bibi *v.* Divandar Prasad. **1937 A.L J. 259=1937 R.D. 131=168 I.C. 680=9 R.A. 665=1937 A.L.R. 392=1937 A.W. R. 195=A.I.R. 1937 All. 350.**

——S. 80 (2)—*Order under—Time for carrying out, if any.*

There is no provision in the Agra Tenancy Act for limiting the period within which, an order of ejectment having been passed the decree-holder must apply for possession. But there is no doubt that it is undesirable that a decree-holder should delay his application for taking formal possession. (*Darling, S.M. and Bomford, J.M.*) Sheo Prasad Gupta *v.* Mandil Singh. **1938 R.D. 541=1938 A.W R. (B.R.) 235.**

——S. 80 (2) (a)—*Ejectment suit—Order on tenant to pay fixed sum of money by certain date—Plea of payment out of Court—Payment not certified or recorded—Effect.*

In an ejectment suit the defendant is ordered to pay a certain sum by a certain date to escape ejectment, and if the tenant pleads payment out of Court, the payment must be either certified or recorded in the manner prescribed by law; otherwise no such payment can be taken account of. (*Drake Brockman, S.M. and Knox, J.M.*) Mohan Lal *v.* Nandia. **1936 R.D 557.**

——S. 80 (3)—*Review—Ejectment order after allowing three periods of grace—Total period reasonable though less than six months—Review on ground of plea* ad misericordian—*Jurisdiction.*

Where the trial Court has allowed three periods of grace for payment, and the total period allowed is not unreasonable though falling short of 6 months, it is not justifiable to allow a review of an order of ejectment on a plea *ad misericordian.* To allow such review is to reopen an ejectment already ordered without any good reason and has the effect of allowing a further and fourth exclusion. Such an order is without jurisdiction. (*Drake Brockman, S.M. and Knox, J.M.*) Shyama Nand Nath *v.* Ram Baran Singh. **1936 R.D. 270.**

——S. 81—Notice under—Service of—Omission to contest notice or to pay arrears—Order of ejectment—Application for review—Competency—"Sufficient reason" for review—Failure to explain non-compliance with section—Effect. *See* C. P. Code, O. 47, R. 1. **1936 R.D. 466.**

——S. 81—*Procedure under—Powers of review—Notice by Tahsildar followed by order of ejectment—Application by tenant for review—Duty of Collector on granting review—Collector confirming order granting review on appeal—Duty of.*

If a Court grants a review application, it has either at once to re-hear the case or make such order in regard to re-hearing as it thinks fit. When, therefore, a Tahsildar who has passed an order of ejectment in pursuance of a notice under S. 81, Agra Tenancy Act, accepts an application of the tenant for review, he should restore the case to the register and proceed according to law. When the contentions of the tenant are such that he intends to contest the claim against him, the application of the landlord for issuing notice under S. 81, therefore, becomes a suit for arrears of rent, and if such arrears exceed Rs. 200, the Tahsildar is bound to forward the suit to the Sub-Divisional Officer. He has no jurisdiction to proceed further in the matter. If on appeal by the landlord the Collector confirms the order of the Tahsildar granting the application for review, he should direct the Tahsildar to proceed as laid down in S. 81 (5). (*Drake Brockman, S.M. and Knox, J.M.*) Ajodhia Prasad *v.* Surji. **1936 R.D. 466.**

——S. 81—*Services of notice under—Extensions of time—Default in payment—Order of ejectment—Review.*

Where on service of a notice under S. 81 of the Tenancy Act, a tenant appears and obtains extensions of time more than once for the payment of the arrears, but does not care to appear on the expiry of the extended time, an order for ejectment is passed, his application thereafter to review the order of ejectment should not be allowed. (*Darling, S.M. and Bomford, J.M.*) Swami Har Saran Das *v.* Nathu. **1938 R.D. 341=1938 A.W R. (B.R.) 182.**

——S. 82—Applicability—Lands let to tenant validly and transferred by him to another—Remedy of landlord—Suit to eject under S. 44—Maintainability. *See* Agra Tenancy Act, Ss. 44 and 82. **1937 A.W.R. 888.**

——S. 82—*Applicability—Mortgage by one of several co-tenants—Acquiescence by others—Effect of.*

S. 82 of the Agra Tenancy Act is not inapplicable to the case of a mortgage executed by one of several co-tenants of a holding. To hold that the section does not apply in such a case would result in a number of co-tenants whittling away the tenancy by small mortgages with which the zamindar would be helpless to interfere. The co-tenants must assert themselves actively as soon as they see that one co-tenant executes a mortgage infringing on their rights. If they deliberately acquiesce in it, they must pay the penalty. *(Darling, S.M. and Bomford, J.M.)* ABDUL MAJID *v.* ABDUL HAMID. **1938 R.D. 190 (2)=1938 A.W. R. (B.R.) 120.**

———**S. 82**—Applicability--Sub-lease by tenant for five years in favour of third party—Sub-lessee to pay annually fixed sum to tenant's creditor and zamindar's rent—Legality of sub-lease—Tenant—If liable to ejectment. *See* AGRA TENANCY ACT, Ss. 27 AND 34 (1). **1936 R.D. 318 (2).**

———**S. 82**—Decision in suit for arrears of *inter partes* under the Agra Tenancy Act of 1901 holding that defendant was a proprietor and not tenant does not operate as *res judicata* in a subsequent suit for ejectment under S. 82 of Act III of 1926. **1937 A.W.R. 1215=1937 A.L.J. 1339.**

———**S. 82**—*Illegal sub-letting—Co-tenants not objecting to each other's sub-letting—Effect—Liability to ejectment.*

As a division of the holding is not binding on the landlord without his consent in writing, it is equally not binding on his tenants in their relation with the landlord. Nevertheless, if each co-tenant sub-lets his holding without objection from the others, then the whole holding becomes illegally sub-let, and each of such co-tenants is liable to ejectment under S. 82 of the Tenancy Act. It is not open to the tenants-in-chief to plead that the whole tenant body did not sub-let the whole holding in one transaction, and thereby try to escape the consequences of their acts. *(Bomford, J.M.)* LACHHUA *v.* DAMRU LAL. **1938 A.W.R. (B.R.) 149=1938 R.D. 290.**

———**S. 82**—*Illegal sub-letting—Ejectment suit—Limitation—Starting point—Renewal of lease from year to year—If furnishes fresh cause of action—Absence of registered lease--Effect.*

In the case of illegal sub-lease, not effected by a registered deed, a fresh cause of action accrues to the Zamindar at every fresh renewal of the lease from year to year, though the sub-letting may have commenced several years before the suit. *(Darling, S.M. and Bomford, J.M.)* BADLU *v.* DWARKA PRASAD. **1937 R.D. 49.**

———**S. 82**—*Mere entry of 'mortgage' in recent patwari papers—If enough to justify ejectment.*

The mere entry of mortgage in a recent patwari paper, in the absence of convincing secondary evidence of the execution of mortgage of an occupancy holding subsequent to Act III of 1926 would not be enough to justify ejectment of the transferee as well as of the transferor under S. 82 of the Tenancy Act. *(Mehta, J.M.)* IBNI HUSAN *v.* GOODAR. **1939 A.W.R. (B.R.) 41=1939 A.L.J. (Supp.) 49=1939 R.D. 303.**

———**S. 82**—Mortgagee of occupancy holding obtaining possession through Civil Court—Liability for ejectment. *See* AGRA TENANCY ACT, Ss. 34 AND 82. **1939 R.D. 34 (2).**

———**S. 82**—*Proof of a case under—Necessary ingredients.*

If the landholder produces copies of village papers to show that there has been transfer under a void lease, then all the ingredients necessary to prove the case under S. 82 of the Agra Tenancy Act are present. *(Marsh, S.M. and Mehta, J.M.)* KISHEN *v.* KAMTA PRASAD. **1939 R.D. 309.**

———**S. 82**—*Suit for ejectment on ground of illegal mortgage by one of co-tenants—Mortgagee found not to have been put in possession—Suit, If liable to be dismissed.*

A suit for the ejectment of the recorded co-tenants from a holding on the ground that one of them had illegally mortgaged a portion of the holding, is liable to be dismissed if it is found that the mortgagee had never been put in possession. *(Bomford, J.M.)* PARTAB BAHADUR *v.* MAZHAR KHAN. **1937 R.D. 268 (1).**

———**S. 82**—*Suit under—Maintainability—Sub-tenant ejected prior to institution of suit under S. 82—Cause of action, if exists.*

Where a tenant had filed a suit under S. 86 of the Tenancy Act against a sub-tenant, got him ejected and actually took possession all prior to the date of the institution of a suit against him under S. 82 of the Act, the latter suit is not maintainable, for no cause subsisted, on the date when the suit was filed. *(Marsh, S.M. and Mehta, J.M.)* JAMUNA MISRA *v.* JAI GOVIND RAM TEWARI. **1939 R.D. 538=1939 A.W.R. (B.R.) 238.**

—— **S. 82**—*Suit under—Decree in favour of plaintiff with proviso that if tenants 'filed suits' to eject sub-tenants decree would not be executed—Sub-tenants surrendering possession without suits—Tenants, if can be ejected.*

Where in a suit under S. 82 of the Agra Tenancy Act, the Court gave the plaintiff a decree with the proviso that if the tenants "filed suits" to eject the sub-tenants the decree would not be executed, and when the plaintiff applied for execution, the tenants filed an objection explaining that the sub-tenants had left possession and that was why they had not thought it necessary to comply with the order of the Court, the Court should, in such circumstances, enquire whether there had been substantial compliance with its order and if it is satisfied that the sub-tenants had really surrendered, should not order the ejectment of the tenants. *(Darling, S.M. and Bomford, J.M.)* PHARENDRA GIR *v.* JHAGROO. **1937 R.D. 261.**

———**S. 82**—*Void mortgage--Redemption subsequent to suit under S. 82—If can save ejectment.*

Where it is clear that when the suit under S. 82 of the Tenancy Act was brought the alleged void mortgage was in existence, but was paid off some months after the filing of the suit, that circumstance cannot save the tenant from ejectment. *(Darling, S.M. and Mehta, J.M.)* BALRAM GOVIND RAI *v.* NABI RASUL. **1938 A.W.R. (B.R.) 370=1938 R.D. 605.**

———**Ss. 82 and 83**—*Defendant belonging to family paying Rs. 1,800 land revenue—Right to benefit of proviso to S. 83.*

The mere fact that in a suit under S. 82 of the Agra Tenancy Act, the main defendant is not an agriculturist inasmuch as he belongs to a family that pays Rs. 1,800 land revenue, cannot be a reason for not giving him the benefit of the proviso to S. 83 of the Act. *(Darling, S.M. and Bomford, J.M.)* ABDUL AZIZ KHAN *v.* MOHAMMAD AHSAN. **1937 R.D. 263.**

———**Ss. 82 and 83**—*Illegal sub-letting—Ejectment—Discretion.*

Where there has been illegal sub-letting in favour of the members of the family, which is a typical agriculturist family, in a suit for ejectment, a proper exercise of discretion would be to allow the tenant to eject the sub-lessees under S. 83 of the Tenancy Act. (*Darling, S. M. and Mehta, J.M.*) Bahoran Tewari *v.* Ram Chander Tewari. **1938 A.W.R. (B.R.) 325=1938 R.D. 674.**

———**Ss. 82 and 83**—*Illegal sub-letting—Penalty—Discretion of trial Court—Exercise of—Principles.*

Full discretion is lodged in the trial Court as regards the area from which a tenant, who transfers land by sub-leases beyond the period allowed by law, is to be penalised. Usually where the tenant belongs to an agriculturist class and there is no persistency in sub-letting, in that case grace is given or if ejectment at all is ordered, it is from the offending area and not from the whole area. (*Marsh, S.M. and Mehta, J.M.*) Tirbeni *v.* Kedar Gvvind Rai. **1939 R.D. 277 (2)=1939 A.W.R. (B.R.) 115.**

———**Ss. 82 and 83**—*Mortgage of occupancy holding before Act—Zamindar not taking action to eject mortgagee—Subsequent sub-letting of holding by mortgagee to mortgagor and others—Zamindar's right to sue for ejectment.*

Where an occupancy holding was mortgaged before the Act of 1926 came into force and the Zamindar did not take action in time to eject the mortgagee but the mortgagee subsequently sublet the holding to the mortgagor and others, the Zamindar is entitled to sue for ejectment of all concerned for illegal sub-letting and no leniency should be shown in such a case under S. 83 of the Act. (*Darling, S.M. and Bomford, J M.*) Pheku Chamar *v.* Abdul Wahab. **1937 R.D. 445.**

———**Ss. 82 and 83**—*Suit for ejectment on ground of illegal sub-letting—Defendant, if entitled to benefit of S. 83.*

Where a suit for ejectment is brought on the ground of illegal sub-letting, the defendant is entitled to the benefit of S. 83 of the Agra Tenancy Act. (*Darling, S. M. and Bomford, J. M.*) Gajadhar *v.* Amarnath. **1937 R.D 137.**

———**Ss. 82 and 83**—*Sub-tenancy in respect of bulk of holding going back 40 years—Tenants' right to benefit of S. 83.*

Where the sub-tenancy in respect of the bulk of the holding goes back 40 years and two of the fields alone had been sublet for 8 years only to a person who is also a sub-tenant in another field in the holding, the tenant is entitled to the benefit of the proviso to S. 83 of the Agra Tenancy Act, in respect of the entire holding. (*Darling, S.M. and Bomford, J.M.*) Abdul Aziz Khan *v.* Mohammad Ahsan. **1937 R.D. 263.**

———**Ss. 82 and 37**—*Liability to ejectment—Mortgage by a co-tenant of his share after a division under S. 37—Effect on the share of the other co-tenant.*

Division of a holding between two co-tenants under S. 37 of the Agra Tenancy Act without getting the zamindar to agree does not result in the creation of two holdings and novation of the contract of tenancy. Where, after such a division, one of the co-tenants mortgages his share alone, yet as in the eye of the law the holding is one, the liability to ejectment is from the whole of the holding. (*Mehta, J. M.*) Subhan *v.* Nabiullah. **1939 R.D. 267=1939 A.W.R. (B.R.) 251.**

———**S. 82 (1)**—Applicability—Occupancy tenant—Transfer by in contravention of S. 27—Validity—Liability of tenant and transferee to ejectment by landlord. *See* Agra Tenancy Act, Ss. 27, 34 (1), 82 (1) and 83. **1936 R.D. 474.**

———**S. 82 (1)**—If applies to fixed rate tenant. *See* Agra Tenancy Act, Ss. 34 (1), 82 (1) and 85 (3). **1940 A.L.J. 261.**

———**S. 83**—Benefit of section—When to be allowed. *See* Agra Tenancy Act, Ss. 82 and 83. **1938 R.D. 674.**

———**S. 83**—*Exemption under—Discretion—Grounds—Sub-letting of whole holding—Relief if available.*

Under S. 83 of the Agra Tenancy Act, the Court in its discretion can exempt from the decree for ejectment, that portion of the holding which had not been 'actually transferred or sublet' at the date of the suit. But where the whole holding has been sublet, and it had been so sublet persistently for a number of years, S. 83 cannot be applied to such a case. (*Darling, S.M. and Bomford, J.M.*) Mukarram Ali Khan *v.* Puran. **1938 R.D. 421=1938 A.W.R. (B.R.) 179=1938 A.L.J. (Supp.) 29.**

———**S. 83**—*Sub-letting for 20 years—Sub-tenant—If becomes tenant in chief.*

Merely because certain plots of land have been sublet for 20 years, the sub-tenant does not become a tenant-in-chief. (*Drake Brockman, S.M. and Knox, J.M.*) Kula *v.* Dasai Koeri. **1936 R.D. 337 (1).**

———**S. 83**—*Void mortgage—Applicability of S. 83.*

Though the benefit of the grace can be allowed under S. 83 of the Agra Tenancy Act in a case where the sub-letting is of the voidable variety, it cannot be applied to a case of a mortgage which is *ab initio* void. (*Marsh, S.M. and Mehta, J.M.*) Ahmad-Ullah *v.* Sheo Nath Badhai. **1939 A.W.R. (B.R.) 112=1939 R.D. 436.**

———**S. 83, proviso**—*Applicability—Illegal sub-letting by occupancy tenant—Tenant essentially agriculturist—Right to benefit of proviso—Conditions.*

An occupancy tenant who is essentially an agriculturist, but who makes an illegal sub-lease should not be lightly deprived of his occupancy rights, if he is prepared to resume possession of the holding and to eject the sub-tenant admitted by him. He should in such a case be given the benefit of the proviso to S. 83 of the Agra Tenancy Act. (*Darling, S.M. and Bomford, J. M.*) Badlu *v.* Dwarka Prasad. **1937 R.D. 49.**

———**S. 83, Proviso**—*Applicability—Void lease.*

The benefits of the proviso to S. 83, Agra Tenancy Act, can be availed of only in the case of voidable leases and not in the case of transactions which are void *ab initio*. (*Drake Brockman, S.M. and Knox, J.M.*) Parbhu Shankar *v.* Sukha. **1936 R.D. 108.**

———**S. 83, proviso**—Right of the tenant to the benefit of. *See* Agra Tenancy Act, Ss. 82 and 83. **1937 R.D. 263.**

———**S. 83, proviso**—Scope—Transfer by occupancy tenant in contravention of S. 27—Ejectment by landlord—Benefit of proviso—If available. *See* Agra Tenancy Act, Ss. 27, 34 (1), 82 (1) and 83. **1936 R.D. 474.**

——**Ss. 84 (1) (a) and 197 (e)**—*Grove divided between two* mahals *at partition—Smaller area falling within one ceasing to be grove—Holder—Liability to ejectment from that portion—Holder continuing as grove-holder in respect of larger part in other* mahal—*If affords protection from ejectment from smaller area.*

Where as the result of a partition a grove is divided between two *mahals*, and a small area falling within one *mahal*, and constituting an entirely separate grove, quite independent of the larger portion which has fallen in another *mahal*, has, since the partition, ceased to be a grove, the holder becomes a non-occupancy tenant liable to ejectment from that plot which has ceased to be a grove. The fact that he continues to be a grove-holder in the larger portion of the other *mahal* cannot protect him from ejectment. (*Darling, S.M. and Bomford, J.M.*) Allah Jalle Shanhu *v.* Raj Bahadur. **1937 R.D. 43.**

——**S. 85 (3)**—If applies to fixed rate tenant. *See* Agra Tenancy Act, Ss. 34 (1), 82 (1) and 85 (3). **1940 A.L.J. 261.**

——**S. 86**—*Applicability—Mortgagee from one of the co-tenants—Status of—Liability to ejectment.*

Where a person claims to be a mortgagee from one of the co-tenants in an occupancy holding, his position will be nothing higher than that of a sub-tenant liable to be ejected and when the alleged mortgage is not proved, the appropriate section to deal with such a tenant would be S. 86 of the Agra Tenancy Act. (*Mehta, J.M.*) Jagarnath Singh *v.* Sheomangal Lal. **1939 R.D. 124=1939 A.W.R. (B.R.) 191.**

——**S. 86**—*Applicability—Tenant of Zamindar's grove—Ejectment—Forum.*

In the case of a tenant paying *sayar*, and not rent in respect of a grove, he can be ejected only by a Civil Court, though the *sayar* payable could be collected by the Revenue Courts. (*Bomford, J.M. and Darling, S.M.*) Ram Chandra Singh *v.* Thakur Gopal Lalji. **1938 R.D. 371=1938 A.W.R. (B.R.) 203=1938 A.L.J. (Supp.) 58.**

——S. 86—Applicability—Widow of occupancy tenant—Sub-lease by—Death of widow—Ejectment of sub-tenant by landlord—Right of—Procedure. *See* Agra Tenancy Act, S. 32 (1) and (3). **1936 R.D. 496.**

——**S. 86**—*Ejectment—Application under—Ejectment of non-occupancy tenant—Respondent discovered to be* thekadar—*Procedure—Application—If can be converted into and dealt with as a plaint under S. 207—Proper course for landlord.*

An application under S. 86 of the Agra Tenancy Act, though it is to be deemed to be a plaint when challenged, cannot be converted into a plaint under S. 207 of the Act and be dealt with as such, if it is discovered that the alleged non-occupancy tenant is a *thekadar*. The landlord in such a case must bring a suit under the proper section and stamp it with the proper court-fees. (*Drake Brockman, S.M. and Knox, J.M.*) Beni Ram *v.* Bhagwant Singh. **1936 R.D. 539.**

——**S. 86**—*Defendant's possession found to be as mortgagee—Ejectment as sub-tenant—Validity.*

In a suit under S. 86 of the Agra Tenancy Act against an alleged sub-tenant, in order to succeed, one must prove the contract of sub-tenancy. Where the defendant's possession has been found by a Civil Court to be that of a mortgagee he cannot be ejected as a sub-tenant. (*Mehta, J.M.*) Rameshwar Prasad *v.* Khedan Koeri. **1939 A.W.R. (B.R.) 70=1939 A.L.J. (Supp.) 65 =1940 R.D. 71.**

——**S. 86**—*Ejectment—Notice of—Form—Inclusion of two khatas in one notice—Legality of notice.*

Where two separate khatas are included in one notice of ejectment, the notice is at the very outset bad in form. (*Darling, S.M. and Bomford, J.M.*) Salig Ram *v.* Ghana Ram. **1938 A.W.R. (B.R.) 150=1938 R.D. 292.**

——**S. 86**—*Ejectment of recorded tenant—Effect on other members of the family.*

Where, on the death of a common ancestor, a surviving son is recorded as heir of a statutory tenant and he is ejected under S. 86 of the Agra Tenancy Act, it is not the duty of the zamindar to look for other tenants who were members of a joint family and whose names had not been recorded in the papers. The members of the family have only to thank themselves for not having got themselves recorded. They cannot deny the knowledge of the ejectment of the recorded tenant who was recorded as the head of the family. (*Marsh, S.M.*) Shiam Sundar Lal *v.* Muket Behari Lal. **1939 R.D. 522=1939 A.W.R. (B. R.) 222.**

——**S. 86**—*Ejectment—Person in possession paying sayar—If can be ejected—Appeal—New point of law.*

It is clear that a zamindar cannot under S. 86 of the Agra Tenancy Act sue to eject a person who is only in possession on payment of sayar. Such a point can be taken for the first time in appeal as it is a perfectly good point of law which can be taken at any time. (*Darling, S.M. and Bomford, J.M.*) Mahadeo Singh *v.* Ganga Ram Das. **1938 A.W.R. (B.R.) 86=1938 R.D. 252.**

——**S. 86**—*Ejectment of sub-tenant—Failure to establish sub-tenancy—Effect.*

Where a plaintiff sues to eject another from possession as a sub-tenant, his suit is liable to be dismissed, if he fails to establish any contract of sub-tenancy between himself and the defendant. (*Darling, S.M. and Mehta, J.M.*) Mohib Ali *v.* Buchunu. **1938 R.D. 753.**

——**S. 86**—*Mortgage and theka in favour of mother and son respectively on same day—Nature of the transaction—Ejectment, if can be had.*

Where a simple mortgage in favour of the mother of a thekadar is executed on the same date as that on which the theka is given to the son and where both the transactions are in respect of the same share of property, the transaction is really a mortgage of zamindari share with possession. As such, Courts would not help to eject the mortgagee without paying the consideration money. (*Darling, S.M. and Mehta, J.M.*) Muneshwar Pathak *v.* Mst. Ureha. **1938 A.W.R. (B.R.) 354 =1938 R.D. 852=1939 A.L.J. (Supp.) 1.**

——**S. 86**—*One of co-sharers in sir executing mortgage in favour of sub-tenant—Suit to eject latter—Joinder of all co-sharers in suit—If necessary.*

All the co-sharers in *sir* should join in a suit under S. 86 of the Agra Tenancy Act to eject a sub-tenant in *sir* in whose favour one of the co-sharers has executed a mortgage. (*Darling, S.M. and Bomford, J.M.*) Raghunandan *v.* Ram Bachan Singh. **1937 R.D. 345.**

———S. 86—*Recorded as sub-tenant claiming to be mortgagee—Holding of land in lieu of interest —If can be ejected as sub-tenant.*

Where a person who is recorded as a sub-tenant in the papers, claims that he is a mortgagee to whom the land was given in lieu of interest for a period of three years and that he was entitled to retain possession if the principal was not paid, he is not a sub-tenant and cannot be ejected under S. 86 of the Tenancy Act. (*Mehta, S.M. and Harper, J.M.*) Misri Lal *v.* Kalap Nath. **1940 R.D. 122 (1)=1940 A.W.R. (B.R.) 49.**

———S. 86—*Suit for ejectment of sub-tenant—Denial of sub-tenancy by person holding land for over 32 years—Burden of proof.*

Where a sub-tenancy is pleaded, but is denied by the other side, the plaintiff has to prove that the sub-tenant was under a direct contract of sub-tenancy, his sub-tenant. When such a sub-tenant is one of 32 years standing, the doubt arises that the sub-tenant is holding direct by some arrangement with the zamindar. (*Mehta, J.M.*) Ram Ghulam *v.* Diwari Lal. **1938 A. W.R. (B.R.) 352=1938 R.D. 850=1939 A.L.J. (Supp.) 2.**

———S. 86—*Suit to eject sub-tenant—Plaintiff declared occupancy tenant at concessional rate—Sub-tenants of long standing at concessional rate —If can resist ejectment.*

Where a person was declared to be an occupancy tenant at the time of the revision of records and rent was fixed though it was at a concessional rate and later, in an enhancement suit it was again so decided his suit for ejectment of sub-tenants who though of long standing, could not be resisted. (*Mehta, J.M.*) Sheo Nandan Singh *v.* Raja Brijendra. **1938 A.W R. (B.R.) 361=1938 R.D. 854 (2)=1939 A.L.J. (Supp.) 4.**

———S. 86—*Suit to eject tenant from grove land —Question if grove was planted by zamindar or tenant—Burden of proof.*

Where in a suit under Ss. 86 and 92, Agra Tenancy Act, for the ejectment of the defendants as non-occupancy tenants from certain plots which are claimed by the plaintiff zamindar to be his grove land, it is established that the grove in one of the plots had already been planted by the zamindar when the defendants were admitted to the holding, it must be assumed that the whole area is zamindari grove, and if the defendants claim the other plots as their grove-land, it is incumbent on them to show that the trees thereon were planted by them. (*Darling, S.M.*) Mohan *v.* Malik Mohammad Ihsan Ullah Khan. **1937 R.D. 369.**

———S. 86—*Tenant admitted by all the co-sharers —If can be ejected by some of them.*

All the co-sharers must join in ejecting a tenant who is admitted by all of them, even though the majority of them might have come to some arrangement about collecting rents behind the back of the others and the tenant. (*Darling, S.M. and Bomford, J.M.*) Noor Mussalman *v.* Rameshwar Prasad. **1937 R.D. 55.**

———S. 86—*Sir* land—Sale of—Relinquishment of ex-proprietary rights—Ejectment of sub-tenant—Suit by vendee alone—Competency. *See* Landlord and Tenant—Ex-proprietary tenant. **1936 R.D. 46.**

———S. 86—Sir *land—Sub-tenant—Liability to ejectment—Hereditary rights—When conferred.*

When there is nothing to show that a sub-tenant in *sir* land is to be protected from ejectment *naslan bad naslan*, it must be presumed that he is an ordinary sub-tenant liable to ejectment. Hereditary rights are not conferred unless they are expressly stated to be such. (*Darling, S.M.*) Ganga Ram *v.* Lalta Pershad. **1936 R.D. 572.**

———S. 86 (2)—*Lease with re-entry clause—Absence of provision for ejectment on failure to give up land when demanded—If confers occupancy rights on heir of statutory tenant.*

In a suit to eject the heir of a statutory tenant, the latter pleaded that as he had been holding continuously under the lease for more than 12 years before the Tenancy Act of 1926 came into force, he had become an occupancy tenant. It was found that the lease contained a re-entry clause, but there was no enforcible clause that the tenant should be liable to ejectment if he failed to give up the land when the zamindar required it.

Held, that the lease did break the period counting for occupancy, and that the defendant was not an occupancy tenant. (*Knox, J.M.*) Nakchhed *v.* Ram Sundar Prasad. **1936 R.D. 166.**

———S. 86 (2)—*Suit to eject heirs of statutory tenants—Plea of occupancy tenancy—Defendant's predecessor proved to have been in continuous occupation from 1309-F. to 1337-F.—Plaintiff alleging seven years' lease but failing to prove same—Status of defendants—Liability to ejectment.*

In a suit for ejectment of heirs of statutory tenants, the latter claimed to be occupancy tenants. Their predecessor in interest was found to have been in continuous possession of the land from 1309-F. till his death in 1337-F. The plaintiff who contended that the predecessor of the defendants held the land on a seven years' lease from 1319-F. which would preclude the accrual of occupancy rights, but could not prove it.

Held, the defendants must be held to be occupancy tenants not liable to ejectment and not merely heirs of statutory tenants. (*Drake Brockman, S.M. and Knox, J.M.*) Sukhdeo Teli *v.* Abhiraji. **1936 R.D. 337 (2).**

———Ss. 86 and 34—Mortgage by occupancy tenant—Last legitimate occupancy tenant dying without heirs—Mother recorded as occupancy tenant—Suit by her against the mortgagee in ejectment, treating him as sub-tenant—Status of mortgagee. *See* Agra Tenancy Act, Ss. 34 and 86. **1937 R.D. 525.**

———Ss. 86 and 44—*Ejectment of licensee—Proper remedy—Suit under S. 86, if can be converted into one under S. 44.*

Where a suit is brought under S. 86 of the Agra Tenancy Act, the person sued is treated as a non-occupancy tenant. It cannot be said in the same breath that such a person is a licensee, whose licence it is desired to be revoked under S. 60 of the Easements Act. In such a case the proper thing would be to file a suit under S. 44 after giving the licensee the necessary notice and if he had stayed on, then under the strict wording of S. 44, he would be a trespasser. But it is not possible to convert a suit under S. 86 to one under S. 44, though the contrary is possible. (*Mehta, J.M.*) Hari Nath Singh *v.* Satyadeo Singh. **1939 R.D. 533=1939 A.W.R. (B.R.) 233.**

——**Ss. 86 and 44**—Trees disappearing from portion of grove land—Suit to eject grove-holder from that portion—If lies. *See* Agra Tenancy Act, Ss. 44 and 86. **1937 R.D. 166 (1).**

——**Ss. 86 and 92**—*Deed described as* zar-e-peshgi *for five years—Provision for re-payment of amount at end of period and for payment by lessee to landholder of fixed amount—Lessee entering and remaining in possession—Non-payment of amount by lessor—Right to eject lessee as sub-tenant at end of term—Transaction—If lease or mortgage.*

A deed purporting to be a *zar-e-peshgi* lease for a period limited to five years, acknowledging receipt of a sum of money *bataur zar-e-peshgi*, and providing, *inter alia*, for payment of a certain amount by the lessee to the landholder and for re-payment of the *zar-e-peshgi* money after the end of the period of five years and also providing for the giving up of possession by the lessee after the period stated, is really a mortgage and not a lease. The lessee entering possession under such a deed and remaining in possession until re-payment of the principal amount is not a sub-tenant, but a mortgagee, and is not liable to ejectment as a sub-tenant at the end of the term when he has not been paid the amount due to him. (*Drake Brockman, S.M. and Knox, J.M.*) Balak Ram *v.* Nathoo. **1936 R.D. 461.**

——**Ss. 86 and 92**—*Name of occupancy tenant removed from* khatauni *merely on order of* qanungo—*Procedure under S. 107 not followed—Right of such tenant to sue for ejectment of his sub-tenants.*

From 1336-F. onwards the plaintiff who was an occupancy tenant was shown as *ghair qabiz* in the *khatauni* with the Zamindar cultivating the plots as his *khudkasht*. The names of the defendants appeared in the *khatauni* for the first time in 1341-F. as cultivating *vice* the Zamindar. In 1342-F. there was a marginal note in *khatauni* to the effect that under the order of the supervisor *qanungo* the name of the occupancy tenant had been expunged. The procedure under S. 107 of the Tenancy Act was not followed in the present case. The occupancy tenant brought a suit for ejectment of the defendants as sub-tenants under Ss. 86 and 92 of the Act and established their contract of sub-tenancy with them.

Held, that the plaintiff must still be recognized as the occupancy tenant of the holding and the defendants were, therefore, liable to ejectment. (*Darling, S.M.*) Chhedi *v.* Duja Singh. **1937 R.D. 463.**

——**Ss. 86 and 92**—*Occupancy holding—Suit for ejectment—Mortgage in favour of defendant—Lease also executed simultaneously in his favour by co-tenants—Rent fixed as payable by lessee.*

One of the co-tenants of an occupancy holding executed a bond in favour of *M* and simultaneously gave him a lease. In the lease there was no reference to the bond which was executed on the same day. A specific rent was fixed as payable by the lessee. The survivor of the co-tenants surrendered his rights in the occupancy holding to the plaintiff who brought a suit under Ss. 86 and 92 of the Agra Tenancy Act for the ejectment of *M* as a sub-tenant.

Held, the transaction cannot be considered to be a mortgage and *M*, the defendant is a sub-tenant who is liable to ejectment on the maturity of the sub-lessee. (*Darling, S. M. and Bomford, J.M.*) Mohram Singh *v.* Deep Singh. **1937 R. D. 512.**

——**Ss. 86 and 92**—*Scope—Widow of occupancy tenant—Re-marriage—Suit for ejectment by landlord—Dismissal—If involves admission to tenancy—Entry of name of widow as tenant in papers—Effect of.*

A landlord sued the widow of an occupancy tenant under Ss. 86 and 92 of the Agra Tenancy Act for ejectment, on the allegation that on her re-marriage the occupancy rights inherited from her former husband ceased to exist and that by process of law she became a non-occupancy tenant liable to ejectment from year to year by the zamindar. The Courts found that she had not become an occupancy tenant, and that the suit under S. 86 was not maintainable. The widow's name, it appeared, was entered in the papers as tenant for several years.

Held, that the suit under Ss. 86 and 92 and its dismissal did not involve an admission on the part of the landlord, that the widow, in spite of her re-marriage, was his tenant, and that the entry of her name in the papers as a tenant did not prove that the landlord, either expressly or by implication, admitted her to tenancy after her re-marriage. (*Drake Brockman, S.M. and Knox, J.M.*) Balaram Chaube *v.* Biranja. **1936 R.D. 440.**

——**Ss. 86 and 92**—*Suit for ejectment brought while Act II of* 1901 *was in force—Suit compromised—Defendant admitted to fresh tenancy and given land under* Singhara—*Subsequent suit to eject him from* Singhara *plot—Defendant, if can revive his claim to occupancy rights.*

Where a suit for ejectment brought by the zamindar while Act II of 1901 was in force was compromised, and the defendant was admitted to a fresh tenancy of the holding and was given land under *Singhara*, in a subsequent suit for his ejectment the defendant cannot revive his claim to occupancy rights which was not recognised in the agreement which led to the decision of the earlier ejectment suit, and as under the new Tenancy Act of 1926 he is not entitled to statutory rights in the *Singhara* plot, he is liable to ejectment as a non-occupancy tenant from this plot. (*Darling, S.M.*) Chaturi *v.* Ram Chander. **1937 R.D. 377.**

——**Ss. 86 and 92**—*Suit to eject as heirs of statutory tenant—Father treated as non-occupancy tenant—Suit, if maintainable—Fresh suit to eject, if lies.*

Where the defendants are sued under Ss. 86/92 of the Agra Tenancy Act as heirs of a statutory tenant, if it is found that the father was rightly or wrongly treated as a non-occupancy tenant, then the suit has to be dismissed. The zamindar cannot ascribe superior rights to the father after his death merely to enable him to eject the sons. The zamindar can bring a fresh suit to eject them as non-occupancy tenants. It would be equally open to the tenants defendants to plead acquisition of statutory right and fresh admission. (*Darling, S.M. and Marsh, J.M.*) BHAGWAT SARAN *v.* MOHAMMAD YAR KHAN. **1938 A.W.R. (B.R.) 249=1938 R.D. 547.**

——**Ss. 86 and 92**—*Suit under—Burden of proof—Long standing entry in Revenue Records—Effect.*

There is no doubt that when a tenant-in-chief seeks to eject the defendant as his sub-tenant and the defendant alleges that he is holding direct from the landlord and denies the existence of any sub-tenancy, the onus is on the plaintiff to prove the relationship alleged by him. But when there is a long standing entry in the Revenue Records in the case of an occupancy tenant, it will be a considerable piece of evidence and the onus will at once be shifted to the defendant to show that though he was recorded as a sub-tenant the course of payment of rent showed that he paid rent in his capacity as tenant-in-chief to the zamindar and that as a matter of fact the plaintiff had abandoned that plot. (*Mehta, J.M.*) BALDEO LONIA *v.* KAMLESHWAR LONIA. **1939 R. D. 530=1939 A.W.R. (B.R.) 230.**

——**Ss. 86/92**—Suit under—Dismissal for default—Fresh suit under S. 44—If barred. *See* AGRA TENANCY ACT, SS. 44, 86 AND 92. **1938 R.D. 57=1938 A.W.R. 29 (B.R.).**

——**Ss. 86 and 92**—*Zamindar seeking to eject occupancy tenants under S. 79—Decretal sum paid by one of them raising money on mortgage—Death of mortgagor tenant—Surviving tenants—If can eject mortgagees as sub-tenants.*

The Revenue Courts will not help an occupancy tenant to get rid of his mortgagee without discharging his liability under the mortgage. Where, therefore, while the zamindar was bringing about the ejectment of the occupancy tenants of the entire holding in proceedings under S. 79 of the Tenancy Act, the decretal sum was paid by one of them raising the requisite money on an usufructuary mortgage, on the death of the mortgagor tenant the surviving occupancy tenants cannot eject the mortgagees as sub-tenants under Ss. 86 and 92 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) NAROTTAM *v.* SHIAM LAL. **1937 R.D. 342.**

——**Ss. 86 and 92**—*Suit for ejectment of heir of statutory tenant*—Ex parte *decree passed—Decree not put in execution within a month—Subsequent suit filed by zamindar—Limitation.*

After the death of a statutory tenant, the zamindar brought a suit for ejectment against his heir and got an *ex parte* decree, on the ground that his period as heir had expired. But he failed to put it into execution within the period of a month allowed by law. He again brought a suit. The defendant contended that the previous suit barred the present suit.

Held, a fresh cause of action arises in each year after the five years during which the heir is entitled to hold up to a limit of three years. The plaintiff has therefore a fresh cause of action in the two succeeding years after the first attempt: provided that the suit was not barred by limitation and the heir was not admitted as a tenant by a written agreement. (*Darling, S.M. and Bomford, J.M.*) RAM KUMAR *v.* NAIKU. **1937 R.D. 513.**

——**Ss. 86 and 92**—*Suit for ejectment of sub-tenant—Sub-tenant pleading that he is mortgagee—Suit dismissed in default—Second suit—If maintainable—C. P. Code, O. 9, R. 9.*

Where in a suit for ejectment of a sub-tenant brought under Ss. 86 and 92 of the Agra Tenancy Act, the sub-tenant claimed a status of a permanent character like that of a mortgagee and the suit was dismissed in default, the decision would operate as a bar to a subsequent suit under O. 9, R. 9, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) MANGRU RAM *v.* CHHEDI. **1937 R. D. 334.**

——**Ss. 86 and 92**—*Suit to eject sub-tenant—Burden of proof—Duty of plaintiff—Entry of defendant as sub-tenant in patwaris papers—Presumption as to—Evidentiary value of.*

In a suit to eject a sub-tenant, the ordinary rule of law as to burden of proof is that when the defendant denies the sub-tenancy, the plaintiff has to prove the contract of sub-tenancy. It is not enough for him to prove merely a long statement in the patwari's papers describing the defendant as a sub-tenant; he must prove something more. There is no presumption in favour of the entry in the Government records; so far as an entry of tenancy or sub-tenancy is concerned, it is only a piece of evidence just like any other evidence. If no contract of sub-tenancy is proved, the suit must fail and must be dismissed. (*Drake Brockman, S.M. and Knox, J.M.*) NAIM NARAIN SINGH *v.* RAM ACHARAJ SINGH. **1936 R.D. 479.**

——**Ss. 86, 92 and 44**—Suit under S. 44—Treatment as one Ss. 86 and 92—Defendants being non-occupancy tenants. *See* AGRA TENANCY ACT, SS. 44, 86 AND 92. **1937 R.D. 522 (1).**

——**Ss. 86, 92 and 205**—Suit under—Stay of Proceedings Act, if apply to. *See* U. P. STAY OF PROCEEDINGS ACT. **1938 R.D. 801.**

——**Ss. 86 and 99**—*Suit to eject defendants as sub-tenants—Defendants claiming to be in direct relationship with zamindar—Plaintiff not proving contract of tenancy—Liability of suit to dismissal—Plaintiff's remedy.*

The plaintiff sued as a tenant-in-chief for the ejectment of the defendants as sub-tenants. The defendants claimed to be in direct relationship with the zamindar and they never paid rent to the plaintiff. The plaintiff was not able to establish any contract of tenancy.

Held, that *vis a vis* the plaintiff the defendants might be trespassers but they were not his sub-tenants and that the remedy of the plaintiff did not lie by way of an ejectment suit under S. 86 of the Tenancy Act.

Held, further, that the plaintiff could have sued the zamindar for recovery of possession of the holding under S. 99 of the Tenancy Act if he had been kept out of possession through the defendants. (*Darling, S.M. and Bomford. J M.*) MIHIN LAL *v.* SURANDRAJIT SINGH. **1937 R. D. 173.**

——**Ss. 86, 121 and 123**—Sir—*Loss of* Sir *character—Absence of any claim for ex-proprietary rights—Position of tenant—If can claim to be statutory tenant.*

A tenant of *Sir* which is the subject of transfer and in which ex-proprietary rights are not claimed, cannot become for that very reason the statutory tenant of that holding. He continues to be a non-occupancy tenant and his ejectment will have to be sought under S. 86 of the Agra Tenancy Act. The tenant cannot sue to get a declaration that he is a statutory tenant. At best he is entitled to have a declaration that he is a non-occupancy tenant and not a trespasser. (*Mehta, J. M.*) JAGSOTTAM *v.* KAILAS SAHI. **1939 A.W.R. (B.R.) 98=1939 R. D. 473.**

——**Ss. 92, 86 and 44**—Suit under S. 44—Treatment as one under Ss. 86 and 92—Defendants being non-occupancy tenants. *See* AGRA TEN. ACT, SS. 44, 86 & 92. **1937 R. D. 522 (1).**

——**S. 95**—Consent of landlord—Proof—Oral evidence—Admissibility. *See* AGRA TENANCY ACT, SS. 44 AND 95. **1938 A.W.R. (B.R.) 206.**

——**S. 95**—*Object of—Ejected tenant holding over—Liabilities of.*

Where a tenant after an order for his ejectment, holds on and retains possession of the holding, he thereby renders himself liable not only to criminal prosecution but also to a suit under S. 44 of the Tenancy Act. It is not open to such a person to take any technical point to prove re-admission for S. 95 was introduced in the new Act, to prevent trespassers from raising such points. (*Darling, S. M. and Bomford, J.M.*) SHEO GULAM LAL *v.* MAHARAJA OF BUMRAON. **1938 A.W.R. (B. R.) 211=1938 R. D. 655.**

——**S. 95**—*Proof of re-admission to tenancy—Mere acceptance of rent—If sufficient.*

The mere acceptance of rent by the zamindar is not necessarily evidence of a contract of tenancy. According to S. 95 of the Tenancy Act the re-admission of an ejected tenant should be in writing. (*Darling, S. M. and Mehta, J. M.*) RADHEY MOHAN LAL *v.* RICHHPAL SINGH. **1938 A.W.R. (B. R.) 320=1938 R.D. 788.**

See also JUKKU RAM LAL *v.* MAHADEO PRASAD. **1940 R.D. 195=1940 A.W.R. (B.R.) 70 (Col. 108).**

——**Ss. 97 and 98**—*Ejectment—Sowing done prior to—Ejected tenant, if entitled to value of crop at harvest.*

An ejected tenant is not *prima facie* entitled to be paid the value at harvest of a crop which he has sown just before ejectment, leaving it to the landlord to take all the risks of damage between sowing and harvest. In such a case he would at best be entitled only to the value of the seed, and labour charges for ploughing and sowing. (*Darling, S.M. and Bomford, J.M.*) CHIRANJIVA NARAIN *v.* MUSTA. **1938 R. D. 395 (1)=1938 A. W.R. (B.R.) 230=1938 A.L.J. (Supp.) 44.**

——**S. 97 (2)**—*Construction—"After the date of the order for execution"—Meaning of—Material date.*

The words "after the date of the order for execution" in S. 97 (2) of the Agra Tenancy Act govern both the word "decree" and the words "order for ejectment." The material date is the date of the order for execution of the order for ejectment. The sub-section only governs the rights of the parties to crops sown after the date of an order for execution of an order for ejectment. The fact that the crops are sown without permission after the order for ejectment is made would not in itself disentitle the tenant to such crops. (*Harries, J.*) IBRAHIM KHAN *v.* NAZIR AHMAD. **169 I.C. 269=10 R.A. 8=1937 A.L.R. 509=1937 A.L.J. 231=1937 R. D. 122=1937 A. W.R. 147=A.I.R. 1937 All. 334.**

——**S. 97 (2)**—*Construction—"Date of the order for execution of the decree or order for ejectment"—Decree for arrears of rent followed by order for ejectment—Order for delivery of possession in execution—Review application by tenant and recall of process—Effect—Dismissal of review application and subsequent delivery of possession—Crops sown without permission after order for ejectment—Right to.*

The appellants sued their tenants (respondents) for arrears of rent, obtained a decree and later on took proceedings in execution and obtained an order for ejectment on 18-11-1929. On 29-11-1929, the execution Court ordered the issue of a delivery order directing delivery of possession to the appellants in pursuance of the order of 18-11-1929. In the meantime the respondents tenants applied for a review of the order of ejectment and on 14-12-1929, the executing Court ordered the Amin to return the process to the Court without executing it, directing that the execution proceedings would be carried out after the disposal of the review application. The review application was heard and dismissed on 28-8-1930. On 29-8-1930, the Amin was again ordered to execute the order of ejectment and on 30-8-1930, the appellants obtained possession. The tenants respondents had sown crops on the land after the order of ejectment was passed consequent upon the decree for arrears of rent, but had not cut the crops by 30-8-1930 on which date delivery was effected. The respondents entered upon the land and cut and removed them and the appellants brought a suit for value of the crops so cut and removed. The crops were sown without the written permission of the landlords appellants.

Held, (1) that the order of 14-12-1929, recalling the Amin to return the process unexecuted was one which merely stayed the earlier order passed on 29-11-1929 and did not set aside that earlier order; and its effect was merely to suspend the execution of the order of ejectment because of the respondent's application; and that the appellants were in no way responsible for the delay which was entirely due to the acts of the respondents; (2) that the order for the execution of the order for ejectment which was carried into effect on 30-8-1930 was not a new order passed on 29-8-1930; but was the original order passed on 29-11-1929, which remained in existence from that date and which was not set aside or recalled though its operation was stayed; and (3) that the crops in question having been sown after the date of the order for execution of the order of ejectment (namely, 29-11-1929) without the written permission of the appellants, the latter were entitled to the crops when possession was delivered to them, and the respondents had no right to the crops under S. 97 (2).

Held, further, that if the original order for the execution of the order for ejectment had been set aside, and possession actually given in pursuance of a new order, the respondents would be entitled to the crops sown by them without permission before such new order for execution had been passed. (*Harries, J.*) IBRAHIM KHAN *v.* NAZIR AHMAD. **1937 A.L.J. 231=169 I.C. 269=10 R. A. 8=1937 A.L.R. 509=1937 R.D. 122=1937 A. W.R. 147=A.I.R. 1937 All. 334.**

S. 99—Applicability.

——**S. 99**—*Applicability — Conditions—Act of 1901, S. 79—Relative scope—Rulings under—If proper guides in applying S. 99.*

Under S. 99 of the Agra Tenancy Act of 1926, if a tenant is wrongfully ejected or prevented from obtaining possession of his holding or any part thereof otherwise than in accordance with the Act by any co-sharer of the landholders, a suit would lie in the Revenue Court. It is not necessary for the application of the section that the ejectment should be by the whole body of the landholders. S. 99 of the Act of 1926 is much wider in scope than S. 79 of the Act of 1901, and the rulings under the latter section of the old Act cannot be relied upon as guides in applying S. 99 of the new Act. (*Ganga Nath, J.*) Ram Chander Singh *v.* Mijli. **173 I.C. 651=10 R.A. 486=1938 R.D. 106=1938 A.L.R. 154=1937 A.L.J. 1249=1937 A.W.R. 1174=A.I.R. 1938 All. 65.**

——**S. 99**—*Applicability*—Grant of occupancy rights in Sir—Subsequent sale of proprietary rights—Death of vendor—Grantee of occupancy rights getting recorded as occupancy tenant before death of grantor—Suit by widow claiming ex-proprietary rights—Competency. *See* Agra Ten. Act, Ss. 14 and 15. **1936 R.D. 488.**

——**S. 99**—*Applicability—Land carried away by river and reformed — Tenant prevented by landlord from taking possession—Suit for declaration of occupancy rights—Maintainability—Proper remedy.*

Where a tenant sues his landlord on the allegation that the land in suit formed part of a larger holding in occupancy right and that it was carried away some years ago by a river but had re-appeared and that when he took, or attempted to take, possession of the land reformed he was prevented or ousted by the zamindar, the suit must be, if the land is identifiable with the land which was previously in his occupation as occupancy tenant, one under S. 99 of the Agra Tenancy Act and not for a declaration of his occupancy rights under S. 126 of the Act. (*Drake Brockman, S.M. and Knox, J.M.*) Bans Bahadur Singh, Babu *v.* Bhikhari Lal. **1936 R.D. 111.**

——**S. 99**—*Applicability—"Otherwise than in accordance with the Act'—Meaning of—Co-tenants holding jointly—Ejectment proceedings against some only—Ouster of all—Legality—Suit by whole body for recovery of possession and compensation—Maintainability.*

It is no doubt true that if a body of co-tenants is ejected in circumstances which warrant the inference that the proceedings have been taken only against some of them without the knowledge of the others who also are ousted from possession along with those who were actual parties to the proceedings, the ejectment of "the tenant" that is the whole body of individuals in joint possession of the holding would be "otherwise than in accordance with the Act," and would therefore give rise to a suit under S. 99 of the Act by the whole body of co-tenants, both those who were parties to the ejectment proceedings and those who were not. But it cannot be held that when proceedings for ejectment have been taken against the majority of a number of tenants constituting "the tenant" whose names alone are recorded, and those whose names are not recorded have certainly had knowledge of the proceedings throughout and have made no attempt to challenge the legality of the proceedings as against themselves, the mere fact that they were not made parties to the proceedings justifies a suit by the whole body of tenants, including those who were parties to the proceedings, for recovery of possession by the whole lot, still less a decree for possession with compensation for ouster of the whole lot. No such suit under S. 99 will lie in the latter case. (*Drake Brockman, S. M.*) Krishna *v.* Saheb Singh. **1936 R.D. 393.**

——**S. 99**—Applicability—Recorded tenant ousted by persons claiming to be exclusive tenants under family partition—Remedy of former. *See* Agra Ten. Act, S. 44. **1936 R.D. 33.**

——**S. 99**—Applicability—Suit to eject co-sharer taking forcible possession of tenants holding. *See* Agra Tenancy Act, Ss. 44 and 99 —Applicability. **1939 R.D. 202.**

——**S. 99**—*Applicability—Suit for restoration of possession on the ground of illegal ejectment —No proof of fraud.*

Where a suit is brought under S. 99 of the Agra Tenancy Act for restoration of possession on the ground of illegal ejectment brought about by fraud, when the alleged fraud is not established, the case does not fall within the purview S. 99 of the Act. (*Harper, S.M. and Sathe, J.M.*) Thakra *v.* Tika Ram. **1940 R.D. 222=1940 A.W.R. (B.R.) 87.**

——**S. 99**—*Applicability—Several* sir *holders—Sub-lessee from one—Suit by for possession—Maintainability.*

A sub-lessee from one of several *sir* holders of a holding cannot maintain a suit under S. 99 of the Agra Tenancy Act for possession of the holding. A tenancy can only be created by all the co-sharers acting conjointly; a tenancy sought to be created by a single co-sharer is ineffective. (*Darling, S.M.*) Ganeshi Lal *v.* Bhabuti Singh. **1937 R.D. 12.**

——**S. 99**—Applicability — Submerged land—Re-appearance—Person claiming same as part of his occupancy tenancy—Remedy of—Omission to seek remedy within 6 months—Effect. *See* Agra Tenancy Act, Ss. 35 (1) (*f*) and 99. **1936 R.D. 336.**

——**S. 99**—Applicability—Suit under S. 44—Zamindar supporting defendant's plea of surrender and new admission—If converts suit into one under S. 99. *See* Agra Tenancy Act, Ss. 44 and 99. **1938 R.D. 339.**

——**S. 99**—Applicability—Tenant filing surrender but resiling and not paying process-fee for notice—Landlord ejecting sub-tenant on basis of surrender—Suit by tenant under S. 99—Competency. *See* Agra Ten. Act, Ss. 32 & 99. **1937 A.W.R. 1205.**

S. 99—Dispossession wrongful.

——**S. 99**—*Dispossession, wrongful—Compensation—Right to—Considerations.*

Where a tenant is found to be illegally dispossessed, he cannot be denied compensation on the mere ground that no crop was upturned. The land has to be prepared by ploughings and weeding for the sowing, next season. Hence if a tenant is prevented from 'cultivating' the area, compensation for loss is called for. (*Darling, S. M. and Mehta, J.M.*) Kashi Sahu *v.* Sekhraj Singh. **1938 R.D. 882.**

S. 99—Right of suit.

——S. 99—*Right of suit—Conditions to be complied with.*

If a tenant pleads that he has been dispossessed by a fraudulent abuse of legal process, he has a right to come under S. 99 of the Act, provided he has not availed himself of the other remedies open to him, by way of review and appeal. In default of a definite finding that the decree-holders were guilty of fraud the suit was not maintainable. (*Darling, S.M. and Bomford, J.M.*) Sheo Prasad Gupta *v.* Mandil Singh. **1938 A.W.R. (B.R.) 235=1938 R.D. 541.**

——S. 99—*Right of suit under—Ejectment for arrears of rent—Proof of fraud—Effect.*

Where in a suit for ejectment for arrears of rent, there has been fraud and a tenant has thereby been ejected, the ejectment is not in accordance with the provisions of the Act and such a tenant has a right to bring a suit under S. 99 of the Act. (*Darling, S.M. and Bomford, J.M.*) Ram Prasad Pande *v.* Jai Bahadur Singh. **1938 A.W.R. (B.R.) 228=1938 R.D. 469.**

——S. 99—*Patta given to another during existence of tenant in possession—If valid and enforceable.*

As no patta can be given validly about a holding in which a tenant is already in existence, a second patta to a different party is not susceptible of being enforced and hence there is no cause of action under S. 99 of the Agra Tenancy Act in respect of it. (*Mehta, J.M.*) Ramjag *v.* Baildehi. **1939 R.D. 122=1939 A.W.R. (B.R.) 174.**

——S. 99—*Right of suit under—Parties.*

A suit under S. 99 of the Agra Tenancy Act can be brought against the landholder or any person claiming through the landholder or both. But a tenant who is ousted by a stranger, *i.e.*, a person who does not claim through the landholder cannot sue the stranger under S 99, but only under S. 44. (*Drake Brockman, S.M. and Knox, J.M.*) Ganga Ram *v.* Hira Lal. **1936 R.D. 477.**

S. 99—Scope.

——S 99—Scope—Ouster of tenant by stranger—Landlord ejecting stranger and letting land to another—Effect—Suit by tenant against latter and landlord—Maintainability—Limitation. *See* Agra Ten. Act, Ss. 44 and 99. **1936 R.D .477.**

——S. 99—*Scope—Retrospective operation—Cause of action arising before Act.*

S. 99 of the Agra Tenancy Act has no retrospective effect and does not oust the jurisdiction of the Civil Court in respect of a suit the cause of action for which arose prior to the coming into force of the Act. (*Ganga Nath, J*) Jagdei *v.* Sampat Dube. **172 I.C. 635=1938 A.L R. 8=10 R.A. 414=1937 A.W.R. 916=1937 R.D 548=1937 A.L.J. 1111=A.I.R. 1937 All. 796.**

——S. 99—*Scope of suit under—Decision as to status of defendant claiming under landholder—*

Unnecessary—If res judicata *between co-defendant.*

In a suit for illegal dispossession under S. 99 of the Agra Tenancy Act against the landholder and a person claiming under him, it is not necessary for its disposal to decide the exact status of the person claiming under the landholder. A decision, even if given, cannot operate as *res judicata* as between the co-defendants in any later suit. (*Mehta, J.M.*) Kayastha Pathshala, Allahabad *v.* Mewa Lal. **1939 R.D. 302=1939 A.W.R. (B.R.) 258.**

S. 99—Suit under.

——S. 99—*Suit for wrongful dispossession alleging that plaintiff was member of joint family with deceased statutory tenant – Assistant Collector finding in plaintiff's favour on ground that he was heir to deceased as his nearest collateral—Decision, if* res judicata *on question of plaintiff's status.*

Where the plaintiff sued the zamindar for wrongful dispossession under S. 99 of the Agra Tenancy Act claiming in his plaint that he was a member of a joint family with the deceased statutory tenant, but the Assistant Collector found in his favour on the ground that he was heir to the deceased tenant as being his nearest collateral who had co-shared in cultivation with him at his death, the decision operates as *res judicata* on the question of the plaintiff's status, and he cannot in a subsequent suit for ejectment shift his ground and claim that he was really admitted to the co-tenancy with the deceased tenant. (*Darling, S.M. and Bomford, J.M.*) Tulsi *v.* Jamuna. **1937 R.D. 373 (2).**

——S. 99—*Suit under—Limitation—Plaintiff appearing to be out of possession during two years following settlement year—No proof that he had since recovered possession—Suit, if barred.*

Where in a suit for recovery of possession of a holding under S. 99 of the Agra Tenancy Act, it was shown from the entries in the *khatauni* that the plaintiff appeared to have been out of possession during the two years succeeding the settlement year when another person was recorded *dewedar qabiz*, and there was nothing to show that the plaintiff had since recovered possession of the holding, his suit is barred by limitation. (*Darling, S.M.*) Gayasi Ram *v.* Kalia. **1937 R.D. 299.**

——S. 99—*Suit under—Limitation—Zamindar getting possession of holding of minor tenant—Suit by latter for possession.*

The law is perfectly clear that if a Zamindar gets possession of a tenant's holding, be he adult or minor, by fair means or foul, the tenant has only six months in which to sue for recovery of possession. (*Darling, S.M. and Bomford, J.M.*) Shyam Saran Pandey *v.* Ram Khelawan. **1937 R.D. 208.**

——S. 99—*Suit under—Limitation—Zamindar giving lease of holding to one* R *on death of recorded tenant—*J, *an unrecorded co-tenant of deceased filing criminal complaint against* R—*Criminal Court deciding that* J *must regard himself as out of possession—Suit by* J. *for restoration of possession—Limitation—Starting point.*

Where on the death of the recorded statutory tenant, the Zamindar gave a lease of his holding to one *R*, and one *J*, an unrecorded co-tenant of the deceased tenant, filed a criminal complaint against *R* which was dismissed, the Court deciding that *J* must regard himself as out of possession, the limitation for a suit by *J* for restoration of possession runs from the date of the decision of the Criminal Court and not from the date of the lease in the absence of proof that *J* knew anything of the lease. (*Bomford, J.M.*) RAJA TIWARI *v.* JHOPARI. **1937 R.D. 294.**

———**S. 99**—Suit under—Time spent in futile application for review—Benefit of S. 14 of Limitation Act if available. *See* LIMITATION ACT, S. 14 —BENEFIT OF. **1938 R.D. 469.**

———**S. 99**—Appropriateness of proceedings under. *See* AGRA TENANCY ACT, SS. 37 AND 99. **1938 A.W.R. (B.R.) 45**

———**S. 99**—Remedy under—When can be availed of. *See* AGRA TEN. ACT, Ss 44 & 99. **1938 R.D. 248.**

———**S. 99, Proviso**—*Applicability - Order for ejectment in execution of rent decree—No actual ejectment—Subsequent lease to another—Suit by original tenant under S. 99—Reliefs to which parties are entitled.*

In execution of a decree for arrears of rent, an order for ejectment was obtained. But the Zamindar did not apply for actual ejectment. He nevertheless leased the property to a different person. The original tenant thereupon filed a suit under S. 99 of the Agra Tenancy Act. It was held that he was entitled only to damages and at the same time was liable to ejectment under the Act in the year "in which the suit was brought" and that the proviso to S. 99 applied. (*Darling, S.M. and Bomford, J.M.*) BABU LAL *v.* PAL. **1938 A. L.J. (Supp.) 1=1938 A W.R. (B.R.) 33=1938 R.D. 310.**

———**Ss. 99 and 44**—*Ejected grove-holder—Failure to avail remedy under S. 99—Retention of possession—Liability to ejectment under S. 44.*

Where a grove-holder alleges that his ejectment under S 79 of the Tenancy Act and dispossession is illegal, has his remedy under S. 99 of the Act and if he fails to avail himself of it within the period of limitation, he has no remedy left. Any attempt by him to retain possession over the plot subsequent to his ejectment gives the other party a right to eject him as trespasser under S. 44 of the Act. (*Marsh, S.M.*) BOBDEE *v.* RAGHUBIR SINGH. **1939 R.D. 603 (1)=1939 A.W.R. (B.R) 273 (1).**

———**Ss. 99 and 44**—*Occupancy tenant seeking to recover possession of his plot from defendant who is in cultivating possession—Remedy.*

Where an occupancy tenant seeks to recover possession of a plot which belongs to his holding from the defendant who is in cultivating possession, his remedy lies by way of a suit under S. 99 of the Tenancy Act for which limitation is only six months. A suit by him under S 44 for the ejectment of the defendant as a trespasser does not lie (*Darling, S.M.*) DHARM SINGH *v.* NARAIN SINGH. **1937 R.D. 207 (2).**

———**Ss. 99 and 44**—*Regaining possession after ejectment—Failure to avail remedy under S. 99—Liability to ejectment under S. 44.*

Where after an ejectment under S. 79 of the Agra tenancy Act the tenant whose remedy even if he was illegally dispossessed was only under S. 99 of the Act, fails to invoke S. 99 within the period of limitation, cannot regain forceable possession of the land; and if he does so he is liable to be ejected under S. 44 of the Act. (*Marsh, S. M.*) BOBDEE *v.* RAGHUBIR SINGH. **1939 R.D. 602 =1939 A.W.R. (B.R.) 272.**

———**Ss. 99 and 44**—*Widow of co-tenant obtaining division of holding—Subsequently re-marrying the other co-tenant—Latter in possession of whole holding—Rights and remedies of the mother of the deceased co-tenant.*

Where the widow of a co-tenant obtains by suit a division of the holding, but which is not consented to by the zamindar and later on re-marries the other co-tenant, and he remains in undisputed possession of the whole holding, he must be held to be claiming the whole holding through the landholder within the meaning of Cl. (1) (*b*) of S. 99. As such the mother of the deceased co-tenant should put forward her claim through a suit under S. 99 of the Act for recovery of possession. A suit under S. 121 is infructuous, as she was never in possession. (*Darling, S.M.*) SURJA *v.* GIRAND SINGH. **1938 R.D. 935 (2)= 1939 A.W R. (B.R.) 59.**

———**Ss. 99 and 82**—*Ejectment—Remedy—Suit by ejected tenant under S. 99, after rejection of review of order of ejectment—If maintainable.*

Whether or not a tenant who has been ejected under S. 82 of the Agra Tenancy Act has a right in certain special circumstances to bring a suit under S. 99, he cannot certainly be allowed to do so where he has tried one remedy after another. An order rejecting an application for review of the order of ejectment when not appealed against should be treated as final. (*Darling, S.M. and Bomford, J.M.*) VIVEK SINGH MAJITHIA *v.* RAM LALL. **1938 A.W. R. (B. R.) 303=1938 A. L. J. (Supp.) 119=1938 R.D. 436.**

———**Ss. 99 and 121**—*Applicability—Hindu joint family having fixed rate tenancy—Suit by one member to set aside alienation of fixed rate tenancy by another member and for declaration that it is not binding on family—Jurisdiction of Civil Court—If excluded.*

A suit by a member of a joint Hindu family seeking to set aside an alienation of family property made by another member thereof and to have it declared that the same does not affect the family property, which, in spite of it, continues to belong to the family, and praying that in case the property has passed out of the family, it be restored to it, is a suit which is usually and generally instituted in the Civil Court. Such a suit is of a very rare occurrence in a Revenue Court. The fact that the property alienated which is the subject-matter of the suit is a fixed rate tenancy, which is both heritable and transferable does not exclude the jurisdiction of the Civil Court which is otherwise the proper Court to decide the question arising in such a case. The fixed rate tenancy belongs to the entire joint family of which the plaintiff is a member, and it is the family and not the plaintiff that is the tenant thereof. Ss. 99 and 121 of the Agra Tenancy Act are wholly inapplicable to such a suit, as the plaintiff and the alienating members are not co-tenants in the strict sense of the term but they are members of a coparcenary body to whom the fixed rate tenancy belongs. There is consequently nothing in those sections read with S. 230 and Sch. IV of the Act to exclude the jurisdiction of the Civil Court.

(*Niamatullah and Harries, JJ.*) DEOKINANDAN PANDEY *v.* RAM CHANDRA TEWARI. **I.L.R. (1938) A. 40=173 I.C. 180=10 R.A. 470=1938 A.L.R. 107=1937 A.L.J. 905=1937 A.W.R. 919=1937 R.D. 551=A.I.R. 1938 All. 17.**

——**Ss. 99 and 121**—*Applicability —Plaintiff claiming to be tenant but not in possession—Suit against landlord and another in possession under S. 121—Maintainability—Proper remedy.*

A person who claims to be a tenant of a plot of land on the basis of a written lease, and who sues the landlord and another who claims to be in possession, must, when he is not in possession, bring his suit under S. 99 of the Agra Tenancy Act and not under S. 121. (*Drake Brockman, S. M.*) MAHOMED ALI *v.* SUMER **1936 R.D. 450 (1).**

——**Ss. 99 and 121**—*Applicability—Death of one co-tenant—Collaterals recorded as heirs—Other co-tenants seeking possession—Remedy—Suit for declaration of tenancy rights—Maintainability.*

Where on the death of a co-tenant, his collaterals are recorded as his heirs, claiming to have shared in the cultivation of the holding with the deceased at the time of his death, the proper remedy of the other co-tenants who wish to obtain possession of the holding is to bring a suit under S. 99 of the Agra Tenancy Act. A declaratory suit under S. 121 is useless and is not the proper remedy. (*Drake Brockman, S.M. and Knox, J. M.*) DUNGAR *v.* KAUNSALYA. **1936 R.D. 559.**

——**Ss. 99 and 121**—*Applicability and scope—Dispute between landlords and sons of late occupancy tenant—Attachment of holding by Criminal Court pending decision by Revenue Court—Suit by sons of late tenant for declaration—Maintainability.*

As the result of a dispute between the landholder and the sons of his late occupancy tenant, in which both parties were prepared to use violence to prevent each other from taking possession of the holding, the Criminal Court attached the holding pending decision of the dispute by a competent Court. The Magistrate took possession and made it clear that he would give back possession to the person whom the Revenue Court might hold to be entitled to hold possession. The sons of the deceased tenant sued under S. 121 of the Act for a declaration of their rights against the landholder, but not for recovery of possession under S. 99 of the Act.

Held, though ordinarily it was useless for a tenant who had been ejected or kept out of possession by his landholder to obtain a declaration under S. 121, in the peculiar circumstances of the case in practice the distinction between Ss. 99 and 121 was not an important one and the suit having been brought within the period of 6 months for a suit under S 99 the use of the wrong section ought to be condoned. (*Knox, J.M*) SHEO BUX SINGH *v.* CHATTAR SINGH. **1936 R.D. 323.**

——**Ss. 99 and 121**—*Suit between two tenants of same village—Declaration that land included in defendant's plot by Revenue Court really belongs to plaintiff and that possession be given to him—Suit for—Jurisdiction—Civil or Revenue Courts.*

Where a tenant brings a suit against another tenant of the same village, seeking a declaration that a certain portion of land which was included in the defendant's plot by the Revenue Court really appertains to the plaintiff's grove and that possession of the same should be given to the plaintiff after dispossession of the defendant, the Civil Court will have jurisdiction in the matter if the landholders of the parties are different. But if the landholders are the same the Revenue Court has jurisdiction. (*Sulaiman, C.J. and Bennet, J.*) MATA PRASAD *v.* TIKA RAM. **167 I.C. 927=9 R.A. 597=1937 A.W.R. 110=1937 A.L.J. 137=1937 A.L.R. 275=1937 R.D. 72=A.I.R. 1937 All. 261.**

——**Ss. 99, 121 and 230**—*Suit for declaration by one tenant against a rival tenant—Addition of a prayer for possession—Jurisdiction of Revenue Court to try.*

Where a suit is really one for a declaration by one tenant against a rival tenant, that he is the tenant of the holding in dispute and possession of the holding is also sought, the fact remains that the opposite party claims only a derivative title from the landlord and hence the suit lies exclusively within the jurisdiction of the Revenue Courts in view of the provisions of Ss. 99 and 121 read with S.230 of the Agra Tenency Act. (*Mulla, J.*) BHOLA OJHA *v.* DHANESHWAR OJHA. **1939 A.W.R. (H.C.) 459=1939 R.D. 386=A.I.R. 1939 All. 677.**

——**Ss. 99 and 123**—*Suit under Ss. 99 and 123 —Plaintiff executing qabuliat after death of occupancy tenant without heir—Trespasser occupying the land—Ejectment by Zamindar—Another person executing qabuliat in favour of Zamindar and placed in possession—Suit by plaintiff three weeks thereafter—Limitation — Wrongful possession—Commencement of.*

The occupancy tenant of a holding died without heirs on 26th March, 1934. On the following day, the plaintiff executed a quabuliat for the holding. Meanwhile, a stranger *H* set up a claim to the occupancy rights of the holding and took possession. The Zamindar proceeded against *H* as a trespasser under S. 44 of the Agra Tenancy Act and obtained a decree and secured the formal ejectment of *H* on 25th June, 1935. On 29th June, 1935, the Zamindar took a fresh quabuliat from an entirely new party, *S*. Three weeks later, the plaintiff brought a suit against the Zamindar under S. 123 of the Tenancy Act for a declaration that he was the statutory tenant of the holding and the plaint was amended by the addition of S. 99. On a question of limitation being raised,

Held, the case is governed by Sch. IV, Group *B*, Serial No. 12; limitation for the suit under S. 99 begins from the time when the wrongful possession took place, and the wrongful possession by the zamindar took place when he accepted another quabuliat from *S* and thereupon placed him in possession of the holding and not from the date when the plaintiff executed the quabuliat. The suit being within time the plaintiff was declared to be the statutory tenant. (*Darling, S. M. and Bomford, J.M*) JAHANGIRA *v.* MOHAMMAD HASNAIN. **1937 R.D. 507.**

——**S. 99 (1)**—*"Claiming through the landholder"—Meaning.*

A person making a false claim without a shadow of a title cannot be regarded as "claiming through the landholder" within the meaning of S. 99 of the Agra Tenancy Act and plead that he can only be ejected by a suit under that section. (*Bomford, J.M.*) CHITTAR *v.* JHUNNA. **1938 R.D. 110=1938 A.W.R. (B.R.) 50.**

——**S. 99 (1) (iii)**—*Suit for compensation for improvement—If lies,where there has been neither an ejectment nor keeping out of possession.*

A suit for compensation for improvement which is only a consequential relief cannot lie when the tenant has neither been ejected nor kept out of possession. (*Harper, J.M.*) Balli Bhar *v.* Vakchhed Mal. **1940 R.D. 122 (2)=1940 A. W.R. (B.R.) 51 (1).**

——**S. 103**—*Relinquishment with all formalities—Plea of fraud and absence of intention to relinquish—Onus.*

When an applicant for relinquishment has gone through the elaborate procedure prescribed by the Revenue Court Manual and complied with all the requirements of procedure, the onus lies very heavily on him to prove that a fraud had been played on him and that he did not want to relinquish the holding. (*Mehta, J.M.*) Mahadeo Kalwar *v.* Syed Mohammad Rizwan-Ullah. **1939 A.W.R. (B.R.) 97=1939 R.D. 375.**

——**S. 103**—*Scope—Surrender—Execution of deed by tenant without ceasing to cultivate land—Suit to declare occupancy rights in land surrendered—Maintainability.*

A tenant who has merely executed a deed of surrender but has not actually ceased to cultivate the land in question is entitled to sue for a declaration of his occupancy rights in the plots alleged to have been surrendered. The mere execution of the deed does not break the continuity of the holding, and if he brings the suit within six months of the date of execution of the deed, he will be entitled to the declaration. (*Drake Brockman. S.M. and Knox, J.M.*) Sukh Nandan *v.* Bindeshri Bux Singh. **1936 R.D. 350.**

——**S. 103**—*Surrender—Conditions of validity—Absence of one co-tenant—If renders surrender invalid.*

When a surrender by co-tenants is otherwise valid, and the other co-tenants really accept the lands in exchange for the plots surrendered, the fact that one co-tenant was absent at the time and did not join in the surrender deed would not by itself vitiate the surrender. (*Drake Brockman, S. M. and Knox, J.M.*) Sukh Nandan *v.* Bindeshri Bux Singh, **1936 R.D. 350.**

——**S. 103**—*Surrender by ex-proprietary tenant—Subsequent sale of holding—Ex-proprietary rights, if revived.*

Where an ex-proprietary tenant relinquishes his holding before its sale by him takes place the ex-proprietary rights which he had lost by actual surrender cannot revive. (*Drake Brockman, S.M. and Knox, J.M.*) Girwar Singh *v.* Pop Singh. **1936 R.D. 98=1936 A.W.R. 222.**

——**S. 103**—*Surrender—What constitutes.*

In order to constitute surrender of a holding there must be an actual "ceasing to cultivate." A notice of surrender, if accepted by the landlord, is not itself a complete surrender. (*Drake Brockman, S.M. and Knox, J.M.*) Girwar Singh *v.* Pop Singh. **1936 R.D. 98=1936 A.W.R. 222.**

——**S. 103**—*Tenant of holding belonging to several proprietors—Surrender by—Conditions of validity.*

A surrender by a tenant, who is a tenant of the whole proprietary body, must be made in favour of the whole proprietary body; and a surrender cannot be made of a portion of the holding without the consent of the whole proprietary body (the landholder). (*Drake Brockman, S. M. and Knox, J.M.*) Doongar Singh *v.* Baljit Singh. **1936 R.D. 57.**

——**Ss. 103 and 106**—*Surrender—Resiling—Proper remedy.*

When a tenant feels that he has given a wrong surrender, then his remedy is not under S. 106 of the Agra Tenancy Act, which is the section under which the zamindar can come in to contest the surrender. While it is doubtful whether the order passed under S. 103 is open to review, the tenant, if he had given up, possession under a misapprehension, has a remedy under S. 99 of the Act within six months of his actual dispossession. In case of fraud, he has only to sit tight and the patwari will return him as in possession in the next year's papers. (*Marsh, S. M. and Mehta, J.M.*) Sahdeo Ram *v.* Dukhanti Nonia. **1939 R.D. 330.**

——**S. 105**—*Surrender—Application—Forum—Presentation to S. D. O.—Effect.*

The proper person before whom the application is to be put under S. 105 of the Agra Tenancy Act is the Tahsildar. Nowhere has it been provided that the S. D. O. is the proper Court for the consideration of such an application. But if it is put in before him, he merely passes it on to the Tahsildar for necessary action. Unless the formalities contemplated by S. 105 and the rules laid in the Revenue Manual are complied with, the proceedings are not complete. (*Mehta, J.M.*) Janhawi Prasad *v.* Jwala Prasad. **1939 R.D. 225=1939 A.W.R. (B.R.) 207.**

——**Ss. 105 and 247**—*Order of Tahsildar under S. 105—Appealability.*

An appeal does lie from an order passed by Tahsildar under S. 105 of the Agra Tenancy Act for the Tahsildar in the eyes of the Revenue Courts is an Assistant Collector of the second class and under S. 247 of the Act appeals are provided from all orders of the Assistant Collector second class. (*Mehta, J.M.*) Janhawi Prasad *v.* Jwala Prasad. **1939 R.D. 225=1939 A.W.R. (B.R.) 207.**

——**S. 107**—*Abandonment—Mere letting in of sub-tenant—If can constitute.*

Where a holding is an ancestral one with occupancy status, the mere letting in of a sub-tenant could not possibly be interpreted as an abandonment. (*Mehta, S. M.*) Putto Lal *v.* Sardar Singh. **1940 A.W.R. (B.R.) 63=1940 R.D. 211.**

——**S. 107**—*Abandonment—Presumption of—Recorded tenant-in-chief ceasing to have connection with holding for long time—Absence of proof of contract between him and person in cultivation—Inference.*

Where it is found that the recorded tenant-in-chief of a holding has long ceased to have any connection with the holding, and there is no evidence to prove any contract between him and the person in cultivation, an abandonment by the recorded tenant must be presumed. (*Drake Brockman, S. M. and Knox, J. M.*) Shanker Kalwar *v.* Fida Husain. **1936 R.D. 435.**

——**S. 107**—*Abandonment— Presumption of—Tenant out of possession and neither paying rent to landlord nor collecting rent from sub-tenants—Inference.*

A tenant-in-chief who does not pay rent to the landlord or collect any rent from the recorded sub-tenants, who lives in another village and who, so far as the records go, has exercised no possession for very many years, must be taken to have abandoned his holding, particularly when the sub-tenants have been paying rent direct to the landlord. The burden is on the tenant-in-chief to prove that he still has title and that he has sub-let the land to the recorded sub-tenants. (*Drake Brockman, S. M. and Knox, J. M.*) Kunnu Koeri *v.* Abdul Hayi. **1936 R.D. 30 (2).**

———**S. 107**—*Abandonment— Sub-letting when may amount to.*

The general rule is that when a portion of a holding is sub-let, the usual presumption about abandonment from part of the holding cannot arise, but where the area has been let out to more than one tenant and one of these tenants who finds his position insecure takes shelter behind the recorded occupancy tenant, it is a case of abandonment of a wholesale character to which the general rule would not apply. (*Mehta, S.M.*) Hari Shanker Lal *v.* Badri Singh. **1940 R.D. 79=1940 A.W.R. (B.R.) 24.**

———**S. 107**—*Abandonment—What may constitute.*

Per *Marsh, S. M.*—Where a tenant has taken no interest in a holding for a period of five years for which he is entitled to sub-let, he must be held to have abandoned the holding.

Per *Mehta, J. M.*—In each case facts would have to be scrutinised to find out if an inference in favour of abandonment can be warranted. (*Marsh, S. M. and Mehta, J. M.*) Maiku *v.* Durjan. **1939 R.D. 605=1939 A.W.R (B.R.) 292.**

———**S. 107**—*Belated application—Inference.*

A zamindar who makes an application under S. 107 of the Tenancy Act, a year after he has taken possession, is invoking the aid of the Court under false pretences. Such an application is not intended to legalize *ex post facto* a trespass already committted. (*Bomford, J. M.*) Bhagwati Prasad *v.* Sundar Koeri. **1938 A.W.R. (B.R.) 225=1938 R.D. 359.**

———**S. 107**—*Scope—Abandonment by tenant-in-chief—Claim by sub-tenant to be tenant-in-chief—Burden of proof—Zamindar's right of ejectment—Delay in suing—Effect of.*

In the case of a holding which is abandoned by the occupancy tenant the person put in possession by the former tenant-in-chief cannot claim himself to be the tenant-in-chief. S. 107 of the Agra Tenancy Act does not give the sub-tenant any rights as against the zamindars. It only protects him against his tenant-in-chief if the zamindar chooses to treat the holding as abandoned, but he can in no case be a tenant-in-chief unless he proves that the zamindar has recognised him as such. The burden is of course on the sub-tenant claiming to be tenant-in-chief, but when the zamindar delays taking actions for many years, the standard of proof required of the tenant must be lowered. (*Bomford, J. M.*) Narsingh Tewari *v.* Kesho Rai. **1938 A.W.R. (B.R.) 101=1938 R.D. 165.**

———**S. 107**—*Sub-tenancy continued by occupancy tenant after expiry of statutory period—Suit for ejectment of sub-tenant—Latter, if can plead abandonment of occupancy rights by plaintiff.*

The fact that the statutory period for which an occupancy tenant could sub-let legally expired at least two years before he brought a suit for ejectment of the sub-tenant, does not enable the latter to plead that the occupancy rights of the plaintiff came to an end because his tenure as sub-tenant was unduly prolonged, so long as the Zamindar was content to recognize the plaintiff as his tenant and had not accepted the sub-tenant as his tenant. (*Bomford, J.M.*) Gharib *v.* Jhallar. **1937 R.D. 138.**

———S. 107—*Tahsilder's duty before passing an order under.*

Before passing an order under S. 107 of the Agra Tenancy Act, a Tahsildar should be really satisfied that the tenant has abandoned. (*Bomford, J. M.*) Bhagwati Prasad *v.* Sundar Koeri. **1938 A.W.R. (B.R.) 225=1938 R.D. 359.**

———S. 107 (1)—*Abandonment—Tenant disappearing—No arrangement made for payment of rent--Zamindar's right.*

Where a tenant has abandoned and left the village without making any arrangements at all for the payment of rent to the zamindar, the case comes under Sub-Cl. (1) of S. 107 of the Tenancy Act and the zamindar can straightaway give a lease of the holding to anybody. (*Bomford, J. M.*) Raghuraj Singh *v.* Badri Singh. **1938 A. W.R (B R.) 145=1938 R D. 286.**

———**S 107 (1)**—*Abandonment—Tenant quitting holding without leaving anybody in charge—Effect—Zamindar, if entitled to take possession.*

Where a tenant leaves his field, without either leaving any one in charge of it, or a sub-tenant to whom the zamindar could turn to for his rent, he must be taken to have clearly abandoned his holding as explained in S. 107 (1) of the Tenancy Act and as such the zamindar is entitled to take possession of it and put any other person in his place. (*Darling, S. M and Bomford, J. M.*) Sukhna *v.* Shiam Krishna. **1938 A.W.R. (B. R.) 142=1938 R.D. 272.**

———S. 107 (2)—Applicability—Only a portion of holding left in charge of another *See* Agra Tenancy Act, Ss. 44 and 107 (2). **1938 R.D. 58 =1938 A.W.R. 20 (B.R.).**

———S. 107 (3)—*Abandonment — Sub-tenant cultivating land for about 20 years and paying rent direct to zamindar—Inference of abandonment by recorded tenant-in-chief.*

Where in a suit for ejectment of an alleged sub-tenant, it is found that the defendant has been in cultivation of the land for about 20 years paying rent direct to the zamindar, the recorded tenant-in-chief must be held to have abandoned the land. (*Drake Brockman, S. M. and Knox, J. M.*) Kualeshar Ahir *v.* Sarju Kohar. **1936 R. D. 178.**

———**S. 121**—Applicability—Claim to be tenant on basis of lease –Claimant not in possession—Suit under S. 121 against landlord and another in possession—Maintainability. *See* Agra Tenancy Act, Ss. 99 and 121. **1936 R.D. 450 (1).**

———**S. 121**—Applicability—Collaterals of deceased co-tenants recorded as heirs—Remedy of surviving co-tenants—Suit for declaration of tenancy rights—Competency. *See* Agra Tenancy Act, Ss. 99 and 121. **1936 R D 559.**

———**S. 121**—*Applicability—Ejectment in proceedings under S. 79—Delivery of possession—Option under S. 97 not exercised—Failure of negotiations for re-admission—Remedy of ejected tenant.*

With the formal ejectment of a tenant in proceedings under S. 79 of the Tenancy Act, his tenancy is completely concluded. Though as a result of the failure of the decree-holder to exercise his option under S. 97, the tenant remains in possession to collect the crops and carries on negotiations for re-admission to holding, he cannot on the failure of such negotiations sue under S. 121 of the Act for a declaration, for, being no longer a tenant he has no *locus standi* to sue under S. 121. It may be open to him perhaps to sue under S. 99 of the Act, if he thinks that he has been in fact re admitted. (*Darling, S.M. and Marsh, J.M.*) RAM SINGH *v.* BHOP SINGH. **1938 A.W.R. (B.R.) 309=1938 A.L.J. (Supp.) 114=1938 R.D. 593.**

——**S. 121**—Applicability—Suit by Hindu coparcener challenging alienation by another coparcener—Property alienated consisting of fixed rate tenancy—Jurisdiction of Civil Court. *See* AGRA TENANCY ACT, Ss. 99 AND 121. **1937 A.W.R. 919=A.I.R. 1938 All. 17.**

——**S. 121**—*Application for correction of papers—Application opposed by other tenants who claimed adverse possession—Dismissal of application—Suit under S. 121 by applicant after 12 years—If barred.*

Where a person put in an application for correction of papers asking that his mother's name should be expunged, and this application was opposed by the other recorded tenants who declared that they did not admit the claims of the applicant and were in adverse possession to him, and the application was dismissed, a suit under S. 121 of the Agra Tenancy Act brought by the applicant who was out of possession for more than 12 years after the dismissal, is time barred. (*Darling, S.M. and Bomford, J.M.*) SHEO NANDAN *v.* BUDHU KOERI. **1937 R.D. 98.**

——**S. 121**—Application for correction of papers dismissed—Subsequent suit under S. 121—*Res judicata. See* U.P. LAND REVENUE ACT, S. 39. **1937 R.D. 82.**

——**S. 121**—*Declaratory suit—Absentee tenant claiming share in tenancy—Disentitling circumstances.*

Where a tenant, who has been absent for a long time, claims a share in the tenancy, he would be entitled to a declaration of co-tenancy excepting in a case where it is proved that the plaintiff gave up his share in the joint family property or where it is proved that the defendants have perfected their rights by adverse possession for the required period. (*Darling, S.M. and Bomford, J.M.*) GANGA PANDE *v.* SHEONET PANDE. **1938 A.W.R. (B.R.) 257=1938 A.L.J. (Supp.) 50=1938 R.D. 539.**

——**S. 121**—*Declaratory suit that plaintiffs were joint occupancy tenants in a holding recorded in names of their cousins alone—Settlement entries not challenged for 30 years—Proprietors collecting rent from defendants alone—Suit, if should be dismissed.*

The plaintiffs sued for a declaration that they were joint occupancy tenants in a holding recorded in the names of their cousins alone. The proprietors deposed that they collected rent from defendants alone and did not recognise the plaintiffs as tenants. For over 30 years the settlement entries had stood unchallenged. The defendants alone were found to be in possession of the fields in dispute.

Held, that the suit should be dismissed. (*Bomford, J.M.*) RAJABALI *v.* KHALIL. **1937 R.D. 120.**

——**S. 121**—Necessity of suit under—Possibility of opposition from landlord. *See* AGRA TENANCY ACT, Ss. 37 & 121. **1938 A.W.R. 45 (B.R.).**

——**S. 121**—Suit under—If barred by prior decision under S. 42 of U. P. Land Revenue Act against the landlord. *See* U. P. LAND REVENUE ACT, S. 42. **1938 R.D. 837.**

——**S. 121**—*Suit under—Order for delivery of possession—Validity.*

In a declaratory suit under S. 121 an order for delivery of possession could not be passed by any Court. Any such order and any such delivery of possession is wholly *ultra vires.* (*Darling, S.M.*) SURJA *v.* GIRAND SINGH. **1938 R.D. 935 (2)=1939 A.W.R. (B.R.) 59.**

——**S. 121**—*Widow succeeding occupancy tenant—Commutation of batai rent without reference to occupancy tenant—Widow's name removed from* khatauni—*Suit under S. 121—Onus as to loss of occupancy rights.*

Where a widow of an occupancy tenant, whose name was cut off the *khatauni*, sues under S. 121 of the Agra Tenancy Act and establishes the occupancy rights of her deceased husband, the burden of proving that those occupancy rights have been lost by abandonment or otherwise lies entirely on the party now claiming to be the tenant in chief. Neither the fact of the commutation of *batai* rent, nor the removal of the name of the occupancy tenant from the *khatauni*, nor the acceptance of cash rent by the lambardar, would deprive the widow of her occupancy rights. (*Darling, S.M. and Bomford, J.M.*) MT. AJUBAN *v.* MT. MULU. **1938 A.L.J. (Supp.) 15=1938 R.D. 280=1938 A.W.R. 40 (B.R.).**

——**Ss. 121-123**—Applicability—Tenant of grove land retaining occupancy rights after disappearance of grove—Transferee from—Status of—Claim to occupancy rights—Remedy—Application for correction—Maintainability. *See* AGRA TEN. ACT, Ss. 18 & 121-123. **1938 R. D. 124.**

——**Ss. 121 and 123**—*Death of co-tenant—Other co-tenant minor—Settlement by Court of Wards with certain others to ensure recovery of rent—Effect of—Suit by co-tenant for declaring him sole tenant.*

Two co-tenants were descendants of the same ancestor from whom the holding descended. One of them died. The other who was living jointly and cultivating with the deceased was a minor. The Court of Wards, acting on his behalf, made a sort of *kachcha* settlement with certain persons which would ensure the recovery of rent. In a suit by the surviving co-tenant after becoming a major for a declaration that he was sole tenant of the land in dispute.

Held, that no sort of relinquishment or surrender on behalf of the plaintiff was made or intended by the Court of Wards; that it would be impossible to hold that the plaintiff was occupancy tenant in part and that those with whom a settlement was made were statutory tenants in the rest of the holding; and since there could not be two kinds of tenants in one and the same holding the plaintiff was entitled to the 'declaration sued for. (*Drake Brockman, S.M. and Knox, J.M.*) SAMHARU *v.* GAYA DIN. **1936 R.D. 179.**

——**Ss. 121 and 123**—*Grove holder, if can get a declaration under.*

A grove holder is one of those persons who could get a declaration in his favour under Ss. 121 and 123 of the Agra Tenancy Act. (*Darling, S.M. and Mehta, J.M.*) BINDHACHAL RAI *v.* MOTI RANI. **1938 A.W.R. (B.R.) 282 (2)=1938 A.L.J. (Supp.) 91=1938 R.D. 627.**

——**Ss. 121 and 123**—*Mortgagee from tenant holding over after death of tenant—Payment of arrears of rent and admission to tenancy by landlord's agent not expressly authorized to do so—Status of—Suit for declaration of statutory tenancy rights—Maintainability.*

A mortgagee from a tenant who is holding and retaining possession after his mortgagor's death and paying up the arrears of rent due in respect of the holding cannot maintain a suit for declaration of statutory tenancy rights at fixed rent, even though he has been recorded as sub-tenant and has been admitted to tenancy by the landlord's agent on payment of arrears of rent, when such agent has no authority to admit tenants without the landlord's express concurrence. The admission by the landlord's agent under such circumstances is not a proper or legal admission, and the mortgagee has to be recorded as a non-occupancy tenant *bila tasfia lagan* in the holding. (*Drake Brockman, S.M. and Knox, J.M.*) SOORAJPAL SINGH *v.* MUNSHI LAL. **1936 R.D. 225.**

——**S. 121**—*Suit for declaration—Maintainability—Loss of possession more than 12 years prior to suit.*

Where a tenant had lost possession over 12 years prior to his suit under S. 121 of the Tenancy Act to be declared an occupancy tenant of the land in dispute, he cannot obtain the declaration without first obtaining possession. (*Mehta, S.M.*) PUTTOO LAL *v.* SARDAR SINGH. **1940 A.W. R. (B.R.) 63=1940 R.D. 211.**

——**S. 121**—*Suit under—Main question for consideration—Unexecuted decree for ejectment against occupancy tenant—Effect on occupancy right.*

Where a suit is under S. 121 of the Agra Tenancy Act, the main question to see is who is in possession. According to S. 35 (1) (*b*) a decree for ejectment standing against an occupancy tenant cannot take effect until it is executed. Hence, where a decree for ejectment against an occupancy tenant remains unexecuted, the occupancy rights of the tenant in the holding continue to subsist. (*Harper, S.M and Sathe, J.M.*) TAHSILDAR AHIR *v.* RAMDHARI SINGH. **1940 A.W.R. (B.R.) 80 (2)=1940 R.D. 218.**

——**Ss. 121 and 123**—*Suit under—Fixed rate tenancy, purchased by member of joint Hindu family, but treated as separate—Merger—Onus.*

Where a fixed rate tenancy is purchased by a member of a joint Hindu family but it is treated as separate from the other properties and the entries are in favour of the son of the original purchaser, sanctity must be attached to existing entries and the onus lies heavily on the recorded sub-tenant who claims a declaration that he is a tenant in chief, to show that the existing entries were wrong and that as a matter of fact the fixed rate tenancy had no legal existence and that it had determined on account of merger. (*Mehta, S.M.*) SITA AHIR *v.* KESHOPRASAD RAI. **1940 R.D. 5=1940 A.W.R. (B.R.) 11=1940 A. L.J. (Supp.) 3.**

——**Ss. 121 and 123**—*Suit under by one branch of a family—Remaining three branches alone recorded as tenants of occupancy holding—Plaintiff branch found to be in possession along with other branches—Zamindar having no objection to inclusion of fourth branch—Right of latter to be recorded as co-tenant.*

Where, in a suit under Ss. 121 and 123 of the Agra Tenancy Act for a declaration of rights in an occupancy holding by one of four branches of a family, it is found that though only the other three branches are recorded as tenants of the holding, the fourth branch is in possession along with the other branches, and that the Zemindar has no objection to the inclusion of the name of the fourth branch in the holding the plaintiff branch is entitled on the score of possession to be recorded as co-tenant in the occupancy holding. (*Darling, S.M.*) SULTAN *v.* DWARKA. **1937 R.D. 15 (2).**

——**Ss. 121 and 123**—Tenant of *sir* subject to transfer—No claim for ex-proprietary rights—If can obtain a declaration that he is a statutory tenant. *See* AGRA TENANCY ACT, Ss. 86, 121 AND 123. **1939 A.W.R. (B.R.) 98.**

——**Ss. 121 to 123**—*Scope and object of—Rent fixed in proceedings under S. 36 of Land Revenue Act—Disregard of S. 14 of Agra Tenancy Act—Remedy.*

It is not the object of Ss. 121 to 123 to declare what rent ought to be payable. The object of the sections is to declare what rent is payable. When once this rent has been fixed once for all in proceedings under S. 36 of the Land Revenue Act, though it be that it was fixed in utter disregard of the mandatory provisions of S. 14 of the Agra Tenancy Act, unless those proceedings are set aside one cannot come under Ss. 121 to 123 of the Tenancy Act for a declaration that the rent fixed in those proceedings was wrong. He can file a suit for abatement, if he likes. (*Marsh, S.M. and Mehta, J.M.*) ANRUDH SINGH *v.* MEGH NARAIN SINGH. **1939 R.D. 221=1939 A.W.R. (B.R.) 203.**

——**S. 122**—*Applicability—Dispute between landlord and person claiming as tenant.*

S. 122, Agra Tenancy Act, does not apply to a case in which the dispute is between the landlord and another person claiming to be a tenant but whose right as such is denied by the landlord, there being no rival claimant to the tenancy in the field. In such a case, if a suit is instituted in the Civil Court, the provisions of S. 273 of the Act will apply. (*Niamatullah, J.*) RANJIT RAI *v.* JUTHAN RAI. **171 I.C. 404=1937 A.W. R. 821=1937 A.L.R. 840=1937 R.D. 546=1937 A.L.J. 1092=A.I.R. 1937 All. 638.**

——**S. 122**—*Scope — Occupancy holding—Widow succeeding to husband and getting daughter also recorded as co-occupancy tenant with consent of lambardar—Partition proceedings—Holding falling into several mahals—New landholder by partition—Suit for declaration that widow alone is tenant of the holding—Maintainability.*

One *S. R.* an occupancy tenant of a holding having died, the holding devolved on his widow

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R., at a time when Act II of 1901 was in force and she was accordingly recorded tenant. Pending partition proceedings in the village, *R.* applied to have the name of her daughter *K.* also to be entered as co-occupancy tenant with her. The request was supported by the lambardar for the time being and was granted and the daughters name too was added along with that of the widow. In the allotment of lands under the partition, the holding of *S.R.* was split up among various *mahals* and the portions in suit fell into the *mahal* of the plaintiff. The latter brought a suit for a declaration that the tenant of the holding was *R.* and not *R.* and *K.* jointly.

Held, that though there was an express consent to both being co-tenants by the then landholder, *i.e.*, the lambardar, there was nothing to prevent the plaintiff who became a lambardar by virtue of a partition from suing for a declaration of the sort, and that S. 122 under which the suit fell, allowed a suit to be brought at any time during the continuance of the tenancy. (*Drake Brockman, S.M. and Knox, J.M.*) TALEWAR *v.* KETKAI. **1936 R.D. 391.**

———S. 123—Applicability—Dispute between persons claiming share in tenancy—Suit for declaration of joint tenancy-in-chief—Competency. *See* AGRA TENANCY ACT, Ss. 37 AND 123. **1936 R.D. 371.**

———S. 123—*Compromise as to rent between landlord and tenant before Collector in proceedings not under Tenancy Act—Binding nature of—Suit by tenant for declaration of rent payable—If barred.*

If in proceedings between the landlord and the tenant before the Collector, which are of such a nature that the Collector could embody the terms of a compromise entered into between the parties in a decree and thereby decree the rent agreed on between them, he passes an order that the rent so decreed should be recorded as the rent, that order is final and no exception can be taken to it afterwards by the tenant either by suit or otherwise. But when that is not the case, the tenants are not debarred from filing a suit under S. 123 of the Agra Tenancy Act for a declaration of rent payable by him. (*Drake Brockman, S.M.*) HAR PERSHAD *v.* SAVANT. **1936 R.D. 565.**

———S. 123—*Declaration under—Absence of any entry as joint tenant for over 60 years—Effect.*

Where the plaintiffs have not for over 60 years been entered as tenants jointly with another branch and further where they live in another village, they have no right after such a long interval of time to get a declaration under S. 123 of the Tenancy Act. In such a case the last settlement entry must be taken as correct. (*Mehta, S.M.*) JAGMOHAN SAITHWAR *v.* HANSAI. **1939 A.W.R. (B.R.) 25=1939 R.D. 519.**

———S. 123—*Rent as originally shown in* khatauni *modified—Modified entry repeated in successive years—No objection taken by zamindar—Suit by thekadar for declaration that correct rent payable is that originally shown—If liable to be dismissed.*

Where the rent of a holding as originally shown in the *khatauni* was modified and the modified entry was repeated in every successive year and neither the zamindar nor his servants questioned the correctness of the rent entered in the *khatauni*, not even when the district was under record operations, a suit by the thekadar for a declaration that the correct rent payable is that originally entered in the *khatauni* is liable to be dismissed. (*Darling, S.M. and Bomford, J. M.*) BHARAT SINGH *v.* HAFIZ ULLAH. **1937 R. D. 148.**

———S. 123—*Scope—Power of Court under—Rent once fixed—Remedy.*

S. 123 of the Agra Tenancy Act does not allow either the landholder or the tenant to get the rent fixed anew. It only gives power to the Court to declare the rent payable, when a rent has been alleged to be fixed and the dispute relates only to the amount which has been settled. Where the rent has been fixed on the basis of a compromise before a Civil Court, any tenant feeling aggrieved by it cannot come by suit under this section, but only to seek abatement of rent. (*Mehta, J.M.*) DEO SARAN RAI *v.* DWARIKA RAI. **1939 R.D. 27= 1939 A.W.R. (B.R.) 170.**

———S. 123—*Scope and applicability.*

The plaintiff-zamindar sued for a declaration under S. 123 of the Tenancy Act that the defendants were liable to pay a certain sum annually for their holding as fixed-rate tenants. This amount included the cess payable under the Benares Family Domains Act, III of 1904. The case for the plaintiff was that the payment of this cess was a condition of the tenure of the defendants.

Held, that this was a matter which could form the subject of a suit under S. 123 of the Tenancy Act. (*Bennet, J.*) NARSING PRASAD SINGH *v.* PURANMASHI. **161 I.C. 762=8 R.A. 779=1936 R.D. 201=1936 A.W.R. 475 (1)=1936 A.L.J. 282=A.I.R. 1936 All. 459.**

———S. 123—*Suit for declaration of plaintiff as grove-holder—Plaintiff out of possession—Maintainability of suit.*

A suit for a declaration that the plaintiff is grove-holder of the land in suit is not maintainable under S. 123 of the Agra Tenancy Act, when the plaintiff is not in possession of the suit land. (*Drake Brockman, S.M. and Knox, J.M.*) SHEO BARTI *v.* HANSRAJ. **1936 R.D. 481.**

———S. 123—*Suit under for declaration of rent—Original rent reduced at revision of records—Inference.*

In a suit for declaring the amount of rent payable in respect of a holding, it was found that the rent of the holding originally payable was Rs. 24-6-0, but that at the revision of records it was entered as Rs. 17—1—0 only.

Held, that there was no reason to believe that the entry at the revision of records was erroneous or mistaken, and that it was quite possible that the Record Officer deliberately recorded only so much of the rent as was legally payable, as it was notorious that landlords in many districts used to collect both cesses and *zaid lagan*. (*Drake Brockman, S.M. and Knox, J M.*) MARZHAR KHAN *v.* SHEIKH INAYAT. **1936 R.D. 121.**

———S. 123—Suit under—Limitation. *See* AGRA TENANCY ACT, Ss. 99 AND 123. **1937 R.D. 507.**

———S. 123—Suit under—Power of Court to fix rent under S. 45. *See* AGRA TENANCY ACT, Ss. 45 AND 123. **1939 R.D. 162.**

———S. 123—*Suit under—Power of Court to fix rent under S. 45.*

It is not open to the Court to fix a rent under S. 45 of the Agra Tenancy Act, when the suit is brought under S. 123 of that Act. 14 R.D. 711, Ref. to. (*Bomford, J.M.*) RANNA RAI *v.* JAIDAYAL OJHA. 1937 R.D. 97.

——S. 123—*Suit under—When to be brought—Necessity of possession.*

A suit under S. 123 can be brought at any time during the continuance of the tenancy. The tenancy commences from the date of the quabuliat in the case of a valid lease. A suit under this section being declaratory, the plaintiff need not have possession on the date of the suit. (*Darling, S. M. and Bomford, J. M.*) JAHANGIRA *v.* MOHAMMAD HASNAIN. **1937 R.D. 507.**

——**S. 123**—*Suit for declaration under—Fixed rate tenancy—Rent payable—Entry of* 'adam wasul'—*Meaning.*

Where at the settlement the rent of a fixed rate tenancy was recorded at a particular figure including an amount *adam wasul* the proper rent payable must be the rent recorded as such by the Settlement Officer and the mere fact that for some reason part was not being realized at the time of settlement will not make the whole amount any the less payable. *Adam wasul* means 'not realized' and 'not realizable.' (*Darling, S.M. and Bomford, J.M.*) SRI NARAIN SINGH *v.* MAHARAJA OF BENARES. **1938 R.D. 420=1938 A.W.R. (B.R.) 169 (2)=1938 A.L.J. (Supp.) 28.**

——**S. 123 and 44**—*Plaintiff not in possession—Remedy.*

A plaintiff not being in possession cannot sue under S. 123 of the Agra Tenancy Act. It is his duty to sue under S. 44 to get the ejectment of the defendants. (*Darling, S.M. and Bomford J. M.*) MAHANGOO GOND *v.* SHEO NATH GOND. **1938 A.W.R. (B.R.) 340=1938 R.D. 474.**

——**S. 123 (c)**—*Declaration as to rent payable different from that entered—When justified.*

In the absence of a definite compromise, or course of conduct indicating the existence of a subsequent compromise reducing the rent which was entered in the papers, no Court could be called upon to declare under S. 123 (*c*) of the Tenancy Act any rent to be payable which is other than the rent which is entered in the papers. (*Darling, S.M. and Mehta, J.M.*) SHARAFAT ULLAH *v.* NOOR MOHAMMAD. **1938 A.W.R. (B.R.) 358=1938 R.D. 746.**

——**S. 123 (c)**—*Enquiry — Scope — Duty of Court—Parties both agreeing that rent was fixed —Difference as to amount—Power of Court to hold no rent fixed—Procedure.*

Where both parties to an application under S. 123 (*c*) of the Agra Tenancy Act agree in saying that the rent has been definitely fixed, but they differ as regards the amount at which it was fixed, it is not open to the Court to hold that no rent has been fixed at all. The Court is bound to decide only as to what was the rent fixed. (*Darling, S.M. and Bomford, J.M.*) RAM SAJAWAN *v.* GANESH PRASAD. **1938 R.D. 96=1938 A.W.R. 51 (B.R.).**

——**S. 123 (c)**—*New plea — Application for declaration of rent—Denial of relationship of landlord and tenant—When to be raised—Plea in appeal—If open.*

In an application for declaration of the amount of rent, the tenant-defendant denying the relationship of landlord and tenant must specifically plead it in his written statement, and must see that an issue is fixed on the point. He cannot be allowed to take the point for the first time at the hearing of appeal from the decision. (*Darling, S.M. and Bomford, J.M.*) RAM SAJAWAN *v.* GANESH PRASAD. **1938 R.D. 96=1938 A.W.R. 51 (B.R.).**

——**S. 123 (c)**—*Suit for declaration of rent payable by statutory tenant—Zamindar claiming higher figure than that entered in* khatauni—*Burden of proof.*

In a suit by a zamindar under S. 123 (*c*) the Tenancy Act for a declaration of the rent payable by his statutory tenant, the burden of proving, in the absence of a lease, a higher figure than that entered in the *khatauni* lies heavily on the plaintiff zamindar. (*Darling, S.M. and Bomford, J. M.*) CHOTEY *v.* MOHOBBE ALI KHAN. **1937 R.D. 376.**

——**S. 126**—Applicability—Land washed away by river and re-formed—Occupancy tenant taking possession as belonging to his holding—Obstruction or ouster by landlord—Suit by tenant for declaration of occupancy rights—Maintainability. *See* AGRA TENANCY ACT, S. 99. **1936 R.D. 111.**

——**S. 127**—Agreement to confer occupancy rights—Attestation before Qanungo—Sufficiency. *See* AGRA TENANCY ACT, Ss. 17 (5) AND 127. **1940 R.D. 224.**

——**Ss. 131, 132 and 137**—*Scope—Suit for arrears of grain rent—Suit brought after delay of three years—Claim to interest at 25 per cent.—Maintainability.*

"Siwai", though it is the usual rate on grain loans, is collected at once. A landlord who chooses to wait for about three years and then sues for arrears of his grain rent under a provision of law which is primarily intended for the recovery of cash rent should not be allowed to charge interest at 25 per cent. The Court in such a case should not allow him more than the interest usually allowed on cash rent arrears. (*Darling, S. M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

——**S. 132**—*Applicability—Rent payable in kind on* batai *basis—Failure to proceed under Ss. 137 and 138—If bars suit for arrears of rent.*

A landholder of a plot in respect of which the rent is payable in kind on a *batai* basis has a remedy under Ss. 137 and 138 of the Agra Tenancy Act. But the remedy therein prescribed is only permissive and not mandatory. A landholder who fails to avail himself of this remedy is not debarred from seeking his redress against his tenant by way of a suit for arrears of rent under S. 132. But such a landlord cannot expect the Court to accept, without the strictest proof, high estimates of the produce. The Courts must always exact definite evidence of the value of the produce. (*Darling, S.M. and Bomford, J.M.*) MANGAN *v.* JODHI. **1937 R.D 287=1937 A.W.R. 621.**

——**S. 132**—Applicability—Suit for weighment dues—Jurisdiction of Revenue Court. *See* AGRA TENANCY ACT, Ss. 3 (3) AND (4) AND 132. **1936 R.D. 14.**

——**S. 132**—Applicability—Suit against subproprietor for rent—Suit under S. 132 if can be converted into one under S. 224. *See* AGRA TENANCY ACT, SS. 224 AND 132. **1938 R.D. 565.**

——**S. 132**—*Appraisement—Landlord resorting to remedy under S. 132—Duty as to proof.*

Where a landholder resorts to S. 132 for relief, rather than to the procedure prescribed by Ss. 137 to 139 of the Tenancy Act, he cannot expect the Courts to accept, without the strictest proof, high estimates of the produce. Definite evidence of the value of the produce should be made available to the Court. (*Darling, S.M. and Bomford, J.M.*) GANGA BALLABH *v.* RATAN SINGH. **1938 A.W.R. (B.R.) 174=1938 R.D. 331.**

——**S. 132**—*Liability for rent—Original letting for agricultural purposes—Acquisition of occupancy rights—Land recorded as abadi only in later settlement.*

Where the land in suit was let for agricultural purposes and the defendants had acquired occupancy rights therein and where in the settlement of 1272-F. it was recorded as cultivated land, and it was only in the settlement of 1301-F. that it was recorded as abadi, a suit for arrears of rent cannot be dismissed on the ground that the land was not cultivated but abadi land. (*Bomford, S.M. and Mehta, J.M.*) CHUNNA *v.* RAM PRATAP SINGH. **1939 R.D. 129=1939 A.W.R. (B.R.) 146 (2).**

——**S. 132**—*Mortgage of fixed rate tenancy—Suit for rent against mortgagor and mortgagee jointly—Maintainability.*

If a fixed-rate tenant mortgages his holding, the mortgagor and the mortgagee form one tenant between them. The landholder would be able to sue both mortgagor and mortgagee in the same way as he would sue a number of co-tenants and be able in the same way to execute his decree against the person of his choice, leaving it to the persons who together form "the tenant" to settle in the Civil Courts their respective liabilities under the agreement to which the landlord was not a party. (*Darling, S.M. and Bomford, J.M.*) KUNJ BEHARI SINGH *v.* LAKHPATI. **1937 R.D. 329.**

——**S. 132**—*'Nadhwana' if a 'cess' leviable under S. 56 or S. 86 of the Land Revenue Act—If a 'Sayar' under the Tenancy Act—If can be sued for.*

Nadhwana is leviable not on the occupation of the land but on the use of water for irrigation. Therefore it is not a 'cess' as defined by S. 56 of the Land Revenue Act; nor does it come under S. 86. But that *Nadhwana* must be included in 'Sayar' is clear from the definition of 'Sayar' which includes irrigation charges. Dues which come under the definition of 'Sayar' can be sued for under S. 132 of the Agra Tenancy Act provided they are 'payable', and they are entirely different from the cesses referred to in the Land Revenue Act. (*Darling, S.M. and Bomford, J.M.*) RADHA KRISHNA *v.* RAM NARAIN. **1938 A.W.R. 38 (B.R.)=1938 R.D. 308.**

——**S. 132**—*Scope—Suit under S. 123 (c) for arrears of rent—Rent shown in papers as Rs. 12 plus Rs. 10 Zaid mutalba—Decree for Rs. 12 only—Appeal dismissed—Failure to apply in revision—Effect—Finality of decision.*

As the result of a compromise decree in a suit for arrears of rent the rent of a holding was shown in the papers as Rs. 12, plus Rs. 10 zaid mutalba. In a subsequent suit a decree was given only at the rate of Rs. 12 by the Assistant Collector, and an appeal against that was dismissed by the Additional Collector. But the plaintiff did not take the order in revision.

Held, that the order should stand as final for the purposes of a rent suit until and unless the zamindar secured a declaration that a higher rate of rent was payable and that it was for him to file suit for a declaration. (*Darling, S.M. and Bomford, J.M.*) RAM PRASAD *v.* KALI PRASAD. **1938 R.D. 99=1938 A.W.R. 49 (B.R.).**

——**S. 132**—Suit under. *See* C. P. CODE, O. 2, R. 2 **1937 A.W.R. 867=1937 R.D. 394.**

——**S. 132**—*Suit under—Maintainability—Rent left unfixed in prior suit under Ss. 121-123—Proper remedy.*

Where in a prior suit for declaration of rent under Ss. 121/123 of the Tenancy Act the rent was not fixed but only the tenant was declared to be a statutory tenant, a suit for arrears of rent cannot be filed before getting the rent first fixed by a suit under S. 45. (*Marsh, S.M. and Mehta, J.M.*) SRIPATA *v.* RAM GARIB. **1939 R.D. 222=1939 A.W.R. (B.R.) 66=1939 A.L.J. (Supp.) 57.**

——**S. 132**—*Suit under—Right of one of the landlords to sue alone—Admission to tenancy by one only.*

Where one of the landholders has succeeded in ejecting the ex-proprietary tenant without any interference from any one and the probabilities are that he alone admitted the tenant, then such a landholder can maintain the suit alone, under S. 132 of the Agra Tenancy Act. The fact that he joined with his brother in levying distraint on some fields which included fields other than those in suit, is of little importance in connection with such a suit. (*Bomford, S.M. and Mehta, J.M.*) GENDAN LAL *v.* MANPHUL. **1939 R.D. 118 (1)=1939 A.W.R. (B.R.) 156 (1).**

——**S. 132**—*Suit under—Admission of claim in part by defendant—Plaintiff not appearing—Duty of Court.*

Where in a suit for arrears of rent under S. 132 of the Tenancy Act, the defendant admits the claim in part, then the Court should decree the suit to that extent, even though the plaintiff is absent. (*Darling, S.M. and Bomford, J.M.*) AJUDHIA PRASAD *v.* FATTU. **1938 A.W.R. (B.R.) 91=1938 R.D. 344.**

——**S. 132**—*Suit to declare statutory tenancy—Failure to prove right in respect of certain plots—Declaration of plaintiff as statutory tenants of some plots and of defendants in respect of other plots—Appeal—Dakhaldihani showing ejectment of certain tenants by zemindar from latter plots—Defendants not proved to be ejected tenants—Power of appellate Court to reverse or disturb declaration in favour of defendants.*

One *P.D.* and others sued for a declaration that they were statutory tenants of a certain number of plots. The Court granted a declaration in respect of 11 plots, but held that he had failed to prove that he was a tenant in possession of the remaining 8 plots; it then ordered that one *L* should be entered as statutory tenant in respect of 4 of them, and one *S*, as statutory tenant in respect of the other 4. In appeal the Commissioner while agreeing with the lower Court that the plaintiffs had failed to prove their claim in respect of the 8 plots, ordered them to be entered as the *Khudkasht* of the zamindar, *N.*, relying on a *dakhaldihari* which showed that *N.*, the zamindar, had ejected tenants from those plots. *N* himself did not claim to be in possession but accepted plaintiff's claim to be tenants.

Held, that in the absence of proof on the specific point, it cannot be assumed that the ejected tenants were *L* and *S*. The order declaring them as statutory tenants of the plots in question could not be reversed or disturbed. (*Drake Brockman, S.M. and Knox, J.M.*) Lutawan *v.* Bishwa Nath. **1936 R.D. 484.**

——**S. 132**—*Suit for arrears of rent—Plea of non-fixation of rent and of absence of possession—Decree for arrears—If* res judicata *as to status of defendant.*

In a suit for arrears of rent in the Court of the Tahsildar, the defendant pleaded that no rent had been fixed and that he was not in possession, but the Tahsildar decreed the suit.

Held, the decision could not operate as *res judicata* in a subsequent proceeding as regards the status of the defendant in the prior suit. (*Drake Brockman, S.M. and Knox, J.M.*) Bansraj *v.* Mutsaddi Lal. **1936 R.D. 538 (1).**

——**S. 132**—*Suit for rent—Lambardar having no proprietary interest in holding—Plea of payment to him in good faith—Sustainability.*

Payment of rent to a lambardar cannot be pleaded in defence to a suit for arrears of rent by the co-sharers, as having been made in good faith, when such lambardar has no proprietary interest in the holding but is actually a co-tenant and the other tenants are his near relatives. (*Darling, S. M. and Bomford, J. M.*) Bohra Kishun Chand *v.* Jumna Bux. **1937 R.D. 56.**

——**S. 132**—*Undivided mahal—Right of individual co-sharer to sue for rent—Individual co-sharer getting* sir *demarcated and rent fixed—If solely entitled to sue ex-proprietary tenant for rent—U.P. Land Revenue Act, S. 36.*

Co-sharers in an undivided mahal must, as a rule, exercise their rights jointly unless they have appointed an agent; the only exception to this rule is where the law allows one co-sharer to sue for his share of the rent when it is the custom in the *mahal*. The law does not countenance the division of the tenants amongst the proprietary body and the collection of the whole of the rents from such tenants. The mere fact that an individual co-sharer has got the area which was once that joint *sir*, demarcated and the rent fixed thereon under S. 36 of the U. P. Land Revenue Act, does not entitle him to sue alone for the rent due from the ex-proprietary tenants. (*Drake Brockman, S.M.*) Gopi Nath *v.* Chunni. **1936 R.D. 443.**

——**Ss. 132 and 45**—*Suit for arrears of rent—If competent, when rent not settled—Proper procedure.*

A suit for arrears of rent could only be decreed, if the rent was fixed from before. So it is not competent for a Court to fix rent in a suit for arrears. If the rent is unsettled, the proper course is for a plaintiff to have it fixed by a suit under S. 45 of the Tenancy Act and then sue for arrears under S. 132. (*Misra, J.*) Kundan *v.* Jawahar Singh. **1938 A.W.R. (H.C.) 634 (2)=1938 R.D. 804=1938 A.L.J. 985=1938 R.D. 831=1938 A.L.R. 850=A.I.R. 1938 All. 617.**

——**Ss. 132 and 45**—*Suit for rent—Court if can make out new case that no rent had been fixed.*

Unless a suit under S. 45 of the Agra Tenancy Act is before the Court, it is not at liberty in a suit for arrears of rent to make out a new case against the pleadings that no rent had been fixed. (*Marsh, S.M. and Mehta, J.M.*) Mahesh Sahoo *v.* Badlu. **1939 A.W.R. (B.R.) 105=1939 R.D. 378.**

——**Ss. 132 and 200**—*Suit for theka money—Absence of written lease—Mortgage and a qabuliyat in favour of mortgagee—Relief on the basis of compensation for use and occupation.*

Where a mortgagor executes a qabuliyat in favour of the mortgagee purporting to take the mortgaged property on lease from the mortgagee as thekadar and agreeing to pay a certain amount, though no written instrument of lease as required by S. 200 of the Agra Tenancy Act is executed by the mortgagee, in a suit by the latter under S. 132 of the Agra Tenancy Act, relief can be given to him by treating the suit as one for compensation for use and occupation. (*Verma, J.*) Mir Singh *v.* Raghubir Singh. **184 I.C. 873=1939 A.W.R. (H.C.) 454=A.I.R. 1939 All. 615.**

——**Ss. 132 and 265 (1)**—*Shamilat patti—Right to collect rent—Co-sharers, if can sue separately for arrears of rent—'Usage', what may not amount to.*

Per *Darling, S.M.*—In the case of a shamilat patti, a lambardar is entitled to collect the rents, in the absence of any usage or contract to the contrary. As such, a co-sharer of a solitary statutory holding in the shamilat patti cannot sue alone for arrears of rent in respect of it. The fact that a particular co-sharer used to collect rent of this holding cannot be said to establish a usage within the meaning of S. 265 (1) of the Tenancy Act.

Per *Mehta, J.M.*—The exact significance of the term 'usage' used in S. 265 (1) is that it is a usage to the contrary to what takes place normally, that is, a lambardar collects rent but a usage may be set up by which, it is not the lambardar who collects rent but somebody else, or by usage, it is not all co-sharers who collect rent,but some body appointed by them as agent. Where a course of practice has ripened into usage and which has been embodied as a result of a joint declaration of the co-sharers into an entry in the *wajib-ul-arz*, it ought to be respected and individual co-sharers allowed to sue separately for arrears of rent. (*Darling, S.M. and Mehta, J.M.*) Bachan Singh *v.* Dalel Singh, **1938 R.D. 816.**

——**Ss. 132 and 266**—*Sale of proprietary share by a co-sharer—Demarcation of ex-proprietary tenancy and fixation of rent—Right of vendee to sue for arrears of ex-proprietary rent, independently of other co-sharers—Agency, if can be implied.*

Per *Darling, J.M.*—Where in Khata khewat forming a part of a divided mahal the co-sharers are in possession of their respective shares in the shape of Sir and Khudkasht, and on a sale by one of the co-sharers of his proprietary rights though the vendee gets the ex-proprietary tenancy demarcated and rent fixed, yet he cannot sue alone for the arrears of this rent, as the tenant is the tenant of the whole coparcenary body.

Per *Mehta, J.M.*—The language of S. 266 of the Tenancy Act allows a course of conduct to set up, being the result of internal mutual arrangement by which an implied agency may be created in favour of some co-sharers or other acting on behalf of the whole coparcenary body under S. 266 (1) or 265 (1). (*Darling, S.M. and Mehta, J.M.*) NATHOO RAM *v.* MIHI LAL. **1938 R.D 806=1938 A.W.R.(B.R.) 428=1939 A.L.J. (Supp.) 19.**

——Ss. 132 (2) and 216—*Land occupied by tenants—Lessee of tenants' rights—Position of—S. 132 (2) if can be used against such a person.*

Though a proprietor can give as many leases as he like, he cannot superimpose a tenant over existing tenants. Where land is already occupied to a great extent by tenants, what purports to be a lease of tenant's rights must be either regarded as void or as a lease of thekadari rights. S. 216 of the Tenancy Act is clear that S. 132 (2) cannot be used as against a thekadar for recovery of arrears of rent in respect of such a lease. (*Darling, S.M. and Bomford, J. M.*) RAM NATH SINGH *v.* SECRETARY OF STATE. **1938 R.D. 796.**

——Ss 132 (2) and 252—*Order by Collector on application under S. 132 (2), for realisation of arrears of rent—If revisable by Board.*

Where a case comes before a Collector because it was filed under S. 132 (2) of the Tenancy Act for realisation of arrears of rent, revision will lie to the Board in respect of any order that may be passed therein. (*Darling, S.M. and Bomford, J.M.*) RAM NATH SINGH *v.* SECRETARY OF STATE. **1938 R.D. 796.**

——Ss. 133 and 134—*Combining number of suits for arrears of rent—Condition—Amount due on each holding not separately specified in either decree or notice—Power of Court to grant relief.*

The facility of combining in one suit, a number of suits for arrears of rent against the same tenant, is afforded to a plaintiff provided he sees to it that in being allowed this privilege, he does not prejudice the interests of the defendant. Where five such suits were combined, but neither in the decree nor in the notice was there any specification of the arrears of rent due in respect of each separate holding, there is a serious failure of compliance with law, resulting in prejudice to the defendant. Every Court has inherent power to correct a mistake of this character. The legislature in framing Ss. 133 and 134 of the Tenancy Act wanted to see that the ignorant tenantry was not allowed to be exploited by the carelessness of the Court or the plaintiff. Hence where it is merely a matter of arithmetical calculation to arrive at the exact amounts due, the executing Court, can work out the figures and give relief accordingly. (*Marsh, S.M. and Mehta J.M.*) SANTOO KEWAT *v.* RAI RASH BEHARI LAL. **1939 A.W.R. (B.R.) 95=1939 R.D. 393.**

——S. 136—*Scope of—Decree for arrears of canal dues—Tenant, if can escape ejectment—Remedies open to decree-holder.*

According to S. 136 of the Agra Tenancy Act, a tenant against whom a plaintiff has obtained a decree for arrears of canal dues, cannot escape ejectment, for the decree-holder has all the remedies open to a decree-holder for arrears of rent. The remedy against the defaulter is complete as

under ordinary arrears of rent. (*Marsh, S.M. and Mehta, J.M.*) SHANKER *v.* DESRAJ. **1939 R. D. 238 (2)=1939 A.W.R. (B.R.) 211.**

——Ss. 137 and 138—Scope—Remedy under—If mandatory—Failure to resort to—If bar to suit under S. 132. *See* AGRA TENANCY ACT, S. 132, **1937 A.W.R. 621=1937 R.D. 287.**

——Ss. 140 and 141—*Suit for ejectment—Plea of holding with consent of plaintiff—Rent receipts—Ambiguity—Benefit of doubt.*

Where in a suit for ejectment as a trespasser, the defendant who has been in occupation for 11 years pleads that he held with the consent of the plaintiff and produces certain rent receipts which are ambiguous in its terms, the landlord who prepared his receipts in such a form that they are ambiguous, has only himself to thank if the Courts give the tenant who has held for 11 years the benefit of the doubt. (*Bomford, S.M.*) KAMLA DATT *v.* DALLU. **1939 R.D. 123=1939 A.W.R. (B.R.) 166.**

——S. 152 (2) and U. P. Land Revenue Act S. 36—*Landholder distraining crops of tenant and selling them while proceedings to fix rent are pending—Legality—No arrear of rent.*

In a proceeding under S. 36, Land Revenue Act, no doubt as soon as the rent is fixed it becomes payable from the date the ex-proprietary tenancy arises and not from the date when it is fixed by the Collector but until the land has been specified and the rent has been fixed by the Collector, it can hardly be treated as an arrear of rent. Where, therefore, a landholder distrains the crops of his tenant for arrears of rent and sells them, while proceedings under S. 36, Land Revenue Act, are pending and the rent is not fixed, the distraint is illegal as there is no arrear of rent within the meaning of S. 152 (2) of the Act. The subsequent fixing of rent by the Collector will not make the distraint valid on the date when the property is sold and so legalise the sale. (*Sulaiman, C.J. and Niamatullah, J.*) MURLIDAR *v.* HAR SARUP. **169 I.C. 843=10 R. A. 72=1937 A.L.J. 702=1937 A. W.R. 629=1937 R.D. 343=1937 A.L.R. 593=A. I.R. 1937 All. 451.**

——Ss 175 and 179—*Suits under—Claims for compensation — Distinction — Separate suits—Necessity.*

While compensation can be claimed either under S. 175 or S. 179 of the Agra Tenancy Act, the difference between the two is that compensation will be given under S. 175 if there were no arrears at all, while it will be given under S. 179 if there has been irregularity in procedure. Suits under S. 175 and S. 179 are really distinct with distinct causes of action and separate periods of limitation. An aggrieved party desirous of coming under S. 176 or Ss. 178 and 179, has to file separate suits. (*Darling, S.M. and Bomford, J.M.*) BABAR SINGH *v.* RUP SINGH. **1938 A.W.R. 34 (B.R.)=1938 R.D. 311.**

——Ss. 183 and 184—*Rent-free grant—Agreement by superior proprietor to pay land revenue on behalf of inferior proprietor—Effect of—Suit by superior proprietor for arrears of revenue against inferior proprietor—Maintainability—Procedure for making latter liable for revenue—Fixing of revenue by Settlement Office—If amounts to order of resumption or rescission of agreement.*

When there is an agreement in force between the superior proprietors and the inferior proprietors that the former will pay the land revenue on behalf of the inferior proprietors of the *khewat*, such a contract amounts really to a rent-free grant within the meaning of Ss. 183 and 184 of the Agra Tenancy Act, and if it is desired to rescind or revise the contract, proceedings must be taken under the Resumption Chapter. If the Settlement Officer fixes revenue on the land, his action cannot amount to a rescission of the contract or to an order resuming the grant. It is for the superior proprietor to apply for resumption, and until an order for resumption, is obtained, the holder, *i.e.*, inferior proprietor will not be liable to pay the revenue. (*Knox, S.M. and Grant, J.M.*) PYAREY LAL *v.* AMNA KHATOON. **1936 R.D. 404.**

———**Ss. 183 and 184**—*"Rent free grant"—Superior and inferior proprietors of land—Agreement by former land revenue—Inferior proprietors to hold land without payment of revenue—Effect of—Suit for arrears of revenue—Maintainability—Procedure for making holder liable for revenue—Agra Tenancy Act, Ss. 221 and 224—U. P. Land Revenue Act, Ss. 75, 76 and 77.*

Where by an agreement the inferior proprietors are permitted to remain in possession of lands free of payment of land revenue payable thereon, the payment of which the superior proprietor, who engaged for the payment of revenue, undertakes to make, such arrangement is one which can be revised by the Settlement Officer under S. 75, 76 or 78 of the U. P. Land Revenue Act at the time of revision of settlement. It is an agreement which holds good until it is definitely abrogated. Where, however, the Settlement Officer omits to make the arrangement which the law provides that he shall make, the remedy of the superior proprietor is to proceed under the Resumption Chapter. He cannot sue the holders for arrears of revenue under S. 221 or 224. These sections are not applicable to the case. The term "rent free grant" covers grants where under an agreement even the land revenue payable on the area is to be paid by the landlord. (*Drake Brockman, S.M.*) JUGAL KISHORE *v.* MUTHRA PERSHAD. **1936 R.D. 406.**

———**S. 184**—*Presumption under—Retrospective application—Refutation by continuous entry.*

The presumption allowed by S. 184 of the Agra Tenancy Act does not apply to rent-free grants prior to the Act of 1926. Though a grant is not made as required by S. 123 by a registered instrument, there may still be a presumption in favour of the grantee but that can be refuted by a continuous entry of the holder as an occupancy tenant. (*Mehta, S.M. and Harper, J.M.*) RAMA DEVI *v.* CHURA SINGH. **1940 R.D. 82=1940 A.W.R. (B R.) 29=1940 A.L.J. (Supp.) 9.**

———**S. 184**—*Rent-free grant—What amounts to—Mere non-collection of rent—Effect.*

S. 184 of the Agra Tenancy Act lays down that land held rent-free in respect of which no liability to rent is recorded in the annual registers shall in the absence of evidence to the contrary be presumed to be held under a rent-free grant. Where the liability to pay rent is recorded but land is held rent-free with the consent of the landlord, it does not mean that it is held in virtue of a rent-free grant. (*Darling, S.M. and Bomford, J.M.*) BALDEO PRASAD PANDE *v.* LALTA. **1938 A.W.R. (B.R.) 244=1938 R.D. 549.**

———**S. 186 (1) (c)**—Applicability— Grantee holding grant for over 50 years—No two successors to original grantee—Status of such grantee. *See* AGRA TENANCY ACT, Ss. 187 AND 186 (1) (*c*). **1938 A.W.R. (B.R.) 88=1938 R.D. 304.**

———**Ss. 186 (c) and 188 (1) (b)**—*Applicability—Rent-free grant for religious service of looking after dargah—Liability of tenant for rent and to ejectment—Claim to proprietary right—Maintainability.*

Under S. 186 (*c*) of the Agra Tenancy Act, no length of tenure can entitle a tenant to claim proprietary rights in the land. Land which is found to be rent-free grant for the purpose of a specific religious service, namely that of looking after a *dargah* cannot fall within the purview of S. 186. Such land is liable to have rent fixed upon it at the instance of the landlord and the latter is entitled to eject the holder of the land under S. 188 (1) (*b*) of the Act, when he no longer requires the service. (*Drake Brockman, S.M.*) MANZOOR ALI SHAH *v.* BABU RAM. **1936 R.D. 234 (2).**

———**Ss. 186 and 192 and Agra Pre-emption Act (XI of 1922), S. 11**—*Rent-free grantee—When becomes a proprietor—Sale by—If gives rise to a right of pre-emption.*

Though a rent-free grantee might fulfil the conditions laid down by S 186 of the Tenancy Act he becomes a proprietor only from the date of his declaration as such in a suit brought under S. 192 and not at any time before. Where such a rent-free grantee whose status had not been converted into that of a petty proprietor by reason of appropriate proceedings under the Tenancy Act, effects a sale, it is neither a sale of proprietary interest in land nor is the vendor a petty proprietor within the meaning of S. 11 of the Agra Pre-emption Act and hence no suit for pre-emption lies in respect of such a sale. (*Iqbal Ahmad and Bajpai, JJ.*) RAM GHULAM *v.* RAM BHAJAN. **I. L. R. (1939) All. 282=181 I. C. 805=11 R. A. 612=1939 A. W. R. (H. C.) 99=1939 R D. 107 (2)=1939 A.L.J. 157=A.I.R. 1939 All. 226.**

———**Ss. 187 and 186 (1) (c)**—*Grant held for over 50 years, but not by two successors to the original grantee—Position of grantee—Sub-tenants from—Liability to ejectment.*

Even though the grantees may have held the grant for more than 50 years, yet until the grant has been held by two successors in interest to the original grantee, they come under S. 187 of the Agra Tenancy Act and it is wrong to hold that their status is that as defined in Cl. (1) (*c*) of S. 186 of the Act. Any one admitted to a sub-tenancy by such grantees are liable to ejectment as sub-tenant within the definition of Cl. (7) of S. 3 of the Act (*Darling, S.M.*) UMRAO *v.* SOHAN LAL. **1938 A.W.R. (B.R.) 88=1938 R.D. 304.**

———**Ss. 187 and 188**—Muafi khidmati grant—Nature and incidents of—Grantee of—Person holding under—Status of—If sub-tenant. *See* AGRA TENANCY ACT, S. 3 (7). **1938 R.D. 160=1938 A.W.R. (B.R.) 91.**

———**S. 188**—*Suit to eject under—Grant subject to a condition against alienation—Ejectment, when can be ordered.*

Where a suit is brought under S. 188 of the Agra Tenancy Act for the ejectment of a grantee from land alleged to be held under a service tenure on the ground that the services were no longer required, but the evidence showed that the grant was not an ordinary service tenure and that no definite services were required of the grantee, it was held that grant was one subject to a condition that the grantee should not mortgage or sell the land included in the grant, and that if it was found that the condition had been broken, the grantee was liable to ejectment. (*Marsh, S. M. and Mehta, J M.*) JIVA RAM *v.* MOONGA RAM. **1939 R.D. 242=1939 A.W.R. (B.R.) 216.**

——**S. 189 (b)**—Khidmati *tenant—Ejectment—Limitation—Starting point.*

According to the provisions of S. 189 (*b*) of the Agra Tenancy Act, in the case of a *Khidmati* tenant, whenever a landlord finds that he does not require the tenant's services, he can, within 12 years of notice to the other party that his services are no longer required, bring the suit for ejectment. (*Mehta, S.M.*) ALOPI DATTA *v.* RADHEY SHYAM. **1940 R.D. 134=1940 A.W.R. (B.R.) 52.**

——**S. 192**—Scope—Suit under S. 44—Absence of prayer in plaint for fixation of rent—Subsequent prayer for—If can be granted—Absence of material for fixing rent—Effect. *See* AGRA TENANCY ACT, SS. 44 AND 45. **1936 R.D. 85.**

——**S. 192**—When could be invoked. *See* AGRA TENANCY ACT, SS. 44, 45 AND 192. **1938 R. D. 914.**

——**S. 196**—*Construction-Grove-holder—Meaning—Planting of grove—Written permission of landlord—When necessary.*

Under S. 196 of the Agra Tenancy Act a grove-holder is a person to whom land has been let by a landlord for the purpose of planting a grove and the opening words of the section say nothing about a written permission. It is only when a tenant has a holding already and wants to plant a grove on it that he should get the written permission of the landlord in order that he may have the rights of a grove-holder. (*Knox, J.M.*) JAI DEVI KUER *v.* TOTA RAM. **1936 R.D. 234 (1).**

——**S. 196**—*Permission to re-plant—When necessary.*

It is only when the grove as a unit loses its character as a grove and re-plantation is necessary that written permission of the zamindar is necessary under S. 196 of the Agra Tenancy Act. But if it is maintaining its grove character, no written permission is necessary for plantation of individual trees. (*Marsh, S. M. and Mehta, J. M.*) MANOHAR DAS *v.* SYED KAZIM HUSAIN. **1939 R.D. 326.**

——**S. 196**—*Tenant, holding over—Status of—Planting of trees by him—If becomes a grove.*

When once the area was definitely held not to be a grove and when the tenant was ejected but was holding over, he is only a trespasser, and any plantation of trees by that person would not be recognised under the law, and what was held not to be a grove cannot be converted into a grove by the action of a trespasser. (*Mehta, J. M.*) SALIG RAM *v.* THAKUR SRI RAM SINGH. **1938 A.W.R. (B.R.) 267 (1)=1938 R.D. 771=1938 A.L.J. (Supp.) 89 (2).**

——**Ss. 196 and 197**—*Mahanth allowing persons to plant groves—Right to eject—Limits.*

Where a Mahanth allows persons to plant groves, they become grove-holders and are not trespassers. Grove-holders as long as they look after their trees and pay their rent regularly

cannot be ejected as trespassers. (*Marsh, J.M.*) GORAKH NATHJI *v.* SWAMI NATH LAL. **1938 A.W.R. (B.R) 315=1938 R. D. 623.**

——**Ss. 196 and 197**—*Applicability—Occupancy holding—Plot planted with trees—Sale in execution—Purchaser—Right of—Surrender of holding by tenant to landlord—Purchaser's right to be recorded as grove-holder.*

Where in execution of a decree of a Civil Court a plot of land comprised in the holding of an occupancy tenant with trees thereon—the number of trees being such as making the plot a grove—if sold, the purchaser who gets possession of the plot through the Civil Court is entitled to be recorded as groveholder of that plot under Ss. 196 and 197 of the Agra Tenancy Act, when the occupancy tenant surrenders the holding to his landlord. Where a tenant plants a grove with the implied consent of the landlord, such planting changes the character of the holding, and the grove can be mortgaged and sold. The purchaser gets the right to use the plot so long as it retains the character of grove. (*Darling, S.M. and Bomford, J.M.*) SARDHA DIN *v.* MASURIA DIN. **1938 R.D. 147=1938 A.W.R. 80 (B.R.).**

——**Ss. 196 and 197 (a)**—*Grove lands ceasing to be such—Status of holder—Right to re-plant grove*

Under S. 197 (*a*) of the Agra Tenancy Act it has to be presumed that a grove-holder holds the grove land under a lease for a term expiring with the land ceasing to be grove land; and the moment it ceases to be grove land, he becomes a non-occupancy tenant holding over. If he subsequently wishes to re-plant trees on the land, he becomes a person planting a grove on land held by him as a tenant under the second clause of S. 196. Before he can be entitled to re-plant the grove, he must prove that he is acting in accordance with local custom giving him such a right or that he has the landlord's written permission. (*Drake Brockman, S. M. and Knox, J. M.*) BACHAN SINGH *v.* BHOLA. **1936 R.D. 321 (2).**

——**Ss. 196 and 197 (h)**—*Scope of—Planting of grove by occupancy tenant with permission of landholder—Removal of trees—Effect—Liability of grove-holder to ejectment.*

An occupancy tenant who plants a grove in a plot of his occupancy holding with the permission of his landholder, holds that plot as a grove-holder in supersession of all subsisting rights and liabilities under S. 197 (*h*). The effect of this is that when the plot ceases to retain the character of a grove, the grove-holder cannot rely on his former occupancy rights to protect him from ejectment as a non-occupancy tenant. (*Darling, S. M. and Bomford, J.M.*) RAM SAHAI *v.* HET SINGH. **1938 A.W.R. 1 (B.R.)=1938 R.D. 108.**

——**S. 197**—*Grove ceasing to be such—Status of grove-holder—Right to plant new trees.*

If a plot ceases to be a grove, the grove-holder becomes a non-occupancy tenant and without written permission is not entitled to plant new trees. (*Drake Brockman, S.M. and Knox, J.M.*) KAILASH BIHARI LAL *v.* MUKTA PRASAD. **1937 R.D. 599.**

——**S. 197**—*Grove land—Trees dying out or cut down from part—Part left vacant—Assessment of vacant part to land revenue—Remedy of* *grove-holder—Suit to declare that he is grove-holder of whole plot—If lies.*

It is not legitimate to split up a grove into two portions merely because the trees have disappeared from one portion of it, having been cut or having died away, and the land has been left vacant. It has to be presumed that the whole plot has been held under a single agreement, and until there is some sort of formal division, the holding cannot be split up. If the vacant half is assessed to revenue, the tenant-grove-holder is not bound by the assessment proceedings, because assessment takes place without reference to the tenant; it must be shown that he had some notice of the proceedings or that there was a formal or actual division of the holding and that the tenant had lost possession of a portion of it. The tenant is entitled to sue for and get a declaration that he is grove-holder in case the vacant portion is assessed to revenue. (*Drake Brockman, S. M. and Knox, J. M.*) PREM SHANKAR *v.* SHRI NARAIN. **1936 R.D. 348.**

——S. 197—*Grove-holder—Right to transfer his interest—Law as to—Custom to the contrary—Onus.*

S. 197 of the Agra Tenancy Act has introduced a change in the law from what had been ruled in various rulings, and the general law is that a grove-holder has a right of transfer and the burden of proof of a custom to the contrary lies on any one who denies the rights of transfer to a grove-holder. (*Bennet, Iqbal Ahmad, Yorke and Varma, JJ.*) MUBARAK HASAIN *v.* SAGAR MAL. **I.L.R. (1938) All. 396=175 I.C. 665=10 R.A. 717=1938 A.L.R. 473=1938 R.D. 505=1938 A.L.J. 400=1938 A.W.R. (H.C.) 251=A.I.R. 1938 All. 321 (S.B.).**

——S. 197 (a)—*Grove-holder—Status of—Grove ceasing to exist—Position of grove-holder—Liability to ejectment.*

It is clear from the provisions of S. 197 of the Agra Tenancy Act that the status of a grove-holder is that of a non-occupancy tenant. Though, no doubt, the lease under which a grove-holder is presumed to hold as a non-occupancy tenant comes to an end when the grove ceases to exist, even thereafter his position continues to be that of a non-occupancy tenant and he is therefore liable to ejectment at the instance of the landholder. The mere non-payment of rent by him cannot affect his status as a non-occupancy tenant A non-occupancy tenant whether holding or not holding under a lease is liable to ejectment at the instance of the landholder, even though he may have continued in possession of the holding for a period of more than 12 years after the expiry of the term of a lease. (*Iqbal Ahmad, J.*) FAKHRUDDIN HUSAIN *v.* ABDUL WAHID. **175 I.C. 20=10 R.A. 644=1938 A.L.R. 374=1938 A.W.R. (H.C.) 145=1938 R.D. 367=1938 A.L.J. 208=A.I.R. 1938 All. 213.**

——S. 197—*Right to eject grove-holder—Sale splitting holding and destroying unitary character of grove—Retained area denuded of trees—Zamindar's remedy.*

Where a grove-holder by transfer of a portion of his holding, splits the holding and thereby destroys the unitary character of the holding, and retains in himself a portion of the holding completely denuded of trees, the zamindar is entitled to eject the holder on the ground that the grove character has been lost. (*Mehta, S M.*) BADRI NARAIN SINGH *v.* SUGRIV SINGH. **1939 A.W.R. (B.R.) 8=1939 R.D. 36.**

——S. 197—*Suit for arrears of rent—Plots in suit found to be grove land as entered in settlement—Suit, if can be decreed on basis of subsequent entries in* khatauni.

Where in a suit for arrears of rent by the zamindar, the Court finds that the plots in suit are still grove land as recorded at the settlement and that no rent has been duly assessed thereon, the suit cannot be decreed even though rent has been entered against the plots in suit in the subsequent *khatauni*. (*Darling, S.M.*) MOHAMMAD SAID KHAN *v.* MAHADEO. **1937 R.D. 267.**

——S. 197 (a) and (h)—*Occupancy tenant planting grove—Liability to ejectment on land ceasing to be grove.*

S. 197 (*h*) of the Agra Tenancy Act merely states that a tenant planting a grove becomes a grove-holder and under Cl. (*a*) of the section the grove-holder becomes a non-occupancy tenant when the land ceases to be grove land and that liability is subject to custom and contract. Where in the *wajib-ul-arz* of a village it is laid down that in the case of a rented grove when the field is clear of trees, the land will remain with the man who planted the grove on payment of rent, while if the grove is not rented he will cease to have any right in the land once the grove loses its character, it cannot be said that it means that the rent-free grove-holder became a trespasser and the rent paying grove-holder a tenant liable to ejectment at will. In such a case the grove-holder becomes a non-occupancy tenant whose lease has not expired. He is not a non-occupancy tenant holding from year to year whose lease has expired or will expire. As such he is not liable to ejectment under S. 86. (*Bomford, S M. and Mehta, J.M.*) BHAGWANT *v.* GAURI GANESH. **1939 R.D. 57=1939 A.W.R. (B.R.) 133.**

——Ss. 197 (b) and 198—*Ex-proprietary holding—Grove in—Usufructuary mortgage of before Act of 1926—Suit by mortgagee to enforce after Act—Maintainability—Plea that mortgage void under Act of 1901—Sustainability—T. P. Act, S. 43—Applicability of.*

Defendant executed in 1915 a registered deed of usufructuary mortgage in favour of the plaintiff in respect of certain property which was described as a grove in an ex-proprietary holding. Trees in the grove numbering about 325 were also mortgaged by the deed. The plaintiff having sued for enforcement of the mortgage by sale of the trees, or, in the alternative, possession over the trees, etc., the defendant raised the plea that the grove being an ex-proprietary holding, could not be mortgaged under the law then in force and that the mortgage was therefore void and unenforceable.

Held, that though the grove was not legally transferable in 1915, under the law as it stood then, the holding which was originally ex-proprietary became a grove-tenure as a result of the planting of the trees and became capable of being transferred by way of mortgage, etc., under the Act of 1926, and there was no legal bar to the suit filed in 1927 being decreed.

Held, further, that the defendant could under S. 198 of the Agra Tenancy Act be presumed to be a grove-holder, and the transfer made by him in 1915 should, under S. 43 of the T. P. Act, be held to operate on the interest held by him at the time of the suit, which was now a transferable interest capable of being sold in execution of a decree on the mortgage. (*Sulaiman, C.J. and Bennet, J.*) KUNWAR BAHADUR *v.* GULSHER KHAN. **169 I C. 115=9 R A. 702=1937 A.L.R. 441=1937 A.L.J. 275=1937 R.D. 59=1937 A.W.R. 174=A.I.R. 1937 All. 287.**

———S. 197 (b)—*Grove—Transferability—No prohibition in* wajib-ul-arz—*Countenancing of transfer by landlord on prior occasion—Effect of.*

The Courts would not allow words to be introduced in the *wajib-ul-arz* which are not actually present. Where in the *wajib-ul-arz* of a village, the right to transfer grove rights is not specially forbidden, and where further such a transfer has been countenanced by the landlord, in the past, such rights could not be denied particularly after the passing of the Tenancy Act of 1926. Any custom which might have existed has been broken by the landlord countenancing such transfer. (*Darling, S M. and Mehta, J. M.*) MOHAMMAD UMAR *v.* RAM PIARI. **1938 R.D 916.**

———S. 199—*Ejectment suit against alleged sub-tenant—Plea of proprietary title—Order referring defendant to civil suit—Non-compliance with—Subsequent suit in Civil Court for ejectment as trespasser—Competency—Remedy of plaintiff.*

In a suit for ejectment of an alleged sub-tenant by the co-sharers of a mahal the defendant claimed proprietary rights, and he was referred to the Civil Court to establish his right. The defendant did not, however, institute such a suit against the present plaintiff who was also a co-sharer. The plaintiff then sued the defendant in the Civil Court for ejectment treating him as a trespasser.

Held, that the result of the failure of the defendant to sue the plaintiff in the Civil Court as directed was that under S. 199 (2) of the Agra Tenancy Act, the Revenue Court was bound to decide the question of title against the defendant and that it did not entitle the plaintiff to sue the defendant in the Civil Court for ejectment as a trespasser. The proper remedy of the plaintiff was to apply to the Revenue Court to revive the former ejectment suit which had been lying dormant, and move that Court to decide it. (*Rachhpal Singh, J.*) MURTAZA HUSAIN *v.* MUZAFFARUDDIN. **1936 R.D. 7.**

———S. 199—*Second lease executed during currency of first lease—Validity.*

It is open to a proprietor to execute a second lease towards the end of the period of the first lease provided that he does not attempt to superimpose the second lease on the first during the currency of the first lease. (*Bomford, J. M*) SUNDER SINGH *v.* MAIKU LAL. **1937 R.D. 207 (1).**

———S. 199—*'Thekadar'—Lessee under permanent lease getting mere possession of plots without right of collecting rents and profits—Status of.*

Where the lessee is given the mere possession of certain plots of land by a permanent lease and the collection of the rents and profits is not the subject of the lease, the lessee not being a lessee of proprietary rights in the land, is not a thekadar within the meaning of S 199 of the Act. (*Sulaiman, C.J. and Bennet, J.*) LACHMI NARAIN *v.* BATUK SINGH. **I.L.R. (1937) All. 588=1937 R.D. 425=171 I.C. 203=1937 A.L.R. 813=10 R. A 239=1937 A.L.J. 656=1937 A.W.R. 699=A.I.R. 1937 All. 561.**

———S. 199—'Thekadar'—*Permanent lease by owner over the heads of sitting tenants—Conferment of heritability and transferability—Status of lessee—Right to recover rent from sitting tenants—Latter induced to execute leases at increased rates and as sub-tenants—If bound by such lease—Liability to pay increased rates.*

When a person competent to give a permanent lease, gives a lease over the heads of sitting tenants conferring both heritability and transferability, and reciting *inter alia*, that the lessor has no concern with the property as to what he does with it so long as he receives the annual rent, the lessee is, under Act III of 1926, a *thekadar* or assignee of rents. He has full authority to collect the rents from the sitting tenants. But when the permanent lessee induces the sitting tenants to execute leases at increased rates admitting themselves as sub-tenants, the leases cannot be held to be binding either as to the status or as to the new rates. The tenants continue as tenants-in-chief and are liable to pay rent to the *thekadar* only at the rate at which the rent stood before the new leases were executed. (*Drake Brockman, S.M. and Knox, J.M.*) RAM ADHAR KOERI *v.* SHRI HANUMANJI. **1936 R.D 451.**

———S. 200—Scope—*Thekadar*—Person coming into possession under lease conferring landholder's powers and holding over—Status of. *See* AGRA TEN. ACT, Ss. 44 & 205. **1936 R.D. 133.**

———Ss. 201 (1) and 218—*Construction*—Thekadar—*Holding over after expiry of* theka—*Status and rights of—Absence of proof of payment of rent or consent of landlord to holding on—Effect.*

It cannot be held that a *thekadar* holding over and retaining possession after the expiry of the period of the *theka* can exercise the rights of a *thekadar* when there is no evidence to show that the landlord has accepted from the *thekadar* any rent falling due after the expiry of the *theka* or that he assented to the continuance of the *theka* after that date. (*Darke Brockman, S.M. and Knox, J.M.*) RAM PIYARI *v.* RAM BHAROSE. **1936 R.D. 229.**

———S. 202—*Construction—'Other dues' if includes profits—Arrears of rent and other dues, meaning of.*

The expression 'other dues' occurring in the first part of S. 202 of the Tenancy Act includes profits; and the expression 'arrears of rent and other dues' means arrears of rent and other arrears and includes arrears of profits. (*Collister, J.*) HAR DAYAL *v.* RAM MANOHAR LAL. **181 I. C. 484=11 R.A. 569=1939 R.D. 86=1939 A.W. R. (H.C.) 72 (2)=A.I.R. 1939 All. 206.**

———S. 202—Effect on limitation for a suit under S. 226. *See* AGRA TENANCY ACT, SS. 226 AND 202. **1939 A.W.R. (H.C.) 72 (2).**

———S. 202—Theka—*Suit for arrears of profits —Period of limitation.*

S. 202 of the Agra Tenancy Act provides for a period of limitation for suits for arrears of profits in respect of the *theka* area which accrue prior to the commencement of the *theka* and for arrears which remain due at the expiry of the theka. A *thekadar* has a right to recover any arrears remaining due at the expiry of his *theka*, provided he brings his suit, within one year of the expiry of his *theka*. (*Thom, C.J. and Ganga Nath, J.*) Har Dayal *v.* Ram Manohar Lal. **1940 A.L.J. 255=1940 A.W.R. (H.C.) 265=1940 R.D. 190=A.I.R. 1940 All. 316.**

——S. 203 — *Applicability — Perpetual lease giving heritable rights and powers of transfer—Provision against ejectment under any circumstances—Effect of—Status and rights of lessee—Rights—If saleable in execution*—Thekadar.

A deed of perpetual lease, the terms of which give the lessee the right to receive rents and profits and also full power to transfer his rights and which provides that the lessee's rights should be heritable and that in no circumstances should the lessee be ejected, confers on the lessee the status and rights of a *thekadar* and not merely of an agricultural tenant. His rights are transferable and saleable in execution of a decree. (*Thom, Ag. C.J. and Niamatullah, J.*) Nazim Husain *v.* Ram Nath Dubey. **172 I.C. 923=10 R.A. 435=1938 A.L.R. 45=1938 R.D. 81=1937 A.W.R. 1043=1937 A. L. J. 1166=A. I. R. 1938 All. 35.**

——S. 205—Applicability—Lease conferring powers of landholder—Person entering possession under and holding over—If *thekadar*—Ejectment—Remedy. *See* Agra Tenancy Act, Ss. 44 and 205. **1936 R.D. 133.**

——**S.** 213—*Effect of*—Theka—*Surrender by* thekadar *before expiry of period—Zamindar, if can sue for rent.*

S. 213 of the Agra Tenancy Act authorizes a *thekadar* to surrender his interest in the *theka* at any time with the consent of the lessor zamindar. It is erroneous to think that once the *theka* has been executed for a certain period the lessor zamindar can on no account be ever entitled to exercise his rights as zamindar during that period, even if the *thekadar* surrendered his rights. So where there has been a surrender before the expiry of the period fixed a zamindar is entitled to maintain a suit for arrears of rent, even if it be with reference to the period for which the *theka* was executed. (*Verma, J.*) Surya Pal Singh *v.* Bunde Ali Khan. **1938 A.L.J. 93=1938 R.D. 204=1938 A.W.R. 74 (H.C.).**

——**S.** 216—*Scope—Usufructuary mortgage by zamindar and lease back—Separate deed charging rent on zamindari—Suit to enforce charge for arrears of rent—Jurisdiction of Civil Court—Deeds—If one and same transaction—Evidence—Admissibility to prove that transactions amount only to simple mortgage.*

A proprietor of a zamindari estate executed a usufructuary mortgage of his zamindari, and also a *qabuliat* in favour of the mortgagee, whereby he retained possession of the zamindari on payment of a certain sum by way of rent of *theka* money. On the same day he also executed a third document by which the equity of redemption in the mortgaged property was charged as security for the due payment of the rent or *theka* money. The rent having fallen in arrears the mortgagee brought a suit in the Civil Court to enforce the security bond executed by the mortgagor.

Held, that though by reason of S. 216 of the Agra Tenancy Act, the mortgagee would be

bound under the Act to sue for arrears of rent in the Revenue Court, the claim in the present case being one for enforcement of the charge, the suit had to be brought only in the Civil Court; although the latter could not pass a decree for arrears of rent, it could ascertain the amount of the arrears of rent and enforce the charge created by the agreement.

Held, further, that the three documents did not form one transaction, and that it was not open to the parties to adduce evidence tending to vary or contradict the terms of the written documents or to prove that the documents taken together created only a simple mortgage. (*Harries and Rachhpal Singh, JJ.*) Mahomed Ashraf Ali Khan *v.* Behari Lal. **169 I.C. 1004=10 R.A. 89=1936 R.D. 2=1937 A.L.J. 511 =A.I.R. 1937 All. 478.**

——**S.** 219—*Scope and applicability*—Theka *of* 1901—*Right of* thekadars *to remission—U. P. General Clauses Act, S.* 6 (c).

S. 219 of the Agra Tenancy Act applies to 'all' *thekadars* and as the word 'all' does not admit of any exception, it applies to all *thekadars* past, present and future. S. 6 of U. P. General Clauses Act would apply to only those cases 'where a different intention does not appear in the new enactment.' As such it cannot apply to the case of *thekas* though they may have been executed prior to the new Act and the *thekadars* have right to remission in rent though there may have been a remission of revenue by Government. (*Thom, C.J. and Ganga Nath, J.*) Amna Khatoon Begum *v.* Beni Ram. **I.L.R. (1939) All 334=181 I.C. 30=11 R.A. 551=1939 A.W. R. (H.C.) 107=1939 A.L.J. 70=1939 R.D. 73= A.I.R. 1939 All. 209.**

——**S.** 221—*Applicability—Plot proprietor under sale-deed by co-sharer stipulating non-liability for* lagta *to vendor and his heirs, successors, etc.—Suit against for arrears of land revenue—Maintainability by successor of vendor—Proper remedy—Suit under Resumption Chapter.*

Where a person becomes a plot proprietor by virtue of a sale deed executed by a co-sharer, which contains a stipulation that the vendor, his heirs, successors, and representatives-in-interest would not be entitled to demand *lagta* from the vendees, a suit by the successor in interest of the vendor under S. 221 of the Agra Tenancy Act for arrears of land revenue against the plot proprietor is misconceived and not maintainable. Such an agreement is not binding after the death of the grantor beyond the expiration of the term of the settlement, and is subject to the law of Resumption. The correct remedy of the vendor's representative-in-interest is to bring a suit under the Resumption Chapter of the Tenancy Act. (*Darling, S.M.*) Rajendra Prasad *v.* Kallua. **1937 R.D. 10.**

——**S.** 221—*"Co-sharer"—Meaning of—Co-sharer not in possession—Liability of.*

There is nothing in S. 221 of the Agra Tenancy Act which indicates that the person who may be sued is a co-sharer out of possession. A co-sharer, for the purpose of S. 221, must be taken to be the person who is recorded as a co-sharer for the period in suit. (*Sulaiman, C. J. and Bennet, J.*) Brij Chandra Sharma *v.* Ram Narain. **I.L.R. (1937) All. 706=1937 A.L.J.**

707=1937 R.D. 385=1937 A.L.R. 847=171 I.C. 394=1937 A.W.R. 627=A.I.R. 1937 All. 618.

——S. 221—*Profits collected by lambardar exceeding revenue paid—His right to sue for arrears of revenue.*

If the profits collected by a lambardar exceed the land revenue and cesses actually paid, he is not entitled to maintain a suit for arrears of revenue under S. 221, Agra Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) Babu Singh *v.* Munshi Singh. **1937 R.D. 370.**

——S. 221—*Suit for arrears of land revenue by lambardar with rights by purchase—Plea of* malik farotar—*Duty of Court—Decree without enquiring into plea—Propriety of.*

A superior proprietor must seek his remedy through the resumption chapter in the Agra Tenancy Act. Where in a suit for arrears of land revenue under S. 221 of the Act by the lambardar who has recently acquired rights in the mahal by purchase, the defendant pleads the status of *malik farotar* and declares that the land revenue has always been payable by the *malik mahal*, the Court must decide whether the defendant is a *malik farotar* against whom the plaintiff should proceed under the resumption chapter, and if the plea is found against, whether the plaintiff is entitled to any and what relief. It is not proper to decree the suit straightaway. (*Darling, S.M. and Bomford, J.M.*) Bhawani *v.* Reoti Ram. **1938 R.D. 117=1938 A.W.R. 76 (B.R.).**

——S. 221—*Suit by lambardar for arrears of revenue—Liability of defendant—Test.*

Where there is no doubt that the defendant is entered in the *khewat* and the revenue has been assessed against his *khata* in the *khewat*, he is liable to pay the land revenue assessed on his *khata*. (*Darling, S.M. and Bomford, J.M.*) Lal Ratnakar Singh *v.* Bhim Lal Singh. **1938 R.D. 194=1938 A.W.R. 58 (B.R.).**

——S. 221—*Suit for lambardari fees—Payment of revenue direct by co-sharer—If negatives right to fees.*

Though a co-sharer pays his revenue direct into the Thasil nevertheless, the lambardar is entitled to his fees, as he is legally responsible for paying the revenue. (*Darling, S.M. and Bomford, J.M.*) Hardei *v.* Ram Sarup. **1938 R.D. 127=1938 A.W.R. 4 (B.R.).**

——S. 221—*Suit under—Onus—Facts to be proved by lambardar.*

In a suit under S. 221 of the Agra Tenancy Act, unless the lambardar shows that his realisations are not sufficient to pay the land revenue, he is not entitled to a decree. The burden of proving this is entirely on the plaintiff lambardar. (*Darling, S.M. and Bomford, J.M.*) Babu Ram *v.* Chaturbhuj. **1937 R.D. 562=1937 A.W.R. 1122 (1).**

——S. 221—*Village expenses—Right to recover—Proof of incurring of expenses—Necessity.*

A claim for village expenses cannot be allowed in the absence of any evidence to show that the lambardar had incurred any such village expenses. (*Darling, S.M. and Bomford, J.M.*) Hardei *v.* Ram Sarup. **1938 R.D. 127=1938 A.W.R. 4 (B.R.).**

——**Ss. 221 and 224**—Applicability—Superior and inferior proprietors—Latter permitted to hold possession free of revenue—Former undertaking to pay revenue—Effect of—Suit for arrears of revenue—Maintainability. *See* Agra Tenancy Act, Ss. 183 and 184. **1936 R.D. 406.**

——S. 222—*Applicability*—Thekadar *from co-sharer—Payment of arrears of revenue—Right to sue co-sharer for recovery of such arrears.*

A *thekadar* is a farmer or lessee of proprietary rights in land, and in particular of the right to receive rents or profits, and unless otherwise provided for in the *theka*, he may exercise all the rights of his lessor under the Act, subject to certain exceptions. A *thekadar* from a co-sharer can under S. 222, therefore, sue a co-sharer for arrears of revenue which he has himself paid on behalf of that co-sharer. (*Drake Brockman, S.M.*) Narain Singh *v.* Girdhar Singh. **1936 R.D. 372 (2).**

——S. 222—*Each co-sharer collecting rent from his own tenants by private arrangement—Sum in excess of land revenue due from a co-sharer realised from his tenants—Suit by him against other co-sharers to recover the excess—If lies.*

Where by a private arrangement every co-sharer of a *mahal* has his own tenants from whom he collects rents, and a sum in excess of the land revenue due from a co-sharer has been realised from his own tenants, he cannot seek to recover that excess from the other co-sharers of the *mahal* by means of a suit under S. 222 of the Agra Tenancy Act. A suit under this section can only lie against co-sharers who have defaulted and in no sense of the word can the co-sharers be said to have defaulted in the present case. (*Darling, S.M.*) Radha Govind *v.* Kanhaiya. **1937 R.D. 67.**

——S. 223—*Assignee of land revenue—Suit by, for arrears—Parties—Joinder of several co-sharers collectively—If bad.*

An assignee of land revenue is not precluded from suing a number of co-sharing proprietors collectively for arrears of revenue due to him, which the defendants have defaulted to pay. All the co-sharers being jointly and severally responsible for the revenue, the assignee can in fact only sue all of them as a body and cannot distinguish between them. Nor can the Court giving a decree specify the separate liability of any other co-sharers. (*Drake Brockman, S.M. and Knox, J.M.*) Imam Baksh *v.* Laiq-un-Nissa. **1936 R.D. 45.**

——S. 223—*Suit by assignee of revenue—If can be brought against lambardar alone.*

A suit under S. 223 of the Tenancy Act by the assignee of revenue should be brought against all the co-sharers collectively, not merely against the lambardar. (*Darling, S.M. and Bomford, J.M.*) Bohrey Lekhraj *v.* Special Manager, Court of Wards, Muttra. **1937 R.D. 563.**

——S. 223—*Suit by assignee of revenue—Proper parties—Decree against lambardar, if proper.*

A suit under S. 223 of the Agra Tenancy Act by the assignees of revenue, should be brought against all co-sharers collectively. But if it is brought against the lambardar alone and he has no objection, a decree can be passed against him in his individual capacity, to the extent of his share. (*Darling, S.M. and Bomford, J.M.*) Lekhraj *v.* Special Manager, Court of Wards, Muttra. **1937 A.W.R. 1122 (2).**

——S. 223—Suit under—Denial of liability to pay revenue—Decision—Appeal, if lies to District Judge. *See* AGRA TENANCY ACT, S. 242 (1) (*d*) — APPEAL TO DISTRICT JUDGE. **1939 A.W.R. (H.C.) 433 (F.B.).**

———S. 224—*Applicability—Under-proprietary holding—Jama included in revenue payable by superior proprietor at settlement of 1287—Same provision repeated at settlement of 1330 F. but revenue calculated and assessed in 1330 F.—Revenue still paid by superior proprietor—Suit by latter under S. 224 for arrears of land revenue—Maintainability—Proper remedy.*

At the settlement of 1284 F., it was laid down that the *jama* for an under-proprietary holding was included in the revenue payable by the superior proprietor. This was repeated at the current settlement of 1330 F. but the under-proprietary revenue was calculated and assessed. In spite of the actual assessment of this under-proprietary revenue in 1330 F., it continued to be paid by the superior proprietor who tried to resume the grant by way of a suit for arrears of land revenue under S. 224 of the Agra Tenancy Act.

Held, that the suit under S. 224 was incompetent and that the superior proprietor's remedy was through the Resumption Chapter of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) JUGAL KISHORE *v.* SONPAL. **1937 R.D. 23 (2).**

———Ss. 224 and 132 — *Applicability — Suit against sub-proprietor for rent—Suit filed under S. 132, if can be converted into one under S. 224.*

The remedy of a plaintiff muafidar for recovery of the rent due from the *sirdars* who are sub-proprietors under S. 4 (16) of the Tenancy Act lies by way of suit under S. 224 and not S. 132 of the Act. Such suits are triable only by an Assistant Collector of 1st class. Consequently, where the suits are lodged under S. 132 in the Court of an Assistant Collector of the 2nd class, it cannot be converted into one under S. 224. (*Darling, S.M. and Bomford, J.M.*) GATSARAN NARAINJI *v.* RAM SINGH. **1938 A.W.R. (B.R.) 307=1938 R.D. 565.**

———Ss. 224 and 230—*Suit to recover malikana dues—Forum—Civil or Revenue Court.*

Where by an order of the Settlement Officer a certain percentage of the assets was fixed as malikana payable to a superior proprietor by an inferior proprietor, it represents the former's share of the rent payable by the tenants to the land holder and so they come within the words 'rent due to him as such in S. 224. S. 230 of the Act becomes applicable to such a suit and hence any suit in respect of a malikana would not be cognizable by a Civil Court and can be brought in the Revenue Court. (*Bennet, A.C.J. and Verma, J.*) BHAGWAN SINGH *v.* IMRAT SINGH. **I.L.R. (1938) All. 856=1938 A.W.R. (H.C.) 594 =1938 A.L.R. 862=1938 A.L.J. 936=1938 R.D. 790=178 I.C. 455=A.I.R. 1938 All. 615.**

———S. 226—*Decree against collecting co-sharer —When can be passed.*

When a suit is filed against a lambardar under S. 226 of the Agra Tenancy Act, a decree cannot be passed against the collecting co-sharer who is not a lambardar unless the plaintiff has applied to amend his plaint to add all co-sharers and the suit to proceed under S. 227 of the Act. (*Marsh, S.M. and Mehta, J.M.*) BABU RAM *v.* KUNDAN SINGH. **1939 R.D. 240=1939 A.W.R. (B.R.) 67 (2)=1939 A.L.J. (Supp.) 63.**

———S. 226—*Profits—Collection charges—Suit by co-sharer against lambardar for share of profits—Rate of collection expenses to be allowed.*

The customary and reasonable rate of collection charges or expenses is 10 per cent. and that rate should be allowed in a suit for profits by a co-sharer against a lambardar. (*Harries, J.*) SHYAM LAL *v* SUNDER LAL. **171 I.C. 686=1937 A.L.R. 872=1937 A.W.R. 650=1937 A.L.J. 769 =1937 R.D. 387=A.I.R. 1937 All. 661.**

———S. 226—*Rate of profits—Decision as to, if can operate as* res judicata.

It cannot be held that a decision as to the rate profits operates as a *res judicata*, for circumstances governing the rate of profits differ from year to year. (*Darling, S.M. and Bomford, J.M.*) SHIVA BANS PANDEY *v.* RAJMAN PANDEY. **1938 A.L.J. (Supp.) 84=1938 A.W.R. (B.R.) 300= 1938 R.D. 441.**

———S. 226—*Re-union of plots—Effect on proprietary interest of parties.*

The mere re-union of plots so as to constitute a new joint khewat will not confer any fresh right or disturb the proprietary interests of the parties. (*Sulaiman, C.J. and Bajpai, J.*) BHAWANI PRASAD *v.* BAHAL SINGH. **163 I.C. 767=9 R.A. 76=1936 A.L.J. 801=1936 A.W.R. 611=1936 R.D. 246=A.I.R. 1936 All. 492.**

———S. 226—Sir *and* khudkasht *cultivated by co-sharer in excess of his share—Collection of excess —Duty of lambardar.*

As a part of the profits of the mahal arise from the cultivation of *sir* and *khudkasht* by co-sharers, where such cultivation is in excess of the share then a collection of the excess at a certain fixed rate has to be made from those co-sharers. It is the duty of the lambardar to make this collection, and if a certain co-sharer will not pay the excess due from him, to inform the co-sharers who may be entitled to bring a suit. (*Bennet, J.*) SOHANPAL SINGH *v.* THE SPECIAL MANAGER, COURT OF WARDS. **166 I.C. 889=9 R.A. 460=1936 R.D. 578=1936 A.W.R. 1189=1937 A.L.R. 101=1936 A.L.J. 1318=A.I.R. 1937 All. 113.**

———S. 226 (1)—*Co-sharer in village—Auction purchaser of share of—Right to sue for profits from date of sale—Mutation in village papers—If condition precedent to right to profits—C. P. Code, S. 65.*

A person who has purchased in auction the share of an admitted co-sharer in a village gets vested in him all the rights of the co-sharer whose share he has purchased from the date of the actual sale and purchase and is therefore entitled to sue for his profits from the date of sale, though his name is not recorded as a co-sharer in the revenue papers until some later date. To entitle him to sue for profits, it is not necessary that mutation should be effected in his name in the village papers. (*Harries, J.*) SHYAM LAL *v.* SUNDER LAL. **1937 A.L.J. 769=1937 R.D. 387=171 I.C. 686=1937 A.L.R. 872=1937 A.W.R. 650=A.I.R. 1937 All. 661.**

———S. 226 (1) — *Lambardar — Negligence— Collection less than 75 per cent.—If evidence of negligence—Liability to account—Basis of—Gross rental.*

Where the collections made by a lambardar are considerably less than 75 per cent. there is a *prima* *facie* case of negligence on his part, and the onus is on him to show that he had not been negligent in the matter of collections. In such cases where the lambardar is found negligent, the Court is entitled to make him liable to account on the basis of gross rental. (*Harries, J.*) Shyam Lal *v.* Sunder Lal. **171 I.C. 686=1937 A.L.R. 872=1937 A.W.R. 650=1937 A.L.J. 769=1937 R.D. 387=A.I.R. 1937 All. 661.**

——**Ss. 226 and 202**—*Limitation for suit for profits—Effect of S. 202.*

For a suit under S. 226 of the Tenancy Act the period of limitation is three years. The effect of S. 202 of the Agra Tenancy Act is only to reduce the period as against the lessor only in respect to arrears which had accrued before the *theka* and to reduce it as against the *thekadar* only in respect to arrears accruing during the period of the *theka* that period is not reduced in favour of the *lambardar* by S. 202. (*Collister, J.*) Har Dayal *v.* Ram Manohar Lal. **181 I.C. 484=11 R.A. 569=1939 R.D. 86=1939 A.W.R. (H.C.) 72 (2)=A.I.R. 1939 All. 206.**

——**Ss. 226 and 227**—*Co-sharers—Suit by one for accounts—Parties—Joinder of all—If necessary—Suit against one only—Competency.*

Under the law a co-sharer can sue another single co-sharer or any number of them for settlement of accounts. It is not absolutely necessary that all the co-sharers should be impleaded. The ultimate decree will be of course against the one sued only in proportion to his share. The co-sharer selected as defendant is usually the one who has been making collections and who holds a large share of *sir* and *khudkasht*. (*Drake Brockman, S.M. and Knox, J.M.*) Balley *v.* Jagdeo Singh. **1936 R.D. 259 (1).**

——**Ss. 226 and 227**—*Suit under—Maintainability—Settlement providing for distribution of profits contrary to the Tenancy Act—Rights—Agitation—Forum.*

No action under S. 236 or 227 of the Agra Tenancy Act will lie in a case where there is a settlement which provides for a distribution of profits in a manner different from that to which the co-sharers are entitled under the Agra Tenancy Act, and the rights of parties under such a settlement must be vindicated only in the Civil Court. (*Thom, C.J. and Ganga Nath, J.*) Asharfi Kuer *v.* Ram Pearey. **I.L.R. (1939) All. 594=183 I.C. 584=12 R.A. 152=1939 A.W.R. (H.C.) 456=1939 A.L.J. 428=1939 R.D. 382=A.I.R. 1939 All. 442.**

——**Ss. 226 and 229**—*Assignee from co-sharer of profits—'Profits on account of a year,' meaning of.*

Where the 'profits on account of a year' is assigned, the expression means that the profits which arises out of the rental demand for that particular year, irrespective of the year in which the collection is made, is assigned. It cannot include arrears previous to the year with reference to which the profits are stated to arise. (*Bennet and Ismail, JJ.*) Mahomed Ismail *v.* Hira Lal. **183 I.C. 432=12 R.A. 135=1939 R.D. 236=1939 A.L.J. 353=1939 A.W.R. (H.C.) 321=A.I.R. 1939 All. 449.**

——**S. 227**—*Collecting co-sharer—If entitled to retain his total share of profits.*

A collecting co-sharer is entitled to retain out of what he has collected from a tenant only a share of proportionate to his share in the *khewat*. He cannot claim to deduct his entire share of profits in the whole jamabandi. (*Thom, C.J. and Ganga Nath, J.*) Man Singh *v.* Baij Nath Sahai. **I.L.R. (1939) All. 888=185 I.C. 668=12 R.A. 341=1939 A.W.R. (H.C.) 692=1939 A.L.J. 830=1939 R.D. 513=A.I.R. 1939 All. 694.**

——**S. 227**—*Co-sharers—Realisation of rent—Method—Excess realisation by one—Remedy of others—Suit for profits.*

Every co-sharer in a joint mahal is entitled to realize from each tenant his share of the rent and no more. If a co-sharer realizes from a particular tenant rent in excess of his share he is liable, in a suit under S. 227 of the Tenancy Act, to pay to the other co-sharers the amount realized by him in excess of his share in the rent payable by the tenant. Further the excess rent realized cannot be credited by one co-sharer towards his full share of profits according to the jamabandi. In a suit for settlement of accounts under S. 227 of the Tenancy Act, all that the collecting co-sharer would be entitled to is to deduct from the realizations made by him from particular tenants his share of the rent payable by those tenants, and the excess realizations, if any, must go towards the satisfaction of the claim of such co-sharers who may not have realized their legitimate share of the rent from those tenants. (*Iqbal Ahmad, J.*) Baij Nath Sahai *v.* Man Singh. **177 I.C. 454=11 R.A. 203=1938 R.D. 683=1938 A.L.R. 757=1938 A.W.R. (H.C.) 461=1938 A.L.J. 698=A.I.R. 1938 All. 515.**

——**S. 227**—*Co-sharers — Suit by one against another for profits—Right of defendant to deduct own share.*

In a suit under S. 227 of the Agra Tenancy Act by a co-sharer for arrears of profits against another co-sharer who has collected them, the latter collecting co-sharer would only be responsible for distributing any profits remaining after deducting his own share. (*Drake Brockman, S.M. and Knox, J.M.*) Bhoop Ram *v.* Kedar Singh. **1936 R.D. 49.**

——**S. 227**—*Co-sharers—Suit by one for profits—Mortgagee of specific plots from one co-sharer—Decree against—If can be passed.*

Where a co-sharer mortgages specific plots of which he is in exclusive possession, the Court in a suit for profits instituted by another co-sharer should regard the mortgagor-co-sharer and his mortgagee as a single unit, and a decree can be passed under S. 227 of the Agra Tenancy Act against the mortgagee from the co-sharer as well. (*Bennet, J.*) Sheomurat Singh *v.* Bip Narain Singh. **174 I.C. 60=10 R.A. 585=1938 R.D. 139=1938 A.L.R. 228=1937 A.L.J. 1354=1938 A.W.R. 19 (H.C.)=A.I.R. 1938 All. 108.**

——**Ss. 227 and 266**—*Co-sharer, if can collect whole rent due—Liability to be sued by others for their share.*

Each co-sharer is entitled to collect only his own share of the rent of a tenant and not the entire rent payable by a tenant. Where there has been a collection of the full rent from the tenant, it is in excess of his legal right and the other co-shares are entitled to make a claim against him for such excess collection from each and every tenant from whom he had collected in full or for more than his share. (*Bennet and Verma, JJ.*) GAJRAJ SINGH *v.* KALLU. **1940 A.W.R. (H.C.) 267=1940 R.D. 207=A.I.R. 1940 All. 309.**

——S. 227—*Decree under—Execution by Collector—Order by Collector—Appeal— Forum—District Judge or Commissioner—S. 242 -C. P. Code, S. 47.*

When a decree for profits under S. 227 of the Agra Tenancy Act is sought to be executed against immovable property forming part of a mahal, the decree must be sent to the Collector who must deal with it as a decree of his own Court; and in executing the decree, the Collector acts under S. 47, C. P. Code. Any order passed by the Collector in execution is appealable to the District Judge under S. 242. But no appeal lies to the Commissioner. (*Drake Brockman, S.M. and Knox, J.M.*) MUQADDAM ALI *v.* MAHERUDDHUGH SINGH. **1936 R.D. 197.**

——S. 227—Gonwandhar—*Right to sue for share of profits of* mahal.

A *gonwandhar* has no share in a *mahal* as defined in S. 4 (4) of the Land Revenue Act. Therefore, he cannot sue for a share of the profits of a *mahal* under S. 227 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) RAM LAKHAN SINGH *v.* RAM NARESH SINGH. **1937 R.D. 337.**

——S. 227—*Lambardar—Suit for settlement of accounts—Competency.*

Every lambardar is a co-sharer first, and the fact that he is a lambardar does not make him any the less a co-sharer, and a lambardar is competent to maintain a suit for settlement of accounts under S. 227 of the Agra Tenancy Act. He may have to implead all the co-sharers or such of them as may be interested in the result of the suit as parties to the suit. But the suit cannot be dismissed on the ground that the lambardar has no right of suit under S. 227. (*Niamatullah and Ismail, JJ.*) GAJRAJ SINGH *v.* TEJ SINGH. **I.L.R. (1938) All. 143=1938 R.D. 101=1938 A.L.R. 191=173 I.C. 884=10 R.A. 528=1937 A.W.R. 1169=1937 A.L.J. 1277=A.I.R. 1938 All. 55.**

——S. 227—*Suit against collecting co-sharer—Right to share in profits actually realised.*

When a co-sharer sues a collecting co-sharer for profits under S. 227 of the Tenancy Act, there is no reason why the sole collecting co-sharers should not share with the other co-sharers the profits actually realised. (*Darling, S.M. and Bomford, J.M.*) MADAN *v.* RAM GOPAL. **1938 A.W.R. (B R.) 163=1938 R.D. 373.**

——S. 227—*Suit for profits—Maintainability—Purchaser from co-sharer obtaining decree for proportionate share of ex-proprietary rent only—If can sue for profits.*

Where a purchaser from a co-sharer obtains a decree, only for the proportionate share of the ex-proprietary rent, in his suit, he is entitled to sue for profits. (*Darling, S.M. and Bomford, J. M.*) GANGA RATHI *v.* RAM AUTAR. **1938 A.W. R. (B.R.) 349=1938 R D. 398.**

——S. 227—Suit for profits by co-sharer—Sale of plaintiff's proprietary rights in auction—Right to profits after date of sale. *See* C. P. CODE, S. 65. **1936 R.D. 49**

——S 277—*Suit for profits—Scope—Question as to nature of holding as to being* sir, khudkasht *or ex-proprietary—Relevancy of.*

A suit for profits should ordinarily be decided on the records as they stand. Such a suit is not a suit in which it can be conveniently decided whether a particular plot is partly ex-proprietary tenancy, or *sir* or *khudkasht*. (*Drake Brockman, S.M. and Knox, J.M.*) BATAN LAL *v.* BALA PRASAD. **1936 R.D. 530 (1).**

——S.. 227—*Suit under—Appeal to District Judge—When lies.*

No appeal lies to the District Judge in a suit under S. 227 of the Agra Tenancy Act, when the amount claimed is below Rs. 200. (*Drake Brockman, S.M. and Knox, J.M.*) BHOOP RAM *v.* KEDAR SINGH. **1936 R.D. 49.**

——S. 227—*Suit under—Necessity to implead proper properties—Failure to add—Duty and powers of Court.*

In a suit under S. 227 of the Agra Tenancy Act, for the settlement of accounts, it is necessary to implead all the parties who have collected the money. Where there has been an omission to do so, the Court should in the exercise of its wide powers under O. 1, R. 10, C. P. Code, implead all the necessary parties and not dismiss a suit on that ground, if necessary damages may be awarded to the other party. (*Darling, S. M. and Mehta, J. M.*) RAM BHAROSE *v.* SUNDAR LAL. **1938 A.W.R. (B.R.) 419=1938 R.D. 826.**

——S. 230—*Applicability—Suit for return of sum advanced for* zaripeshgi *on repudiation by heir of grantor—Jurisdiction of Civil Court.*

A suit by a person for return of the money advanced by him in consideration of a *zaripeshgi* lease, the validity of which is denied by the persons succeeding the grantor of the lease, on the ground that the consideration for the contract of lease has failed is a suit which the Civil Court is competent to try, and is not one for the Revenue Court. S. 230 of the Agra Tenancy Act does not apply to such a case. (*Niamatullah and Allsop, JJ.*) MAHOMED ANIS *v.* IQBAL HUSAIN. **173 I.C. 642=10 R. A. 485=1938 R D. 88=1938 A.L.R. 158=1937 A.W.R. 990=1937 A.L.J. 1202=A.I.R. 1938 All. 29.**

——Ss. 230 and 123—*Attachment, under decree for arrears, of crops in different zamindari—Distraint by that zamindar—Civil suit to declare distraint fictitious and that rent paid was on basis of* batai—*If barred by S. 230*

Where a person who had obtained a decree for arrears of rent, attached certain share of standing crop, in a different zamindari, but the other zamindar distrained the whole crop for his own arrears, a civil suit to declare the distraint fictitious and to declare that the rent paid to that zamindar was on the basis of *batai* is maintainable and is not barred by S. 230 of the Tenancy Act, for the plaintiff not being a landholder with reference to the land in question could not file a suit under S. 123 of the Agra Tenancy Act. (*Bennet and Verma. JJ.*) ALI AHMAD *v.* MEHARBAN ALI. **179 I.C. 814=11 R.A. 389=1938 A.L.J. 1076=1938 R D. 880=1938 A.W.R. (H.C.) 786=A I.R. 1939 All. 59.**

——S. 230—*Joint lease for agricultural land and for shops—One sum of rent reserved for both—Suit for arrears of rent—Jurisdiction of Revenue Court.*

A suit for arrears of rent due under a joint ease for both the agricultural land and for shops, eserving one sum of rent for both the properties, can be entertained only by a Civil Court. Such a suit does not fall under the Fourth Schedule of the Agra Tenancy Act, and consequently it is not cognizable by the Revenue Court. (*Ganga Nath and Smith, JJ.*) DAU DAYAL *v.* RAM PRASAD. **58 All. 1050=165 I.C. 649=9 R. A. 293=1936 A.L.J. 1009=1936 R.D. 293=1936 A.W.R 696=A.I.R. 1936 All. 741.**

——**S. 230**—*Bar under—Suit by a tenant against his co-tenant for profits—Jurisdiction of Court of Small Causes to try.*

Where the plaintiffs claim profits in proportion to their share in the holding on the allegation that they were co-tenants with the defendants, of certain land which was exclusively in the cultivation of the defendants, the suit is exclusively cognizable by Civil Court. The bar provided by S. 230 of the Agra Tenancy Act will be effective only if the suit is of the nature specified in Sch. 4 to the Act. The mere fact that the defendants alleged that the plaintiffs were not the tenants of the holding would not oust the jurisdiction of the Civil Court. (*Niamatullah and Ismail JJ.*) DATA RAM *v.* DHARA. **I.L.R. (1938) All. 462=176 I.C. 514=11 R A. 117=1938 R.D. 725=1938 A.L.R. 639=1938 A.W R. (H.C.) 326 =1938 A.L J. 519=A.I.R. 1938 All. 375.**

——**S. 230**—*Jurisdiction of Revenue Courts—Test—Perpetual lease by co-sharers, including minors—Landlord and tenant relationship established—Minors, if can agitate validity of lease in Civil Court.*

In the case of agricultural lands, when once the relationship of landlord and tenant is established between the parties, their rights and liabilities can be adjudicated upon by the Revenue Courts only. Where agricultural land is granted on a perpetual lease by all the co-sharers who were majors and by the mother on behalf of the minors and the lessee is in possession as a tenant, though the perpetual lease may be invalid, the relationship of landlord and tenant is established, and as such any agitation as to the invalidity of the lease cannot be carried on in a Civil Court. (*Bennet, A.C. J. and Verma, J.*) TAHAD ALI *v.* ISRAR. **I.L.R. (1939) All. 89=180 I C. 504=11 R.A. 466=1938 A.L.J. 1110=1938 A.W.R. (H.C.) 788=1938 R. D. 910=A.I R.1939 All. 121.**

——**S. 230**—*Relief falling within competence of Revenue Court—Jurisdiction of Civil Court.*

Where a landholder brings a suit that the transferee of a fixed rate tenant has no right to build a house on the ground that it does not constitute improvement, adequate relief can be granted by Revenue Court under Ss. 82 and 120 and hence only Revenue Court has jurisdiction to try the suit. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R (1938) All. 754=177 I.C. 450=11 R.A. 199=1938 A.L.R. 747=1938 A.L. J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714 =A I.R. 1938 All. 511.**

——**S 230**—Usufructuary mortgage of zamindari—*Quabuliyat* by mortgagor retaining possession on payment of rent—Separate deed charging rent on equity of redemption—Suit in Civil Court to enforce charge for arrears of rent—Maintainability. *See* AGRA TEN. ACT, S. 216. **1936 R.D. 2.**

——**S. 234**—*Jurisdiction—Decree for arrears of rent—Agreement to enhance rent—Power of Assistant Collector of 2nd class to include in decree.*

The Court of an Assistant Collector of the second class has no power to include in a decree for arrears of rent an agreement to enhance rent. (*Darling, S. M. and Bomford, J. M.*) RAM PRASAD *v.* KALI PRASAD. **1938 R.D. 99=1938 A.W. R. (B.R.) 49.**

——**S. 237**—Theka *granted by mortgagor pending foreclosure proceedings—Mortgagee agreeing to* thekadar *being recorded as such on his undertaking to surrender possession after Civil Court's decree—Mortgagee applying for mutation after decree by Civil Court— Application opposed by* thekadar—*Mortgagee's remedy.*

In the course of foreclosure proceedings the mortgagor gave a *theka* of the mortgaged village to one *X* who applied for mutation. The mortgagee opposed the application but eventually agreed that *X* should be recorded as *thekadar* on the understanding that if and when the mortgagee should get "*dakhal*" he would surrender possession. The proceedings in the Civil Court ended in favour of the mortgagee and he was granted possession as against the mortgagor. When the mortgagee applied for mutation and removal of *X's* name, *X* opposed the application.

Held, that the possession of a proprietor was distinct from that of a *thekadar* and all that the mortgagee had been given by the Civil Court was proprietary possession and that if he thought that *X's theka* was really void *ab initio* or had come to an end in accordance with his promise, it was open to him to file a suit to get rid of him, and that a mutation case between proprietors was not the proper forum to decide whether *X's theka* had come to an end or not. (*Darling, S. M. and Bomford, J M.*) BHAWANI SHANKAR *v.* DULAREY LAL. **1937 R.D. 391.**

——**S. 238**—*Assistant Collector not empowered under to carry on sales—Proceedings before such officer, if null and void.*

Where an Assistant Collector is not duly empowered under S. 238 of the Agra Tenancy Act with the powers of a Collector for the purpose of carrying out sale of landed property, all the proceedings in his Court, in execution of a decree for arrears of land revenue, are *ab initio* null and void. (*Darling, S. M. and Marsh, J. M.*) RAM RAKSHPAL *v.* RAM SARUP. **1938 A.W.R. (B.R.) 254=1938 R.D. 557.**

——**Ss. 238 and 258**—*Decree of Revenue Court sent for execution to Collector—Transfer by latter to Sales Officer—Legality.*

Where an application for execution of a Revenue Court decree for execution against the share of the judgment-debtor in a revenue paying *mahal*, under serial No. 13 of List II of Sch. II to the Agra Tenancy Act, the Collector must execute the decree as if it were a decree of his own Court He cannot transfer the execution—assuming that execution proceedings constitute a 'case' under S. 258—to an Assistant Collector or Sales Officer subordinate to him, unless the officer to whom it is transferred is invested with the powers of a Collector under S. 238 of the Act. (*Drake Brockman, S. M. and Knox, J. M.*) MUQADDAM ALI *v.* MAHERUDDHUJH SINGH. **1936 R. D. 197.**

——**S. 239**—*Order by Collector empowering Honorary Assistant Collector to entertain plaints—If confers power to entertain applications.*

An Honorary Assistant Collector who has been empowered by order of the Collector to entertain plaints in suits, has jurisdiction to entertain applications as well although the word "application" is not specifically mentioned in the order. It must be deemed to cover applications also and both plaints and applications can be filed in the Court of the Honorary Assistant Collector under S. 239 of the Agra Tenancy Act. (*Drake Brockman, S. M. and Knox, J. M.*) RAMJI LAL *v.* BHARAT SINGH. 1936 R.D. 195.

———S. 240 —*"Court" — If includes District Judge.*

It is impossible to hold that the word "Court" used in S. 240 must necessarily mean the "Revenue Court" of the first instance (*i.e.*) the Assistant Collector, or the Collector and not a District Judge. (*Sulaiman, C. J. and Bennet, J.*) PANCHAM *v.* RAMESHWAR. **162 I.C. 954=8 R.A. 919=1936 R.D. 144=1936 A.W.R. 393=1936 A. L.J. 337=A.I.R. 1936 All. 376.**

———S. 241—*Suits for arrears of rent under S. 132 against same tenant by same landlord in respect of different plots—Appeal in one only—Jurisdiction of Collector in appeal to modify decree in another suit not appealed from.*

Under S 241 of the Agra Tenancy Act, the Collector has no jurisdiction to modify the decree passed in a suit for arrears of rent under S. 132, when there is no appeal duly presented with regard to that suit, though an appeal is validly before him in respect of another suit against the same tenant by the same landlord with regard to another plot. (*Darling, S. M. and Bomford, J. M.*) GANGA SINGH *v.* DWARKA PRASAD. **1937 R. D. 14.**

———S. 242—*Applicability—Court of a Small Cause Court Judge.*

A forum such as a Small Cause Court Judge has no jurisdiction at all under the Agra Tenancy Act as an appellate Court. S. 242 of that Act only refers to the Court of the District Judge and not to a Court such as the Court of the Small Cause Court Judge. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L R. (1938) All. 754=177 I.C. 450=11 R A. 199=1938 A.L. R. 747=1938 A.L.J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

———S. 242—Appeal against order under S. 144, C. P. Code—If lies. *See* AGRA TENANCY ACT, Ss. 3 AND 242. **1938 A.L.J. 988.**

———S. 242—Decree under S 227—Execution by Collector—Order in execution—Appeal—Forum —District Judge or Commissioner. *See* AGRA TENANCY ACT, S. 227. **1936 R.D. 197.**

———S. 242 (1) (d)—*Appeal to District Judge—Competency—Decision of Revenue Court in suit under S. 223 in which the liability to pay revenue is denied.*

An appeal does lie to the District Judge under S. 242 (1) (*d*) of the Agra Tenancy Act against the decision of the Revenue Court in a suit for the recovery of arrears of revenue brought under S. 223 of the same Act, if the defendant pleads that he is not liable to pay any revenue at all. (*Bennet, Allsop and Verma, JJ.*) MAHENDER MAN SINGH *v.* BADRI. **I.L.R. (1939) All. 704=182 I.C. 602=12 R.A. 35=1939 A.L.J. 489=1939 A.W.R. (H.C) 433=1939 O.L.R. 427=1939 R.D. 367= A.I.R. 1939 All. 433 (F.B.).**

———S. 242 (1) (a) and (d)—*Appeal to District Judge—Essentials.*

Though a suit may be one under S. 221 of the Agra Tenancy Act, it is only when the amount of revenue annually payable is in issue that an appeal lies to the District Judge. When a person denies his liability to pay the amount claimed, there is no issue about the amount as there is no contention about it. (*Ganga Nath, J*) MOHAMMAD YUSUF ALI KHAN *v* SHIAM KUNWAR. **174 I.C. 448=1938 R.D. 144=1938 A.L.R. 275=10 R.A. 576=1938 A.W.R. (H.C.) 24=1938 A.L.J. 3=A.I.R. 1938 All. 135.**

———S. 242 (d)—*Applicability—Suit by lambardar for revenue against co-sharers—Plea of denial of liability to revenue—Appeal to District Judge —If lies.*

S. 242 (*d*) contemplates only suits in which liability for revenue is not denied, but the amount of the revenue annually payable is in dispute between the parties in the Court of first instance and also in appeal. It has no reference to the question of the liability for revenue. When the defendants therefore plead that they are revenue free proprietors and are not liable to pay any revenue, S. 242 (*d*) does not apply, and no appeal therefore lies to the District Judge in such a case. (*Ganga Nath, J.*) RAMESHWARI PRASAD *v.* DINA NATH. **1936 R.D. 17.**

———S. 242 (3) (a)—*Scope—Question of proprietary right—Whether lands are* sir *lands or tenancies—Appeal to District Judge—If lies.*

A question whether certain lands are the *sir* plots of a person or whether they are their tenancies would not be a question of proprietary right within the meaning of S. 242 (3), Agra Tenancy Act, and no appeal therefore lies to the District Judge in such a case. An appeal would lie only to the Court of the Commissioner. (*Sulaiman, C.J. and Harries, J.*) RAM CHANDRA SINGH *v.* MISRILAL. **I.L.R. (1937) All. 958=172 I C. 629=10 R.A. 418=1938 A.L.R. 18=1937 A.W.R. 888=1937 R.D. 532=1937 A.L.J. 1204 =A.I.R. 1937 All. 790.**

———S. 242 (3) (a)—*Suit under S. 44 of Tenancy Act—Defendant pleading lease—Question of proprietary right if in issue—Appeal from decision in suit—Forum.*

Where in a suit under S. 44 of the Tenancy Act, it was admitted that the plaintiff was a zamindar, but it was contended by the defendant that he was a lessee of proprietary rights, and the suit is dismissed, the appeal lies to the Commissioner and not to the District Judge, for as the lease is not a transfer of proprietary interest in land under the Tenancy Act, there is no question of proprietary right in issue between the plaintiff and the defendant. (*Iqbal Ahmad and Bajpai, JJ.*) BHAIRO KUMAR *v.* MARKANDE GIR. **I.L.R (1939) All. 822=185 I.C. 767=12 R.A. 347=1939 A.L. J. 620=1939 A.W.R. (H. C.) 585=1939 R.D. 444=A.I.R. 1939 All. 679.**

———S. 242 (3) (b)—*Decision on a question of jurisdiction—Decision on a concession by an Advocate—Right of appeal.*

Where a question of jurisdiction was raised and an issue was also framed, but as it was conceded in arguments, the finding on the issue was recorded as based on such concession, and where regarding which grounds of appeal are taken, there is a suit in which a 'question of jurisdiction has been decided and is in issue in the appeal' and hence an appeal lies under S. 242 (3) (*b*) of the Tenancy Act. (*Bennet and Verma, JJ.*) MAHARAJA OF BENARES *v.* BAULESHWAR SINGH. **181 I. C. 852=11 R.A. 619=1939 R.D. 101=1939 A. W.R. (H.C.) 150=1939 A.L.J. 120=A.I.R. 1939 All. 210.**

——**Ss 242 and 248 (3)**—*Suit for profits under S. 227—Decree by Assistant Collector—Execution sale—Order of Collector confirming—Appeal—Forum—District Judge or Commissioner.*

An order passed by the Collector confirming a sale carried out by the sale officer in execution of a decree for profits passed by an Assistant Collector under S. 227 of the Agra Tenancy Act is appealable to the District Judge under Ss. 242 and 248 (3), when the value of the subject-matter exceeds Rs. 200 and no appeal lies to the Commissioner. (*Darling, S.M. and Bomford, J. M.*) KALYAN SINGH *v.* BHAGWAN SINGH. **1937 R.D. 37.**

——**Ss. 242 (3) (a) and 252**—*Applicability—Suit against lambardar for arrears of profits—Question of proprietary right involved—Appeal—Revision.*

Where a question of proprietary right is raised in a suit by a co-sharer against the lambardar for arrears of profits, the case is one in which an appeal lies to the District Judge under S. 242 (3) (*a*), and, therefore, no revision lies to the Board of Revenue under S. 252 of the Agra Tenancy Act. (*Drake Brockman, S. M. and Knox, J. M.*) SHIB KARAN SINGH *v.* JIWA KUNWAR. **1936 R.D. 29.**

——**S. 243**—*Interpretation—Right of second appeal—Condition.*

S. 243 of the Tenancy Act requires that a question of proprietary title should have been in issue between the parties claiming such right in the first appellate Court and shall be in issue in the appeal. The section clearly indicates that the dispute between the parties should be as regards their respective proprietary rights and that each party should be claiming such right. The mere fact that the defendant is denying the plaintiff's proprietary right without setting up any proprietary right in himself would not bring the case within the scope of the section. The intention of the Legislature by using the words "parties claiming such right" obviously was that the parties between whom the dispute arises should each claim such a right. 1930 A.L.J. 1065 and A.I.R. 1935 All. 568, Overr. (*Sulaiman, C.J. and Bajpai, J.*) KAN KUAR *v.* ATAL BEHARI LAL. **I. L.R. (1937) All. 138=165 I.C. 736=1936 R.D. 432=1936 A.W.R. 954=1936 A.L.J. 1007=A.I. R. 1936 All. 800.**

——**S. 244**—*Mixed question of law and fact—Second appeal—Question of admission to tenancy.*

The question of admission to tenancy might be interpreted as a mixed question of law and fact and as such on that ground a second appeal might be admitted. (*Darling, S.M. and Mehta, J.M.*) NAND LAL *v.* WAJID ALI. **1938 A.W.R. (B.R.) 547=1938 R.D. 672.**

——**S. 244**—*Second appeal—Interference - No doubt as to identity of plot—Difference in area owing to mistake in measurement—Court being misled.*

Where there is no doubt about the identity of the plot in question, but the Commissioner was misled by the difference in the area of the plot which was due to a mistake in the measurement, his order can be set aside in second appeal (*Darling, S.M. and Mehta, J.M.*) MADHAI SAITHWAR *v.* TULSI KEWAT. **1938 A.W.R. (B.R.) 373=1938 R.D. 735.**

——**S. 247**—*Construction and effect—Order by Assistant Collector, second class, on review application—Appeal—C. P. Code, O. 47, R. 7.*

Under the special rule of law enacted by S. 247 of the Agra Tenancy Act, all orders of an Assistant Collector of the second class passed on review, when granting or rejecting the application for review, are appealable without the limitations and restrictions given in R. 7 of O. 47, C. P. Code. (*Drake Brockman, S M. and Knox, J.M.*) ALGU KEWAT *v.* GHIRAU TEWARI. **1936 R.D. 257.**

——**S. 248 (3)**—*Execution proceedings governed by O. 21, C.P. Code—Order confirming sale—Appeal—Forum — Either revision or appeal under para. 1011-A or 1011 of the Revenue Manual—Competency.*

Where the execution of a decree in a suit under S. 132 of the Tenancy Act is governed by O. 21, C. P. Code, an appeal against the order confirming the sale of the judgment-debtor's property lies under S. 248 (3) of the Tenancy Act to District Judge if the value of the subject-matter exceeds Rs. 200. No appeal nor revision lies to the Commissioner under paras. 1011 and 1011-A of the Revenue Manual in such a case. (*Darling, S.M. and Bomford, J.M.*) ASA RAM *v.* PARMA. **1938 A.W.R. (B.R.) 158=1938 R.D. 254.**

——**Ss. 248 (3) and 226**—*Order of Collector confirming sale in execution of decree for profits—Appeal—Forum.*

An appeal against an order of Collector confirming a sale in execution of a decree for Rs. 225 passed in a suit for profits under S. 226 of the Agra Tenancy Act, lies not to the Commissioner, but to the District Judge under Cl. (3) of S. 248 of the Act. (*Darling, S.M and Bomford, J.M.*) AMIR HASAN *v.* BADRI PRASAD. **1937 R.D. 373 (1).**

——**Ss. 248 (3) and 252**—*Stay of execution of decree for ejectment—Appeal, if lies to District Judge—Revision to Board—Competency.*

Where an Assistant Collector stays the execution of a decree of ejectment, the order though one under S. 47, C. P. Code, will not be open to appeal to District Judge by reason of Ss. 248 (3) and 242. Hence it is open to revision by the Board under S. 252. (*Darling, S.M. and Mehta, J.M.*) HOLDSWORTH *v.* ZAMINDAR CHAUDHURI. **1938 R.D. 801.**

——**Ss. 248 (3) and 253**—*Ejectment order under S. 80—Appeal—Revision—Jurisdiction of High Court.*

An order of ejectment passed under S. 80 of the Agra Tenancy Act is appealable to the District Judge under S. 248 (3) of the Act; and a revision lies to the High Court under S. 253 of the Act and not to the Board of Revenue. (*Niamatullah, J.*) AISHA BIBI *v.* DIVANDAR PRASAD. **1937 A.L.J. 259=168 I.C. 680=9 R.A. 665=1937 A.L.R. 392=1937 R.D. 131=1937 A.W.R. 195=A.I.R. 1937 All. 350.**

——**S. 249**—*Appeal—Order of remand by District Judge—Appealability—Remedy.*

The Agra Tenancy Act does not provide for an appeal from an order of remand; but the order can be questioned by a superior Court when the final decree is appealed from, under S. 105 (1), C. P. Code, which applies to suits and appeals under the Tenancy Act, though S. 105 (2) does not apply, as the Tenancy Act does not allow an appeal from an order of remand. (*Niamatullah and Allsop, JJ.*) Sri Ram *v.* Jai Kishan Lal. **I.L.R. (1938) All. 79=1938 R.D. 66=1938 A. L. R. 57=172 I.C. 964=10 R.A. 448=1937 A.W.R. 1075=1937 A.L.J. 1237=A.I.R. 1938 All. 37.**

———S. 249—*Order dismissing objection by judgment-debtor in execution—Second appeal.*

No second appeal lies from an order passed in appeal dismissing an objection by judgment-debtor in execution. (*Bennet, J.*) Gulab Devi *v.* Abdul Ghafur Khan. **166 I.C. 229=9 R.A. 382=1937 A. L.R. 2=1936 A.W.R. 984=1936 A. L.J. 1235=A.I.R. 1936 All. 868.**

———S. 249—*Order under S. 79—Second appeal.*

No second appeal lies to the High Court from an order under S. 79 of the Agra Tenancy Act passed by the District Judge in appeal. (*Allsop, J.*) Mubarik Hasan *v.* Ishri Prasad. **163 I.C. 971 (1)=9 R.A. 104=1936 A.W.R 472=1936 R. D. 186=1936 A.L.J. 678=A.I.R. 1936 All. 451.**

———S. 249—*Second appeal—Appellate order of Revenue Court in execution proceedings—If appealable.*

No further appeal lies against an order passed in appeal by a Revenue Court in execution proceedings. (*Allsop, J.*) Jannat-un-Nissa Begam *v.* Parshadi. **185 I.C. 808=12 R.A. 355=1939 A.W.R. (H.C.) 793=1939 A.L.J. 1014=A.I.R. 1940 All. 28.**

———S. 249—*Suit for profits—Order of remand by District Judge on appeal—Appeal, if lies.*

No appeal lies to the High Court from an order of remand passed by a District Judge on appeal in a suit for profits. (*Sulaiman, C.J. and Bennet, J.*) Pancham *v.* Rameshwar **162 I.C. 954=8 R.A. 919=1936 R.D. 144=1936 A.W.R. 393=1936 A.L.J. 337=A.I.R. 1936 All. 376.**

———Ss. 249 and 3, Cl. (14)—*Second appeal from order passed under S. 47, C. P. Code, under Tenancy Act—If lies—'Decree' under Tenancy Act—Meaning of.*

The definition of a 'decree' given in S. 2, Cl. (2) of the C. P. Code does not apply to the Agra Tenancy Act. Under the Agra Tenancy Act, a 'decree' as defined in S. 3, Cl. (14) means any order which so far as the Revenue Court is concerned, finally disposes of a suit. So it does not include the determination of any question within S. 47, C. P. Code. Any order passed under S. 47 is not a decree but remains an order under the Agra Tenancy Act. Hence no second appeal would lie from an order passed under S. 47, C. P. Code, under the Tenancy Act. Where a lower appellate Court assumes jurisdiction in a matter, treating it as one in which a second appeal is allowed by a statute, a second appeal would lie to the High Court and the High Court could then correct the mistake of the lower Court. But it is not so in a case which, as treated by the lower Court, is one in which, a second appeal is expressly prohibited by the statute. (*Ganga Nath, J.*) Dharam Singh *v.* Tikam Singh. **174 I.C. 481=10 R.A. 586=1938 A.L.R. 280=1938 A.L.J. 63=1938 R.D. 149=1938 A.W.R. (H.C.) 53=A.I.R. 1938 All. 124.**

———S. 250—*Review—Observance of provisions of O. 47, C. P. Code, if obligatory.*

The absence of reference to O. 47, C. P. Code, in S. 250 of the Agra Tenancy Act in the terms in which that order is referred to in S. 251 of the Tenancy Act, makes it quite clear that in the case of reviews before the Board the observance of the provisions of O. 47 are not legally obligatory. (*Mehta, S.M. and Harper, J.M.*) Kuber Singh *v.* Baijnath Singh. **1940 R.D. 193=1940 A.W. R. (B.R.) 71.**

———S. 251—*Ejectment order under S. 79 against several co-tenants—Application for review by one—Plea of non-service of summons—Applicant's brothers and uncle taking prominent part in ejectment proceedings—Inference—Review—If to be allowed.*

An application for review of an order of ejectment should be refused where the case has been actually defended by one of a number of defendants having a common interest, even if there be some doubt about the due service of summons on one of several such persons. Where an applicant for review pleads non-service of notice as the reason for review, but it is found that his uncle, a co-tenant has actually taken a prominent part in the ejectment proceedings, as also his own full brothers, it has to be held that the applicant has had full knowledge of the proceedings, and his application for review has to be rejected. (*Darling, S.M.*) Ganga Saran *v.* Hoti Lal. **1937 R.D. 42.**

———S. 251—*Order for ejectment followed by order for possession—Review—Non-service of notice personally on tenant—Poverty and illiteracy of tenant—If grounds for review.*

The law does not lay down that orders for ejectment under S. 86 of the Agra Tenancy Act and orders for delivery of possession may be reviewed or cancelled because notices have not been personally served on the tenants; nor does it allow review or cancellation because the tenants defendants are poor and illiterate. (*Drake Brockman, S. M. and Knox, J. M.*) Ramji Lal *v.* Bharat Singh. **1936 R.D. 195.**

———S. 251—*Review—Limitation — Ejectment order—Starting point.*

The date of delivery of possession is the date from which the period of limitation is to be counted for purposes of an application to review an order of ejectment. (*Marsh, S.M. and Mehta, J.M.*) Jammi Kuer *v.* Mathuri. **1939 A.W.R. (B.R.) 87=1939 R.D. 275=1939 A.L.J. (Supp.) 77.**

———S. 251—*Review of ejectment order—Holding sub-let when possession delivered—Limitation—Starting point.*

Where after an order of ejectment possession had been given to the landlord of a holding which was sub-let at the time of the delivery of possession, the order of ejectment may be reviewed even though the application for review is filed long after possession had been given, but is within time from the date of the knowledge of ejectment. (*Marsh, S.M. and Mehta, J.M.*) Shambhoo Nath *v.* Sher Singh. **1939 A.W.R. (B.R.) 90=1939 R.D. 433.**

———S. 251—*Review of ejectment order—Limitation—Starting point.*

The only safe date from which limitation can run in order of ejectment cases is the date on which possession is actually delivered. (*Marsh, S.M. and Mehta, J.M.*) Tota *v.* Asa Ram. **1939 A.W.R. (B.R.) 100=1939 A.L.J. (Supp.) 80.**

——S. 252—*Failure to award costs—Revision.*

Failure to award costs has, no doubt, been held to be a ground for revision. But it is undesirable that applications in revision should be encouraged in trivial cases where the amount at stake in the case is small. (*Darling, S.M. and Bomford, J.M.*) Mahboob Ullah *v.* Rahmat Ullah. **1937 R.D. 379.**

——S. 252—*Finding of fact—Production of additional evidence before the Board—Desirability.*

Per *Mehta, J.M.* (*Marsh, S.M.*, contra)—Where there is a finding by the Collector as to the non-existence of a practice of payment of rent by the sub-tenant to the mortgagee, it is a finding of fact and in such a case it would be dangerous to allow the sub-tenant to go before the Commissioner and fail to convince him as to the existence of the practice and thereafter to allow the same person to produce additional evidence before the Board to show that the Collector had come to a wrong decision. (*Marsh, S M. and Mehta, J. M.*) Baldeo Prasad *v.* Budhoo. **1939 R.D. 567=1939 A.W.R. (B R.) 243.**

——S. 252—Order on application under S. 132 (2) of the Tenancy Act—If revisable. *See* Agra Tenancy Act, Ss. 132 (2) and 252. **1938 R.D. 796.**

——S. 252—*Revision—Competency—Order under R.* 13 *of* O. 9, *C. P. Code.*

No revision lies under S. 252 of the Agra Tenancy Act against a Commissioner's order under R. 13 of O. 9, C. P. Code, refusing to set aside an *ex parte* decree, as O. 43, R. 1 (*d*) clearly provides that an appeal would lie therefrom. (*Mehta, J. M.*) Jai Devi *v.* Chaudhri Raghubir Narain. **1938 A.W.R. (B.R.) 388.**

——S. 252—*Revision—Stay of suit for inadequate reasons—If a ground.*

Where a trial Court for grossly inadequate reasons postpones a suit, the Board has wide powers under S. 252 of the Tenancy Act to interfere in revision with such an order. (*Darling, S.M. and Mehta, J.M.*) Ram Lal *v.* Nawal Kishore. **1938 R.D 935 (1)=1939 A.W.R. (B. R.) 60.**

——S. 252 (c)—*Material irregularity contemplated by—Absence of adequate service of notice to appear—Revision.*

Where there is no adequate service of a notice to appear, it constitutes a material irregularity as contemplated by S. 252, Cl. (*c*) of the Agra Tenancy Act and the Board can therefore exercise its revisional powers and pass such orders as it thinks fit. (*Darling, S.M. and Mehta, J.M.*) Mam Raj *v.* Mangal Sen. **1938 R.D. 929=1939 A.W.R. (B R.) 54.**

——S. 252—*Powers of revision—Improper admission of application under S.* 132 (2)—*Interference.*

The Board has full powers of revision under S. 252, if the Collector has improperly admitted an application under S. 132 (2) of the Act against a Thekadar, notwithstanding the provisions of S. 216 of the same Act. (*Darling, S.M. and Marsh, J.M.*) Secretary of State *v.* Ram Nath Singh. **1938 R.D. 798=1938 A.W.R. (B.R.) 410.**

—— S. 252 — Revision — Competency — Order staying execution of decree for ejectment. *See* Agra Tenancy Act, Ss. 248 (3) and 252. **1938 R.D. 801.**

——S. 252—*Revision—Grounds — Absence of hard and fast standard as to what is an illegality or irregularity—Finding not based on evidence.*

It is impossible to lay down a hard and fast standard of what constitutes such illegality or irregularity as would justify interference. Where a Collector's finding was not based on the evidence on the record and he had entirely failed to appreciate what constituted a separate property in which a lambardar has no share, and where it is clear that to deprive the lambardar of the right to collect rents of what may be a number of small tenants on behalf of a large number of petty cosharers would result in great confusion and difficulty to all concerned, the circumstances were held to be sufficient to warrant the Board's interference in revision. (*Darling, S.M. and Bomford, J.M*) Sahdeo *v.* Ram Saran. **1938 R.D. 742=1938 A.W.R. (B.R.) 359 (2).**

——S. 252—*Revision—Sale of landed property in execution of rent decree—Stay order consequent on the order under S.* 6 *of the Encumbered Estates Act—No appeal—C. P. Code, S.* 47.

Where a judgment-debtor's landed property is brought to sale in execution of a decree for arrears of rent passed against him and before the sale is confirmed he obtains an order under S. 6 of the Encumbered Estates Act and the Collector passed an order staying all further execution proceedings.

Held, no appeal lies against the stay order as it does not determine the rights and liabilities of the parties. S. 47, C. P. Code, is not applicable to the stay order. The Board can deal with the order of stay in revision under S. 252 of the Tenancy Act. (*Darling, S.M. and Bomford, J.M.*) Chhater Sain *v.* Nagina. **1937 R.D. 510.**

——S. 252—Suit for profits against lambardar—Question of proprietary right raised—Revision to Board of Revenue—If lies. *See* Agra Tenancy Act, Ss. 242 (3) (*a*) and 252. **1936 R.D. 29.**

——S. 252 (c)—*Material irregularity—Assistant Collector giving plaintiff only 3½ weeks to deposit fees for fresh summons—Dismissal of suit on default by plaintiff—Interference in revision—C. P. Code, O. 9, R. 5.*

Under R. 5 of O. 9, C. P. Code, a period of three months is allowed to a plaintiff when a summons is returned unserved. Where, therefore, in a suit for profits under S. 226 of the Agra Tenancy Act the Assistant Collector only allows the plaintiff some 3½ weeks within which to furnish a new application and to deposit fresh fees for the issue of another summons, and when through some oversight the plaintiff's lawyer fails to do the needful, the Assistant Collector in a very summary fashion dismisses the suit, he acts with material irregularity within the meaning of S. 252 (*c*) of the Act, and his order is liable to be set aside in revision. (*Darling, S.M. and Bomford, J.M.*) Sri Niwas Pershad *v.* Dudershan Pershad. **1937 R.D. 381.**

—— S. 253—*Revision—Conditions for—Order in execution of decree passed by Special Officer* *under S. 35 (c), U. P. District Boards Act—Revision to High Court if lies*

According to S. 253 of the Tenancy Act one of the conditions for a revision to lie to the High Court is that an appeal must lie to the District Judge from the suit or application decided by the Subordinate Revenue Court. Where an order is passed in execution in respect of a decree passed by a Special Officer designated by the Local Government under S. 35 (*c*) of the U. P. District Boards Act, no appeal lies to the District Judge and hence no revision would lie to the High Court. (*Bennet and Verma, JJ.*) SARDAR SINGH *v.* CHHOTEY LAL **I.L.R. (1940) All. 178=1940 A.W.R. (H.C.) 33=188 I.C. 314=1940 A.L.J. 44 =1940 R.D. 32=A.I.R. 1940 All. 194.**

——S. 258—*Order by Collector transferring execution to Assistant Collector—Appeal.*

An order by the Collector to whom a decree under S. 227, Agra Tenancy Act, is sent for execution, transferring the execution case to an Assistant Collector under S. 258 of the Act is appealable as an order under S. 47, C. P. Code, and the appeal lies to the District Judge. (*Drake Brockman, S.M. and Knox, J.M.*) MUQADDAM ALI *v.* MAHERUDDHUJH SINGH. **1936 R.D. 197.**

——S. 264 and Sch. II, List 2, Serial 14—*C. P. Code, O. 42, R. 1 (All.).*

According to the provisions of S. 264 and serial No. 14 of list 2 of the 2nd Sch. of the Agra Tenancy Act, the memorandum of second appeal must be accompanied by a copy of the judgment of the original Court. This is unaffected by the proviso introduced into R. 1 of O. 42 by the Court, for the Court has no jurisdiction, to effect, by way of a rule, an amendment to the provisions of the Agra Tenancy Act. (*Thom, C.J. and Ganga Nath, J.*) RAM BIJAI PRASAD SINGH *v.* RAM BHANJAN SINGH. **I.L.R. (1939) All. 766=1939 A.L.J. 592=1939 A.W.R. (H.C.) 564=12 R.A. 291=184 I.C. 895=A.I.R. 1939 All. 638.**

——S. 265—Lambardar—If entitled to receive capital money in land acquisition cases. *See* LAMBARDAR. **66 I.A. 145=I.L.R. (1939) All. 460 =1939 A.W.R. (P.C.) 58=(1939) 2 M.L.J. 98 (P.C.).**

——S. 265—*Admission to tenancy by lambardar after he ceased to have any share in the patti—Validity.*

Where a lambardar had ceased to have any share in the patti, an admission to tenancy in that patti by such lambardar would be invalid. (*Darling, S.M. and Bomford, J.M.*) DAULAT SINGH *v.* SUNDAR. **1938 A.W.R. (B.R.) 155=1938 R.D. 247.**

——S. 265—*Joint patti—Collection of rent—Right of lambardar—Custom entitling co-sharer—Proof—Evidence of.*

Under S. 265 of the Agra Tenancy Act, the lambardar in a joint patti is entitled to collect rent, unless by some contract or usage some other co-sharer is entitled to do so. It is possible to infer a custom or contract from a large number of instances in which the right of a co-sharer was repeatedly recognised in proceedings under S. 270 of the Act but such evidence can be rebutted. Oral evidence of co-sharers in proof or disproof of the custom or contract will be valuable. (*Niamatullah, J.*) HADIYAR KHAN *v.* UMARDARAZ ALI KHAN. **172 I.C. 621=10 R.A. 411=1938 A.L.R. 11=1937 A.L.J. 788=1937 R.D. 347=1937 A.W.R. 595.**

——S. 265 — *Lambardar—Right of, to collect rent or settle land in patti in which he has no interest—Lessee settled by such lambardar—Right of co-sharers to eject.*

A lambardar has no legal right to collect rents or to settle land in pattis in which he has no share or interest. If the lambardar grants a lease of land in a patti in which he has no interest and admits a tenant, the lease is waste paper, and the tenant under the lease is a trespasser liable to be ejected by the co-sharers of the patti or their representatives in interest. (*Knox, S.M. and Grant, J.M.*) BAKHT BAHADUR *v.* BALDEO. **1936 R.D. 455.**

——S. 265—*Right of lambardar to settle and eject tenants.*

S. 265 of the Agra Tenancy Act is perfectly clear and if any person denies the right of the lambardar to settle and eject tenants it must be proved that there is a contract or usage which debars him from collecting rents. The fact that one of the co-sharers is allowed to accept rents, which are brought to her, is not sufficient to deprive the lambardar of his ordinary rights. (*Bomford, J.M.*) BALLABHDASS *v.* MAHPAL SINGH. **1937 R.D. 171.**

——S. 265—*Lambardar—Right to sue for rent—Absence of share in patti—Onus.*

The lambardar cannot sue for rents in a patti in which he has no share, but it is for the defendant concerned to prove that his field represents a property in which the lambardar has no share. (*Darling, S.M and Bomford, J.M.*) SAHDEO *v.* RAM SARAN. **1938 A.W.R. (B.R.) 359 (2)=1938 R.D. 742.**

——S. 265 —'Usage'—What may not amount to—Significance of the term. *See* AGRA TENANCY Act, Ss. 132 AND 265. **1938 R.D. 816.**

——Ss. 265 and 266—*Lambardar having no share in the* khewat—*Suit by him in ejectment—Defendant sued on the ground that the lease got by her is fictitious—Maintainability of suit.*

A lambardar who had no share in the *khewat* to which the area in suit belonged, brought a suit under S. 44 of the Agra Tenancy Act for the ejectment of a lady as a trespasser on the ground that the lease got by her from her husband, the former lambardar, was fictitious. He had not been appointed as an agent on behalf of all the co-sharers nor have any of them joined him in the plaint.

Held, that the suit is not maintainable. If the lambardar cannot collect rent, he cannot eject.

Obiter.—If all the co-sharers bring a suit for the ejectment of the lady, it will be open to them to establish that the lease granted to her by her husband, cannot be recognised. (*Darling, S.M. and Bomford, J.M.*) HOORJAHAN BEGAM *v.* ATARSEN. **1937 R.D. 517.**

——Ss. 265 and 266—*Co-trustees—Suit by one who is also lambardar but not described as such—Joinder of other trustee as co-plaintiff—If justified—Proper procedure.*

The fact that one of two co-trustees who is also the lambardar, does not sue for arrears of rent as lambardar does not entitle the other co-trustee to be added as a co-plaintiff in the suit. Since the plaintiff is a lambardar and is as such entitled to make collections, it is against his interests that another person should be given the right to make collections. His failure to sue as lambardar would only deprive him of his costs, but cannot justify the grant of a decree in favour of the other co-trustee as well. (*Darling, S.M. and Bomford, J.M.*) Hira Lal Roy Chowdhury *v.* Annapurna. **1938 A.L J (Supp.) 9=1938 A.W.R. (B R.) 97=1938 R.D. 188.**

——**S. 266**—*Co-sharers—Suit by one only for arrears of rent—Competency—Plea that suit not maintainable—When to be raised.*

One of several co-sharers cannot maintain a suit for arrears of rent. The tenant can plead that the suit by one co-sharer only is not maintainable and he can raise this plea at any stage. The mere fact that one of the other zamindars and the son of another say in the witness box that they have no objection to the plaintiff suing alone cannot satisfy the requirements of the law. The plaintiff co-sharer must implead all the co-sharers as parties to the suit unless he can show that he is their appointed agent or is allowed by usage or contract to sue alone. (*Darling, S.M. and Bomford, J.M.*) Raj Kumar Rai *v.* Ram Lakhan. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

——**S. 266**—*Joint patti—Ejectment of heir of statutory tenant—Suit by some only of the co-sharers—Maintainability—Burden of proof.*

The landholder is the person entitled to sue for ejectment of an heir of a statutory tenant; and the landholder in the case of a joint undivided patti is either the lambardar or the whole coparcenary body of co-sharers, or that co-sharer who is entitled to receive the whole rent of the tenant. In a suit for ejectment of the heir of a statutory tenant by two of the sharers, who do not form the whole coparcenary body and neither of whom is the lambardar, the burden is on the plaintiff to prove that they used to collect, and had a right to collect, the whole rent of the defendant. In the absence of such proof no decree for ejectment can be made. (*Darling, S.M. and Bomford, J.M.*) Bharosa *v.* Bijai Bahadur Singh. **1938 R.D. 163=1938 A.W.R. (B.R.) 99.**

——**S. 266**—*Non-compliance with provisions of—Plea, if open to tenant who has exhausted all remedies to set aside ejectment order.*

A tenant who has exhausted all his remedies for getting the ejectment order against him, set aside, and who even after a further *locus penitentiae* did not pay the decretal amount, cannot be permitted to plead that as the provisions of S. 266 of the Agra Tenancy Act were contravened, the ejectment order passed against him was illegal and that hence his possession was legal entitling him to a declaration under Ss. 121 and 123 of the Act. (*Marsh, S.M. and Mehta, J. M.*) Shiv Sagar Pande *v.* Luchman Koeri. **1939 R.D. 598=1939 A.W.R. (B.R.) 268.**

——**S. 266**—*Scope of—Creation of tenancy—Power of one of several co-sharers.*

The granting of a lease of agricultural plots is permitted by the Tenancy Act and every owner of an agricultural plot of land is, therefore, competent to grant a lease of the same. But if the plot is owned by two or more co-sharers the right to grant a lease can be exercised jointly by them all or not at all. Each co-sharer has the right to enjoy possession of joint agricultural plots in conjunction with his other co-sharers, but has not the right, without the concurrence of the other co-sharers, to introduce a tenant on the joint plots. It is this principle that has been given legislative sanction by S. 194 of the former and by S. 266 of the present Tenancy Act. (*Iqbal Ahmad and Verma, JJ.*) Lachhmina Kunwari *v.* Makfula Kunwari. **I.L R. (1938) All. 441=175 I.C 902=11 R.A. 17=1938 R.D 463=1938 A.L.R. 497=1938 A W.R. (H.C.) 199=1938 A. L.J. 333=A.I.R. 1938 All. 316.**

——**S. 266**—Scope of—Language, if allows agency to be implied. *See* Agra Tenancy Act, Ss. 132 and 266. **1938 R.D. 806.**

——**S. 266**—*Suit by one of the co-sharers—When permissible.*

S. 266 of the Agra Tenancy Act does not bar a suit by one of the coparceners suing as a landholder, if as a result of a private arrangement between the coparceners, he was allowed to act as the landholder. In the case of a private partition between co-sharers, the co-sharer in whose share a tenant's holding lies, has the authority to eject without joining other co-sharers. (*Mehta, J.M.*) Habibulnisan Bibi *v.* Abdul Latif. **1939 A.W. R. (B.R.) 108=1939 R.D. 377=1939 A.L.J. (Supp.) 68.**

——**S. 266**—*"Special contract"—Form and requisites of—Necessity for written instrument—Actionable claim—T. P. Act, S.* 130.

A "special contract" under S. 266 must denote something special and the section suggests that there must be an instrument in writing to evidence such a special contract. A claim for rent to fall due in future being an actionable claim, the special contract must be in the form of an instrument in writing as contemplated by S. 130 of the T. P. Act. (*Drake Brockman, S.M. and Knox, J.M.*) Man Singh *v.* Roshan. **1936 R.D. 230.**

——**S. 266**—Vendee of *sir* land—Right to sue alone to eject sub-tenants on relinquishment of exproprietary rights by vendor. *See* Landlord and Tenant—Exproprietary tenant. **1936 R. D. 46.**

——**S. 266 (1)**—Construction and scope—Joint *khewat khatas*—Admission of tenant to occupation by one co-sharer—Ejectment suit under S. 44 by another—Maintainability. *See* Agra Tenancy Act, S. 44. **1936 R.D. 114.**

——**S. 266** (1)—*Co-sharers—Suit by one for whole rent from one tenant—Maintainability—Absence of custom or special contract—Effect.*

In the absence of proof of a custom or special contract to that effect an individual co-sharer in undivided *mahal* cannot maintain a suit for the whole rent against an individual tenant. It is, however, doubtful, whether an individual co-sharer can even sue an individual tenant for the whole of the rent even if there is a custom or special contract to that effect. (*Drake Brockman, S.M. and Knox, J.M.*) Sundar Lal *v.* Chunni Lal. **1936 R.D. 357 (1).**

——**S. 266 (1)**—*Undivided patti—Co-sharers—Right of one to sue for whole rent.*

One of several co-sharers in an undivided patti is not entitled to collect, or to sue for, the whole rent, unless he happens to be the lambardar or unless he proves a special contract or a local usage entitling him to collect the entire rent. S. 266 (1) is fatal to such a claim. He can only sue for his share of the rent. (*Knox, S.M. and*

Grant, J.M.) CHITRA *v.* SHER ALI KHAN. **1936 R.D. 321 (1).**

——**S. 266 (2)**—*Applicability and scope—Sale of proprietary rights along with* mahal—*Undertaking to pay rent of ex-proprietary holding to vendor—Latter given right to collect whole rent—Undertaking acted upon for* 50 *years—Usage in* mahal *for ex-proprietary tenant to pay whole rent to vendee who accounted to co-sharers—Effect of—Right of vendee to realize entire rent.*

C.S., the proprietor of a fractional share in a *mahal*, who also held some *sir* land, sold his entire proprietary rights in the *mahal* along with his *sir* land to the plaintiff in 1880, *C.S.* thus became entitled to ex-proprietary rights in that *sir*. There was a covenant in the sale deed that *C.S.* should pay the plaintiff purchaser a sum of Rs. 80 a year as the rent of his ex-proprietary holding, and the plaintiff-purchaser would be entitled to collect the whole rent of the holding. In pursuance of this covenant the plaintiff had been realising from *C.S* and after his death from his sons, the whole rent of the ex-proprietary holding from the date of the sale-deed up to the year 1930. It was also found by the Court, in suits instituted by the plaintiff for rent, that there was a custom in the *mahal* for the ex-proprietary tenant to pay the rent to the purchaser who accounted for it to this co-sharers.

Held, that the case fell within S. 266 (2), Agra Tenancy Act, and that though the ex-proprietary tenant in the joint *mahal* was a tenant not only of the purchaser of his share but of the entire coparcenary body in view of the custom or usage obtaining in the *mahal* and of the special contract contained in the sale-deed which was acted upon for about 50 years, the plaintiff-purchaser was entitled to realize not only his share of the rent but the whole of rent due from the ex-proprietary tenant. (*Iqbal Ahmad, J.*) DURBIGAI SINGH *v.* ZOHRA SULTAN BEGAM. **172 I.C. 216=10 R.A. 387=1937 A.L.J. 1130=1937 A.W.R. 838=1937 R.D. 480=A.I.R. 1937 All. 760.**

——**S. 266 (2) and (3)**—*Scope and effect of—Joint* khewat—*Rights and powers of co-sharers—Collection of rents and admission and ejectment of tenants—Right of individual co-sharers.*

S. 266 (2) of the Agra Tenancy Act means that the law will not interfere in any way with the right of single co-sharers, who under local usage or special contract are entitled to receive separately their share of the rent payable by a tenant realising such share of the rent in any manner allowed by law. But the effect of S. 266 (3) is that the power of the co-sharers is severally limited to recoveries of money due to them from the tenants. The Act is silent as to who is entitled to admit tenants or eject them or eject trespassers. The reason is that any recognition of the right of an individual co-sharer to so admit or eject tenants or trespassers would destroy the jointness of the property. There is also no provision made for the case where a co-sharer may by usage or special contract receive separately the whole rent of a particular tenant or particular tenants, presumably because if the tenants are, so to speak, divided up amongst the co-sharers, each individual co-sharer becomes the landlord of that tenant and for all practical purposes the so-called joint undivided property becomes a congeries of specific properties held in severalty. (*Drake Brockman,*

S.M. and Knox, J.M.) SEELO *v.* KURYA SINGH. **1936 R.D. 114.**

——**Ss. 267 (2) and 242 (3)**—*Revenue Court returning appeal for presentation to Civil Court—Civil Court disagreeing with view of Revenue Court—Procedure.*

Where the Revenue Court returns the memorandum of appeal for presentation to the Civil Court on the ground that as the finding of the Court below that the respondents have proprietary rights in the land in suit is being challenged in appeal, the proper forum is the Civil Court according to S. 242 (3), and if the appeal is presented to the Civil Court, it is the duty of the Civil Court, if it disagrees with the view expressed by the Revenue Court, to submit the record to the High Court with a statement of the reasons for his disagreement under S. 267 (2) of the Agra Tenancy Act. (*Darling, S.M.*) AHSAN ALI KHAN *v.* GORI LAL. **1937 R.D. 244 (1).**

——**S. 268**—*Applicability.*

S. 268 applies only to cases in which, if rightly instituted in a Civil or Revenue Court, an appeal lies to the District Judge according to law and cannot consistently with other provisions of the Act (S. 230 and S. 242), be applied to suits wrongly instituted in a Civil Court, in which, if rightly instituted in the Revenue Court, an appeal would have lain on the revenue side. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R. (1938) All. 754=177 I.C. 450=11 R.A. 199=1938 A.L.R. 747=1938 A.L.J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

——**S. 269 (1)**—*Suit for enforcement of charge for arrears of rent in Civil Court—Dismissal on ground of suit being cognisable in Revenue Court—Appeal to District Judge—Transfer to Subordinate Judge—Jurisdiction of latter to determine appeal.*

A suit to enforce a charge for arrears of rent was dismissed as being cognisable by a Revenue Court. An appeal was taken to the District Judge who transferred it to a Subordinate Judge for trial.

Held, even if the suit were not cognisable in the Civil Court—which was not the case—the Subordinate Judge had jurisdiction to hear the appeal, and having all the materials before him, should hear and determine it under S. 269 (1) of the Agra Tenancy Act. (*Harries and Rachhpal Singh, JJ.*) MAHOMED ASHRAF ALI KHAN *v.* BEHARI LAL. **169 I.C. 1004=10 R.A. 89=1937 A.L.J. 511=1936 R.D. 2=A.I.R. 1937 All. 478.**

——**S. 270**—*Applicability—Suit for arrears of rent by co-sharer—Plea of payment to another co-sharer—Latter becoming co-sharer only in year previous to year of suit—If valid defence to suit.*

Under S. 270 of the Agra Tenancy Act a person to whom the tenant pleads payment of rent in good faith must be a person to whom he has been paying up to the date of the institution of the suit for rent. A person who has come in as co-sharer only in the year just preceding the year of suit is not such a person and a payment to such a person is not a valid defence to a suit for rent by the other co-sharer. S. 270 is not applicable to such a case. (*Drake Brockman, S.M. and Knox, J.M.*) MAN SINGH *v.* ROSHAN. **1936 R.D. 230.**

H. M. DAR, B.A., LL.B., Vakil High Court, SRINAGAR (KASHMIR)

——**S. 270 (2)**—*Scope of—Decree against third person impleaded under S. 270 (1)—If can be passed.*

Cl. (2) of S. 270 of the Agra Tenancy Act contemplates a separate suit which may be brought by the landholder to recover his arrears of rent from the third person to whom the tenant might have paid the rent in question in good faith, or to get his proprietary right in the holding determined against the third person. S. 270 does not provide for the passing of any decree against the third person who may be impleaded under its provisions, and the reason is obvious. (*Ganga Nath, J.*) LAKSHMI NARAIN *v.* HARISH CHANDER **1940 A.L.J. 365=1940 A.W.R. (H.C.) 337=A.I.R. 1940 All. 339.**

——**S. 271**—*Dispute as to shares in suit for profits—Prior decision of Civil Court—Reference to Civil Court—Necessity.*

In a suit for profits though there is a dispute as to the exact shares of the parties, it is unnecessary to refer the case to a Civil Court, where the parties have already resorted to it and the decision of that Court was before the Revenue Court on a prior occasion in connection with a previous profits case. The decision in the earlier profits case will operate as *res judicata*, at least as regards the shares of parties. (*Darling, S.M. and Bomford, J.M.*) SHIVA BANS PANDEY *v.* RAJMAN PANDEY. **1938 A.L.J. (Supp.) 84=1938 A.W.R. (B.R.) 300=1938 R.D. 441.**

——**S. 271**—*Jurisdiction—Civil and Revenue Courts—Dispute as to whether defendant is a mortgagee of* sir *or not.*

Where there is a dispute as to whether a defendant is a mortgagee of *sir* or not, it is for the Civil Courts to decide that question. (*Darling, S. M. and Bomford, J.M.*) RAMAKANT SINGH *v.* BENI MADHO SINGH. **1938 A.W.R. (B.R.) 334=1938 R.D. 397.**

——**S. 271**—*Scope—Dispute as to proprietary right—Jurisdiction of Revenue Court—Decision by Revenue Court—Finality of.*

Under S. 271, Agra Tenancy Act, read with the Explanation (1) if there is a real and *bona fide* dispute between the parties upon the question of proprietary right, that question must be submitted to a competent Civil Court for decision and the Revenue Court should not decide the same. The Revenue Court has only power to decide the whole suit where it is clear that the question of proprietary right has already been decided by a competent Court. But where there is a real doubt about the matter, it is the duty of the Revenue Court to send an issue on the point to the Civil Court for a decision; and if it decides a question of proprietary right when it ought not to do so, its decision is without jurisdiction and the decree is a nullity and is not a final decision between the parties, which would prevent either of them from raising the question again. (*Harries and Rachhpal Singh, JJ.*) UBAID-ULLAH KHAN *v.* ABDUL JALIL KHAN. **I.L.R (1937) All. 628=170 I.C. 657=10 R.A. 142=1937 R D 302=1937 A.L R. 699=1937 A.L.J. 979=1937 A.W.R. 539=A.I.R. 1937 All 481.**

——**S. 271**—*Suit for ejectment—Defendant claiming proprietary title and possession—Procedure.*

Where in a suit for ejectment of the defendant as a trespasser under S. 44 of the Tenancy Act, the defendant sets up a definite claim for proprietary title and possession, the Court should frame an issue on the question of proprietary title and then submit the record to the competent Civil Court for the decision of this issue. (*Darling, S.M. and Bomford, J.M.*) ABDUL LATIF KHAN *v.* SHANTI SARAN. **1937 R.D. 506.**

——**S 271 (1)**—*Applicability.*

Sub-S. (1) of S. 271, Agra Tenancy Act, applies only to a case where the original tenant pleads that he is not a tenant but that he had a proprietary right in the land. But it cannot apply to a case where such a plea is raised not by the original tenant but by a defendant added under S. 270 (1) of the Act. (*Iqbal Ahmad and Bajpai, JJ.*) RISAL SINGH *v.* HIRA. **I.L.R. (1940) All. 117=188 I.C. 74=1940 A W.R. (H C.) 12=1940 R D 11=1940 A.L.J. 24=A.I.R. 1940 All. 197.**

——**S. 271 (1) (a)**—*Scope—Suit under S. 44—Defendant setting up mortgage right—Mortgage not denied—Question of proprietary right, if raised—Jurisdiction of Revenue Court.*

Where in suit under S. 44, the defendant pleads that he is a mortgagee and the mortgage is not denied, it is not open to the defendant to contend that the defence raises a question of proprietary right, so as to necessitate the sending of an issue to the Civil Court for decision. And when the point is raised for the first time in second appeal before the Board of Revenue it is without force. The question whether the defendant is a mortgagee of the plaintiff is one of fact, as also his status, and is a point for the Revenue Courts to decide. (*Bomford, J.M.*) SACHITANAND PANDEY *v.* SHIVA SARAN RAI. **1938 R.D. 125=1938 A.W.R. (B.R.) 70.**

——**S 271 (4)**—*Decree after Civil Court's finding—Appeal—Forum.*

Where on a question of proprietary right being raised by the defendant the matter is referred to a Civil Court and on receipt of its finding an Assistant Collector passes a decree, it becomes appealable to the Civil Court (*i.e.*) District Judge, if a question of proprietary right is in issue in appeal also. (*Iqbal Ahmad and Bajpai, JJ.*) RISAL SINGH *v.* HIRA. **I.L.R. (1940) All. 117=188 I.C 74=1940 A W.R. (H.C.) 12=1940 R.D. 11=1940 A.L.J. 24=A.I.R. 1940 All. 197.**

——**S. 271 (4)**—*Scope—Suit under S. 44—Dispute as to proprietary right—Reference to Civil Court—Compromise and decision accordingly—Subsequent finding by Revenue Court that compromise invalid owing to incompetency of parties—Appeal—Forum—District Judge or Commissioner.*

In a suit for ejectment under S. 44 of the Agra Tenancy Act, an issue relating to proprietary rights in the land in suit was referred to the Civil Court and in the Civil Court there was a compromise between the parties as to that issue. When the case came back to the Revenue Court it was found that the parties who effected the compromise were not competent to do so and therefore the compromise was invalid.

Held, that the dispute regarding proprietary right was still in issue, and an appeal from the decree in the suit therefore lay to the District Judge under S. 271 (4) of the Act and not to the Commissioner. (*Drake Brockman, S M. and Knox, J.M.*) PARMANAND LAL *v.* ACHHAIBAR PANDE. **1936 R.D. 231.**

——**Ss. 271 and 242 (3)**—*Claim of proprietary right—Procedure to be followed—Decision of issue by Assistant Collector—Appeal—Forum.*

Where the written statement raises a clear claim of proprietary right, under S. 271 of the Agra Tenancy Act, the Assistant Collector ought to frame an issue and send it for decision to the Civil Court. If instead of that he decides the issue himself, an appeal against his decision lies to the District Judge only under S. 242 (3), as the question of proprietary right is still in issue in the appeal. Where the appeal is preferred to the Commissioner, he has no jurisdiction to hear it, and he has only to return it for presentation to the proper Court. (*Bomford, S.M. and Mehta, J.M.*) RAM GOPAL *v.* BABU RAM. **1939 R.D. 128.**

——**S. 273**—*Appeal—Decision by Revenue Court on issue referred by Civil Court—Order reviewing decision—Appeals from first decision and from that passed on review—Competency.*

Where an issue is framed by the Civil Court and referred to the Revenue Court under S. 273 of the Agra Tenancy Act as to whether the relationship of landlord and tenant exists between the parties and decided by the Revenue Court, no appeal lies from the decision of the Revenue Court or against an order passed on an application for review of such decision altering or setting aside the previous finding on the issue referred. The only remedy open to the aggrieved party is to prefer an appeal from the final decree passed by the Civil Court and therein challenge the finding of the Revenue Court. (*Sulaiman, C.J. and Bennet, J.*) JOKHAI *v.* JAWAHIR LAL. **I.L.R. (1937) All. 699=1937 A.W.R. 471=1937 R.D. 271=1937 A.L.J. 521=170 I.C. 17=10 R.A. 103 =1937 A.L.R. 649=A.I.R. 1937 All. 500.**

——**Ss 273 and 268**—*Suit instituted in Court of Munsiff having jurisdiction—Reference by him to Revenue Court—Objection in appeal to such reference—Maintainability.*

Where a suit is instituted in the Court of a Munsiff having jurisdiction and the Munsif makes a reference under S. 273 of the Agra Tenancy Act to the Revenue Court, and the District Judge, on appeal, has the case fully before him, no objection on the ground that the Munsif has committed an error of procedure in making the reference can, on the analogy of S. 268, be maintained by the appellate Court. (*Sulaiman, C.J. and Bennet, J.*) NANDAN SINGH *v.* PHUNESH SINGH. **167 I.C 397=9 R.A. 528=1936 R.D. 543=1937 A.L.R. 188=1936 A.W.R. 1085=1937 A.L.J. 46=A.I.R. 1937 All. 105.**

——**S. 273 (1)**—*"Agricultural holding"—Land taken for growing vegetables.*

Agriculture in the broad sense includes the growing of vegetables. Land taken for the cultivation of vegetables is, therefore, agricultural holding within the meaning of S. 273 (1) of the Agra Tenancy Act. (*Sulaiman, C.J. and Bennet, J.*) NANDAN *v.* PUNESH SINGH. **167 I.C. 397=9 R.A. 528=1936 R.D. 543=1937 A.L.R. 188=1936 A.W.R. 1085=1937 A.L.J. 46=A.I.R. 1937 All. 105.**

——**Sch. II, List I**—Revenue Court decree—Execution — Procedure — Revenue Manual — Applicability—C. P. Code, Ss. 68 to 72 and O. 21. *See* C.P. CODE, Ss. 68, 69, 70, 71 AND 72. **1936 R. D. 197.**

——**Sch. II, No. 10**—*Scope—Set-off effected by parties on agreement—Recognition by Court—If barred.*

What Sch. II, No. 10 of the Agra Tenancy Act forbids, is a set-off by the Court. The Court is not prohibited from giving effect to a set-off already agreed on by the parties. There is a clear distinction between a case in which a Court is called upon to allow a set-off and one in which it is merely asked to recognise a set-off already made by the parties themselves. The latter is not prohibited by No. 10 of Sch. II of the Act. (*Niamatullah, J.*) NITANAND *v.* ROOP NARAIN. **169 I.C 15=9 R.A. 723=1937 A.L.R. 487=1937 A.L.J. 183=1937 A.W.R. 168=1937 R.D. 129= A.I.R. 1937 All. 320.**

——**Sch. II, Serial No 10**—*Scope—Suit under S. 222 for recovery of defendant's share of revenue paid by plaintiff—Plea that plaintiff paid same out of funds due to defendant in his hands out of collections—Plaintiff's father as lambardar and not accounted for—If open—Duty of plaintiff to account and prove that payment was out of his own pocket.*

In a suit under S. 222, Agra Tenancy Act, for recovery of the defendant's share of the revenue paid by the plaintiff, the defendant pleaded that the plaintiff's father who was the lambardar at the time of the alleged payment did not make the collections diligently on behalf of all the co-sharers as he ought to, and in consequence of his negligence arrears were not collected, and the plaintiff as representing his father was liable to pay the defendant the latter's share of the profits at the time his father was lambardar. The plaintiff was never the lambardar, and after the death of his father, which occurred in the year in which he paid the revenue, and before a new lambardar was appointed every co-sharer collected for himself.

Held, that the defendant's plea was in substance a plea of set-off which could not be entertained in view of serial No. 10 of schedule to the Agra Tenancy Act, and that the defendant should, if he wanted to raise the question, should do so by a separate suit; (2) that the plaintiff, having paid revenue to Government, was entitled to call upon the defendant to contribute his share of the revenue; and (3) that the plaintiff was not to establish that the payment had been made out of his pocket and not out of the funds of the defendants in his hands before he could get a decree. (*Niamatullah and Allsop, JJ.*) SRI RAM *v.* JAI KISHAN LAL. **I.L.R. (1938) All. 79=1938 R.D. 66=1938 A.L.R. 57=172 I.C. 964=10 R.A. 448 1937 A W.R. 1075=1937 A.L.J. 1237=A.I.R. 1938 All. 37.**

——**Sch. II, Serial No. 10**—*Suit for arrears of rent—Plea of discharge of liability by agreement —If open.*

In a suit for arrears of revenue, there is nothing to prevent a defendant in the Revenue Court from pleading that the liability incurred by him has been legally discharged by a prior agreement with the plaintiff under which the amount due as revenue had been set-off against a prior debt. It is not a 'set-off' as is contemplated by O. 8, R. 6, C. P. Code. (*Allsop, J.*) RAMANUJ DAS *v* RAM SAMUKH DAS. **1940 A.W.R. (H.C.) 285=1940 R.D. 185=1940 A.L.J. 372.**

——**Sch. IV, Group A**—*Suits under—Appeal to District Judge—When lies.*

It is not in every suit in Group A of Sch. IV of the Agra Tenancy Act that an appeal lies to the District Judge. No appeal lies when the value of the subject-matter of the suit is below Rs. 200. (*Drake Brockman, S.M. and Knox, J.M.*) Imam Baksh *v.* Laiq-un-Nissa. **1936 R.D. 45.**

——**Sch. IV, Group A**—Suit under S. 271—Appeal to District Judge—When lies. *See* Agra Tenancy Act, S. 227. **1936 R.D. 49.**

——**Sch. IV, Group B, Serial No. 2**—*Starting point—Suit under S. 44—Date of unauthorised occupation within 12 years—Onus of proof as to.*

A suit under S. 44 of the Agra Tenancy Act is governed for purposes of limitation by Serial No. 2 of Group B of Sch. IV of the Act and the period of 12 years must be computed from the date when the landlord first knew of the unauthorised occupation of the land by the defendant; the plaintiff must prove that he obtained such knowledge within 12 years of the suit. (*Niamatullah, J.*) Hamiduddin *v.* Akbar Husain. **169 I.C. 628=10 R.A. 43=1937 A.L.R. 568 (1)=1937 A.L.J. 413=1937 A.W.R. 337=A.I.R. 1937 All. 372.**

——**Sch. IV, Group B, Serial No. 12**—Applicability—Wrongful dispossession—When commences. *See* Agra Tenancy Act, Ss. 99 and 123. **1937 R.D. 507.**

——**Sch. IV, Group F, Serial No. 3 or 5**—*Applicability—Decree—Nature—Test.*

In order to determine whether a decree falls under Serial No. 3 or 5 of group F of the Sch. IV of the Tenancy Act, the only question for consideration is the nature of the decree. If not only costs are included in the decree but an order for abatement, ejectment or some other matter, then the costs are only subsidiary and the decree is not a money decree. If however the decree gives no relief whatever apart from costs then it is a money decree. (*Harper, J.M.*) Uma Shanker *v.* Siddheshwar Prasad. **1940 R.D. 133=1940 A.W.R. (B.R.) 51 (2).**

——**Sch. IV, Group F, Serial Nos. 3 and 5**—*Suit for abatement of rent remanded by Board to Assistant Collector—Suit compromised before him and rent abated—Application for realisation of costs awarded to Zamindar in Court of Commissioner and Board—Limitation.*

Where a suit for abatement of rent was remanded by the Board back to the Court of the Assistant Collector before whom the suit was compromised and rent was abated, an application by the defendant zamindar for the realisation of costs awarded to him in the Court of the Commissioner and the Board falls under Serial No. 5 and not Serial No. 3 of Group F of Sch. IV of the Tenancy Act. The limitation is only one year. (*Darling, S.M.*) Khalil Ahmad *v.* Daltua. **1937 R.D. 448.**

——**Sch. IV, Group F, Serial No. 5**—*Wrongful ejectment of tenants in proceedings under S. 79—Subsequent cancellation of on review—Order cancelling ejectment—If decree.*

In a case tenants were ejected in proceedings under S. 79 of the Tenancy Act for failing to meet a decree for arrears of rent. On review the order of ejectment was cancelled in execution proceedings, as it was found that the decretal sum had been paid in full, and the order of ejectment had been wrongly passed. The tenants applied for delivery of possession more than a year after this order.

Held, the order cancelling the order of ejectment is not a decree and does not fall under Sch. IV, Group F, Serial No. 5 of the Agra Tenancy Act. The only section under which the ejected tenants could be put back in possession of their holding is S. 144 of the C. P. Code. The limitation for recovery of possession is three years under Art. 181, Limitation Act. (*Darling, S.M. and Bomford, J.M.*) Hoti *v.* Gangadhar. **1937 R.D. 509.**

AGRA ZAMINDARS' ASSOCIATION RULES AND REGULATIONS, R. 5 (1)—Right to membership of Association—Qualification—Representative of family paying land revenue amounting to Rs. 1,500—If qualified—If elector for landholder's constituency—Electoral Rules, R. 11. *See* U. P. Electoral Rules, Sch. II, R. 11. **1937 A.L.J. 135 (F.B.)**

AGRICULTURISTS' LOANS ACT (XII OF 1884), S. 4—Applicability—Loan for weeding land and making pavement—If one under Act. *See* Land Improvement Loans Act, S. 4. **41 Bom. L.R. 257.**

——**S. 4 and Land Improvements Loans Act, S. 4**—Relative scope and operation of. *See* Land Improvements Loans Act, S. 4. **(1939) 2 M.L.J. 23.**

AJMER COURTS REGULATION (I OF 1877), Ss. 14, 15 and 17—*Appeal against order of abatement by first appellate Court—If competent.*

An appeal against an order of the first appellate Court that an appeal had abated, is not competent under any of the Ss. 14, 15 or 17 of the Ajmer Courts Regulation. (*Weston.*) Mangi Lal *v.* Gopi Nath. **1937 A.M.L.J. 107.**

——**S. 15**—*Decree modified by lower appellate Court in favour of appellant—Actual point decided against—Right of second appeal.*

Where the lower appellate Court modifies the decree of the trial Court in favour of a party, but the point raised in second appeal is actually decided against him, a second appeal by him is not barred under the Ajmer Courts Regulation. (*Norman, I.C.S.*) Durgah Khwaja Sahib *v.* Girdhari. **1936 A.M.L.J. 108.**

——**S. 15**—*Second appeal—Maintainability—Grounds—Order by appellate Court that appeal abated—Second appeal—Revision.*

Under Regulation I of 1877 a second appeal lies only when the decision of the original Court has been modified or reversed in first appeal, and not otherwise. When the appellate Court has passed an order that the appeal has abated on the ground that the legal representatives of a deceased appellant have not been brought on the record within the time limited, no second appeal lies. The case is also not one in which a reference can lie under S. 17, for a reference under the Regulation is restricted to points of law upon which the first appellate Court has upheld the trial Court's decision. Further a right of reference under certain circumstances would not oust the revisional jurisdiction of the Judicial Commissioner when those circumstances do not exist. The case can therefore be considered as a revision application and dealt with on that footing. (*Weston, I.C.S.*) Abdul Aziz *v.* Amir Ali. **1935 A.M.L.J. 102.**

———S. 17—Reference—Competency — Order declaring appeal has abated—Reference—If can be made—Revision—Competency. *See* Ajmer Courts Regulation, S. 15. **1935 A.M.L.J. 102.**

———(IX OF 1926)—*Applicability—Execution proceeding continuing from before the coming into force of Regulation of 1926—Reference to High Court under old Regulation—Objections causing the reference filed after new Regulation—Reference, if competent.*

An execution proceeding had been continuing from before the coming into of the Ajmer Courts Regulation of 1926. A reference was made to the High Court under Ss. 17 and 18 of the old Regulation I of 1877 in connection with certain objections which were filed after the new Regulation of 1926 came into force. A point was raised that the reference was incompetent as the case was governed not by the old Regulation but by the new Regulation under which no reference could be made to the High Court.

Held, that the reference should be heard because of an order of the High Court passed on a previous reference arising out of some execution proceedings between the same parties that a reference was competent. (*Sulaiman, C.J., Rachhpal Singh and Allsop, JJ.*) Ale Rasul *v.* Balkishen. **167 I.C. 21=9 R.A. 506=1937 A.L.J. 204=1937 A.W.R. 70=1937 A.L.R. 162=A.I.R. 1937 All. 144 (F.B.).**

———**(as amended in 1932). S. 21**—*Scope—Agent empowered by jagirdar—If a recognized agent under O. 3, Rr. 1 and 2 to C. P. Code.*

According to S 21 of the Ajmer Courts Regulation as amended in 1932 in additions to the persons mentioned in O. 3, R. 2, C. P. Code, a person specially empowered to act as his agent by a jagirdar to whom a sanad has been granted, shall be deemed to be a recognized agent for the purposes of O. 3, Rr. 1 and 2, C. P. Code. (*Davies.*) Durgah Khawaja Sahib *v.* Jatan Lal. **1940 A.M.L.J. 5.**

———S. 24—*Exemption under—If extends to benefits arising from land.*

The exemption from attachment and sale given by S. 24 of the Ajmer Courts Regulation is confined to land and does not include benefits arising from land. (*Weston.*) Man Mal *v.* Kanwari Lal. **1937 A.M.L.J. 89.**

———S. 24—Lands exempted under—Receiver in respect of—If can be appointed. *See* Civil Procedure Code, S. 51. **1937 A.M.L.J. 89.**

AJMER FOREST REGULATION (VI OF 1874), S. 2—*Forest officer—Forest guard, if a forest officer.*

A forest guard since he is not appointed by the Chief Commissioner is not a forest officer. (*D. R. Norman.*) Jas Raj *v.* Emperor. **1939 A.M.L.J. 90.**

———S. 9—*Bye-laws under—Bye law V—Zamindar—Meaning of.*

The persons termed 'zamindars' in the bye-laws framed under S. 9 of the Ajmer Forest Regulation, are a clearly defined group and their common feature is not that they own land outside the forest, but that they once owned the land which has been declared to be forest and who are entitled to get a share of forest profits. (*D. R. Norman.*) Jas Raj *v.* Emperor. **1939 A.M.L.J. 90.**

AJMER GOVERNMENT WARDS REGULATION (I OF 1888), S. 17—*Sanction for sale—If refers only to private sale.*

S. 17 of the Ajmer Government Wards Regulation which requires the sanction of the Chief Commissioner to the sale of property by the Court of Wards obviously refers to a private sale. (*D. R. Norman.*) Beni Prasad *v.* Sarfraz Ali. **1939 A.M.L.J. 85.**

———S. 21—*Suit for* Hasil *Nature of—Permission from Court of Wards—Necessity.*

Suit for *Hasil* is a suit for rent and as such sanction of the Court of the Wards is not necessary. Rent is not confined to an obligation arising out of express contract. *Hasil* is not a share of the land revenue assigned to the Istimarardar. The term 'Land revenue' applies only to Government dues. (*D. R. Norman.*) Bahadur *v.* Abdul Rahman Khan. **1937 A.M.L.J. 62.**

———S. 22—*Scope and applicability—Mortgage prior to estate coming under Court of Wards.*

S. 22 of Ajmer Government Wards Regulation lays down that a Government Ward is incompetent to charge his property, but where the mortgage was in point of time, executed prior to the estate of the Ward coming under the Court of Wards, the section has no application. (*D. R. Norman.*) Beni Prasad *v.* Sarfraz Ali. **1939 A.M.L.J. 85.**

AJMER LAND AND REVENUE REGULATION (II OF 1877), S. 9—*Scope—Subdivision of ownership—If prohibited.*

The prohibition contained in S. 9 of the Regulation is only as regards the division of liability to pay land revenue beyond a defined minimum share; it does not prohibit the sub-division of ownership beyond that minimum. (*Norman.*) Birdhi *v.* Surajmal. **1936 A.M.L.J. 23.**

———**Ss. 65 (3) and 68**—*Settlement record—Entry as to party holding share in each unit—If evidence of non-division of shares.*

A statement in the settlement records that each of the parties holds a share in each unit is no evidence that the shares are not divided and separately owned, as opposed to a tenancy in common. (*Norman.*) Birdi *v.* Surajmal. **1936 A.M.L.J. 23.**

———**Ss. 67 and 69**—*Entry in settlement record—Value of—Suit for declaration of title—Cause of action.*

There is nothing in any of the laws applicable to Ajmer-Merwara, to warrant the statement that an entry in the settlement record either creates or takes away any right or title. An entry is only a piece of evidence to which a presumption of correctness attaches, and this presumption is rebuttable. A right to sue for declaration of title will arise only when there is any invasion of title. The mere fact that a settlement entry is adverse to title, will not debar a person for all time from seeking for a declaration of his title. (*Weston.*) Abdul Hakim Khan *v.* Mathura. **1938 A.M.L.J. 33.**

———**Ss. 67 and 69**—*Revenue records—Entry in—Presumption of correctness—Earlier and later entry.*

Although the presumption of correctness would attach to the later entry rather than to the earlier one, yet when the earlier entries are supported by substantial evidence while the later entry is supported by none, that presumption of correctness is thereby sufficiently rebutted. (*Weston.*) ABDUL HAKIM KHAN *v.* MATHURA. **1938 A.M.L.J. 33.**

——**Ss. 68, 69 and 70**—*Effect on Patwari Cess Regulation—Extent of repeal—Repeal of Patwari's Cess Regulation—Effect.*

Ss. 68, 69, paras 2 and 70 of the Ajmer Land and Revenue Regulation were repealed by S. 6 of the Ajmer Patwaris Cess Regulation as regards those estates which are mentioned in the schedule to the latter Regulation. But they are still in force as regards other estates; and though the Patwari's Cess Regulation itself has since been repealed, that cannot revive any law repealed by it. (*D. R. Norman.*) SHAMLAT COMMITTEE *v.* BHAGWAN SINGH. **1937 A.M.L.J. 1**

——**S. 69**—*Mutation—Grounds for—Punjab Land Revenue Act, Ss. 34 to 37—Effect of.*

S. 69 of the Ajmer Land and Revenue Regulation only authorises mutations on account of something which happens after the settlement. The application of Ss. 34 to 37 of the Punjab Land Revenue Act to Ajmer has not changed the law in this respect. These sections give no power to amend a settlement record except on acccunt of something occurring subsequently. (*D. R. Norman.*) SHAMLAT COMMITEE *v.* BHAGWAN SINGH **1937 A.M.L.J. 1.**

——**S. 69 (2)**—Applicability—Muafi estate—Punjab Land Revenue Act, S. 37—Scope and effect of. *See* AJMER PATWARI'S CESS REGULATION, S. 3. **1937 A.M.L.J. 1.**

——**S. 119**—*Bar of civil suit—Scope and extent of—Recovery of hasil—Suit on title, if barred.*

Though there may be a prayer for declaration of the plaintiff's right as *muafidar*, if the suit is really one for recovery of hasil, it is not barred by S. 119 of the Land and Revenue Regulation. No provisions exist in the Regulation for recovery of hasil through revenue officers. The Regulation does not bar suits on title unless a copy of the settlement record in the name of the plaintiff is produced with the plaint. (*Weston.*) UMRAO MAL *v.* GOPI NATH. **1938 A.M.L.J. 63.**

——**S. 119 (b)**—*Bar of civil suit—Scope and limit of the rule as to.*

The restriction on the jurisdiction of Civil Courts created by S. 119 of the Land and Revenue Regulation should be construed strictly. It was intended merely to prevent interference through the medium of Civil Courts with final decisions taken by revenue officers. A suit to obtain a declaration which may be used as evidence before a revenue officer and a suit to obtain an order directly within the province of the revenue officer are quite different. Clearly a civil suit to eject a tenant at will or a suit to restrain ejectment by injunction is barred by S. 119. But a decree of declaration is not an executable decree and it may not be binding on the revenue officials. S. 119 cannot be held to be a bar to such a decree being given. (*Weston.*) ABDUL HAKIM KHAN *v.* MATHURA. **1938 A M.L.J. 33.**

AJMER LAND AND REVENUE RULES (1895), R. 18 (e)—*Applicability*—Chahi *land—Well-water not used in particular year—If makes land non*-chahi.

Chahi land, that is land irrigated by a well, does not cease to be *chahi* because it is not necessary in any particular year to use the well-water. R. 18 (*e*) of the Ajmer Land and Revenue

Rules would only apply when the character of the land has been permanently changed. (*Norman, I.C.S.*) GIRDHARI *v.* DURGAH KHAWAJA SAHIB. **1936 A.M.L.J. 128.**

AJMER LAWS REGULATION (III OF 1877), S. 8—*Right to pre-empt all the properties sold—Pre-emptor if can pick and choose only one.*

Where a pre-emptor had a right of pre-emption in more than one of several properties sold, he cannot pick and choose and claim to pre-empt only one of them. (*D. R. Norman.*) GHULAM CHISTY *v.* FATEH MOHAMMED. **1939 A.M.L.J. 77.**

——**S. 33**—*Construction—"Which may be decreed in the suit"—Effect of—Interest—Award of—Limits.*

The words "which may be decreed in any suit", in S. 33 of the Ajmer Laws Regulation, which contains the rule of *damdupat* in the province, limit the meaning of the words "principal sum" to the principal claimed in the suit, and not the amount originally advanced when part of it has been repaid before suit. (*D. R. Norman.*) RIDHA KARAN *v.* JIWAN. **1937 A.M.L.J. 26.**

——**S. 33**—*Interest—Decree for—Limits.*

S. 33 of the Ajmer Laws Regulation lays down that interest which may be decreed by a Civil Court may not exceed the amount of the principal sum of money received by the defendants. In this particular case an account was directed to be taken of sums of money and the value of the goods and so forth actually advanced, and it was ordered that in the matter of interest an equivalent sum to this sum and no more should be added and decreed. (*Davies.*) MEHTA SURAT SINGH *v.* AMAR SINGH. **1939 A.M.L.J. 161.**

AJMER MUNICIPAL REGULATION (VI OF 1925)—*Rules—Lease of Nazul land within municipality—Sanction of Chief Commissioner—Necessity.*

Under the rules framed under the Ajmer Municipal Regulation for the sale and lease of Nazul land within municipal limits, sanction of the Chief Commissioner is required only to leases for more than a year. The rules have no restrospective application and cannot invalidate leases granted before the rules. (*D. R. Norman.*) GHULAM HUSAIN *v.* MUNICIPAL COMMITTEE, AJMER. **1937 A M.L.J. 12.**

——**S. 234**—*"Other moneys payable"—Rent—If recoverable summarily.*

Rent for lands owned by the Municipality is not money payable under a Regulation or Byelaw, and is not covered by the expression "other moneys payable", in S. 234 of the Ajmer Regulation. Such rent cannot therefore be recovered by summary process under S. 234 (*Norman.*) MUNICIPAL COMMITTEE, AJMER *v.* VAKIL & Co. **1936 A.M.L.J. 7.**

——**S. 245 (e) (i)**—*Fixing of rent—Power of Municipal Committee.*

S. 245 (*e*) (*i*) of the Ajmer Municipal Regulation does not authorize the fixing of rent. (*Norman.*) MUNICIPAL COMMITTEE, AJMER *v.* VAKIL & Co. **1936 A.M.L.J. 7.**

AJMER PATWARI CESS REGULATION (1877), S. 3—*Applicability to muafi estate—Punjab Land Revenue Act, S. 37—Applicability—Land and Revenue Regulation, S. 69 (2)—Effect of.*

AJMER PATWARI CESS REGN. (1877), S.6.

A muafi estate is one to which the Patwari Cess Regulation applies. S. 69 (2) of the Land and Revenue Regulation does not apply to such an estate. Whether S. 69 (2) of the latter Regulation is or is not law in Ajmer. S 37 of the Punjab Land Revenne Act, which was applied to Ajmer in 1895 is law in Ajmer, and as that is later than the Land Revenue Regulation, S. 69 (2) of the latter cannot limit any powers contained in S. 37 of the Punjab Land Revenue Act as applied to Ajmer. (*D. R. Norman.*) SHAMLAT COMMITTEE *v.* BHAGWAN SINGH. **1937 A.M. L.J. 1.**

——S. 6—Effect on Land Revenue Regulation. *See* AJMER LAND AND REVENUE REGULATION, Ss. 68, 69 AND 70. **1937 A.M.L.J. 1.**

AJMER RURAL BOARDS REGULATION (VI OF 1886), S. 2—*Right of landholder or jagirdar to levy local right from tenants.*

Regulation VI of 1886 only provides for the levy of local rate by Government from all landholders, but it does not provide for the levy of local rates by a landholder or jagirdar from his tenants. (*Norman, I.C.S.*) DURGAH KHWAJA SAHIB *v.* GIRDHARI. **1936 A.M.L.J. 108.**

ALLAHABAD GENERAL RULES (CIVIL), Chap. 21, R. 1—*Fees to legal practitioner—Inclusion in decree—Duty of Judge to be satisfied as to its payment.*

The Judge has to satisfy himself that the fee of the legal practitioner has been paid before the amount is included in the decree. He may of course accept a certificate given by the legal practitioner if it is unrebutted, or in any case if he believes it in preference to any other evidence which may be before him. (*Allsop, J.*) SARJURAM SAHU *v.* MT. DULARNA BIBI. **162 I.C. 53 (1)=8 R.A. 824=1936 A.W.R. 384=1936 A.L J. 507=A.I.R. 1936 All. 652.**

ALLAHABAD HIGH COURT RULES, Chap. 1, R. 1 (4)—*Application under S. 5, Limitation Act—Power of Single Judge to hear—Appeal not cognizable by him.*

Even though the appeal under which an application under S. 5,Limitation Act, is made, cannot be heard by a single Judge, being valued at more than Rs. 1,000 but less than Rs 2,000 he can hear an application under S. 5, Limitation Act, made in that appeal if the applicant has not valued it at a sum exceeding Rs. 2,000. (*Niamatullah and Bajpai, JJ.*) DURGA *v.* LAKHPAT RAI. **160 I.C. 876=8 R A. 657 (2)=1936 A.W.R. 63=1936 A.L.J. 1=A.I.R. 1936 All. 139.**

——**Chap. 1, R. 1 (4)**—*Application under S. 5 of Limitation Act—Valuation—Duty of office.*

Chapter 1, R. 1 (4) requires at least by implication that an application thereby contemplated should be specifically valued and such valuation should appear on the face of it. Where any application is found to be not valued the counsel should be called upon to state the valuation which will determine the jurisdiction of the Bench under that rule. The office are not justified in assuming that the value of an application under S. 5, Limitation Act, which is not specifically valued, cannot exceed the value of appeal. (*Niamatullah and Bajpai, JJ.*) DURGA *v.* LAKHPAT RAI. **160 I.C. 876=8 R.A. 657 (2)=1936 A.W.R. 63=1936 A.L.J. 1=A.I.R. 1936 All. 139.**

ALLUVION AND DILUVION.

ALLUVION AND DILUVION—*Accretion—Lanka—Whether accretion—Gradual formation—Meaning of.*

It cannot be laid down invariably that a lanka is not an accretion at all because its formation has not to be proved to be gradual. The recognition of title by alluvial accretion is largely governed by the fact that this accretion is due to the normal action of physical forces; the word "gradual", in reference to the formation, with its qualifications, only defines a test relative to the conditions to which it is applied. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682=12 R M. 121=1938 M.W.N. 301=47 L.W. 163=A.I. R. 1938 Mad. 470.**

——Accretion—Ownership of identifiable land—Determination—General rule as to—Custom—Onus. *See* BENGAL ALLUVION AND DILUVION REGULATION, Ss. 2 AND 4—ACCRETION. **1939 A.L.J. 708.**

——*Accretion in river-bed formed in one season—Accretion remaining unchanged—Accretion, if belongs to riparian owner.*

An accretion formed in a river-bed in a single flood season and remaining unchanged thereafter for 30 years cannot be held to belong to the riparian owner and is not a "gradual" accretion. (*King, J.*) NARAYANI *v.* KRISHNAN NAMBIAR. **161 I.C. 111=8 R.M. 779=1936 M.W.N. 473=A.I.R. 1936 Mad. 128.**

——Apportionment of alluvial accretion—Several estates concerned—Principles and methods of apportionment. *See* BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4 (5). **I.L.R. (1938) 1 Cal. 361=66 C.L.J. 304.**

—— *Claim based on reformation and claim based on lateral accretion—Priority.*

Where there are two competing claims to land, one based on re-formation and the other upon lateral accretion, the former must prevail. (*Varadachariar and King, JJ.*) SECRETARY OF STATE *v.* MAHARAJA OF PITHAPUR. **182 I.C. 682=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301=A.I.R. 1938 Mad 470.**

——*Dhardura—What is meant by.*

The custom of Dhardura means that the main stream of the river would always remain the boundary between any two villages, irrespective of the fact that the change in the course of the river is gradual or sudden. The land which is thrown out by the change in the course of the river would by custom appertain to the village in proximity with which it comes out of the river. (*Zia-ul-Hasan and Hamilton, JJ.*) PASHPAT PRATAP SINGH *v.* UDAI BHAN PRATAP SINGH. **14 Luck. 763=183 I.C. 808=1939 O.A. 674=1939 O.L.R. 558=12 R.O. 62=1939 A.W.R. (C.C.) 153=1939 O.W.N. 809=A.I.R. 1939 Oudh 269.**

——*Lanka in river—Lateral accretion or vertical accretion—Onus of proof—Circumstances to be considered.*

In the case of a lanka in a river, which at that point is both tidal and navigable, if the lanka presents every appearance of being a lateral accretion and not an island, the onus is on the Government to show that it once was an island. When there is no positive evidence to establish the continued existence of any stream along the bank of the river which has shrunk, and when it is obvious that the course of the deep channels in the river must be subject to frequent changes, the lanka must be held to be a lateral and not a vertical accretion. (*Varadachariar and King, JJ.*) Secretary of State *v.* Maharaja of Pithapur. **182 I.C. 682=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301=A.I.R. 1938 Mad. 470.**

——*River changing course—Lands gained by accretion — Division of—Rights of riparian proprietors—Principles.*

The fundamental principle governing the apportionment of accreted lands among riparian proprietors whose lands abut on the sea or river is that the division must be made fairly amongst them giving them each a share in the new frontage in proportion to the extent of their old frontages. The method that is to be adopted must lead to a fair and proportionate division of new river frontage, amongst the riparian owners. Perpendicular lines therefore dropped from the common boundary point of *asli* lands on the old river bank to the new river bank would secure this equitable distribution of the new river frontage amongst the riparian owners. If such method is adopted there may be little overlappings or gaps triangular in shape according to the configuration of the new river bank, but these small triangular plots can be divided amongst the adjoining proprietors by the process of bisection. (*R.C. Mitter, J.*) Sahabaddin Sarkar *v.* Kafiladdin Tapadar. **167 I.C. 130=9 R.C. 639=A.I.R. 1937 Cal. 18.**

——*Submerged land — Re-formation after seventy years—Title of owner—Abandonment of right by owner—If can be presumed—Rule as to.*

No presumption of abandonment of title to submerged land can be drawn against an owner from lapse of time, although the interval may amount to about seventy years. The presumption must normally be the other way, because, in the nature of things, the owner of submerged land can exercise no acts of ownership over it during the period of its submergence. Further in the case of a river whose fluctuations in course and tendency to throw up and wash away lankas is notorious, the mere extension of the period of submersion to nearly seventy years is not enough to support a finding that the owner must be deemed to have abandoned his right to the land. (*Varadachariar and King, JJ.*) Secretary of State *v.* Maharaja of Pithapur. **182 I.C. 682=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301=A.I.R. 1938 Mad. 470.**

——*Submerged land—Re-formation—Title to—Proof— Identification — Proof required from claimant.*

All that is required to establish title by re formation to a lanka in a tidal and navigable river is identification of the site or part of the site of the lanka with the site of land which formerly belonged to the claimant and which was washed away by the river. The fact that between the submergence and the re-formation the land was wholly lost and absorbed and no part of its surface remained capable of identification in no way militates against the title based upon the re-formation. But a title founded on original ownership and identification of site must be confined *prima facie* to the re-formation on that site. (*Varadachariar and King, JJ.*) Secretary of State *v.* Maharaja of Pithapur. **182 I.C. 682**

=12 R.M. 121=47 L.W. 163=1938 M.W.N. 301 =A.I.R. 1938 Mad. 470.

AMENDMENT. *See* Practice—Pleadings.

——Of decree. *See* C. P. Code, S. 152.

——Of plaint. *See* C. P. Code, O. 6.

——Of pleadings. *See* C. P. Code, O. 6, R. 17.

ANIMALS FERAE NATURAE—Damage to crops by cattle—Liability of owner—Plea that he had lost control over them—Sustainability. *See* Tort—Vicarious liability. **A.I.R. 1936 Nag. 272.**

ANNUITY—Annuity and maintenance—Distinction. *See* Maintenance. **A.I.R. 1936 Pat. 527.**

APPEAL.

See also (1) C. P. Code, O. 41 and O. 43, R. 1 (Appeals from Orders).
(2) Practice—Appeals.
(3) Privy Council Appeals.
(4) Second Appeals.

Alternative plea in.
Appellate Court.
Competency.
Costs.
Court-fee.
Interference.
Letters Patent Appeal.
New point.
Parties.
Question of fact.
Right of.
Miscellaneous.

Alternative plea in.

——*Alternative plea in—If open.*

Where in a case for damages for breach of contract a party claims damages on the basis of a re-sale and fails to prove it, he cannot in appeal set up an alternative claim for damages on the basis of a market price. (*Monroe, J.*) Tikam Chand Bhag Chand *v.* Kakhan Lal Din Dayal. **40 P.L.R. 55=175 I.C. 90=10 R.L. 676=A.I.R. 1937 Lah. 842.**

Appellate Court.

——*Duty of appellate Court—Objection going to root of case.*

An appellate Court is bound to take notice of an objection which goes to the root of the case although not pressed by the appellant. (*Mir Ahmad, A.J.C.*) Bhundhelkhand Motor and Cycle Agency *v.* People's Bank of Northern India, Ltd., Lahore. **162 I.C. 416=8 R. Pesh. 197=A.I.R. 1936 Pesh. 97.**

——*Appellate Court—Finding of fact—Reversal by final Court of fact—Duty of such Court.*

A final Court of fact, especially when it reverses the decision of the Court of first instance should consider the entire evidence on the record and its judgment should indicate that its conclusion has been arrived at after a consideration of all the materials on record. (*Tek Chand, J.*) Lala Ram *v.* Chhanga. **42 P.L.R. 275.**

——*Appellate Court—Functions and duties of Court of first appeal—Necessity for determination of all questions of fact.*

It is the function and duty of a Court of first appeal to determine all the questions of fact necessary for decision of the issues in the case. It might think that on a particular issue the burden of proof is on the plaintiff or on the defendant and its view on that may effect its finding. In that case it would do well to say what view it would take of the disputed question of fact had it placed the burden on the other party. It would then be possible for the Court of first appeal to avoid all the unnecessary harassment to the parties which is involved when in second appeal it is found that there is no ascertained set of facts to which the law can be applied. (*Rowland, J.*) Rajpati Narayan Singh *v.* Kirit Narayan Singh. **173 I.C. 599=4 B.R. 299=10 R.P. 424=18 Pat. L.T. 806=1937 P.W.N. 578=A.I.R. 1938 Pat. 71.**

——*Duty of appellate Court in first appeal regarding matters of fact.*

The Legislature has thought fit to entrust to the first appellate Court the final decision of all matters of fact on which the disposal of the suit turns. Every officer in this position should realize that the confidence thus reposed in him implies a corresponding duty and trust, that he will to the best of his power weigh and balance the evidence, facts and considerations appearing on both sides. He should endeavour so to decide his cases that his judgment may carry a conviction, if not of its correctness, at least of a fair endeavour to place a correct valuation on the merits of the cases of both sides. He should never let it appear either to the public or to a superior Court that he has chosen to accept the evidence of one side or the other without due consideration of the salient facts established and contrary to the conclusion to which the outstanding facts point, aribitrarily or on patently inadequate grounds. (*Rowland, J.*) Bhagwan Singh *v.* Ujagir Singh. **A.I.R. 1940 Pat. 33.**

——*Appellate Courts — Power — Remand on issues not raised in pleadings—Competency.*

An appellate Court is competent to remand a suit for re-hearing on issues not raised in the pleadings, when such remand is on questions of jurisdiction which can be raised at any time. (*Courtney-Terrell, C.J. and Madan, J.*) Baraik Ram Gobind Singh *v.* Chowra Uraon. **16 Pat. 632=1938 P.W.N. 78=173 I.C. 644=4 B.R. 315=19 Pat.L.T. 259=10 R.P. 430=A.I.R. 1938 Pat. 97.**

——*Appellate Court—Powers of—Addition of parties—Successful defendant—Right to impeach decree as wrong.*

A person who is impleaded as a defendant to a suit and is a party to a decree dismissing the suit that has been passed in the suit, has the right to show even as a respondent in the appeal from the decree, that the decree was wrongly passed even though the effect of setting aside the decree would be to re-open the suit as against him. The Court has wide powers to add a party to a suit or an appeal. (*Mukerji and S.K. Ghose, JJ.*) Debendra Narain Roy *v.* Jogendra Narain Deb. **167 I.C. 615=9 R.C. 726=A.I.R. 1936 Cal. 593.**

——Appellate Court—Powers of — Appeal against interlocutory order—Subsequent abatement of suit—Effect on appeal—Power of Court to deal with appeal *See* Practice—Appeal. **14 Mys.L.J. 108=41 Mys.H.C.R. 208.**

——*Appellate Court—Powers of—Finding of fact—Presumption of correctness — Reversal—Burden of proof.*

The reversal of the findings of fact of a trial Judge is well within the competence of an appellate Court, but the presumption is that the decision of the trial Judge on the facts is right, and that presumption must be displaced by the appellant. (*Sir Lancelot Sanderson.*) James Augustus Williams *v.* P. P. Johnson. **1937 A.W.R 1155=1937 A.L.J. 1027 (P.C.).**

——*Appellate Court—Powers of—Findings of trial Court based on oral testimony—Reversal of—Duty to discuss and consider relevant evidence.*

When the appellate Court reverses the findings of the trial Court it must consider and discuss the relevant evidence in the trial Court where the conclusions of the trial Court mostly depend upon the oral testimony of witnesses. (*Nasim Ali, J.*) Raghumani Roy *v.* Bibhuti Bhusan Roy. **162 I.C. 790=8 R.C. 655=64 C.L.J. 65=A.I.R. 1936 Cal. 256.**

——*Appellate Court—Powers of interference—Discretion of trial Court.*

The discretion exercised by the trial Court, which is indubitably vested in it by law, may only be interfered with by appellate Court where such discretion is not exercised judicially or is exercised in an arbitrary manner. The mere fact that the appellate Court is inclined to exercise its discretion in favour of a party is no ground for interference. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) Tejumal Bhawandas *v.* Murad. **30 S.L.R 242=165 I.C. 91=9 R.S. 75=A.I.R. 1936 Sind 169.**

Competency.

——*Competency—Appeal from decree and application for review filed at same time—Application successful before appeal is heard—Appeal—If barred.*

Where an appeal from a decree and an application for review of the decree are filed at once and at the same time if the application for review is successful before the appeal is heard and a second decree is passed in substitution of the first then the appeal must be directed against the second decree and not against the first. 34 All. 2·2; A.I.R. 1931 Cal. 323 and A.I.R. 1929 Bom. 183, Rel. on. (*Davis, C.J. and Mehta, A.C.J.*) Lachmibai *v.* Doulatram Devidas. **29 S.L.R. 445=163 I.C. 30=8 R.S. 182=A.I.R. 1936 Sind 53.**

——*Competency—Court deciding suit under special procedure agreed on between the parties—Decree—If one passed with consent—Appeal—If lies—Right of parties to resile from—Estoppel.*

When a party invites the Court to adopt a special procedure which is not contemplated by the Code of Civil Procedure, he cannot afterwards turn round and say that the Court is to blame for adopting that procedure. In other words, the doctrine of estoppel would apply and prevent him from blowing hot and cold. The decree passed by the Court as a result of adopting the special procedure with the acquiescence of the parties is in the nature of an arbiter's award and must be deemed to be a decree passed with the consent of the parties, and no appeal lies from such a decree (*Pandrang Row, J.*) Makudam Mahomed *v.* Mahomed Sheik Abdul Kadir. **164 I.C. 611=9 R.M. 148=44 L.W. 351=1936 M.W.N. 740=A.I.R. 1936 Mad. 856=71 M.L.J. 281.**

——*Competency — Decree — Application for review — Rejection—Effect—If supersedes old decree—Correction of accidental slip on review application—If one passed under S. 152 or under O. 47—Appeal from original decree—Maintainability—Original decree, if superseded.*

There are three stages in a review application. The first is the *ex parte* stage when the Court may either reject the application at once or may grant a rule calling on the other side to show cause why review should not be allowed. In the second stage, the rule may either be admitted or rejected. If the rule is discharged, the case ends then and there: if on the other hand the rule is made absolute then the third stage is reached. The case is then heard on the merits and may result in a repetition of the former decree or in some variation of it. In either case the whole matter having been reopened, there is a fresh decree. When the Court rejects a review application holding that there is no ground the order is passed in the second stage and not in the third stage. There is no fresh decree. The hearing of the rule in the second stage may involve to some extent an investigation into the merits, but that does not alter the character of the order made. When the rule is discharged in the second stage, there is no fresh decree superseding the original decree, the parties being relegated to and still resting on the old decree. In such a case an appeal from the original decree is not barred, but is maintainable; and the appeal cannot be dismissed on the ground that the order dismissing the review application has the legal effect of vacating the decree from which the appeal is filed. Nor can the correcting of an error arising from an accidental slip bring into existence a fresh decree barring the right of appeal from the original decree. Such correction must in truth be deemed to be an order passed in exercise of the powers of amendment under S. 152, C. P. Code, though the Court may have passed the order on a review application, purporting to act under the review provisions of the Code. An amended decree must, in the contemplation of law, be taken as in force from the date of the original decree, as there is a well-founded distinction between a case of amendment and a case of novation or substitution. In the case of the amended decree, an appeal therefrom is perfectly competent. (*Venkatasubba Rao and Abdur Rahman, JJ.*) PAKKIRI MAHOMED ROWTHER *v.* SWAMINATHA MUDALIAR. **182 I.C. 251=12 R.M. 27=1938 M. W.N. 250=47 L W. 474=A.I.R. 1938 Mad. 573 =(1938) 1 M L.J. 796.**

——Competency—Finding — When open to appeal—Decree against personal property of late mahant of mutt—Finding that rents accrued due during his lifetime and collected since by his successor are personal property of late mahant—Appeal against—If competent *See* RELIGIOUS ENDOWMENT—MUTT. **71 M.L.J. 797.**

——*Competency—Interlocutory order passed by consent.*

A decree by consent is not appealable. But an interlocutory order passed by consent may be appealable under certain circumstances. (*Mosely and Sharpe, JJ.*) T. R. M. RAMASWAMY CHETTIAR *v.* M. M.K. KUTTAIN CHETTYAR. **A.I.R. 1940 Rang. 153.**

——Competency—Issue as to court-fee—Decision of trial Court on—Appealability. *See* COURT-FEES ACT, S. 12. **63 C.L.J. 16.**

——Competency—Order rejecting appeal for failure to furnish security for costs. *See* C. P. CODE, O. 41, R. 10 (2). **A.I.R. 1936 Rang. 109.**

——*Competency—Order of remand under inherent powers—If decree—Appealability.*

An order of remand under the inherent powers of the Court cannot be treated as a decree unless the order can be brought within the definition of 'decree' as given in the C. P. Code and no appeal lies from such order. (*Middleton, J.C. and Almond, A.J.C.*) MOTI KHAN *v.* ATAM CHAND. **161 I.C. 716=8 R. Pesh. 182=A.I.R. 1936 Pesh. 79.**

——Competency—Order under O. 34, R. 12, C. P. Code, on application by person not party to suit—"Decree." *See* C. P. CODE, S. 2 (2). **45 L. W. 646=A.I.R. 1937 Mad. 554.**

——Competency—Partition suit—Order after preliminary decree and before final decree—If decree—Appealability. *See* C. P. CODE, S. 96. **1937 A.W.R. 692.**

——*Competency—Party taking benefit of decree—Right to appeal—Decree declaring election of defendant invalid—Nomination of defendant on footing of invalidity of defendant—Right of defendant to appeal against decree.*

The right of appeal is the creature of statute and is a very valuable right. It should not be ordinarily taken away unless a party has definitely by his conduct or act lost the right. The acceptance by a party of the benefit of a decree or order does not debar the party from appealing against such decree or order, unless the decree or order imposes a term or condition on the opposite party which is for the benefit of the appellant and unless the appellant accepts the benefit of the term or condition so imposed on his opponent. In any event there can be no scope for a preliminary objection to the competency of the appeal unless there is a benefit conferred on the appellant by the decree or order itself. In a suit for a declaration that the defendant has not been validly elected as a Municipal Commissioner, the lower Courts held the election invalid and granted the declaration. The Local Government under its statutory powers of nomination appointed the defendant as a Commissioner to fill up the vacancy caused by the decree declaring the election invalid. The defendant accepted the appointed, but nevertheless appealed against the decree.

Held, by the High Court, that the defendant by accepting the nomination did not lose his right of appeal, no benefit having been conferred on him by the decrees of the lower Courts, and that the appeal was therefore perfectly competent. (*Guha and Bartley, JJ.*) GOPESH CHANDRA ADITYA *v.* BENODE LAL DAS. **165 I.C. 606 (2)=9 R.C. 425 =40 C.W.N. 553=A.I.R. 1936 Cal. 424.**

——*Competency—Pendency of review application against decree—If bar to appeal from decree—Review granted pending appeal—Effect.*

An appeal from a decree presented after the filing of an application for review of the judgment and decree appealed from, and during the pendency of the review application is incompetent; and if the application for review is granted and a new decree is passed, the appeal cannot be heard, and it must be dismissed, for the decree appealed from is superseded by the new decree. (*Pandrang Rao, J.*) PACKIRI MUHAMMAD ROWTHAR *v.* SWAMINADHA MUDALIAR. **162 I C. 261= 8 R M. 970=1936 M W.N. 277=43 L.W. 542= A.I.R. 1936 Mad. 464.**

——*Competency* — Pro forma *defendant impleaded as assignor of plaintiff—Appeal by assignor claiming relief in favour of plaintiff—Maintainability.*

A person who is impleaded as a *pro forma* defendant in a suit as the person from whom plaintiff derived title but who has no interest in the property in suit, has no *locus standi* to appeal against the dismissal of the suit against which the plaintiff himself does not appeal. (*Sulaiman, C. J. and Bennet, J.*) NIRMAL SINGH *v.* ZAMIR UDDIN KHAN. **169 I.C. 395=10 R A 17 (1)=1937 A.L.R. 526=1937 A.L J. 296=1937 R.D. 151=1937 A.W.R. 260=A.I.R. 1937 All. 368.**

——*Competency—Preliminary decree in mortgage suit—Appeal—Omission to apply for stay of proceedings—Subsequent final decree—Failure to appeal from—If bar to maintainability of appeal from preliminary decree.*

Pending an appeal from a preliminary decree in a mortgage suit the trial Court made a final decree. The appellant did not ask for a stay of proceedings after he instituted his appeal nor did he file an appeal against the final decree. At the hearing of the appeal a preliminary objection was raised that the appeal was not competent.

Held, that the appeal from the preliminary decree was not incompetent, and that the passing of the final decree was no bar to the hearing of the appeal from the preliminary decree, and that the Court in appeal had also the power to vary or reverse or affect the final decree. (*Rangnekar and Norman, JJ.*) BASAWANT *v.* KALLAPPA. **175 I.C. 43=10 R B. 515=40 Bom L.R. 164=A.I R. 1938 Bom. 222.**

——Competency—Rent sale—Application to set aside—Order refusing—Observation that sale was only a sale in execution of money decree—Appealability. *See* B. T. ACT, S. 174 (5). **40 C. W.N. 182 (2).**

——Competency—Rent suit—*Ex parte* decree—Order refusing to set aside—Appealability. *See* C. P. CODE, O. 43, R. 1 (*d*). **63 C L.J. 277=40 C. W.N. 992.**

——*Competency—Suit against two persons—Claim to relief against both or either—Decree against one only—Appeal claiming relief against other—If incompetent.*

Where a plaintiff sues two defendants praying the Court to make both or either of them liable, the fact that he gets a decree against one of them will not operate as a bar to an appeal by him as regards the other defendant. He has still got a grievance in that he does not get a decree against the other defendant, his appeal for relief against him is perfectly competent. (*Wort, J.*) BANK OF BEHAR, LTD. *v.* MADHUSUDAN LAL. **170 I.C. 451=10 R.P. 125=3 B.R. 729=18 Pat L.T. 337 =1937 P.W.N. 344=A.I.R. 1937 Pat. 428.**

——Competency—Suit of small cause nature tried as money suit by judge having small cause power—Decree—If appealable—Remedy. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 25. **62 C.L.J. 530.**

——*Competency—Suit of small cause nature—Trial as original suit by Court having small cause powers—Decree—If appealable—Revision.*

If a suit of a small cause nature is tried by a Judge as an ordinary suit but not as a Small Cause Court Judge, and if the Judge has the powers of a Small Cause Court Judge to try suits of that value his decision must be taken to be a decision of a Small Cause Court, and is not open to appeal. The decree can only be revised by the High Court under S. 25 of the Provincial Small Cause Courts Act. (*R. C. Mitter, J.*) BANKIN CHANDRA DEB SARKAR *v.* MADAN MOHAN DEB. **40 C.W.N. 698.**

——Competency—Sureties—Appeal by some only—Failure of one to appeal—If a bar. *See* SURETY—CO-SURETIES. **A.I.R. 1936 Pesh. 20.**

——*Competency—Wrong decision on jurisdiction.*

A wrong decision, even though it relates to jurisdiction, would not give a right of appeal where otherwise no appeal lay. A.I.R. 1930 Pat. 280, Foll. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

Costs.

——Costs—Direction of trial Court—Interference by appellate Court. *See* COSTS—DISCRETION. **17 Pat.L.T. 279.**

Court-fee.

——*Court-fees—Appeal filed in District Court, transferred to High Court on application by appellant—Court-fee payable.*

A memorandum of appeal presented to the Court of the District Judge under the law applicable to appeals, which has been transferred to the High Court on an application by the appellant, should bear court-fee stamp as prescribed for a memorandum of appeal presented to the High Court. (*Guha, J.*) DHARNIDHAR SARDAR *v.* SURJYA KANTA ROY. **172 I.C. 518=10 R.C. 385 (1)=41 C.W.N. 1083=65 C.L.J. 499=A.I.R. 1937 Cal. 514.**

Interference.

——Interference — Discretion — Order as to costs—Grounds for reversal. *See* COSTS—DISCRETION. **(1940) 1 M.L.J. 388.**

Letters Patent appeal.

——*Letters Patent appeal—Memorandum of appeal not mentioning names of all parties—If complete.*

No memorandum of appeal, whether in a Letters Patent appeal or in any other appeal can be considered to be complete unless it mentions the names of all the parties against whom relief is sought. There is no reason for distinction in this respect between a Letters Patent appeal or any other appeal. (*Young, C. J. and Monroe, J.*) RAMESHWAR DAS *v.* OFFICIAL RECEIVER, DELHI. **I. L. R. (1938) Lah. 398=40 P. L. R. 1060=180 I.C. 698=11 R.L. 707=A.I.R. 1938 Lah. 325.**

New point.

——New point—Point of law—If can be raised in appeal for the first time. *See* AGRA TENANCY ACT, S. 86. **1938 R.D. 252=1938 A.W.R. (B.R.) 86.**

——*New point—Question of fact—Plea based on—If can be raised for the first time in appeal.*

A suit by a mortgagee of a recorded occupancy tenant against another treating him as his subtenant, for arrears of rent, was decreed. But the defendant in appeal pleaded for the first time that the plaintiff had not proved his right to sue, as a mortgagee after the Act of 1926 will not be recognized by the Courts. It was held that it was clearly a point that required a definite issue to be framed on which the plaintiff could have produced the requisite evidence. The defendant never having challenged the right of the plaintiff on this question should not be allowed to raise for the first time in the appellate Court, a definite question of fact which should have been specifically raised in the Court below. (*Bomford, J.M. and Darling, S. M.*) DURPAT *v.* SHEO NARAIN. **1938 A.L.J. (Supp.) 6=1938 A.W.R. (B.R.) 96 =1938 R.D. 353.**

——*New point—Question of fact not raised in trial Court or in grounds of appeal—If can be raised at hearing of appeal.*

A question of fact which has not been raised before the first Court or in the grounds of appeal cannot be permitted to be raised at the hearing of the appeal for the first time. (*Varadachariar and Mockett, JJ.*) KUPPUSWAMI *v.* RASAPPA CHETTIAR. **170 I.C. 7=10 R.M. 178=44 L.W. 438=1936 M.W.N. 738=A.I.R. 1936 Mad. 865.**

——*New point—Sale for arrears of rent—Objection to validity as having been conducted by person without authority—If can be raised for first time in appeal.*

A new point, for instance, that a certain sale for arrears of rent was invalid because it was conducted by a person having no authority to hold the sale, may be raised for the first time in appeal and given effect to when it is not necessary to take any evidence on the point. Nor can it be said that the decree of the appellate Court based on such new point is wrong or without jurisdiction, when no real prejudice is caused thereby to the respondent, so as to justify interference in second appeal. (*Pandrang Row, J.*) SUBBIAH THEVAR, *In re.* **1936 M.W.N. 611=44 L.W. 306 =164 I.C. 973=9 R.M. 186=A.I.R. 1936 Mad. 700=71 M.L.J. 284.**

Parties.

——*Parties*—Pro forma *defendant.*

Where persons were joined in a suit as *pro forma* defendants as they did not join as plaintiffs and where no issues were framed with respect to their interest and where none of these persons are interested in the result of the litigation, such persons are not necessary parties to the appeal in that suit. (*S. K. Ghose and Patterson, JJ.*) SABITRIBAI *v.* JUGAL KISHORE. **179 I.C. 95=11 R. C. 468=43 C.W.N. 41=A.I.R. 1938 Cal. 639.**

Question of fact.

——*Question of fact—Inference of intention from circumstances.*

Whether a particular intention can be inferred from a particular set of circumstances is rather a question of fact than of law. (*Sir George Lowndes.*) BALASUBRAMANYA PANDYA THALAIVAR *v.* SUBBIA TEVAR. **65 I.A. 93=I.L.R. (1938) Mad. 551=1938 A.W.R. (P.C.) 62=66 C.L.J. 581=40 Bom.L.R. 704=32 S.L.R. 328=1938 A. L.J. 215=4 B.R. 251=42 C.W.N. 449=10 R.P. C. 162=19 Pat.L.T. 169=172 I.C. 724=47 L.W. 110=1938 O.W.N. 117=1938 O.L.R. 61=1938 O.A. 54=1938 A.L.R. 77=A.I.R. 1938 P.C. 34= (1938) 1 M.L.J. 426 (P.C.).**

Right of.

——*Right of—Adverse finding against a party but the decree wholly in his favour.*

When a decree is wholly in favour of a party and gives him all the relief sought for by him but the judgment contains an adverse finding against him, he has no right of appeal against the decree, which can enable him to contest such adverse finding. The right of an appeal is a creation of the statute and one has to look to the provisions of the Code of Civil Procedure to find out whether in a particular case an appeal is competent or not. Ss. 96, 100 and 104, C. P. Code, make provisions for appeals. There is no provision for any appeal against a mere finding irrespective of the decree or order. (*Srivastava, C.J.*) PATESHWARI DIN *v.* SARJU DASS. **171 I.C. 596= 1937 O.L.R. 567=1937 O.W.N. 1127=A.I.R. 1938 Oudh 18.**

——Right of—Decision by Land Acquisition Court—Appealability. *See* LAND ACQUISITION ACT, S. 54. **43 L.W. 338.**

——Right of—Decree in favour of plaintiff imposing conditions—Appeal against imposition of conditions—Adverse finding — Appealability—Test. *See* C. P. CODE, S. 96. **42 C.W.N. 492.**

——Right of—If lost—Election—Defeated candidate accepting appointment in Municipality—Right of appeal not lost. *See* ASSAM MUNICIPAL ACT (I OF 1923), S. 21-A, 10 AND 19. **A.I.R. 1936 Cal 424=40 C.W.N. 553.**

——Right of—High Court rules relating to constitution of Benches—Amendment pending appeal—Retrospective operation. *See* GOVERNMENT OF INDIA ACT, S. 108 (1). **1936 A.L.J. 1046**

——*Right of—Necessary party impleaded in suit but not in appeal—Such party, if has right of second appeal.*

Where a necessary party is impleaded in a suit but not impleaded in first appeal, such a party has a right of second appeal as he is interested in its right decision. (*Bhide, J.*) PALA SINGH *v.* MT. HARNAMI. **177 I.C. 632 =11 R.L. 348 (2)=A.I.R. 1938 Lah. 70.**

——*Right of—Non-party to suit.*

Only persons whose names appear as parties to the decree or order of the Court below are entitled to appeal if they are aggrieved. A person whose name does not appear in the array of parties can ask the Court to implead him by including his name among the parties. If he does not choose to do so, he cannot maintain an appeal. (*Agha Haidar, J.*) SADHU MAL KHAZANA MAL *v.* DEVI CHAND. **173 I.C. 505=10 R.L. 450=A. I.R. 1937 Lah. 347.**

——Right to—Deprivation of—Acquiescence in the procedure adopted by the Judge. *See* PRACTICE—PROCEDURE. **30 S.L.R. 17=A.I.R. 1936 Sind 72.**

Miscellaneous.

——*Failure by party to appeal—Party, if debarred from having recourse to other modes of relief.*

Where there is an appeal against a decision, the effect of not appealing is that the decision holds good for what it is worth. So far as concerns any other modes of relief available, the person not appealing is in no worse position than if he had appealed and failed. 24 Cal. 546, Rel. on. (*Addison and Din Mohammad, JJ.*) INTIZAMIA COMMITTEE *v.* CENTRAL BANK OF INDIA, LTD. **182 I.C. 785=12 R.L. 68=A.I.R. 1938 Lah. 129.**

——Order of remand—Direction for *de novo* trial—Appeal. *See* C. P. CODE, S. 151. **A.I.R. 1936 Pat. 491.**

——Rejection of—Non-payment of court-fee on plaint—Appellate Court calling on plaintiff to pay court-fee on plaint. *See* C. P. CODE, S. 2 (2). **1937 A.L.J. 171=A.I.R. 1937 All. 280.**

APPELLATE COURT—Power of—Power to direct determination of mesne profits subsequent to suit in execution proceedings—Lower Court not dealing with subsequent mesne profits. *See* PARTITION—MESNE PROFITS. **30 S.L.R. 17=A.I.R. 1936 Sind 72.**

APPROBATE AND REPROBATE.

See (1) ESTOPPEL.
(2) EVIDENCE ACT, S. 115.

APPROPRIATION. *See* CONTRACT ACT, Ss. 59 TO 61.

ARBITRATION AND AWARD.

See also (1) ARBITRATION ACT (IX OF 1899).
(2) C. P. CODE, SCH. II, O. 32, R. 7 AND O. 23, R. 3.

Arbitrator.
Award.
Clause in contract.
Misconduct.
Reference.
Umpire.
Miscellaneous.

Arbitrator.

——*Arbitrator—Misconduct — Meaning of—Proof—Onus—Rejection of material evidence tendered by party—If ground for setting aside award.*

"Legal misconduct" on the part of an arbitrator does not necessarily involve moral turpitude or dishonesty on the part of the arbitrator. It is misconduct in the judicial sense of the word and has been described generally to mean an erroneous breach of duty on the part of the arbitrator, however honest, which causes miscarriage of the justice. It has also been described as such a mishandling of the arbitration as is likely to amount to some substantial miscarriage of justice. Misconduct is a question of fact in each case and has to be ascertained from the facts of the entire proceedings before the arbitrator. It really lies in the conduct of the arbitration proceedings and the onus of proof lies on the party who alleges it. If a material piece of evidence is tendered and rejected, it may amount to misconduct entitling a party to have the award set aside. (*Wadia, J.*) ABOOBAKER LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410.**

——*Arbitrator—Nomination of, by party--Time for.*

The period of days after which one party in accordance with the terms of the agreement may nominate an arbitrator on behalf of the other must be so many clear days commencing from the midnight after the receipt of the letter or notice requiring the other party to nominate his arbitrator. Where a party anticipating the necessity of such an appointment wrote letters on a day just before the expiry of the period to be sent when the necessity actually arose, it cannot be said that the appointment was complete before the expiry of the period provided the formal appointment by communication to the arbitrator or to the party concerned is not made before the expiry of the period. (*Weston, J.*) LOUIS DREYFUS & CO. *v.* HEMANDAS HOTCHAND. **187 I.C. 262=A.I.R. 1940 Sind 37.**

——Arbitrator—Position of—Commissioner and arbitrator—Distinction. *See* C. P. CODE, SCH. II, PARA. 16. **18 Pat. 193.**

ARBITRATION AND AWARD.

——*Arbitrator—Powers of — Amendment—Entire suit referred—Amendment of plaint to correct mistake in date—Power to allow—Previous refusal of amendment by Court—Effect of.*

Where an entire suit has been referred to arbitration, the arbitrator has power to allow an amendment of the plaint in order to correct a mistake in a date given therein, when the amendment is one which the Court had power to allow if it had tried it, even though the Court had refused such amendment on a previous occasion. (*Harries, C.J. and Fazl Ali, J.*) TEJPAL MARWARI *v.* KEDARNATH HIMAT SINGHA. **6 B.R. 144=185 I.C. 273=12 R.P. 336=20 Pat.L.T. 700=1939 P.W.N. 703=A.I.R. 1939 Pat. 597.**

——*Arbitrator—Power of—Power to award interest.*

An arbitrator has wide powers in deciding the disputes referred to him. He has power to award interest, where he considers it fair and fit. (*Pollock, J.*) TULSIRAM *v.* JHANAKLAL. **I.L.R. (1936) Nag. 44=155 I.C. 556=9 R.N. 88=19 N.L.J. 151=A.I.R. 1936 Nag. 197.**

——*Arbitrator—Powers of—Power to decide question of costs—Award as to costs—Power of Court.*

Where all questions in dispute between parties are referred to arbitration, the arbitrator is thereby empowered to decide the question of cost which is one of the matters involved in the suit. Where the arbitrator files the award and directs that the parties should bear their own costs the award can be said to contain sufficient provisions concerning costs and the directions in the award do not need any amplification to be put into effect and the Court's discretion in the matter of costs is removed by the arbitrator's award. A.I.R. 1918 Nag. 108, Foll.; A.I.R. 1914 Sind 62, Dist. (*Middleton, J.C.*) HARNAM SINGH *v.* KISHAN CHAND. **161 I.C. 7=8 R.Pesh. 151=A.I.R 1936 Pesh.37.**

——*Arbitrator or referee—Statement of Counsel appointing referee—Latter empowered to examine parties—Character of referee, if altered thereby.*

Where the Counsel's statement makes it clear that a person is being appointed as a referee and that he is to make a statement in Court, the fact that he was allowed to make the statement after taking the statements of the parties, could not have the legal effect of altering the character of the referee, for it cannot be said that a referee can never be authorized by the parties to examine the parties before making his statement in Court. Such a person is not an arbitrator. (*Mulla, J.*) RAMESHWAR NATH *v.* GHULAM RASOOL KHAN. **I.L.R. (1939) All. 50=180 I.C. 316=11 R.A. 437=1938 A.L.J. 1132=1938 A.W.R. (H.C.) 807=A.I.R. 1939 All. 92.**

——*Arbitrator—Who is—Technical expert authorised to settle disputes merely by use of his skill and judgment—If arbitrator.*

A mere agreement between two persons to be concluded by the decision of a third does not by itself constitute such third person an arbitrator. To give him that character it should be intended that such person should determine the disputes in a quasi-judicial manner. What is the intention of the parties in any particular case must necessarily depend upon the true construction of the agreement between them. Where an architect or other technical expert in the service of one of the parties to a contract is clothed with authority to settle disputes between the parties, which he is required to decide merely by the exercise of his own skill and judgment, such architect or expert is not an arbitrator. (*Rupchand and Bilaram, A. J.C.*) DES RAM *v.* SECRETARY OF STATE. **165 I. C. 598=9 R.S. 104=A.I.R. 1936 Sind 201.**

Award.

——*Award accepted and acted on by a party to it—If liable to be challenged by him—Evidence to impugn it—Court—If can go into.*

Where a party to an award has not merely signed it as an award but understood it, agreed with it, accepted it and acted on it, and took possession of the property dealt with in it, he is estopped from challenging it. It is not open to the Court to go into evidence which has for its object the impugning of that award. 24 A. 164, Foll. (*Stone, C.J. and Niyogi, J.*) DULAN BAI *v.* SUNDERSAO. **I.L.R. (1937) Nag. 449=A.I.R. 1938 Nag. 132.**

——Award against firm—Application to file in Court—Objection by person served with notice that he is not partner of firm—Competency—When to be raised. *See* C. P. CODE, O. 21, R. 50 (2). **29 S.L.R. 292.**

——*Award—Assessment of compensation—Inclusion of interest—Power of arbitrator.*

The arbitrators whose only duty is to ascertain the actual value of certain property at a certain time have no power to include interest in their assessment of value. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **169 I.C. 562=10 R.P.C. 17=A.I R. 1937 P.C. 214 (P.C.).**

——*Award—Assessment of compensation—Methods of valuation—Discretion of arbitrators.*

The arbitrators must in general have a wide discretion in selecting their method of valuation for purpose of compensation but where they have considered two methods and two methods only and have chosen one of these methods and have rejected the other, it becomes a question of law whether, having regard to their terms of reference their decision can be justified. (*Lord Macmillan.*) INTERNATIONAL RAILWAY CO. *v.* NIAGARA PARKS COMMISSION. **169 I.C 562=10 R.P.C. 17=A.I. R. 1937 P.C. 214 (P.C.).**

——*Award—Binding nature—Clause in excess of terms of reference—Award fixing rate of maintenance to Hindu widow at fixed rate—Provision that rate fixed could not be increased or decreased—Award acted upon and maintenance paid at that rate for long time—Effect—Right of widow to claim enhancement on ground of altered circumstances.*

An award on an arbitration, which has been acted upon by the parties for a considerable length of time, may be treated as an agreement between the parties, that they would abide by it, even though the award contains a clause which is in excess of the terms of reference. Where a clause in such an award allotting maintenance to a Hindu widow at a certain rate, provides that the widow cannot ask for any increase at all, and that the party bound to pay it cannot get it reduced though it may be in excess of the terms of reference, if the parties have acted upon it for a long time, and maintenance has been paid and received at such rate, the widow is bound by it and cannot claim a higher rate afterwards on the ground of altered circumstances. (*Venkataramana Rao, J.*) KAMESWARAMMA *v.* THAMMANA. **1937 M.W.N. 1039.**

——Award—Construction—Provision for payment of money by one party to the other as the equivalent of latter's share in immovable property—Clause that until such payment ownership of latter shall not cease—If operates as a document of title and as present creation, declaration or assignment of title—Registration *See* REGISTRATION ACT, S. 17 (1). **17 Pat L T. 835.**

——*Award—Criminal complaint of misappropriation—Disputes between parties referred to arbitration—Criminal Court not compounding case—Award acquitting accused holding that there was no misappropriation—Validity.*

After filing a complaint for criminal misappropriation the parties submitted their disputes, the chief one concerning misappropriation to arbitration. One of the parties moved the Criminal Court to have the case compounded, but the application was rejected. The result was that while the arbitrators were engaged in settling the disputes, one of the main disputes concerning misappropriation was being agitated in the Criminal Court. The award delivered held that no amount had been misappropriated and acquitted the accused. The whole award mainly depended on the finding on the issue.

Held, that under the circumstances although the reference did not succeed in stifling the criminal prosecution, still the arbitrators did arrogate to themselves the powers of a Magisterial Court. Hence the award was invalid.

Held also, that the rest of the award also could not be upheld. That would have been possible only if the arbitrators had acquitted the accused of the charge pending against him by merely stating that fact. (*Mehta, J.*) FAZAL ELLAHIE *v.* NAZIR AHMED. **176 I.C. 490=11 R.S. 18=A.I. R. 1938 Sind 130.**

——*Award—Duty of arbitrator to keep record of enquiry.*

There is no law, which requires an arbitrator to keep a record of his proceedings. All that is necessary is that there should be an award in writing by the arbitrator. He is, of course, bound to make enquiry, but he is not bound to keep a record of such an enquiry. (*Jai Lal, J.*) RAM DHAN DAS RAMJI DAS *v.* SHANKAR DAS DEVI DAYAL. **164 I.C. 296=9 R.L. 100=A.I.R. 1936 Lah. 492.**

——*Award—Effect of—Absence of finding on particular point of dispute between parties—Right of parties to re-agitate that point—*Res judicata.

The decision given by arbitrators, when it becomes final, puts an end to all the controversies between the parties. It is no longer open to any of the parties to say that he is entitled to re-agitate a point which had been taken either in attack or in defence on the ground that the arbitrators have not given any finding on it. When the arbitrators make an award, all disputed points between the parties on which they were at variance are set at rest as a result thereof, and when the arbitrators, after taking into consideration the pleas raised on both sides, give a finding on the respective rights of the parties, then all the controversies between the parties come to an end. It is not open to any of the parties to re-agitate any of the pleas which had been taken by them before the matter was referred to arbitration. (*Harries and Rachhpal Singh, JJ.*) GANPAT RAI *v.* BHAGWAT DAYAL. 1937 **A.W.R. 805=1937 A.L.J. 1141.**

——*Award—Enforceability of—Suit to enforce—Private reference to arbitration in pending suit—Award of arbitrator—Validity.*

In a suit for delivery of possession of certain land, the parties agreed to refer their dispute to arbitration outside Court and had the suit dismissed. The arbitration proceeded and the arbitrator awarded the land to the plaintiff, but the defendants refused to give it up. The plaintiff brought a suit for possession of the land based on the agreement to refer to arbitration and the award of the arbitrator.

Held, (*i*) that the suit could be filed on the award irrespective of the procedure laid down in Sch. II despite S. 89, C. P. Code, which only deals with the filing of awards under that special procedure; (*ii*) that the award was valid though made on a reference made during the pendency of the suit without the intervention of the Court and that it operated to merge and extinguish all claims embraced in the submission and furnished a good cause of action. (*Baguley, J.*) MAUNG PO IT *v.* MA BU LI. **1937 Rang.L.R. 225=173 I.C. 690=10 R.R. 365=A.I.R. 1937 Rang. 459.**

——*Award—Finality of—Presumption of—Plea that award is beyond scope of reference—Burden of proof.*

The Courts will make every reasonable intendment in favour of an award being a final, certain and sufficient termination of the matters in dispute, and unless and until the contrary is shown, the Court will presume that the arbitrator has determined only such matters as were in dispute and were referred to him, and that the burden of proving that the arbitrator has awarded on matters not within the submission or has failed or omitted to award on matters which were within the submission lies upon the party who seeks to impeach the award. (*Rupchand Bilaram, Ag.J.C. and Lobo, A.J.C.*) VISHINDAS KHUSHALDAS *v.* TEJUMAL KHUSHALDAS. **174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.**

——*Award—If contract or consent decree*

An award is not a contract inasmuch as the parties to it do not contract with the arbitrator; and it is also different from a consent decree where the order of the Court is imposed upon the agreement of the parties. (*Davis, J.C. and Tyabji, J.*) TARA CHAND KHIMANDAS *v.* SYED ABDUL RAZAK SHAH. **I.L.R. (1939) Kar. 422=182 I.C. 226=12 R.S. 4=A.I.R. 1939 Sind 125.**

——*Award—Misconduct of arbitrator—Error of judgment—If amounts to.*

Where arbitrators have allotted through error of judgment an asset of uncertain and fluctuating value upon the basis of a gross over-valuation, to one branch of the family instead of to all the branches according to their respective shares, this does not amount to misconduct within the meaning of the law of arbitration. (*Lort Williams, J.*) RAJ KUMAR *v.* SHIVA PRASAD. **184 I.C. 553=A.I.R. 1939 Cal. 500.**

——Award going beyond terms of reference—Acceptance by parties—Party consenting and receiving benefits under—Right to challenge afterwards. *See* HINDU LAW—MAINTENANCE—WIDOW. **50 L.W. 195.**

——*Award—Minor represented by father—If bound by award.*

The fact that one of the parties to the reference to arbitration is a minor is no ground for holding that he is not bound by the award. When he is represented in the arbitration proceedings by his father he cannot repudiate them or the award following thereon. (*Pollock, J.*) TULSIRAM *v.* JHANAKLAL. **I.L.R. (1936) Nag. 44=165 I.C. 556=9 R.N. 88=19 N.L.J. 151=A.I.R. 1936 Nag. 197.**

——*Award—Nature of—Partition proceedings—Award declaring rights of parties in property without giving them possession—If merely declaratory.*

In partition proceedings, the award declared the rights of the parties in the property and did not state that possession was to be given to the parties.

Held, that the award was merely declaratory and hence possession of the properties could not be given to the parties in the execution proceedings. (*Tek Chand and Abdul Rashid, JJ.*) SANT LAL *v.* RAMAYA RAM. **178 I.C. 547=11 R.L. 474=40 P.L.R. 619=A.I.R. 1938 Lah. 177.**

——*Award—Objection to—Suit on mortgage—Reference to arbitration—Award allowing mortgagors to occupy house for certain period free of rent though house to be conveyed to mortgagees on date of award—On default mortgagees to pay mesne profits at rate of Rs. 100 per month—House capable of realizing only Rs. 10 per mensem—Default in handing over possession—Decree based on award, giving mortgagees mesne profits at rate of Rs. 100 per mensem—Validity.*

In a suit on a mortgage the dispute was referred to arbitration. The award allowed three years to the mortgagors to occupy the mortgaged house free of rent, though it was to be conveyed to the mortgagees from the date of award. In case the mortgagors failed to hand over possession at the expiry of three years they would pay mesne profits at the rate of Rs 100 per month from date of default up to possession. The house could realize only Rs. 10 per mensem as rent. The mortgagors occupied the house rent free for three years but defaulted in handing over possession. The mortgagees obtained decree for mesne profits at the rate of Rs. 100 per mensem.

Held, that a Court executing the decree was *prima facie* bound by the decree. As the mortgagors did not raise any objection to the award at the proper time, it was too late for them to challenge the decree. The mere fact that the house if given on rent might not fetch Rs. 100 was not sufficient ground for affording relief to the mortgagors; there might be several considerations weighing with the arbitrators in fixing the amount. (*Rupchand Bilaram and Havelivala, A.J.Cs.*) CHHUGOMAL *v.* BRIJLAL. **171 I.C. 515=10 R.S. 110=A.I.R. 1937 Sind 219.**

——*Award—Operation of—Basis of rights of parties.*

A valid award operates to merge and extinguish all claims embraced in the submission, and after it has been made the submission and the award furnish the only basis by which the rights of the parties can be determined. (*Abdul Rashid and Addison, JJ.*) DAMODAR DAS AND SONS, LTD. *v.* BASHESHWAR NATH. **167 I.C. 730=9 R.L. 541 (2)=A.I.R. 1936 Lah. 865.**

—— *Award—Setting aside—Grounds.*

An award cannot be set aside on the ground of uncertainty upon a point upon which there is no controversy between the parties. (*Rupchand Bilaram, Ag J.C. and Lobo, A.J.C.*) Vishindas Khushaldas *v.* Tejumal Khushaldas. **174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.**

——*Award—Setting aside—Grounds—Irregularity in proceedings—Effect of—Powers of Court in proceedings to set aside award—Scope of enquiry.*

The Court never sits in appeal from the award of an arbitrator. Its function is to see whether the grounds of misconduct alleged have been strictly proved. In order that the Court may set aside the award on the ground of irregularities in the proceedings, the irregularities must be of such a nature as to amount to no hearing at all. Parties cannot get out of an award upon objections which do not affect the substantial justice of the case. (*Wadia, J.*) Aboobaker Latiff *v.* Reception Committee, Indian National Congress. **171 I.C. 470=10 R.B. 200=39 Bom.L.R. 476=A.I.R. 1937 Bom. 410.**

——*Award—Setting aside of—Submission of specific question of law.*

Where it is alleged that there was a submission of a specific question of law, it must be such that it can be fairly construed to show that the parties intended to give up their rights to resort to the King's Court, and in lieu thereof to submit that question to the final decision of a tribunal of their own. Where circumstances are not such, then the Court is entitled to interfere with the decision of the arbitrator. (*Costello and Lort Williams, JJ.*) Gopinath *v.* Salil Kumar Mitter. **I.L.R. (1938) 2 Cal. 349=179 I.C. 106=11 R.C. 470=A.I.R. 1938 Cal. 705.**

——*Award—Setting aside—Terms of reference directing physical partition—Award ordering sale of premises and dividing sale proceeds—Award—If should be set aside.*

Where the terms of the order of reference direct the arbitrators to decide on the mode of partition of the premises, and to partition the premises with the assistance of an engineer if necessary on the basis that each party is entitled to one-third share therein, the jurisdiction of the arbitrators is limited to effecting a physical partition. If they direct the sale of the premises and divide the sale proceeds among the parties according to their shares, the award goes beyond the terms of reference and must be set aside. (*Panckridge, J.*) Diboprakash Ganguly *v.* Suprokosh Ganguly. **177 I.C. 289=11 R.C. 224=A.I.R. 1938 Cal 341.**

——*Award—Uncertainty—What is.*

Where an award directs certain produce to be sold at market price, the amount to be realized is sufficiently certain and cannot make the award uncertain. (*Rupchand Bilaram. Ag. J. C. and Lobo, A J.C.*) Vishindas Khushaldas *v.* Tejumal Khushaldas **174 I.C. 334=10 R.S. 250=A.I.R. 1938 Sind 59.**

——*Award—Validity—Absence of an arbitrator at all sittings.*

If any one of the arbitrators was not present at all the sittings, that would affect the validity of the award. (*Niyogi, J.*) Ramdhar Ram *v.* Santadar. **178 I.C. 29=A.I.R. 1938 Nag. 492.**

——*Award — Validity — Agreement to refer future disputes to arbitration.*

An award made on an agreement to refer future disputes to arbitration can be legally filed in Court. There is nothing illegal in such agreements and an award made on such reference to arbitration is perfectly valid. (*Jai Lal, J.*) Ram Dhan Das Ramji Das *v.* Shankar Das Devi Dayal. **164 I.C. 296=9 R.L. 100=A.I.R. 1936 Lah. 492.**

——*Award—Validity—Award of costs—Order of reference giving arbitrator discretion in the matter—Arbitrator omitting to follow directions of appellate Court—Effect of.*

Where the arbitrator is directed by the Court to keep the directions of the appellate Court as to costs in view while awarding costs,but at the same time the order of reference gives him a discretion in the matter, he is not bound to follow the directions of the appellate Court and his failure to d so does not vitiate the award and no substantial injustice is involved. (*Baguley and Mosley, JJ.*) Ma Ngwe *v.* U Min Sin. **163 I.C. 590=9 R.R. 29=A.I.R. 1936 Rang. 240.**

——*Award—Validity—Dispute between* A *and* B *regarding boundary referred to arbitration—*A *not knowing English — Document n English containing agreement to refer and not explained to* A*—Award, if a bar to subsequent suit by* A *against* B *regarding same cause of action.*

The dispute between *A* and *B* regarding boundary line between two territories was referred to arbitration. The agreement referring the dispute to arbitration was contained in a document written in English. *A* who was ignorant of English affixed his mark to the document which was not explained to him so as to make him understand its true import.

Held, that the award was not binding on *A* and was no bar to the subsequent suit by *A* against *B* regarding the same cause of action. (*Lord Russel of Killowen.*) Kwamin Bassayin *v.* Bendentu II. **170 I.C. 423=10 R.P.C. 66=A.I.R. 1937 P.C. 274 (P.C.).**

——*Award—Validity—Minor's share in property referred to arbitration—Decision about its partition—If outside reference.*

Where what is referred to arbitration is only the share of a minor in a certain property, the decision of the arbitrators about its disposal or partition is outside the scope of the reference and is, therefore, void. (*Dalip Singh, J.*) Saraswati Devi *v.* Jagannath. **41 P.L.R. 201=A.I.R. 1939 Lah. 308.**

——*Award based on a compromise between parties—Validity of.*

An award which purports to be the considered award of the arbitrators cannot be said to be no award simply because the arbitrators accepted the compromise arrived at by the parties and cast the terms of the compromise in the form of an award. Such an award cannot be invalidated. (*Stone, C. J. and Niyogi, J.*) Dulan Bai *v.* Sundersao. **I.L.R. (1937) Nag. 449=A.I.R. 1938 Nag. 132.**

——*Award—Validity of—Arbitrator not holding public enquiry—Award, if vitiated.*

No procedure is laid down for the arbitrator in Sch. II, C. P. Code, and unless it is proved that the arbitrator refused to examine any evidence tendered by the parties, the mere fact that he did not record any proceedings or did not hold a public enquiry will not be enough to vitiate the award. (*Din Mahomed, J.*) KANSHI RAM *v.* HARNAM DAS. **A.I.R. 1940 Lah. 73.**

——*Award—Validity—Failure of one of the arbitrators to sign award—Defect of procedure—Award when not to be set aside.*

Where an award is arrived at under the 'joint consultation' of all the arbitrators and represents their decision, the mere failure of one of the arbitrators to sign the award does not render it invalid. An award made on proper reference ought not to be set aside on the ground of an alleged defect in procedure not affecting the merits, where substantial justice has been done. (*Thomas, C.J. and Zia-ul-Hasan J.*) BENI DATT *v.* BAIJ NATH. **14 Luck. 65=174 I.C. 369=10 R. O. 255=1938 O.W.N. 480=1938 O.L.R. 186=1938 O.A. 341=A.I.R. 1938 Oudh 125.**

——*Award—Validity—Award not signed by disagreeing arbitrator.*

Where the parties to a reference to an arbitration agree that the decision of the majority of the arbitrators would prevail, the fact that the award was not signed by the arbitrator who differed from the opinion of the majority does not affect its validity. (*Henderson, J.*) ABINASH CHANDRA *v.* PARASHURAM. **44 C.W.N. 866.**

——*Award—Validity of—Partition of joint properties—No specific directions given by arbitrators with respect to particular easements.*

Where joint property belonging to certain persons has been partitioned by an award made without the intervention of the Court, the mere fact that no specific directions having been given by the arbitrators about the ventilators and drains existing in the properties partitioned does not render the award invalid on the ground of difficulty in execution of the award or indefiniteness in the award. It is open to the parties to find out for themselves what would be the legal inference to be derived from the award with respect to these particular easements in the properties. The ordinary rules of law relating to easements in a joint property divided between two owners will apply unless there is something in the award which takes any particular easement out of the general law and assigns a particular right in any party to that easement. (*Dalip Singh, J.*) MOHAMMAD MUSTAFA KHAN *v.* MOHAMMAD YAR KHAN. **188 I.C. 477=A.I.R. 1940 Lah. 24.**

——*Award—Validity — Partnership — Disputes referred to arbitration—One partner subsequently dying—Proceedings conducted without his legal representatives.*

The terms of an agreement of partnership expressly provided that upon the death of a partner his rights survived to his legal representatives. Upon disputes as to accounts having arisen between the groups of partners the matter was referred to arbitration. Shortly afterwards a partner in one group died but the arbitration proceedings were conducted in the absence of and without notice to the legal representatives of the deceased partner.

Held, that the proceedings were not binding on the legal representatives of the deceased partner as they were not parties to it, nor could it be said that their interests were substantially represented by other members of the group because although the interests of all might be identical, the group was not a legal entity and the real parties to the agreement were individual members of the group. (*Bhide, J.*) ABDUL GHANI *v* SIRAJ-UD-DIN. **41 P. L.R. 580=A.I.R. 1939 Lah. 154.**

——*Award—Validity—Partnership accounts—No valid reference on behalf of one partner.*

The principle that in a pending suit all parties must join in the reference also applies to arbitrations out of Court. Disputes relating to accounts of partnership cannot be settled unless all the interested persons are joined, because the dispute involves the interests of all the partners which cannot be settled piecemeal by some of the partners without the consent of the others. Where therefore such a dispute between the partners is referred to arbitration out of Court on the assumption that all the partners have joined in the reference but it subsequently transpires that there was no valid reference on behalf of one of the partners, then the award that is afterwards passed on such reference is not binding on the other partners also. (*Bhide, J.*) ABDUL GHANI *v.* SIRAJ-UD-DIN. **41 P.L.R. 580=A.I.R. 1939 Lah. 154.**

——*Award—Validity—Piecemeal awards.*

It is not competent to an arbitrator to decide a matter piecemeal and deliver several awards, unless he is so authorised by the agreement between the parties. (*Rachhpal Singh and Bajpai, JJ.*) GANGA DHAR *v.* INDAR SINGH. **I.L.R. (1938) All. 236=174 I.C. 671=10 R.A. 607=1938 A.L. R. 316=1938 A.W.R. (H.C.) 63=1938 A.L.J. 113=A.I.R. 1938 All. 195.**

——*Award treated as a compromise acted under—Doctrine of estoppel—Applicability of.*

The doctrine of estoppel applies, even if an award were not an award but merely a compromise acted under. (*Stone, C.J. and Niyogi, J.*) DULAN BAI *v.* SUNDERSAO. **I.L.R. (1937) Nag. 449=A.I.R. 1938 Nag. 132.**

Clause in contract.

——Clause in contract—Construction. *See* CONTRACT—CONSTRUCTION. **I.L.R. (1937) 1 Cal. 606.**

——*Arbitration clause—Construction—Agreement authorizing one party to nominate arbitrator or other party on failure of latter to nominate—Appointment of such arbitrator by first party—If inoperative until other party receives notice of it.*

Where an agreement has provided that if any party shall refuse or neglect to appoint an arbitrator within certain days after one party shall have appointed an arbitrator and served a written notice upon the other party requiring him to appoint an arbitrator, then upon such failure the party making the request may appoint another arbitrator to act on behalf of the party so failing to appoint and the arbitrator so appointed may proceed and act in all respects as if he had been appointed by the person failing to make such appointment, the appointment of such arbitrator cannot be deemed to be inoperative or incomplete until other party received notice of it. (*Weston, J.*) LOUIS DREYFUS & CO. *v.* HEMANDAS HOTCHAND. **187 I.C. 262=12 R.S. 224=A.I.R. 1940 Sind 37.**

——*Clause in contract—Officer referring to arbitration—Competency of—Officer to whom it is referred—Validity of reference—Government—On being one of the parties—Rules framed by Government regarding Government litigation if relevant.*

Where an agreement between the Military and a contractor for the supply of fodder provided that, any dispute or difference arising out of this contract shall be referred to the arbitration of the officer sanctioning the contract, a reference made by the Assistant Director of Grass Farms is competent, an officer of the Department is competent, in the absence of any indication in the contract that the reference should be made by a particular officer. Further the rules framed by the Government regarding the conduct of Government litigation have no bearing on the question of reference to arbitration. The reference has to be made not to the person who sanctioned the contract but to the officer who may be holding the appointment of the sanctioning authority at the time of the dispute. So reference to the Officer who became the successor of a different officer as the sanctioning authority on a re-organization of the department is valid. (*Jai Lal, J.*) KIDAR NATH RAM CHANDRA *v.* SECRETARY OF STATE. **171 I.C. 361=40 P.L.R. 643=A.I.R. 1938 Lah. 223.**

——*Clause in contract—Submission to—Proof—Writing, if necessary.*

A submission of a party to an arbitration clause need not be in writing. It may be proved by other evidence. (*Addison, J.*) JUBILEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. **42 P.L.R. 48=A.I.R. 1940 Lah. 180.**

——*Clause in contract—Validity—One of parties a firm—Dispute to be referred to its directors.*

Where one of the parties to a contract is a firm, a clause for the submission of disputes to the arbitration of its directors is perfectly legal. (*Addison, J.*) JUBILEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. **42 P.L.R. 48=A.I.R. 1940 Lah. 180.**

——Clause in contract—Validity. *See* CONTRACT ACT, S. 28. **A.I.R. 1937 All. 650.**

Power of.

——*Powers of arbitrator—Death of one of parties before decision—Power of arbitrator to continue proceedings.*

The arbitrators have jurisdiction to continue the arbitration proceedings although one of the parties dies before they give their decision, where one of the terms of the agreement between the parties is that their heirs and legal representatives would be bound by the decision of the arbitrators In the absence of such a term in the agreement between the parties, the arbitrators have no authority to go on, although a son of the deceased files an application on behalf of himself and on behalf of his minor brothers to the effect that the arbitration proceedings should continue. (*Henderson, J*) ABINASH CHANDRA *v.* PARASHURAM. **44 C.W.N. 866.**

——*Powers of arbitrator—Procedure.*

An arbitrator is not bound by the technical rules of procedure which the Court must follow, nor need he record separate findings on the various points on which the parties are at issue, or write a reasoned judicial decision. All that he is required to do is to give an intelligible decision which determines the rights of parties in relation to the subject-matter of the reference. Where an arbitrator has been selected by reason of his special knowledge of the affairs of the parties to decide dispute, he is entitled to take a broad view of the case and give an award, which he conceives to be just and equitable in the circumstances. (*Young, C.J. and Tek Chand, J.*) RAMINDER SINGH *v.* MOHINDER SINGH. **A.I.R. 1940 Lah. 186.**

——Powers of Court—Difference of opinion between arbitrators—Power of Court to appoint umpire—Deed of reference filed by parties not providing for such contingency. *See* C. P. CODE, SCH. II, PARA. 4. **42 P.L.R. 124.**

Misconduct.

——*See* under sub-headings. ARBITRATOR—AWARD—MISCELLANEOUS.

Reference.

——Reference—Agreement not signed by *ex parte* defendant—Award—Decree on—Mortgagee with possession from *ex parte* defendant—Suit to declare decree illegal and void—Maintainability. *See* C. P. CODE, SCH. II, PARA. 15. **1935 A.M.L.J. 89.**

——*Reference—Parties to suit agreeing to abide by decision of presiding officer after local inspection—Effect of—Presiding officer, if appointed as arbitrator—C. P. Code, Sch. II.*

Where the parties to a suit presented an application saying that they were desirous of leaving the matter entirely in the hands of the presiding officer, and that they would be bound by whatever decision he should arrive at after making a local inspection.

Held, (1) that although the word 'arbitrator' was used by the parties in their application, the agreement was no more than to abide by the decision of the Court, arrived at as the result of a local inspection, without recording any evidence, and there was nothing against the validity of such an agreement and that the parties did not mean to appoint the presiding officer as an arbitrator in the case, (2) that the provisions of Sch. II, C. P. Code, did not apply to cases in which the parties to a suit wanted to appoint the presiding officer of the Court, in which the suit was pending, as an arbitrator, (3) that it was not incumbent upon the presiding officer under the law to record notes of his local inspection. (*Zia-ul-Hasan and Smith, JJ.*) NAUSHAD ALI *v.* MOHAMMAD ISHAQ. **13 Luck. 152=166 I.C. 853=9 R.O. 343 (2)=1937 O.W.N. 223=1937 O.L.R. 63=A.I.R. 1937 Oudh 224.**

——*Reference—Revocation—Ground for—One of the parties working at the shop of a kuram of arbitrator.*

Where after the subject-matter of a suit was referred to arbitration and before any proceedings are taken by the arbitrator, one of the parties applies to revoke the reference on the ground that the other party is working at the shop of one *X*, a kuram of the arbitrator, a fact which has subsequently come to his notice, the Court should cancel the reference even though it was originally made on the joint application of both the parties. (*Skemp, J.*) KARAM DIN *v.* MOHAMMAD DIN. **166 I.C. 1008=9 R.L. 454 (1)=38 P.L.R. 480 (1)=A.I.R. 1937 Lah. 71.**

——*Reference by party to contract on basis of arbitration clause—Stay by Court—Party charged with fraud—Right to apply to Court for stay of arbitration proceedings.*

The Court has a discretion to stay arbitration proceedings which have been initiated by a party on the strength of an arbitration clause in the contract between the parties. When the questions at issue between the parties involve serious allegations of fraud—one of the parties going to the length of filing a criminal complaint against the other—the party who is charged with fraud has the right to ask the Court that matters which affect his honesty and integrity should be decided in open Court. (*Leach, C.J. and Madhavan Nair, J.*) Laldas Lakshmidas *v.* J. D. Italia. **48 L. W. 399=178 I.C. 761=11 R.M. 494=1938 M.W. N. 924=A.I.R. 1938 Mad. 918=(1938) 2 M.L.J. 531** (2).

——Reference made in pending suit without Court's intervention—Award if compromise. *See* C. P. Code, O. 23, R. 3. **1939 Rang. L.R. 280**(**F.B.**)

——*Reference to—Validity—Mutwalli—Declaratory suit by.*

In a suit for a declaration that the plaintiff is the mutwalli of a mosque, reference to arbitration is not illegal and the decree passed in accordance with the award is not invalid. (*Bhide, J.*) Fazal Rahman *v.* Zainab Bibi. **A.I.R. 1940 Lah. 123.**

——Reference to arbitration—Leave of Court. *See* C. P. Code, O. 32, R. 7.

Umpire.

——*"Umpire"—Meaning of.*

The ordinary meaning of the word 'umpire' is a person who is to decide upon disagreement. (*Weston, J.*) Louis Dreyfus & Co. *v.* Hemandas Hotchand. **187 I.C. 262=12 R.S. 224=A.I.R. 1940 Sind 37.**

——*Umpire—Failure to appoint—If fatal.*

In a case where the arbitrators disagreed on the matters referred to them, and the necessity for umpire became established, it may well be that the omission of the arbitrators to appoint an umpire before they entered upon the submission would be fatal to the whole proceedings. But when, no disagreement between the arbitrators occurred, the omission to make the appointment of umpire is not a defect amounting to legal misconduct on the part of the arbitrators and sufficient to vitiate the award made. (*Weston J.*) Louis Dreyfus & Co. *v.* Hemandas Hotchand. **187 I.C. 262=12 R.S. 224=A.I.R. 1940 Sind 37.**

Miscellaneous.

——*Contemporaneous civil suit—Absence of stay—Validity of arbitration proceedings—Continuation—Procedure.*

Where the same matter comes before two tribunals, a public tribunal appointed by the Sovereign and a domestic forum chosen by the parties, and no order is made staying the proceedings either under S. 19, Arbitration Act, or under Para. 2 of Sch. II, C. P. Code, before the one or the other, the public tribunal alone must decide that matter and cannot be hampered by any adjudication thereupon made by the private tribunal. Neither can that adjudication be pleaded as a bar to the action nor can it be allowed to affect the merits of the decision given by the public tribunal. Thus the effect of the institution of the suit is that all proceedings before the arbitrators subsequent to the institution of the suit are invalid. But if after the institution of the suit a party still wishes to proceed with the arbitration, his remedy is to apply for stay, which the Court will grant, unless there are weighty reasons to the contrary, leaving the parties to proceed with the arbitration from the stage at which the proceedings were on the date of the institution of the suit. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) Jowahir Singh Sundar Singh *v.* Fleming Shaw & Co., Ltd., Amritsar and Karachi. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

——*Misconduct—Party aware of the claim against him—Arbitrator supplying him with the details of the claim and passing award on the same day—Propriety.*

Where an arbitrator supplied the litigant appearing as a party before him with details of the claim against him and proceeded to give his award on the same day,

Held, he should have given the party further opportunity to meet the case set up against him. But his failure to do so does not amount to judicial conduct, where the party has not been ignorant of the nature of the claim when he appeared before the arbitrator. Ordinarily a litigant appearing as a party before an arbitrator is entitled to know the details of the claim which has been prepared against him. (*Jai Lal, J.*) Kidar Nath Ram Chandra *v.* Secretary of State. **171 I.C. 361=40 P.L.R. 643=A.I.R. 1938 Lah. 223.**

ARBITRATION ACT (IX OF 1899)—Applicability—Contract of insurance accepted in Presidency Town—Contract containing arbitration clause. *See* C. P. Code, Sch. II, Para. 17. **1937 A.L.J. 98=A.I.R. 1937 All. 208.**

——*Applicability of provisions—Architect settling cost of work redone.*

When a member of a firm of architects is holding an inquiry as to the cost of certain work redone, on the refusal of the contractor to do so, he acts in his capacity as an arbitrator and is subject to the provisions of the Arbitration Act. (*Rupchand Bilaram, Ag. J.C. and Lobo, A.J.C.*) Harnamsing *v.* Parsram Lalchand. **173 I.C. 401=10 R.S. 210=A.I.R. 1938 Sind 45.**

——**S. 2 (as amended by U. P. Local Act)**—*Applicability.*

Under the Arbitration Act as amended by the U. P. Local Act, in order to make the Act applicable, the parties themselves should agree that the arbitration proceedings should take place under the Arbitration Act. It is, therefore, necessary that there should be a specific reference in the agreement to the Indian Arbitration Act, and a mere reference to arbitration in general would not bring in the operation of the Act. (*Sulaiman, C.J and Bajpai, J.*) Guardian Assurance Company, Ltd. *v.* Shiva Mangal Singh. **I.L.R. (1937) All. 234=1937 A.L.R. 265=167 I.C. 897 =9 R.A. 585=1937 A.L.J. 98=1937 A.W.R. 52 =A.I.R. 1937 All. 208.**

——**S. 2**—*Award relating to mortgaged property situated at Sialkot—Jurisdiction of Amritsar Court to make order filing award.*

Though S. 2, Arbitration Act, does not expressly refer to the provision of the law contained in S. 16, C. P. Code, the implication is obvious when it states where the suit could be instituted. Where mortgaged property which was involved in the award is situated at Sialkot, the Court of the District Judge at Amritsar has no jurisdiction to make an order filing the award, inasmuch as if the subject-matter submitted to arbitration were the subject of a suit, the suit could not be instituted at Amritsar. (*Addison and Din Mohammad, JJ.*) Gopi Chand *v.* Khazan Chand. **178 I.C. 240=40 P.L.R. 598=A.I.R. 1938 Lah. 226.**

——**S. 2**—*Scope—Suit maintainable in Presidency town on account of residence of defendant.*

A case falls within the purview of S. 2 of the Arbitration Act only where the subject-matter in dispute is of such a nature as to be the subject of dispute in a Presidency-town, and not where the subject-matter is not of such a nature and the suit could be filed because the defendant resides there. (*Sulaiman, C.J. and Bajpai, J.*) GUARDIAN ASSURANCE COMPANY, LTD. *v.* SHIVA MANGAL SINGH. I.L.R. (1937) **All. 234=1937 A.L.R. 265 =167 I.C. 897=9 R.A. 585=1937 A.L.J. 98=. 1937 A.W.R. 52=A.I R. 1937 All. 208.**

——**Ss. 3, 4** (a) and 11 (2)—Reference to arbitration by company—Award, where to be filed. *See* COMPANIES ACT, S. 152 (3). **44 C.W.N. 285.**

——**S. 4**—"*Submission*"—*Rules of Merchants' Association requiring members to submit differences* inter se *to arbitration—Written undertaking to abide by rules signed by members—If written agreement to submit.*

The words of the definition of 'submission' in S.4 of the Arbitration Act are sufficiently wide to include cases where the agreement is made without, at the time it is made, there being any differences between the parties, either in existence or in direct contemplation. Also it is not necessary, to constitute a 'submission' that the terms of the agreement should all be contained in one document. Such an agreement may be found in correspondence consisting of a number of letters. The printed rules of Merchants' Association requiring all members in all cases of dispute or differences *inter se* arising from certain transactions to submit the said disputes or differences to arbitration together with the written undertakings to abide by the rules, signed by members at the time of their admission as members are sufficient to constitute the written agreement to submit required by S. 4. (*Weston, J.*) KOTUMAL POKARDAS *v.* ADAM HAJI. **I.L.R.(1939) Kar. 769= 186 I.C. 272=12 R.S.189=A.I.R. 1939 Sind 357.**

——**Ss.4** (b) and 19—'*Submission*'—*Arbitration clause in contract.*

An arbitration clause in a contract for sale of goods ran thus:—"If any dispute arises with regard to this indent or to relative goods, it shall be optional to you (seller) to release me from the contract and take the goods back or to refer the dispute in respect of Japanese goods to the arbitration of Japanese Commercial Museum and in respect of other goods to the arbitration of the Bengal Chamber of Commerce or to two merchants, one to be nominated by each party, and I agree to accept the decision of the arbitration as final." Though the defendant offered to refer the dispute to the arbitration, the plaintiff filed a suit claiming damages for breach of contract. The defendant made an application for stay of the suit.

Held, that the arbitration clause fulfilled the definition of "submission" as given in the Indian Arbitration Act and that the test was whether both parties were bound by that clause and not whether a right had also been expressly given to the opposite party to initiate arbitration proceedings.

Held, further, when the plaintiff elected not to release the defendant from the contract, he was bound to refer the matter in dispute to arbitration. Further the suit and all proceedings thereunder were stayed. (*R. C. Mitter, J.*) BRINDABAN CHANDRA DATTA & CO. *v.* BISHESHWAR LAL. **I.L.R (1937) 1 Cal. 606=174 I.C. 58 =10 R.C. 610=A.I.R. 1938 Cal. 10.**

——**S. 4** (b)—*Submission to arbitration—Essentials.*

In order that there may be a valid submission to arbitration as defined by S. 4, Cl. (*b*) of the Arbitration Act, it is only necessary that there should be a written agreement embodying either directly or by implication all the terms. It is not necessary that each party should sign the submission to arbitration. All that is required is that both parties accept a written document as containing the agreed terms; it might be in the form of a signed document by both parties containing the terms, or a signed document by one party containing the terms and a plain acceptance either signed or orally accepted by the other party, or in the third case, an unsigned document containing the term of the submission to arbitration, agreed to orally by both parties. 56 Cal. 118 and 53 All. 384, Foll. (*Panckridge, J.*) KESHORAM COTTON MILLS *v.* KANHYALAL. **44 C.W.N. 607.**

——**S. 5**—*Applicability—Matter in dispute not within jurisdiction of arbitrators—Remedy of aggrieved party—Application for leave to revoke submission.*

If a matter in dispute submitted to arbitration is not within the jurisdiction of arbitrators, the proper remedy of a party to the submission is to apply to the Court for leave to revoke the submission. If the Court is satisfied that the submission was *ultra vires* it has undoubtedly the power to give leave to revoke the submission to arbitration, and that is the appropriate remedy. (*Cornish, J.*) MADURA MILLS CO., LTD. *v.* KRISHNA AYYAR. **171 I.C. 690=10 R.M. 390=1937 M.W.N. 518= 45 L.W. 405=A.I R. 1937 Mad. 405.**

——**S. 8**—*Refusal by arbitrator to act further till payment of his fees—If amounts to refusal to act.*

Where the arbitrator says that he would act no further till his fees are paid in advance such action amounts to a refusal to act on his part within the meaning of S. 8, Arbitration Act, and a new arbitrator can be appointed in his place. (*Ameer Ali, J.*) PRIYABRATA BOSE *v.* PHANI BHUSAN GHOSE. **174 I.C. 483=10 R.C. 677=A. I.R. 1937 Cal. 523.**

——**S 8** (1) (b)—*Construction—Parties jointly appointing two arbitrators—One of them dying—Court's power to supply vacancy.*

It is an ordinary canon of construction that a section of a statute should be so construed as to render every part thereof consistent with every other part. S. 8 must be read as a whole and Cl. (*b*) of sub-S. (1) must be read as qualified by sub-S. (2). It is consistent with the language of entire section to construe Cl. (*b*) as covering the case of a vacancy where the submission provides for reference to a single arbitrator and any other construction would render Cl. (*b*) of sub-S. (1) inconsistent with the words of sub-S (2). Hence where the parties have jointly appointed two arbitrators and one of the arbitrators dies or a vacancy otherwise occurs, the Court has no power under S. 8 (1) (*b*) to supply the vacancy and appoint an arbitrator. (*Lobo, J.*) RAMJI FURUSHOTAM *v.* HARI SHAMLA. **181 I.C. 337=11 R.S. 215=A.I.R. 1939 Sind 81.**

——**S. 9**—*Appointment of arbitrator before expiry of seven days from notice—Legality.*

The appointment of an arbitrator within seven days from the service of notice on the other party is illegal and the mere embodying of the appointment in a reference on a later date does not affect the invalidity of the appointment. (*Lobo, J.*)

KISHINCHAND SANTRAM *v.* ROCHALDAS. **180 I.C. 143=11 R.S. 170=A.I.R. 1939 Sind 24.**

———S. 9—*Scope—Contract of sale—Arbitration clause—Appointment of arbitrators in contravention of S. 9—Legality.*

K and *M* entered into a contract of sale of certain goods on terms and conditions of the importing office. The contract between the parties contained an arbitration clause which provided that all disputes of whatsoever nature, unless amicably settled, should be referred to two arbitrators, one to be nominated by each under the provisions of the Arbitration Act. Upon a dispute having arisen *K* nominated one arbitrator on its behalf and called upon *M* to nominate one for him within three days. On failure of *M* to do so *K* himself appointed an arbitrator on behalf of *M*. This was in accordance with the arbitration clause contained in the contract between *K* and the importing office. The two arbitrators thus nominated by *K* drew up an award.

Held, that the arbitrators acted without jurisdiction because whatever terms and conditions of the importing office were to be incorporated in the contract between *K* and *M*, the arbitration clause in the contract of the office could not be incorporated by implication because the contract between *K* and *M* actually contained a separate arbitration clause and hence the appointment of another arbitrator by *K* on behalf of *M* was in contravention of the provisions of S. 9, Arbitration Act, and hence illegal. (*Lobo, J.*) KISHINCHAND SANTRAM *v.* ROCHALDAS. **180 I.C. 143=11 R.S. 170=A.I.R. 1939 Sind 24.**

———S. 10—*Duty of arbitrator to follow rules of evidence.*

An arbitrator is not of course bound by the technical and strict rules of evidence. But he must not disregard the rules of evidence which are founded on fundamental principles of justice and public policy. (*Wadia, J.*) ABOOBAKAR LATIFF *v.* RECEPTION COMMITTEE, INDIAN NATIONAL CONGRESS. **171 I.C. 470=10 R.B. 200=39 Bom. L.R. 476=A.I.R. 1937 Bom. 410.**

———S. 11—*Award against minor—Filing of—Appointment of proper guardian—Necessity for—C. P. Code, S. 141 and O. 32, R. 3.*

Under S. 141, C. P. Code, the procedure provided in regard to suits is to be followed, so far as it can be made applicable, in all proceedings in any Court of civil jurisdiction. The presentation of an application by an arbitrator for filing an award under S. 11 of the Arbitration Act comes within the category of "civil proceedings." Where, therefore, the award is against a minor, it is incumbent to make a prayer in the application for the appointment of a proper guardian for such minor under O. 32, R. 3, C. P. Code. If a proper guardian is not appointed, a decree passed against the minor on the basis of the award is a nullity. (*Abdul Rashid, J.*) ARURA *v* PUNJAB ZAMINDARA BANK, LTD **42 P.L.R. 114=A.I.R. 1940 Lah. 164.**

———S. 11—*Filing of award—Jurisdiction of.*

The contention that under the Arbitration Act jurisdiction to entertain proceedings is given to the District Judge alone and the Additional District Judge is not competent to entertain such proceedings is not maintainable as it is opposed to S. 21, Punjab Courts Act, which provides that the Additional District Judge can exercise all the powers of the District Judge, but the District

Judge has to assign such powers to him. Previously a case was on the record of the District Judge, who actually heard it and subsequently it went to the Additional District Judge who disposed of it. No objection was taken by the party to the jurisdiction of the Additional District Judge on that date.

Held, that under the circumstances it must be assumed that the District Judge did assign this case to the Additional District Judge. In any case, the party having taken no objection to the jurisdiction of the Additional District Judge was not entitled to raise it subsequently. (*Jai Lal, J.*) SHIV NATH RAI *v.* MESSRS. LALLO MAL. **182 I.C. 159=12 R.L. 3=A I R. 1938 Lah. 838.**

——S. 11—*Order declining to file award—Appeal.*

There is no provision in the Arbitration Act for appeal against an order refusing to file an award. But an appeal filed through mistake can be heard as a revision. (*Mir Ahmad, A.J.C.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* LEKHU RAM. **173 I.C 11=10 R. Pesh. 49=40 P.L.R. 79 =A.I.R. 1938 Pesh. 3.**

———S. 11 (2)—*Award filed in wrong Court—Proper order.*

If an application to file an award is made in a Court which has no jurisdiction to entertain it, the proper order on it would be, not an order of dismissal, but an order for return of the application for presentation to the proper Court. (*Mitter and Lodge, JJ.*) JHIRIGHAT NATIVE TEA CO., LTD. *v.* B. GUPTA **I.L.R (1940) 1 Cal. 358=188 I.C. 143=44 C.W.N. 285=71 C.L.J. 62=1940 Comp.C. 56=A.I.R. 1940 Cal. 220.**

———S. 11 (2)—Reference to arbitration by company—Award, where to be filed. *See* COMPANIES ACT, S. 152 (3). **44 C.W.N. 285.**

———Ss. 11, 13 and 14—*Application by arbitrator to District Judge for filing award—District Judge transferring file to another Judge—Legality of procedure.*

A dispute between a Bank and *S* was referred to arbitration under the provisions of the Arbitration Act. The arbitrator made an award in favour of the Bank and filed it in the Court of the District Judge. The District Judge transferred the application and award to the Court of the Honorary Sub-Judge who on the acceptance of the award by the parties passed a decree in terms of the award. Subsequently the designations of the various Courts in the province were altered and the Divisional Judge (old style) became the District Judge. The arbitrator and the Bank presented a fresh application in the Court of the District Judge that the award be filed in his Court. The Court directed it to be filed.

Held, that the procedure adopted by the District Judge in sending the file to the Court of the Honorary Sub-Judge was a nullity. All the proceedings were complete when the award was filed by the arbitrator subject to any action which might be taken by the Court under Ss. 13 and 14; the mere presentation of the award amounted to filing of it within the meaning of S. 11 and as it was already filed, a second application for filing it did not lie and the order of the District Judge on that application was a nullity. (*Middleton, J.C. and Almond, A.J.C.*) SAINDITTA MAL *v.* LYALLPUR BANK. **160 I.C. 693=8 R. Pesh. 127 =A.I.R. 1936 Pesh. 2.**

——S. 12—*Extension of time—Discretion of Court—Power to extend time without application by a party.*

Extension of time for making the award under S. 12 of the Arbitration Act is a matter entirely within the discretion of the Court. There is nothing in the section to suggest that the Court should not exercise this power to extend the time unless it had been expressly asked by a party to do so. (*Cornish, J.*) Madura Mills Co., Ltd. *v.* Krishna Ayyar. **171 I.C. 690=10 R.M. 390=1937 M.W.N. 518=45 L.W. 405=A.I.R. 1937 Mad. 405**

——S. 13—*Award remitted re-consideration—Powers of arbitrator—Scope of.*

A Judge remitted an award to the arbitrator and indicated particular matters which had to be dealt with by the arbitrator. In the final award the arbitrator submitted that he dealt specifically with those points and also gave certain directions for carrying out his decision on these matters into effect.

Held, the other changes introduced in the final award were merely incidental or consequential, and that they fell within the scope of the questions remitted to him for re-consideration and that the award was not vitiated. (*Abdul Rashid and Addison, JJ.*) Damodar Das and Sons, Ltd. *v.* Basheshar Nath. **167 I.C. 730=9 R.L. 541 (2)=A I.R. 1936 Lah. 865.**

——S. 13—*Award—Remission in part—Jurisdiction of Court.*

A Court in remitting an award under S. 13 of the Arbitration Act must remit it as a whole and has no jurisdiction to remit only a part of the award for re-consideration. (*Wadia, J.*) Aboobaker Latiff *v.* Reception Committee, Indian National Congress **171 I.C. 470=39 Bom.L. R. 476=10 R.B. 200=A.I.R. 1937 Bom. 410.**

——Ss. 13 and 14—*Award—Remission of—Grounds for—If same as for setting aside.*

Under S. 13 of the Arbitration Act, the Court is not bound to remit the award only on the grounds mentioned in para. 14, Sch. II, C. P. Code. An award may generally be remitted on the following grounds: (1) defect patent on the face of the record; (2) mistake on the part of the arbitrator, such that he himself desires a remission of the award to him; (3) discovery of some material evidence subsequent to the making of the award which might have affected the arbitrator's decision; and (4) misconduct. These are not, however, exhaustive. The grounds for remitting an award are much wider than those for setting an award aside under para. 14; but the jurisdiction is statutory and cannot be increased or decreased. (*Wadia, J.*) Aboobaker Latiff *v.* Reception Committee, Indian National Congress. **171 I.C. 470=39 Bom.L.R. 476=10 R.B 200=A I.R. 1937 Bom. 410.**

——S. 14—Petition under—Nature and scope of—Applicability of O. 1, R. 8, C. P. Code. *See* C. P. Code, O. 1, R. 8. **38 Bom.L R. 380.**

——S. 14—*Scope—Question of validity of submission—If can be enquired into.*

The words of S. 14 are sufficiently wide to cover an enquiry into and a decision on the question of the validity of the submission. As the basis of an arbitration is the submission, the improper procuring of an arbitration, which is covered by S. 14 must include the question of the validity of the submission. (*Davis, J. C. and Mehta, A.J.C.*) Rochanbai *v.* Motumal. **31 S. L.R. 55=169 I.C. 623=10 R.S. 10=A.I.R. 1937 Sind 110.**

——S. 14—*Scope—Suit to set aside award on the ground of arbitrator's misconduct—Maintainability.*

Quaere.—Whether a suit lies to set aside an award on the grounds covered by S. 14 of the Arbitration Act, by reason of R. 373 of the Bombay High Court (Original Side) Rules. (*Wadia, J.*) Abdul Gani Sumar *v.* The Reception Committee of the 48th Indian National Congress. **60 Bom. 645=163 I.C. 532=9 R.B. 29=38 Bom.L R. 380=A.I.R. 1936 Bom. 259.**

——S. 15—*Award filed in Court—Conclusive nature of—Remedy of aggrieved party.*

An award, once it is made and filed under the Arbitration Act, is conclusive of the matters which it decides until it has been set aside by legal process. A party dissatisfied with an award may either file a suit to set aside the award or he can apply under S. 14 of the Act. (*McNair, J.*) Bal Krishna Mohta *v.* Brijmohan Biani. **42 C.W N. 367.**

——S. 15—*Award filed in Court—Effect of—Enforceability as a decree—Objection as to jurisdiction of arbitrator or validity of award—If can be raised in execution.*

Award when filed in Court is enforceable as if it were a decree of Court and an executing Court has to treat it as such and execute it. It is open to an aggrieved party to raise the question of the jurisdiction of the arbitrator by instituting a regular suit. But he cannot be permitted to raise the question in execution as the executing Court cannot go into the question as to the validity of the award or the jurisdiction of the arbitrator. (*Rachhpal Singh and Ismail, JJ.*) Krishna Gopal *v* Mst. Lakshmi Bai **I.L.R. (1938) All. 389=175 I C. 297=10 R.A. 676=1938 A.L.R. 412=1938 A L J. 210=1938 A.W.R. (H.C.) 135 =A.I.R 1938 All. 232.**

——S. 15—*Decree passed on award—If a bar to enforce award.*

No decree need be passed on an award to which the Arbitration Act applies. The passing of a decree therefore is a superfluous act for doing which a Judge has no legal sanction. It is consequently a nullity and a surplusage which must be ignored and is no bar to the application to enforce the award. (*Mir Ahmad, A.J.C.*) Peoples Bank of Northern India, Ltd. *v* Lekhu Ram. **173 I. C 11=10 R. Pesh. 49=40 P.L R. 79=A.I.R. 1938 Pesh. 3.**

——S. 15—*Execution of award—Right of holder after transfer of his rights thereunder—C. P. Code, O. 21, R. 16.*

Though an award filed in Court is not a decree it is given the same status as a decree for the purpose of enforcement, with the result that all the provisions of the C. P. Code applicable to execution apply to such award. Therefore the holder of an award is entitled to execute the award, although he may have transferred his rights under it to a transferee unless and until such transferee comes to the Court and applies under O. 21, R. 16, C P. Code. (*McNair, J.*) Anath Nath *v* Monmotha Nath **184 I.C. 652=12 R.C. 263=A.I.R. 1939 Cal. 482.**

——S. 15—*Reference to arbitration by company—Decree passed on award and executed by Court without objection—If* ultra vires—*Points decided in such proceedings—If* res judicata.

Where in a reference to arbitration by a limited liability company a decree is passed by a Sub-Judge and is executed without objection by the judgment-debtor, the question whether the decree could be executed in that Court or not does not become *res judicata*. The decree is a nullity in such arbitrations because it is the award which has to be executed. It follows that the Court should ignore the decree and the execution of such decree is *ultra vires*. *A fortiori* a point decided in such *ultra vires* proceedings cannot become *res judicata*. It is the award which has to be enforced and it can only be enforced by the District Judge and no one else A.I.R. 1933 Pesh. 66, Rel. on. (*Almond, J.C. and Mir Ahmad, J.*) PEOPLES BANK OF NORTHERN INDIA, LTD. *v.* PADAM LAL. **177 I.C 659=11 R. Pesh. 30=A.I.R. 1938 Pesh. 54.**

——**Ss. 15 and 11**—*Award made, but not filed, before institution of suit—Power of arbitrator to file award.*

Where a valid award has been made, but not filed, before the institution of a suit by one of the parties to the arbitration proceeding, the arbitrator, although he is *functus officio* in his judicial capacity when the suit is instituted, is not prevented from acting in a ministerial capacity in filing the award. (*McNair, J.*) BALKISSEN MEHTA *v.* BRIJMOHAN. **41 C.W.N. 1198.**

——S. 19—*Application under—Nature of—Order on—Revision.*

An application made under S 19, Arbitration Act, is not an interlocutory proceeding or a mere branch of a suit within the meaning of S. 115 of the Code. It is a case in itself and decides finally between the parties whether the matter shall or shall not be decided by arbitration; therefore an application in revision will lie and is not excluded by S. 115. (*Davis, J. C. and Lobo, A.J.C*) INDO PERSIAN TRADING CO. *v* PARMANAND HARNAMSINGH **166 I.C. 541=9 R.S. 146=A.I.R. 1936 Sind 205.**

——S. 19—*Application for stay—Onus.*

Where an application is filed by a defendant for stay of the suit under S. 19 of the Arbitration Act, the onus is always on the plaintiff to show why he should not be bound by an agreement to refer disputes to arbitration. (*Addison, J.*) JUBILEE CHAMBER OF COMMERCE, LTD., RAWALPINDI *v.* LALA AMRIT SHAH. **42 P.L.R. 48=A.I.R. 1940 Lah. 180.**

——S. 19—*Arbitration and civil suit—Award prior to stay of suit—Legality—Stay of suit—If can be ordered.*

The defendant submitted a dispute to the arbitration under an agreement to do so. The plaintiff instituted a suit in the Civil Court relating to the same dispute in breach of the agreement. The plaintiff subsequently filed an application under O. 39, R. 1, C. P. Code, for injunction, restraining the arbitration from continuing its proceedings, pending the suit. The arbitration proceedings continued in spite of this application, on which no order had been passed and an award was delivered. Subsequently during O. 39, proceedings, the defendant filed an application under S. 19, praying for the stay of the suit as the award had already been delivered. The defendant had taken no other proceeding or filed any written statement in the suit concerning the dispute.

Held, that the award was null and void as an order staying the suit under S. 19 of the Act was not obtained before the award.

Held, further, that the declaration that the award was null and void did not mean that the defendant's application under S. 19 should be dismissed. On the other hand the Court was bound to consider and decide it according to law. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) JOWAHER SINGH SUNDER SINGH *v.* FLEMING SHAW & CO., LTD. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

——S. 19—*Clause in agreement to refer to arbitration, dispute arising out of agreement—Plaint alleging rescission of contract on ground of breach of its terms by defendants—Plaint raising issue as to factum of contract—Suit, if may be stayed in either case.*

Where an agreement in writing was entered into between the plaintiffs and the defendants, which contained a clause, whereby it was provided that in case of disputes between the parties arising out of the agreement, the matter should be submitted to arbitration, and the plaintiff's case is that the contract was rescinded by him as the defendants were gulity of a breach of some of the written as well as the oral terms of the contract relating to payment, the dispute between the parties arises out of the agreement, the question being whether the defendants committed a breach of the terms, and the defendants are, therefore, entitled to an order staying the suit of the plaintiffs for a declaration that the contract has been validly rescinded. But where the case of the plaintiffs is that the person who signed the contract as representing them had no authority to do so, that there was, therefore, no contract between the parties and, accordingly, no agreement to refer to arbitration, a suit by them for a declaration that they did not enter into the alleged contract is not, so far as it deals with that contract, in respect of a matter referred within the meaning of S. 19 of the Arbitration Act, and the defendants are not, therefore, entitled to a stay of the suit. (*Panckridge, J.*) HARI NAGAR SUGAR MILLS, LTD. *v.* SKODA (INDIA), LTD. **41 C.W.N. 563.**

——S. 19—*Order refusing stay—Appeal or revision.*

Obiter.—From an order refusing stay under S. 19, no appeal lies; only revision is competent. (*Coldstream, J.*) REGAL THEATRES, LTD. *v.* GURCHARAN SINGH. **39 P.L.R. 423=172 I.C. 432=10 R.L. 323=A.I.R. 1937 Lah. 206.**

——S. 19—*Right to invoke Act—Onus.*

It is for the party who is invoking the Arbitration Act to prove his right so to do. (*Panckridge, J.*) KESHORAM COTTON MILLS *v.* KANHYALAL. **44 C.W.N. 607.**

——S. 19—*Stay of suit—Award declared nullity—Arbitration proceedings—If can continue.*

Any proceedings taken after the institution of a suit on a reference made prior to the institution of the suit are no doubt null and void; but a suit can still be stayed and the parties cannot be compelled to waive their right to move the private tribunal upon which they had agreed at the time the contract was entered into between them. The arbitration proceedings can legally continue on the stay of the suit in spite of the decision that the award already made is a nullity. (*Din Mohammad, J.*) Hukam Chand *v.* Toya Menka Kaisha, Ltd. **A.I.R. 1940 Lah. 265.**

——S. 19—*Stay of suit—Grounds—Allegations of fraud, misrepresentation and coercion.*

If allegations of fraud and coercion go to the very root of the agreement to refer to arbitration, or if they relate to matters outside the scope of the submission, the only forum to decide that matter is the Civil Court. In either of these cases S. 19 will *ex necessitate rei* be inapplicable. If, on the other hand, misrepresentation, fraud or coercion is alleged to have been committed in reference to matters which are sought to be proved in proof or disproof of the contentions of the parties relating to a dispute which has been, or can be, validly referred to arbitration in accordance with the original agreement, this will not necessarily be a ground for declining to stay the suit. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) Jowahir Singh Sunder Singh *v.* Fleming Shaw & Co., Ltd., Amritsar and Karachi. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

——S. 19—*Stay of suit ordered on misrepresentation—Revival of suit—Inherent power of Court.*

An order staying the suit, if made on a fraudulent misrepresentation can be reversed by the Court making the order, if it is satisfied of the fraud and misrepresentation of the other side and the suit can in the circumstances be revived. Similarly, the Court is empowered under S. 151, C. P. Code, to make any order as may be necessary for ends of justice or to prevent abuse of the process of the Court. Nothing in the Arbitration Act bars this action. (*Din Mohammad, J.*) Hukam Chand *v.* Toya Menka Kaisha, Ltd. **A.I.R. 1940 Lah. 265.**

——S. 19—*Stay of suit—If can be ordered after award.*

There is nothing in S. 19 of the Arbitration Act to justify the conclusion that an order of stay can be passed under the section even after the award had been given. The object of passing an order staying the suit under S. 19, is to allow the parties to proceed with the arbitration. But if before the application for stay is made or has been disposed of the arbitrators have already made the award, there will be no point in making the stay order. In that event, the proper course for the opposite party would be to plead the award in bar of the suit and not to obtain an order staying the suit pending arbitration which had already terminated. (*Tek Chand, Offg. C.J. and Abdul Rashid, J.*) Jowahir Singh Sundar Singh *v.* Fleming Shaw & Co., Ltd., Amritsar and Karachi. **176 I.C. 352=11 R.L. 201=A.I.R. 1937 Lah. 851.**

——S. 19—*Stay—Grant of—Conditions—Proof of existence of contract or submission in writing—Necessity—Duty of applicant for stay—Denial of contract or submission—If justifies refusal of stay.*

S. 19 of the Arbitration Act is in the nature of a summary procedure and does not normally include any lengthy or protracted inquiry or investigation. The Arbitration Act requires a submission in writing, and the fact that a contract or submission in writing exists has to be established by the person who comes to Court and applies for a stay. On the assumption that a contract which contains a submission in writing exists, an application may be made, because on that assumption the arbitrators have jurisdiction. If the fact of the contract itself is disputed, the arbitrators cannot decide the point, and the Court in the normal course would refuse a stay. Merely sending contract notes by a party to another without any confirmation notes signed by the other party does not amount to a submission in writing as required by the Arbitration Act. (*Kania, J.*) Shriram Hanutram *v.* Mohanlal & Co. **I.L.R. (1940) Bom. 249=187 I.C. 494=12 R.B. 460=41 Bom.L.R. 1293=A.I.R. 1940 Bom. 93.**

—S. 19—*'Step in the proceedings'—Defendant asking for adjournment of hearing of plaintiff's summons to compel him to file written statement—Adjournment obtained by consent and without prejudice to defendant's application for stay of suit—Effect of.*

Where the defendant asked for an adjournment of the hearing of the summons taken out by the plaintiff to compel him to file the written statement, and the adjournment was obtained by consent and without prejudice to the defendant's pending application for stay of the suit.

Held, that the defendant did not take any step in the proceedings within the meaning of S. 19. (*Lort Williams, J.*) Dwarka Das & Co. *v.* Chain Roop Singhee. **I.L.R. (1937) 2 Cal. 63=41 C.W.N. 1261.**

ARCHAKA—Grant—If to deity or Archaka burdened with service. *See* Grant—Religious Endowment. **(1937) 2 M.L.J. 413.**

——Right of—Right to claim adversely to temple. *See* Grant—Religious Endowment. **(1937) 2 M.L.J. 368.**

ARMS ACT (XI OF 1878). S. 4—*'Ammunition'—Empty cartridge cases.*

An empty cartridge case is undoubtedly a part of ammunition within the meaning of S 4 of the Arms Act and its possession is an offence under that Act. (*Allsop and Ganga Nath, JJ.*) Emperor *v.* Bhopal Singh. **162 I.C. 912=8 R.A. 915=37 Cr.L.J. 727=1936 A.L.J. 657=1936 A.W.R 216=1936 A.Cr.C. 91=1936 Cr. C. 504=A.I.R. 1936 All. 392.**

——S. 4—*"Ammunition"—Lead bullets.*

Bullets made of lead are not excluded from the terms of the Arms Act. A piece of lead in the shape of a bullet or in the shape of shot is certainly ammunition or a part of ammunition. Lead as such which is not in such a shape is excluded from the meaning of the term, although lead can be made up into cartridges. (*Allsop and Ganga Nath, JJ.*) Emperor *v.* Bhopal Singh. **162 I.C. 912=8 R.A. 915=37 Cr.L.J. 727=1936 A.L.J. 657=1936 A.W.R. 216=1936 A.Cr.C. 91=1936 Cr.C. 504=A.I.R. 1936 All. 392.**

——S. 4—Carrying gun without percussion cap—If 'armed'. *See* Arms Act, Ss. 19 (*e*), 13 and 4, **A.I.R. 1937 Nag. 213.**

——S. 4—*'Spear'—If includes spear-head.*

As the word 'spear' is used in S. 4 of the Arms Act in contradistinction to spear-head, a spear cannot be held to include spear-head. (*Iqbal

Ahmad, J.) Ram Brich *v.* Emperor. **167 I.C. 935=9 R.A. 600=38 Cr.L J. 511=1937 A.L.R. 285=1937 A.Cr.C. 25=1936 A.W.R 1289=1937 A.L.J. 41=A I.R. 1937 All. 228.**

——S. 13—*Intention—Person found going about with 'arms'—Presumption.*

Obiter.—A man who is found going about with a pistol, gun, sword or other weapon which comes within the definition of 'arms' must, in the absence of proof to the contrary, be presumed to be carrying it with the intention of using it, should an opportunity for using it arise This presumption is further strengthened where the accused is coming back from a jungle. (*Grille and Gruer, JJ.*) Local Government *v* Gajrajsingh. **I.L.R. (1937) Nag. 488=168 I.C 879=9 R.N. 278=38 Cr.L.J. 639=A.I.R. 1937 Nag. 213.**

——**Ss. 19 and 20**—*Relative applicability—Scope of S. 20.*

It is difficult to lay down any general rule as to what cases fall under S. 20 and what cases under S. 19, Arms Act. Every case must be decided on its own facts. S. 20 is not confined to cases where import or export of arms is attempted and applies to cases where a person is concealing a weapon. Where certain arms and ammunition were found tied and concealed under the cot of the accused in a room in a hostel, it must be presumed that the intention of the accused was not only to conceal them from the boys of the hostel but also from any public servant who may happen to come to the hostel and hence they are guilty under S. 20 of the Act. (*Thomas, C. J.*) Jagdish Dutt Shukla *v.* Emperor. **188 I.C. 110=1940 A. Cr. C. 69=12 R.O. 424=1940 O.L.R 306=41 Cr.L. J. 545=1940 O.A 421=1940 O.W.N. 481.**

——**Ss. 19 (e), 13 and 4**—*Offence under—Carrying gun without percussion cap.*

The word 'arms' is defined in S. 4, and it includes part of arms. It would, therefore, include a gun *minus* a percussion cap, and a person carrying that gun would be going armed with arms within the meaning of S. 13, though it could not immediately be fired. The absence, therefore, of the percussion cap would not be fatal to a prosecution under S. 19 (*e*) of the Arms Act. (*Grille and Gruer, JJ.*) Local Government *v.* Gajrajsingh. **I.L.R. (1937) Nag. 488=168 I.C. 879=9 R.N. 278=38 Cr.L.J. 639=A.I.R 1937 Nag. 213.**

——**S. 19 (f)**—*Applicability—Servant carrying unlicenced gun of master—Absence of knowledge that gun was not licensed—Offence—Sentence—If severe punishment called for.*

A person who merely assists the owner of a licensed weapon by carrying it for him or taking it somewhere for him may be said to assist the owner in doing a perfectly legal act, for the owner, being the licensee, is entitled to have the gun in his possession. But if the weapon be an unlicensed weapon neither the actual owner nor his servant or any one to whom he entrusts it can be said to be engaged in a legal act, because the possession in that case is illegal, whether it be in the possession of the owner or of his servant. Technically therefore a person who carries an unlicensed gun of his master is guilty of an offence under S. 19 (*f*) of the Arms Act. But in the absence of proof that the servant had any knowledge that the gun which he was carrying for his master was unlicensed the offence of which he is guilty does not call for a severe

punishment. (*Agarwala and Varma, JJ.*) Emperor *v.* Lalman Tharu. **167 I.C. 352=9 R P. 409=38 Cr.L.J. 409=18 Pat L.T. 88=3 B R. 298=1937 P.W.N. 78=A I R. 1937 Pat. 347.**

——**S. 19 (f)**—*Applicability—Two persons in joint possession of revolver—Offence.*

S. 19 (*f*) of the Arms Act was never intended to cover a case of two persons making temporary use of a revolver in order to foist a false case on another. That two people should jointly own a single revolver is itself an unusual circumstance. (*King, J.*) Subbia Goundan *v.* Emperor. **1937 M.W.N. 572 (2).**

——**S 19 (f)**—*Conviction—Grounds for—Discovery of arms in house of accused —Sufficiency.*

Where the only evidence for the prosecution is that a miscellaneous collection of arms and ammunition was found in a house belonging to the accused, it is not safe to convict him of an offence under S. 19 (*f*) of the Arms Act, when there is no clear evidence that the accused was living in the house until within a short period before the discovery. (*King, J*) Ramalinga Goundar *v.* Emperor. **172 I.C. 498=10 R M. 459=39 Cr.L. J. 147=1937 M.W.N. 878=46 L W. 522=A.I R. 1937 Mad. 975=(1937) 2 M.L.J. 620.**

——**S. 19 (f)**—*Exclusive possession not proved —Conviction.*

An accused was charged under S. 19 (*f*) of the Arms Act and the only evidence against him was that at his instance a place was dug up in the house of another person wherefrom a pistol and some cartridges were recovered, but during the commission of robbery he was not alleged to be armed with a pistol; moreover the person from whose house the pistol and cartridges were recovered was suspiciously withheld by the police.

Held, that such exclusive possession was not established against the accused as would justify his conviction for the offence of possessing a pistol without a licence. (*Din Mohammad, J.*) Maru *v.* Emperor. **172 I.C 351=10 R.L. 301=39 Cr.L.J. 119=A.I.R. 1937 Lah. 561.**

——**S. 19 (f)**—*"Possession"—Arms concealed in railway premises and discovered on accused's information—If in possession and control of accused.*

Where an unlicensed gun, on the information of the accused, was recovered from the railway premises within the railway fencing, which place was accessible to the public, and a path was running close by.

Held, that no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments and hence in the eye of the law he must be deemed to be in possession and control of the gun. (*Collister and Bajpai, JJ.*) Emperor *v.* Chokhey. **I L.R. (1937) All. 710=170 I.C. 453=1937 A.L J. 715=1937 A.Cr.C. 105=1937 A.L R. 661=38 Cr.L. J. 910 (2)=10 R.A. 108=1937 A.W.R. 616=A.I. R 1937 All 497.**

——**S. 19 (f)**—*Possession of arms—Several people occupying house—Head of family—If presumed to be in possession.*

What the prosecution has to prove under S. 19 (*f*), Arms Act, is that the accused has the arms in his possession or control. Where several people occupy a house, it should be presumed that the head of the family is in possession and control of everything in the house including unlicensed arms. It is of course open to him to rebut that presumption by any evidence which he can adduce. (*Middleton, J. C and Almond, A. J. C.*) EMPEROR *v.* MIR AHMAD. **169 I C 681=10 R. Pesh. 9=38 Cr.L.J. 838=A.I.R 1937 Pesh 73.**

——S 19 (f)—*Possession or control—Fire-arms concealed in master's garden—Servant aware of same—If in possession or control—Conviction—Legality.*

Because a man happens to know that there are illegally concealed in his master's garden a revolver and cartridges, it cannot be held that they are necessarily in his possession or control; and he cannot be convicted of an offence under S.19(*f*) of the Arms Act. (*Cunliffe and Henderson, JJ*) CHERU SHEIKH *v.* EMPEROR. **40 C.W.N. 1374.**

——S. 19 (f)—*Possession of spear-head in Ghazipur District—Conviction for—If justified.*

The notification dated 9th May, 1934, issued by the U. P. Local Government does not prohibit the possession of a spear-head in the District of Ghazipur. The word 'spear' used in that notification cannot be extended to spear-head, in view of the language of S. 4 of the Arms Act. Accordingly, the possession of a spear-head in Ghazipur District cannot justify a conviction under S. 19 (*f*) of the Arms Act. (*Iqbal Ahmad, J.*) RAM BRICH *v.* EMPEROR. **167 I.C. 935=9 R. A. 600=38 Cr.L.J. 511=1937 A L R. 285=1937 A.Cr C. 25=1936 A W.R. 1289=1937 A.L.J. 41 =A I.R 1937 All. 228.**

——S. 19 (f)—*'Possession"—Weapon and other articles in room of house of joint family—Absence of evidence as to who is in possession to the exclusion of others—Conviction of head of family and all other male members—Legality.*

During the search of a house belonging to a joint family by the police, a weapon, some gunpowder and other articles were found; the head and manager of the joint family and the other male members of the family were prosecuted and convicted under S. 19 (*f*) of the Arms Act. The articles were found in a loft in one of the rooms in the house, but there was no evidence that the room in question or the weapon was in the particular or exclusive possession of any particular member of the family.

Held, that it could not be inferred that the weapon was in the possession of any other person than the head and manager of the family and therefore he alone was liable to conviction and that the convictions and sentences in respect of the other members must be set aside. (*Agarwala and Madan, JJ.*) MANGAR KOIRI *v.* EMPEROR **15 Pat. 696=165 I.C. 803 (1)=17 Pat L T. 573= 1936 Cr.C. 820=1936 P.W.N. 908=38 Cr.L.J. 100=9 R.P. 216=A.I.R 1936 Pat. 512.**

——S. 19 (f)—*Servant of licensee carrying latter's gun to his house under his orders—Conviction of—Sustainability.*

A servant of a gun licensee who is merely carrying the gun of his master to the latter's house under his orders cannot be held liable to conviction under S. 19 (*f*), Arms Act. (*Lakshmana Rao, J.*) VEERASWAMI *v.* EMPEROR. **187 I C. 120=12 R M. 699=41 Cr.L J 400=1939 M. W.N. 1260=A.I.R 1940 Mad 257.**

——Ss. 19 and 20—*Concealment of arms in loin cloth—Attempt to escape when challenged by Police—Offence committed.*

Where the accused who was travelling on horseback at 4-30 in the morning attempted to escape when challenged by two *sowars* of the mounted police, and he was found carrying a spear-head concealed in his loin cloth.

Held, that the offence fell not under S. 19 but under S. 20 of the Arms Act. (*Skemp, J.*) JODH SINGH *v.* EMPEROR. **179 I.C. 897=11 R.L. 650= 40 Cr.L.J. 279=40 P.L.R. 921=A.I.R. 1939 Lah. 17.**

——Ss. 19 (f) and 23—*Person holding arm after expiry of licence—Offence.*

A man who possesses an arm for which he holds an expired licence does not do so "under that licence and in the manner and to the extent permitted thereby." Accordingly he commits an offence under S. 19 (*f*) and is not punishable under S. 23. (*Middleton, J.C.*) ZAINUL-ABDIN *v.* EMPEROR. **167 I.C. 191=9 R. Pesh. 84=38 Cr. L J. 396=A.I.R. 1937 Pesh. 30.**

——S. 20—Scope and applicability. *See* ARMS ACT, Ss. 19 AND 20. **1940 O.A. 421=1940 O.W. N. 481=188 I.C. 110.**

——S. 29—*Scope of—Trial under S. 19-F by City Magistrate who was also Additional District Magistrate empowered with powers of District Magistrate—Sanction—Necessity.*

Where a City Magistrate who is also the Additional District Magistrate empowered with the powers of District Magistrate tries a case under S. 19-F, it cannot be said that sanction under S. 29 is unnecessary because he exercised the powers of a District Magistrate as well. Even in such a case trial without sanction under S. 29 is illegal. Sanction under S. 29 can only be granted on a consideration of the facts connected with the prosecution and it cannot be said that the Magistrate tried the case after granting sanction to himself in his capacity as Additional District Magistrate; for having granted the sanction in that capacity the case cannot be tried by the Magistrate granting the sanction whether he acts as Additional District Magistrate or City Magistrate. The trial therefore is illegal. (*Lobo, J. C.*) YUSAF UMAR *v.* EMPEROR. **I.L.R. (1940) Kar. 296=189 I C. 29=A.I.R. 1940 Sind 107.**

ASSAM BIJNI SUCCESSION ACT (II OF 1931)—*Applicability outside—Assam.*

The Bijni Succession Act applies to the status of the holder of the Raj wherever the properties appertaining to the Raj may be situate. It was intended by the Assam Legislature that the Act should operate even outside the limits of the province of Assam and was within its authority in legislating on that footing. The scheme of an Act may be such as to affect the properties outside the territorial limits of jurisdiction of a particular Legislature. This generally happens when the legislation is intended to act through a person who is within its jurisdiction. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726 =64 C.L J. 212=A.I.R 1936 Cal. 593.**

——*Scope—If confiscatory.*

The legislature in passing the Bijni Succession Act has passed no provision forfeiting or confiscating the property of any person. It has merely declared a rule of succession which according to it is the customary law and has only supplemented that law where in its view, it needed supplementing. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA

NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

——*Scope—If* intra vires.

The Assam Bijni Succession Act is *intra vires* the Assam Legislature. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I C 615=9 R.C. 726=64 C.L. J. 212=A.I R. 1936 Cal. 593.**

——S. 1—*Act, if public Act or local Act.*

The Bijni Succession Act, even though it may be regarded as local and personal in some of its aspects, is none the less a public Act. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I C 615=9 R.C. 726 =64 C L J. 212=A.I.R. 1936 Cal. 593.**

——**S. 4 (1)**—*"With title dating back", etc.—Force and effect of.*

The words "with title dating back", etc., cannot be taken apart from the rest of the passage and treated as a mere recital and not as a part of the enactment. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I C. 615=9 R C. 726=64 C.L.J. 212=A.I. R. 1936 Cal. 593.**

——**S. 4 (1) and (2)**—*Declarations in—If law.*

The declarations contained in sub-Ss. (1) and (2) of S. 4 are 'law'. They are such declarations as a local legislature of a province, otherwise competent, is empowered to enact. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB **167 I C 615=9 R.C. 726=64 C.L.J. 212=A.I.R. 1936 Cal. 593.**

——**S. 4 (1) and (2)**—*Scope—Claim based on title by adverse possession—If barred.*

The Bijni Succession Act, 1931, is confined to the succession to the Raj and any title otherwise than on the basis of succession, which any body may have to the properties of the Raj or any portion thereof, is clearly outside the scope and purview of the enactment. The only title that sub-Ss. (1) and (2) of S. 4 purport to declare, and the only title which S. 8 speaks of, is title as holder of the Raj on the basis of succession either by nomination or by appointment and no title based on any other ground. A claim solely based on an alleged right of succession to the Raj is therefore hit by sub-Ss. (1) and (2) of S. 4 and is barred, but a claim based upon an alleged title acquired by adverse possession, even though that claim is in respect of the properties which constitute the Bijni Raj, as defined in the Act, but does not concern any question of status as the holder of the Raj or any question of succession, is not barred by the Act. The title declared by the Act is the title to succession based upon the nomination as made on 28th September, 1895, and has nothing to do with any title based on adverse possession and the declaration contained in S. 4 does not affect such title. (*Mukerji and S. K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726 =64 C.L J. 212=A.I.R. 1936 Cal. 593.**

——**S. 9**—*Scope.*

The enactment contained in S. 9 is expressly prospective in its language. (*Mukerji and S.K. Ghose, JJ.*) DEBENDRA NARAIN ROY *v.* JOGENDRA NARAIN DEB. **167 I.C. 615=9 R.C. 726=64 C.L. J. 212=A.I.R. 1936 Cal. 593.**

ASSAM DEBT CONCILIATION ACT (X OF 1936) Ss. 7, 8 and 16—*Decision by Board that debt is time barred—Effect of—Power of Civil Court to deal with such debt.*

A decision by a Debt Conciliation Board that a particular debt covered by a decree is not subsisting as it is barred by limitation, amounts to a decision that the Board has no jurisdiction to deal with such debt. The Civil Court would be competent to deal with any application for the execution of the decree, which might thereafter be filed in such Court, and to decide for itself in those proceedings whether the debt was in effect time-barred. (*Edgley, J.*) PULIN BEHARI *v.* REASAT ALI. **44 C.W.N. 774.**

——**S. 8 (3)**—*Decision of Board—Finality—Extent.*

Under S. 8 (3) of the Act, the Board's decision on the question of jurisdiction would be final. Finality only attaches to the order in so far as it purports to decide that the Board has no jurisdiction to deal with the matter, but, in so far as the order purports to decide whether the alleged debt is in existence or its amount, no finality will attach thereto so as to oust the jurisdiction of the Civil Court. (*Edgley, J.*) PULIN BEHARI *v.* REASAT ALI. **44 C.W.N. 774.**

——**S. 21 (1)**—*Order of Board that particular debt included in application is time barred—Application continuing to be pending before Board—Civil Court, if obliged to suspend proceedings relating to such debt.*

An order of the Board that a particular debt covered by a decree included in the application to it is barred by limitation, disposes of the application in respect of that particular debt inasmuch as it amounts to a decision that the Board has no jurisdiction to deal with it. It, therefore, follows that the Civil Court is under no obligation to suspend thereafter the execution proceedings in connection with that decree, although the application may continue to be pending before the Board. (*Edgley, J.*) PULIN BEHARI *v.* REASAT ALI. **44 C.W.N. 774.**

ASSAM LAND AND REVENUE REGULATION (I OF 1886)—*Beels—Separate Settlement—Power of Government.*

Government has power to settle the Beels separately or to assess them on their own profits. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* BROJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal 629.**

——*Fisheries—If can be assessed separately from land.*

Fisheries included in a lease can be assessed and offered for settlement separately from the other lands of the patta. There is nothing in the Assam Land and Revenue Regulation to prevent such splitting up. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* BRAJENDRA KISHORE ROY CHOUDHURY. **168 I C. 249=9 R.C. 780=64 C.L.J. 458=A.I R. 1936 Cal. 629.**

——**S. 6**—*Scope and effect.*

S. 6 of the Assam Land and Revenue Regulation means that for purposes of settlement of land revenue, and for exercising the powers conferred by the Regulation, Government would not recognise any other species of right over land save and except those which are specified in that section. But that does not mean that as between party and party, these rights could not be acquired under the provision of laws which are also in force in Assam, or that the rights already acquired would stand confiscated. (*M. C. Ghose and Mukherjea, JJ.*) ASRABULLA *v.* KIAMATULLA HAJI CHOUDHURY. **I L.R (1937) 2 Cal. 86=171 I C. 785=10 R C. 305=66 C L.J. 284=41 C.W.N. 503=A I.R 1937 Cal. 245.**

——S. 6 (b)—*Right founded on adverse possession is legally derived.*

A right founded on adverse possession for more than the statutory period is a legally derived right within the meaning of S. 6 (*b*) of the Regulation. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v* BRAJENDRA KISHORE ROY CHOUDHURY. **168 I.C 249=9 R.C. 780=64 C.L.J. 458 =A.I.R. 1936 Cal. 629.**

——S. 6 (b)—*Right under—Right by adverse possession—If legally derived right—Long possession—Effect of.*

The law does recognise a right founded on adverse possession for more than the statutory period to be a legally derived right, and there can be no question that a right acquired by prescription is a legally derived right within the meaning of S. 6 (*b*) of the Assam Land and Revenue Regulation. The Indian law like the English law practically transmutes long possession of real property into ownership by bringing to an end that right of the owner. (*D. N. Mitter and Rau, JJ.*) HANIFULLA *v.* BRAJENDRA KISHORE ROY CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L. J. 458=A I.R. 1936 Cal. 629.**

——Ss. 8 and 9—*Scope and effect—Lease—Acquisition of rights of landholder under—Re-settlement—Clause in* potta *providing for forfeiture—Validity—Abandonment of rights—Proof.*

Where the lessees under a lease have acquired the status of a landholder and acquired heritable rights and the right of use and occupation, the same cannot be taken away by the insertion of a forfeiture clause in a *potta* executed at a re-settlement which would really mean surrender at the end of the term of the lease valuable rights which have been acquired by reason of the lessees being the landholders within the meaning of S. 8. Such a clause would be *ultra vires* under the *statute* and cannot be legally enforced by the Government. Nor can it be said that the lessees have, by reason of the clause in the *potta*, contracted themselves, out of their rights. In order to establish that there has been an abandonment of their rights by the *potta*, there must be something to show in the most explicit terms that the parties understood when accepting the *potta* that they were giving up a very valuable right by reason of their being landholders within the meaning of Ss. 8 and 9 of the Regulation. (*D. N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDURI *v.* SECRETARY OF STATE FOR INDIA. **167 I.C. 124=9 R.C. 633=63 C.L.J. 52=A.I R. 1936 Cal. 774.**

——S. 8 (b)—*Construction—Status of landholder—Acquisition of—Condition—Occupation of land for ten years—If obligatory.*

The language of Cl. (*b*) of S. 8 of the Assam Land and Revenue Regulation does not make it obligatory on the lessees to occupy the land for ten years before he can acquire the status of a landholder. All that is required is that he must hold, irrespective of the period of occupation under a lease, for a term of not less than ten years. The question of the rights of a landholder is not dependent on the length of possession under the lease but is dependent on the lessee's holding under a lease which is given for a term of 10 years. The exception provided for in S. 8 (*b*) would refer to a case where a lessee is holding under a lease to which S. 12 applies (*D. N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDHURI *v.* SECRETARY OF STATE FOR INDIA **167 I.C. 124=9 R.C. 633=63 C.L.J. 52=A.I.R. 1936 Cal. 774.**

——S. 34—*Re-settlement* ultra vires—*Effect—Dispossession under by person claiming in virtue of re-settlement—Right of holder under prior settlement—Mesne profits—Government's liability.*

Where a re-settlement of an estate is *ultra vires* and is not accepted by the party, the latter is entitled to hold on even after the expiry of the term of the previous settlement, and he cannot be dispossessed by the person claiming under the re-settlement. The possession of a person claiming under the Government under the re-settlement which is *ultra vires* is wrongful possession, and the Government is consequently liable for mesne profits to the party entitled to hold under the prior settlement. (*D. N. Mitter and Rau, JJ.*) HANIFULLA *v.* BROJENDRA KISHORE ROY CHOUDHURY. **168 I C. 249=9 R.C. 780=64 C.L.J. 458 =A.I.R. 1936 Cal. 629.**

——S. 70—*Scope of.*

S. 70 was intended to cover only cases of waste land or lands which have been held on behalf of the proprietor Government. (*D.N. Mitter and Patterson, JJ.*) KRISHNA PROSAD ROY CHAUDHURI *v* SECRETARY OF STATE. **167 I C. 124=9 R. C. 633=63 C L.J 52=A.I.R. 1936 Cal 774.**

——Ss. 70 (2) and 76—*Separate account in arrear—Sale of entire estate—Power of Deputy Commissioner—Separate accounts—If must be advertised and put up to sale separately again for next kist.*

On the opening of a separate account under S. 65 of the Assam Land and Revenue Regulation, the liability of all the proprietors still continues to be joint and several. But the separate account in default must first be put up to sale and not the entire estate for such default. If no bids are offered or the bids offered are insufficient to wipe off those arrears, the entire estate is to be put to sale, but after giving an opportunity to the other proprietors to pay up the same within 10 days. As soon as the above-mentioned circumstances combine with the non-payment of the arrears in terms of S 76, the Deputy Commissioner is empowered to put up the entire estate to sale and he cannot again be required to advertise for sale the separate accounts separately and to put them up separately for the default of the next kist. The entire estate can, however, be put up to sale, if and only if, on merging the accounts of the separate accounts into one account, an arrear appears. The net balance has to be struck up to the kist date for which he intends to put it up for sale. He has jurisdiction to include the arrears of the next kist if the advertisement is for the sale of that kist also. (*Mitter and Akram, JJ.*) ABDUL JABBAR *v.* JITENDRA KUMAR PAUL. **I L.R. (1940 1 Cal. 138=186 I.C. 636=12 R.C. 503=70 C.L.J. 451=44 C.W.N. 122=A.I.R 1940 Cal. 77.**

——S. 71—*'Encumbrance'—Interest acquired by adverse possession.*

Obiter.—The interest acquired by a person by adverse possession by remaining in occupation of an estate for 12 years or more before the revenue sale adversely to the old proprietors is not an encumbrance within the meaning of S. 71 of the Assam Land and Revenue Regulation. (*Mitter and Biswas, JJ.*) Jitendra Kumar Pal *v.* Debendra Chandra Saha **180 I C 721=11 R C. 727=42 C W.N. 913=67 C.L J. 380=A.I R. 1939 Cal 50.**

——**S 71.**—*Recorded or unrecorded proprietor repurchasing estate from stranger revenue-sale purchaser—Right to annul encumbrances.*

If a purchaser at a revenue sale who was not a recorded or unrecorded proprietor and who was not responsible for the encumbrance on the estate, later on sells his rights to one who was a recorded or unrecorded proprietor at the time of the revenue sale, the latter would step into the shoes of the former, and would be entitled to exercise all the rights, including the right to avoid or annul encumbrances, which the former had acquired by his purchase. (*Mitter and Biswas, JJ.*) Jitendra Kumar Pal *v* Debendra Chandra Saha. **180 I C 721=11 R.C 727=42 C.W. N. 913=67 C.L.J 380=A I.R. 1939 Cal. 50.**

——**S 72**—*Sale statement—Lumping arrears for earlier kist with arrears for later kist—If an irregularity.*

The lumping of the arrears for an earlier kist with the arrears for the later kist in the sale statement does not constitute an irregularity. (*Mitter and Akram, JJ.*) Abdul Jabbar *v.* Jitendra Kumar Pal. **I L R (1940) 1 Cal 138=186 I.C 636=12 R.C 503=70 C.L.J. 451=44 C.W.N. 122=A I R 1940 Cal. 77**

——**Ss 77 and 82**—*Deposit of earnest money five hours after sale—Irregularity—Sale, if liable to be set aside.*

The deposit of the earnest money five hours after the sale takes place is no doubt not in strict accordance with S. 77 of the Assam Land and Revenue Regulation. But if there is no evidence that the neglect of this provision has resulted in substantial injury, the sale is not liable to be set aside. (*Mitter and Akram, JJ.*) Abdul Jabbar *v.* Jitendra Kumar Pal. **I L.R. (1940) 1 Cal. 138 =186 I.C 636=12 R.C 503=70 C.L J. 451=44 C.W.N 122=A I.R. 1940 Cal. 77.**

——**Ss 80 and 82 (2)**—*Scope—Suit to set aside sale—Limitation—Order confirming sale—If furnishes starting point—Limitation Act, Art.* 12 (c) *—Applicability*

The Assam Land and Revenue Regulation does not speak of any confirmation of the sale held thereunder. After the sale becomes final, it is not necessary to have a further order from the authority holding the sale for the purpose of getting the sale confirmed. Nor does an order of confirmation, if passed, furnish a fresh starting point of limitation for a suit to cancel or set aside the sale. Under S 82 (2) read with S. 80 of the Regulation, the sale becomes final when an application to set aside the sale is finally dismissed by the Commissioner, and a suit instituted beyond a year from that year is barred under the Regulation. Art. 12 (*c*) of the Limitation Act does not apply to a suit to set aside a sale under the Regulation, as the Regulation itself contains a special provision as to limitation. If is not therefore right to travel beyond the Regulation and to go to the Limitation Act. (*Mukerji and Jack, JJ.*) Sadhiram Atoi *v.* Kunja Behari Banerji. **I.L. R. (1937) 1 Cal 437=168 I.C. 568=9 R.C 838 =40 C.W.N. 1359=A I.R. 1936 Cal 715.**

——**S. 82 (2)**—*Construction—"Or"—Meaning of—Suit under—Maintainability—Conditions.*

The word "or" in S. 82 (2) of the Assam Land and Revenue Regulation must be regarded as having been used in the sense of "and" and under the sub-section, unless both the conditions specified are satisfied a suit to annul a sale cannot be maintained. (*Mukerji and Jack, JJ.*) Sadhiram Atoi *v.* Kunja Behari Banerjee. **I L.R (1937) 1 Cal. 437=168 I C 568=9 R C. 838=40 C.W. N 1359=A.I.R. 1936 Cal. 715.**

——**S. 82 (2)**—*Construction—Specification of irregularity in application to Commissioner—Necessity for.*

S. 82 (2) of the Assam Land and Revenue Regulation cannot be construed to the effect that the irregularity complained of must be specified in the application made to the Commissioner under S. 79, only in the case where the suit is instituted beyond a year of the finality of the sale but need not be specified where it is instituted within a year. Both under this provision and under Art. 12 (*c*) of the Limitation Act, the period of limitation to set aside a revenue sale is only one year from the date of the confirmation of the sale. (*Mitter and Akram, JJ.*) Abdul Jabbar *v.* Jitendra Kumar Pal. **I.L R. (1940) 1 Cal. 138=186 I.C. 636=12 R.C. 503=70 C.L.J. 451=44 C.W. N. 122=A.I R. 1940 Cal 77.**

——**S. 82 (2)**—*Scope—Sale of properties of surety for defaulter—Suit to avoid on ground of non-liability of surety under bond—Ground not taken in application to Commissioner—Sustainability*

A suit by a surety for a defaulter for a declaration that the sale of his properties was improper and not in accordance with law on the ground that the plaintiff was under no liability under his surety bond is not a suit to set aside a sale falling under S. 82 (2) of the Assam Land and Revenue Regulation. It is a suit for a declaration that the sale was void *ab initio* as being outside the powers of the revenue authorities. The question can, therefore, very well be agitated in the Civil Court though it may not have been raised on the application made to the Commissioner to set aside the sale. (*Mukerji and Jack, JJ.*) Sadhiram Atoi *v* Kunja Behari Banerjee. **I.L R. (1937) 1 Cal, 437=168 I C 568=9 R C. 838=40 C.W.N. 1359 =A.I.R 1936 Cal. 715**

——**Ss 82 (2) and 146**—*Scope—Sale of surety's properties—Suit to set aside on ground of non-compliance with S.* 146*—Maintainability—Conditions.*

A suit to set aside a sale under the Assam Land and Revenue Regulation on the ground that the provisions of S. 146 of the Regulation have not been duly complied with is a suit coming within the proviso of S. 82 (2) of the Regulation, and must, in order to be maintainable, comply with the provisions of that sub-section. (*Mukerji and Jack, JJ.*) Sadhiram Atoi *v.* Kunja Behari Banerjee. **I L R. (1937) 1 Cal. 437=168 I.C. 568=9 R.C 838=40 C W N. 1359=A.I.R. 1936 Cal. 715.**

——**S. 146**—*Construction and scope—Sale of properties hypothecated by surety for defaulter*

ASSAM LAND & REV. REGN. (1886), S. 154. —*Sale of movables of defaulter under S. 69—If condition precedent.*

S. 146 of the Regulation merely lays down the procedure under which the sale should take place. The section, by making S. 91 (1) applicable to a sale of a surety's immovable properties does not require that before the sale can take place the movable properties of the defaulter should first be proceeded against as laid down in S. 69 of the Regulation. (*Mukerji and Jack, JJ.*) Sadhiram Atoi *v.* Kunja Behari Banerjee. **I.L.R. (1937) 1 Cal. 437=168 I.C. 568=9 R.C. 838=40 C.W.N. 1359=A.I.R. 1936 Cal. 715.**

———**S. 154 (1) (a)**—*Applicability and scope—Jurisdiction of Civil Court—Settlement officer really partitioning estate and offering re-settlement of part only—If* ultra vires—*Jurisdiction of Civil Court to declare* ultra vires.

The Assam Land and Revenue Regulation does not contemplate a partition of an estate except in the manner provided for in Ch. VI. If the settlement officer, in making a temporary settlement of a part of an estate, contravenes the provisions of the Regulation, his acts are *ultra vires*. One of the essentials of an offer of re-settlement is that it should be of the whole estate; if such offer is made and the revenue is increased considerably, the re-settlement cannot be questioned in the Civil Court, because S. 154 (1) (*a*) would apply to such a case; the act of the settlement officer being in conformity with the essential provisions of the Regulation which gives him jurisdiction to act, a mere irregularity in the mode of carrying out the act would not make it *ultra vires*. Where the re-settlement has been offered of the whole estate, the fact that the assessment of revenue has been based on a new basis which increases the assessment considerably will not render it *ultra vires* or liable to be questioned in the Civil Court. But the offer of an estate for re-settlement after partitioning the same is an excess of the authority of the settlement officer, and can be questioned in the Civil Court.

Rau, J.—Where the settlement officer, in effect, partitions an estate and then re-settles one of the partitioned estates, and the partition is effected without any application from the landholders concerned, it is not authorised by the Regulation. Such a composite proceeding which is partly a settlement and partly a partition is entirely foreign to the Regulation. S. 154 is no bar to the Civil Court pronouncing such a proceeding to be *ultra vires*. The question in such a case is not the validity of a mere settlement such as is referred to in S. 154 (1) (*a*). (*D. N. Mitter and Rau, JJ.*) Hanifulla *v.* Brojendra Kishore Roy Choudhury. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal 629.**

———**S. 154 (1) (b)**—*Scope—Questions as to legality of enhancement of revenue and the assessment of revenue—Jurisdiction of Civil Court to decide.*

Under S. 154 (1) (*b*) of the Assam Land and Revenue Regulation, a Civil Court has no jurisdiction to decide whether the Government has power to enhance the revenue or whether the assessment of revenue is illegal or beyond the power of Government, as these are questions as to the amount of revenue to be assessed or as to the mode of principle of assessment. (*D. N. Mitter and Rau, JJ.*) Hanifulla *v.* Brojendra

ASSAM MUNICIPAL ACT (1923), S. 286.

Kishore Roy Choudhury. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal. 629.**

ASSAM LOCAL SELF-GOVERNMENT ACT (VIII OF 1926), S. 93-A—*Realisation of dues by Local Board—Remedy by suit—Availability.*

A Local Board is not precluded from realizing its dues by instituting a civil suit, if it prefers to adopt that method, although such dues might be recovered as an arrear of land revenue under the provisions of S. 93-A of the Assam Local Self-Government Act. (*Edgley, J.*) Raghubir Singh *v.* Tazpur Local Board. **I.L.R. (1939) 1 Cal. 329=43 C.W.N. 408=187 I.C. 593=12 R.C. 595=A.I.R. 1939 Cal. 587.**

ASSAM MUNICIPAL ACT (I OF 1923)—Assessment of building made arbitrarily and maliciously—*Ultra vires*—Suit in Civil Court to challenge—Maintainability. *See* Jurisdiction—Civil Court. **40 C.W.N. 337.**

———**S. 13, Proviso & S. 296 (2)**—*Construction and scope—Election to Municipal Board—Suit to declare that plaintiff was validly nominated and that the election of defendants was invalid—Jurisdiction of Civil Court—Existence of separate election tribunal—If a bar to civil suit.*

The meaning the proviso to S. 13 of the Assam Municipal Act is that the Civil Court's jurisdiction to adjudicate at least upon questions of qualifications of candidates for election to the Municipal Board shall not be taken to be affected either by anything contained in the Act or the rules framed by the Government under S. 296 of the Act. Consequently a suit for a declaration that the plaintiff was duly nominated as a candidate for election and that the election of his rivals, the defendants, is not valid, is maintainable in the Civil Court, under the proviso to S. 13. The fact that by R. 32 of the rules framed under S. 296, election tribunals have been set up does not oust the jurisdiction of the Civil Court, although a party who has approached the election tribunal, specially constituted under the rules, and has been unsuccessful there, may, on the principle of election of remedies, be prevented from re-agitating the matter in the Civil Court. (*Guha and Bartley, JJ.*) Gopesh Chandra Aditya *v.* Benode Lal Das. **165 I.C. 606 (2)=9 R.C. 425=40 C.W.N. 553=A.I.R. 1936 Cal. 424.**

———**Ss. 21-A, 10 and 14**—Elections set aside by Civil Court—Unseated candidate accepting appointment under S. 21-A—Right of appeal by unseated candidate not lost. **165 I.C. 606 (2)=9 R.C. 425=40 C.W.N. 553=A.I.R. 1936 Cal. 424.**

———**Ss. 91 and 76**—*Irregular assessment—Interference by Civil Court.*

A Civil Court cannot interfere with an action of the Municipal Board except on the ground of lack of jurisdiction. It cannot, therefore, interfere with an assessment made by the Board when it is within their jurisdiction under S. 76, though they had acted irregularly in the exercise of their jurisdiction. (*M. C. Ghose, J.*) Sylhet Municipal Board *v.* Harish Chandra Ram Kanai. **172 I.C. 739=10 R.C. 416=65 C.L.J. 553=A.I.R. 1937 Cal. 750.**

———**S. 286**—Rules under—R. 32—Special election tribunals constituted under—Jurisdiction of —If exclusive—Suit in Civil Court to declare validity of plaintiff's nomination and invalidity of defendant's election to Board—If lies. *See* Assam Municipal Act, S. 13, proviso. **40 C.W.N. 553.**

——S. 296 (2)—*Election rules—R. 13—Construction and scope—15 days' time—Necessity for strict compliance with—Election fixed for 18th April—Nomination reaching on 5th April—Office closed from 30th March to 4th April—Validity of nomination—Eastern Bengal and Assam General Clauses Act, S. 14.*

The time of 15 days mentioned in R. 13 of the rules framed under the Assam Municipal Act is the essence of the thing; and if there be not clear fifteen days' interval between the date of submission of the nomination paper and the date of election, the nomination is not valid. A nomination paper reaching the chairman on the 5th of April in respect of an election fixed for the 18th of April is not a valid nomination, even though the office of the Municipal Chairman is closed from 30th March to 4th April, inclusive. S. 14 of the Eastern Bengal and Assam General Clauses Act cannot be invoked for shortening the interval of 15 days mentioned in the rule, for that section has no application when an act is required to be done in such a way as to leave a clear margin of a definite and stated period of time between the date of the act and a fixed date. The rejection of the nomination paper in such a case is not illegal, but perfectly justified. (*Guha and Bartley, JJ.*) Gopesh Chandra Aditya *v* Benode Lal Das. **165 I.C 606 (2)=9 R.C. 425=40 C.W.N. 553=A I.R. 1936 Cal. 424.**

——S. 296 (2)—*Election Rules—R. 13—Scope—Nomination paper sent to Magistrate and not to Chairman—If proper compliance.*

R. 13 of the Election Rules framed under S. 296 of the Assam Municipal Act is mandatory; and the candidate must send his nomination paper to the Chairman himself. If he sends it to anybody else, such as the Election Magistrate, he does not comply with the rule. The fact that the Magistrate sends back the nomination paper to the Chairman would not satisfy the requirements of the rule so as to make the nomination valid. (*Guha and Bartley, JJ*) Gopesh Chandra Aditya *v.* Benode Lal Das. **165 I.C. 606 (2)=9 R.C. 425=40 C.W.N 553=A.I.R 1936 Cal. 424.**

ASSIGNMENT. *See also* Lease.

——Oral assignment of debt—Validity. *See* C P. Code, S. 73—Applicability. **1937 A.L.J. 348=A.I.R 1937 All 424.**

ATTACHMENT. *See also* C. P. Code, S. 60 and O. 21, Rr 46 and 63 and O 38, R. 7.

——Abandonment or waiver of—Attachment before judgment—Re-attachment after decree—Effect of. *See* Mys. C. P. Code Regulation, O. 38, R. 11. **40 Mys H.C.R 477.**

——*Effect of—Administration suit—Decree—Attachment of money due to debtor by Co-operative Society under R. 22 (6) (a), Madras Co-operative Societies Act—If confers exclusive rights on Society as against other creditors.*

An attachment creates no interest in, or charge on, the property attached in favour of the attaching creditors as against the other creditors. When an administration decree is made in respect of the properties of a debtor, all the creditors standing on the same footing, and a creditor who has attached the property of the debtor is not entitled to priority over the others. There is no distinction in this respect between an attachment by a Civil Court under the C. P. Code and an attachment by a Registrar of Co-operative Societies under R. 22 (6) (*a*) of the Rules made under the Madras Co-operative Societies Act. The attachment of a money debt by the Registrar does not stand on any higher or superior footing than an attachment by the Civil Court of a debt under the C. P. Code. (*Madhavan Nair, J.*) Nicholson Town Bank, Ltd., Tanjore *v.* Varadarajalu Naidu. **182 I.C. 254=12 R M. 29=48 L W. 849=1938 M W.N. 1127=A.I R 1939 Mad. 204.**

——*Effect—If creates an equitable or judicial lien.*

An attachment does not create a charge; it only prevents an alienation and does not confer any title. Hence it does not create that particular type of charge known as an equitable lien. Nor does it create a judicial lien for the latter arises where in a judgment *in rem* a lien is established by judgment. (*Stone, C.J. and Bose, J.*) Seth Laxminarayan *v.* Seth Ghasiram. **1939 N.L. J. 257=A.I.R. 1939 Nag. 267.**

——Effect—Writ of attachment—Property not mentioned in—If attached. *See* C. P. Code, O. 38, R. 7. **A.I.R. 1939 Pat 81.**

——*Execution of a warrant of—If a judicial act.*

It is a matter of considerable doubt whether the execution of a warrant of attachment by a process-server can be considered a judicial act which may be considered as taking place at the earliest period of the day on which it takes place. (*Grille, J.*) Poonamchand Sheoratan *v.* Mt. Fulabai. **I.L R. (1938) Nag. 573=11 R.N. 194=177 I.C. 971=A.I.R. 1938 Nag. 309.**

——Share of royalty—Legality. *See* C. P. Code, O. 21, R. 44. **I.L.R. (1937) 2 Cal. 440.**

——*Termination of—Property attached and handed over to bailiff—Persons furnishing security bond for decretal amount and getting charge of property from bailiff—Effect on attachment.*

The property of a judgment-debtor was attached and kept in charge of the bailiff. Two persons executed a security bond and undertook to sell the property. The bailiff handed over the property to them. One of them who claimed the property as his, sold it away but applied for removal of the attachment and the Court granted it on the plea, that the surety bond was not valid in the eye of the law because the bailiff allowed the parties to execute it on his own initiative without receiving any order from the Court. The creditor contended that there was no subsisting attachment of the property since the execution of the bond had released it from attachment.

Held, that the action of the bailiff in handing over the property to the sureties could not be considered to amount to a release of the property from attachment. The sureties were to hand back the property so long as the value thereof remained unpaid and so the property could be regarded under the bailiff's charge and his action did not amount to a release of the property.

Held, further, that it was within the jurisdiction of the Court to consider the application for removal of the attachment and to pass orders for its removal. (*Mackney, J.*) Bank of Chettinad, Ltd. *v.* Maung Po Lu. **161 I.C. 258=8 R. R. 463=A.I.R. 1936 Rang. 12.**

AUDIT CODE, Art. 183—*Applicability—Person who has served under two Municipalities.*

Article 183 does not in terms apply to the case of a person who has served under two Municipalities. The rule does not apply even by analogy in matters of this kind. In the absence of definite rules framed by Government or by Municipalities themselves relating to such cases, the matter must be considered on general principles, according to which each Municipality would be liable to pay for the leave earned during the period of service under it. (*Tek Chand, J.*) MUNICIPAL COMMITTEE, HODAL *v.* PIRYA LAL. **183 I.C. 111=12 R.L. 101=A.I.R. 1939 Lah. 103.**

BAILMENT. *See* CONTRACT.

BANKER AND CUSTOMER—A *having deposit in Bank—Power-of-attorney executed to* B *to get investments at higher rate of interest—* B *withdrawing amount to discharge his own debt to Bank and executing promissory note instead—Bank acting without consulting* A*—Remedy of* A *against* B *and the Bank.*

A who had money in a Bank to her credit executed a power-of-attorney to *B* to attend to make investments of her money at higher rate of interest than ordinary Bank rate. *B* who owed a large amount to the Bank was being pressed by the Bank for payment. *B* withdrew *A's* money, paid off his debts to the Bank and executed instead a promissory note to *A* which was kept with the Bank. The Bank so acted for their own benefit without making any inquiries or consulting *A*.

Held, that *B*, apart from any liability at common law, became a constructive trustee in respect of the sum and the Bank who for their own benefit concurred in the transaction without any inquiry became subject to a fiduciary obligation similar to that by which *B* was bound.

Held also, that *A* could sue both *B* and the Bank or either of them subject to this, that she could not recover more than sum due.

Held, further, that a subsequent contract between *A* and *B* which changed *B's* liability for damages for breach of duty into one of debt did not release the Bank as it was not a party to the contract. *A* could have released *B* and yet have pursued her remedies against the Bank, for there was no question here either of joint liability or of the liability of principal and surety. (*Lord Maugham.*) IMPERIAL BANK OF CANADA *v.* MARY VICTORIA BEGLEY. **163 I.C. 295==1936 A.L.J. 944=1936 A.W.R. 937=44 L.W. 128=1936 M.W.N. 844=A.I.R. 1936 P.C. 193 (P.C.).**

———*Cheques delivered by customer to Bank for collection—Bank realising amounts after suspending payment—Liquidation of bank—Right of customer to preferential payment—Draft purchased by customer drawn on branch for cash—Right to preferential payment.*

When a customer delivers cheques to a Bank for collection, and the Bank realises the amounts thereunder after it suspends payment, the customer would be entitled on the Bank going into liquidation, to claim preferential payment in respect of the proceeds of cheques over other creditors of the Bank. But in the case of draft which a customer gets from the Bank, drawn

on a branch of the Bank, on payment of cash therefor, it is only a purchase of the draft, and there is no entrustment to the Bank of the amount for any specific purpose. The purchaser cannot therefore claim preferential payment in respect of the amount covered by the draft, on the Bank going into liquidation. *Venkataramana Rao, J.*) ALL-INDIA SPINNERS ASSOCIATION, TAMIL NAD BRANCH *v.* OFFICIAL LIQUIDATORS, T. N. & Q. BANK, LTD. **186 I.C. 773=12 R.M. 668=51 L.W. 111=1939 Compy. C. 279=1939 M.W.N. 1071=A.I.R. 1940 Mad. 101.**

———*Collecting banker—Duties and liabilities of—Goods sent by parcel post—Duty to intimate date of arrival of goods to buyer—Omission to do so—Negligence—Collection of money after goods sent back—Liability to refund money to buyer—Misrepresentation.*

A collecting banker is under no special duty, as such, to protect the interests of the person to whom he presents a draft for acceptance or payment. So long as he does not give any personal undertaking or make any misrepresentation, he incurs no liability to him. But he is under a duty to see that by any act or omission of his the buyer is not prevented from taking delivery of the goods in respect of which he presents the draft. In the case of goods sent by a parcel post, which would be kept in the post office only for a specified period, the collecting banker must inform the buyer or consignee of the date of arrival of the goods so that the latter may take steps to take delivery of the goods before the goods are sent back by the post office. If he does not do that, he is guilty of negligence. If the collecting banker does anything with reference to the customary documents by which the buyer is prevented from taking delivery of the goods the banker cannot escape liability. An omission on his part to intimate the date of arrival, and his conduct in taking the money when he is aware or must be deemed to be aware that the goods have already been sent back by the post office to the consignor would certainly amount to a misrepresentation sufficient to render the banker liable in a suit by the buyer for return of the amount collected by him. (*Venkatramana Rao, J.*) CHAMPION AUTOMOBILES, LTD. *v.* CHARTERED BANK OF INDIA, AUSTRALIA AND CHINA. **173 I.C. 989=10 R.M. 651=46 L.W. 370=1937 M.W.N. 1010=A.I.R. 1937 Mad. 858=(1937) 2 M.L.J. 546.**

———*Deposit of amount in Bank by way of fixed deposit as security for overdraft and for opening overdraft accounts—Nature of transaction—Deposits—If trust money—Right to preferential payment in winding-up proceedings.*

Where under an agreement between a customer and a Bank, the former makes fixed deposits of amounts in the Bank for the purpose of enabling him to open overdraft accounts on the security of such fixed deposits, and to obtain accommodation by opening overdraft accounts, such deposits are *prima facie* governed by the ordinary law which regulates a banker and a customer. It does not constitute anything more than a relation of a debtor and creditor. No question of trust arises in such a case; it cannot be pretended that the amounts paid into the Bank by way of fixed deposits are moneys placed with the Bank for any specific purpose so as to clothe the Bank with the relationship of a trustee. The depositor cannot therefore claim payments of the amounts in full in preference to the ordinary creditors of the Bank in winding-up proceedings. (*Venkataramana Rao, J.*) Nayar Modern Bank, Ltd., Palghat *v.* Official Liquidator, T. N. & Q. Bank, Ltd. **1939 M.W.N. 1174=A.I.R. 1940 Mad. 149.**

———*Failure to honour customer's cheque—Measure of damages.*

Where the Banker, being bound to honour his customer's cheque, has failed to do so, he will be liable in damages. If special damage naturally ensuing from the dishonour is proved, it will be properly taken into account in assessing the amount of damages. If the customer be a trader, the Court may properly award substantial damages, in the absence of proof of special damage. In other cases the customer will be entitled to such damages as will reasonably compensate him for the injury which, from the nature of the case, he has sustained. All loss flowing naturally from the dishonour of a cheque may be taken into account in estimating the damages. (*McNair, J.*) Jogendra Nath Chakravarti *v.* New Bengal Bank, Ltd. **180 I.C. 660=11 R.C. 713=A.I.R. 1939 Cal. 63.**

———Forged cheque—Payment—Liability of Bank—Negligence, *See* Negotiable Instrument Act, S. 85. **1938 A.L.J. 504.**

———*Liability of banker—Customer having private account and trust account—Transfer of trust funds to private account—Liability of banker for misapplication—Suit by co-trustee against banker and trustee—Limitation—Starting point—Knowledge of breach of trust—Sanction of Advocate-General—Necessity—C. P. Code, S. 92.*

A banker is not entitled to apply what he knows to be trust funds in discharge of or in reduction of a debt of a customer who has two separate accounts, one in respect of his private funds and another in respect of funds of which he is a trustee. If the banker does so, he can be compelled to make restitution of the moneys so applied. If the banker has the slightest knowledge or reasonable suspicion that the money is being applied or transferred by the trustee from the trust account into his private account in breach of a trust, and if he is going to derive a benefit from the transfer and intends and designs that he should derive a benefit from it, then the banker is not entitled to transfer the amounts from the trust account without further inquiry into the matter. If he does so, he renders himself liable to make good the trust moneys to the trust. A suit against the banker by a co-trustee to recover such trust moneys wrongly applied by the banker in reduction of the private debts owed by the other co-trustee is governed by Art. 120 of the Limitation Act, and the right to sue accrues when the trust funds are wrongly transferred or misapplied. But if the plaintiff co-trustee is kept in ignorance of a breach of trust the right to sue does not accrue until the trustee becomes aware of the fact. Such a suit does not fall within the purview of S. 92, C.P. Code, a suit by a co-trustee against the banker to recover trust moneys misapplied by him and against another co-trustee for accounts does not come under S. 92 and may be instituted without the sanction of the Advocate-General. (*Leach, C. J. and Krishnaswami Ayyangar, J,* Nagappa Chettiar *v.* O.R.M.O.M.S.P. Firm. **I.L.R. (1939) Mad. 121=182 I.C. 673=12 R. M. 125=1938 M.W.N. 1017=48 L.W. 577=A.I.R. 1938 Mad. 999=(1939) 1 M.L.J. 625.**

———*Money paid by customer for transmission to another—Bank suspending payment and going into liquidation—Right to preferential payment.*

A customer of a Bank who had a current account with the Bank handed to the Bank a sum of money for remitting it by telegraphic transfer to a company in Bombay. The Bank did not credit this amount in his account but debited the charges for the intended transfer. The money was, however, never transferred, because on that very day the Bank suspended payment, and liquidation proceedings were started later on. The customer applied for payment of the amount in preference to the ordinary creditors of the Bank.

Held, that the money was received by the Bank in the capacity of a mere agent and was held apart by the Bank as property of the customer, and the customer was therefore entitled to preferential payment in respect of the amount. (*Venkataramana Rao, J.*) New Field Co. *v.* Official Liquidator, T. N. & Q. Bank, Ltd. **1939 Compy. C. 284=1939 M.W.N. 1072=51 L. W. 107=A.I.R. 1940 Mad. 139.**

———*Negligence of customer—Liability—Facts to be shown.*

Even if there is a duty as between the banker and the customer in drawing a cheque in a proper mode, it must be shown in order to hold the customer liable for negligence in drawing cheques, that there was a breach of the duty by the neglect of some usual and proper precaution. (*Lord Wright.*) Mercantile Bank of India, Ltd. *v.* Central Bank of India. **65 I.A. 75=I.L.R. (1938) Mad. 360=172 I.C. 745=42 C.W.N. 321=1938 O.L.R. 68 (2)=1938 O.W.N. 206=1938 A.L.R. 100=1938 P.W.N. 152=19 Pat.L.T. 147=1938 M.W.N. 552=4 B.R. 260=40 Bom.L.R. 713=47 L.W. 329=32 S.L.R. 313=1938 A.L.J. 273=10 R.P.C. 169=1938 A.W.R. (P.C.) 90=66 C.L.J. 510=1938 O.A. 312=A.I.R. 1938 P.C. 52=(1938) 1 M.L.J. 268 (P.C.).**

———Person having individual account and joint account—Amount in joint account solely belonging to him—Right to set-off against debt due on individual account in winding-up proceedings. *See* Companies Act, S. 229. **(1940) 1 M.L.J. 115.**

———*Relationship—Customer directing Bank to apply deposit in particular manner when occasion arises—Effect of—Trust—If created—Bank going into liquidation—Claim by customer to preferential payment—Sustainability.*

According to the rule regulating the relationship between a banker and a customer who has deposited moneys in the Bank, the banker is a debtor, the customer is a creditor and the deposit is a loan to the Bank. The mere fact that the customer gives the Bank a mandate or a direction to apply the money to his credit in a particular manner would not clothe the Bank with a trust. Where a sum of money is paid to the general account of a customer with a direction that the amount must be applied in a particular manner when occasion arises, until the said sum of money is appropriated in the manner directed, no question of trust would arise. The matter would rest in a mere mandate. The Bank is not a trustee for the customer, and he cannot claim preferential payment over other creditors or customers if the Bank goes into liquidation, but can only rank as an ordinary creditor. (*Venkataramana Rao, J.*) Dharmambal Ammal *v.* Official Liquidator, T. N. & Q. Bank, Ltd. **1939 M.W.N. 1063=1939 Compy. C. 266 =50 L.W. 939=A.I.R. 1940 Mad. 98.**

———*Relationship—Fiduciary capacity—When arises—Moneys paid by party for the purpose of effecting specific transaction and credited in anamath account—If held in trust—Insolvency of Bank—Right to preferential payment.*

Defendants 1 to 7 were members of a joint Hindu family carrying on business at Trichinopoly under the name of a banking firm which suspended payment on 30th April, 1935. The plaintiff had arranged to purchase certain lands in Tuticorin and the third defendant suggested to the plaintiff that the transaction could be arranged through their branch office at that place. The plaintiff paid various sums of money into the defendants' banking firm between 25th March, 1935 and 17th April, 1935, on the above account. After the defendants were adjudicated insolvents, the plaintiff sued to recover the moneys paid by him to the Bank alleging that he paid the amounts under an arrangement that the defendants should keep the amounts in trust for him until he decided how they should be disposed of. The plaintiff had no prior banking transaction with the defendants' firm. The account books of the firm showed that the plaintiff's moneys were credited in an *anamath* or suspense account to await the instructions of the plaintiff as regards their disposal. According to the defendants' oral evidence, when amounts were paid to their firm in current account or fixed deposit, generally pass books and cheque books used to be given, and usually agreements used to be entered into regarding the interest payable on the deposits, but this procedure was not followed in respect of the moneys paid by the plaintiff.

Held, that the moneys paid by the plaintiff were received by the defendants' firm in a fiduciary capacity, and not as between a Bank and its customer and that the plaintiff was therefore entitled to preferential payment in full of the moneys paid by him. (*Venkataramana Rao and Kunhi Raman, JJ.*) Official Assignee of Madras *v.* Natesam Pillai. **51 L.W. 144=1940 M.W.N. 598=1940 Comp. C. 66=A.I.R. 1940 Mad. 441=(1940) 1 M.L.J. 254.**

———*Relationship—Nature of.*

The relationship of banker and customer is generally that of agent and principal, of debtor and creditor or of pledgor and pledgee; there are however cases where the banker stands in the relation of trustee as well as agent for his customer. The banker is not a trustee for the customer in respect of money paid in or responsible for him for the use he makes of it, but the position is not the same where the banker uses the securities deposited with him for his own use, and there is conversion of the securities for the purposes of the Bank and not for the purpose of customer. Where securities are deposited as cover or advances and for the purpose of securing overdrafts or advances, the transaction is strictly of the nature of pledge. (*Guha and Bartley, JJ.*) Bank of Dacca, Ltd. *v.* Gour Gopal Saha. **I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602= 65 C.L.J. 74=A.I.R. 1936 Cal. 409.**

———*Relationship—Nature of—Deposits on current account—If repayable only on demand.*

Where native bankers accept deposits on current account on a very extensive scale from their customers and conduct nearly every branch of ordinary banking business as it is understood in England, the relationship is not that of mere lender and borrower but there is an implied agreement that the money is payable on demand. (*Mosely and Dunkley, JJ.*) Daw Hnit *v.* Anamalai Chettyar. **1938 Rang. L. R. 468=179 I.C. 428=11 R.R. 315=A.I.R. 1938 Rang. 335.**

———*Relationship—Trustee depositing trust moneys in Bank—Bank aware of moneys being trust moneys—Effect—If makes Bank a trustee—Company depositing employee's cash security fund in Bank earmarked as such—Bank—If trustee for company's employees.*

The fact that a depositor in a Bank is a trustee, and the money deposited is trust money does not affect the relation which the law creates between a bank and a customer, namely, the relation of debtor and creditor. The legal effect of a notice to the Bank that the money deposited is trust money is only to cast a duty on the Bank not to participate in a breach of trust by the trustee. Where a company, acting under S. 282-B of the Companies Act, deposits in a Scheduled Bank moneys deposited with it by its employees in pursuance of their contracts of service, asking the Bank to earmark the same as employees' cash security, the fact that the Bank receives and accepts the deposit with notice of the fact that the moneys represent cash security of the employees of the depositor company, would not make the Bank a trustee in respect of the moneys. The Bank must be deemed to be aware of the limitation of the powers of the company in regard to the moneys deposited and should not permit any dealing by the depositor-company with those moneys in violation of the duty which the statute imposes. But it cannot be held that the Bank holds the moneys in trust for the employees of the depositor-company, so as to entitle that company to claim preferential payment over the ordinary creditors of the Bank, on the Bank going into liquidation. (*Venkataramana Rao, J.*) Nayar Modern Bank, Ltd. *v.* Official Liquidator, T. N. and Q. Bank, Ltd. **1939 M.W.N. 1066=1939 Compy. C. 272=50 L.W. 944=A.I.R. 1940 Mad. 178.**

———*Rule reserving right to close account without notice to depositor—Legality—Power to close accounts without notice.*

Where a rule regarding the keeping of accounts in a Bank reserves to the Bank the right to close any account without reference to the depositor, if in the opinion of the Bank it is not desirable to keep such account for any reason whatsoever, the

Bank is entitled to close the account without any notice. Such a rule is not illegal or invalid. It is in the nature of a contract between the parties and it cannot be said that the rule is either immoral or opposed to public policy. (*Leach, C.J. and Varadachariar, J.*) Champion Automobiles, Ltd., Madras *v.* Travancore National Bank, Ltd. **174 I.C. 928=10 R.M. 745 (2)=1937 M.W.N. 1052=46 L.W. 733=A.I.R. 1938 Mad. 77=(1937) 2 M.L.J. 817.**

———*Sale of securities by Bank—Customer's right to balance of money over and above his liabilities to Bank.*

The customer is entitled to enforce his ownership to the amount in the hands of the banker, after the sale of the Government Promissory Notes deposited in the Bank as security to cover overdrafts or advances after payment of loans from the Bank for which they were security. (*Guha and Bartley, JJ.*) Bank of Dacca, Ltd. *v.* Gour Gopal Saha. **I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602=65 C.L.J. 74=A.I.R. 1936 Cal. 409.**

———*Set-off in liquidation proceedings—Joint and separate debt—Principle—Individual overdraft account and joint fixed deposit account—Claims in respect of, when can be set off.*

Where there is an amount payable by *A* in his individual account and an account payable to *A* and *B* in their joint account, the two accounts cannot be set off, but if it could be shown that, though the account is in the names of *A* and *B*, *A* is solely entitled to the amount, a set-off will be allowed. Where a person owed to a bank (in liquidation) a sum in respect of an overdraft account and there was an amount due and payable by the bank to the same person and another jointly in respect of a fixed deposit transaction, it was held, that the latter sum could be set off against the former, when it was shown that the sum due in respect of the fixed deposit transaction belonged solely to him who owed money on the overdraft account, though the fixed deposit receipt stood nominally in the name of him and another. (*Venkataramana Rao, J.*) Veerappa Chettiar *v.* Official Liquidators, T. N. & Q. Bank, Ltd. **1940 Compy. Cas. 52=51 L.W. 680=1940 M.W.N. 608=A.I.R. 1940 Mad. 436=(1940) 1 M.L.J. 115.**

———*Suit by fixed depositor for repayment—Forum.*

A fixed depositor cannot bring a suit for repayment from a Bank in any place where he may happen to reside. It has to be filed only in the place where the Bank is situated. (*Bennet and Verma, JJ.*) Allahabad Bank, Ltd. *v.* Gulli Lal. **I.L.R. (1940) A. 207=1940 A.W.R. (H.C.) 72=1940 A.L.J. 94=A.I.R. 1940 All. 243.**

BANKER AND EMPLOYEES—Security for good conduct—Deposit earning interest—If trust monies. *See* Companies—Winding up—Employees' security. **(1939) 1 M.L.J. 209.**

———Liquidation—Employees' provident fund—If part of assets of company or trust money. *See* Companies Act, Ss. 229 and 230 (1). **1938 M.W.N. 1332=A.I.R. 1939 Mad. 352.**

BANKER'S BOOKS EVIDENCE ACT (XVIII OF 1891), S. 5—*"Order of Court for special cause"—Order for production of books under* S. 94, *Cr. P. Code—S.* 94, *Cr. P. Code, if*

conflicts with S. 5 of former Act—Prosecution of auditors of Bank for false statements in balance sheet certified as correct—Order for production of Bank's books—Legality—Right of prosecution to inspection—Duty of Court.

There is really no conflict between S. 94 of the Cr. P. Code, and the Banker's Books Evidence Act. S. 5 of the latter Act is the only section which can be relied upon as containing anything inconsistent with S. 94, Cr. P. Code. But all that S. 5 of that Act enacts is that no officer of the Bank shall in any legal proceeding to which the Bank is not a party be compellable to produce any banker's book the contents of which can be proved under the Act or to appear as a witness to prove the matters, transactions and accounts, etc., unless by order of the Court or Judge made for special cause. "Court" includes a Magistrate trying a criminal case, so that a Bank cannot be compelled to produce its books without an order of the Court "for special cause." But there is no reason at all why an order made under S. 94, Cr. P. Code, should not be regarded as a sufficient order for the purpose of S. 5 of the Banker's Books Evidence Act. There is nothing in that Act which prevents an order being made under S. 94, C. P. Code, in the proper case. In a prosecution against the auditors of a Bank for offences in respect of false statements in the balance-sheet of the Bank certified by them as correct, an order for production can lawfully be made under S. 94, Cr. P. Code, but it should be made, in the case of banker's books, very cautiously and carefully drafted. A routine order *ex parte* is generally undesirable. The prosecutor who applies for an order and for inspection of the books produced should be required to state before the issue of the order not only what books he requires to be produced but also why their production is necessary with specific reference to the allegations in his complaint. Anything in the nature of a roving or fishing inspection of the books of a Bank should be prevented. But the prosecution cannot be denied the right of inspection of documents the production of which has been held to be necessary or desirable for the purpose of the trial and which have been held to be relevant after considering the objections of the party producing. (*Broomfield and Wadia, JJ.*) P. D. Shamdasani *v.* Sir Hugh Golding Cooke. **I.L.R. (1938) Bom. 31.**

———**S. 5**—Police officer conducting investigation—Right to inspect Bankers' books. *See* Cr. P. Code, S. 94. **17 Lah. 593.**

———**S. 6**—*Bankers' books—Production and inspection—Principles governing—Right to object.*

A Bank has under S. 6, sub-S. (3) of the Bankers' Books Evidence Act a statutory right to object to any order directing inspection to be given of its books. It is not the practice of the Court to allow inspection of bankers' books under the Act, unless a *prima facie* case is made out for thinking that there is some matter on which the books of the Bank are bound to be relevant. Courts have no doubt very wide powers of ordering production and directing inspection of documents but such an order against a person, not a party to the proceedings involves a serious inroad upon his normal rights as a citizen. Courts are always averse to giving anything in the nature of a roving or fishing commission to inspect documents.

(*Beaumont, C.J., Rangnekar and Norman, JJ.*) CENTRAL BANK OF INDIA, LTD. *v.* SHAMDASANI. **I.L.R. (1938) Bom. 119=172 I.C. 684=10 R.B. 291=39 Cr.L.J. 207=39 Bom.L.R. 1187=A.I.R. 1938 Bom. 33 (S.B.).**

BAR COUNCILS ACT (XXXVIII OF 1926).

See also LEGAL PRACTITIONER.

———**Ss. 4, 5, 6, 7 and 8**—*If cumulative.*

Ss. 4, 5, 6, 7 and 8 must be read together. (*Davis, J.C., Rupchand Bilaram and Lobo, A. J. Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510=9 R. S. 9=A.I.R. 1936 Sind 75 (S.B.).**

———**S. 5 (2) and R. 21**—*Rule permitting of continuance of member beyond three years—If* ultra vires.

There is nothing in S. 5 (2) which prevents rules being framed whereby certain members elected to the first Bar Council may continue in office thereafter so that a certain continuity may be maintained between the first Bar Council and its successor. R. 21 is not *ultra vires* of the Act. (*Davis, J.C., Rupchand Bilaram and Lobo, A.J. Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510 =9 R.S. 9=A.I.R. 1936 Sind 75 (S.B.).**

———**S. 6 (1) (b) and (4)**—*Powers and rules under—Operation of—If extend to second Bar Council.*

Under S. 6 (1) (*b*) and (4) of the Act, rules may be made to provide for the retirement of members from office by rotation, and for the manner in which the order of such retirement shall be determined, and there is no reason to suppose that the powers conferred by this section and rules made thereunder should not relate to the first Bar Council but only to its successors. (*Davis, J.C., Rupchand Bilaram and Lobo, A.J.Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510=9 R.S. 9= A.I.R. 1936 Sind 75 (S.B.).**

———**Ss. 8 and 9**—Agent authorised to appear and conduct judicial proceedings—Right to act as solicitor and to appear in Court. *See* C. P. CODE, O. 3, RR. 1 AND 2. **(1937) 2 M.L.J. 552 (F.B.).**

———**S. 10**—*Complaint*—Locus standi *to make.*

It is open to any person to complain to the Court as to the undesirability of certain remarks made by a Counsel during the course of a trial. Where a Mahomedan Counsel is alleged to have made certain communal remarks during the course of a trial it is open to a Hindu Association to make a complaint to the High Court for taking action in the matter. (*Davis, J.C. and Mehta, A.J.C.*) MAHOMED ASLAM, *In re.* **162 I.C. 919=8 R.S. 177=37 Cr.L.J. 783=1936 Cr.C. 487=A.I.R. 1936 Sind 49.**

———**S. 10**—*Disciplinary powers of Court under —If can be used to aid the criminal law and award supplementary punishment.*

The principle has to be recognised that the disciplinary jurisdiction vested in the High Court to reprimand, suspend or remove from practice an advocate for misconduct, should not be employed merely to supplement, as it were, by way of a further punishment, a punishment which the advocate has received under the law for the misconduct of which he is guilty. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R. C. 575=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cr. C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 10**—*Duty of Advocates accepting Vakalats for withdrawal of money from Court—Necessity to verify Vakalat before acceptance.*

It is extremely and clearly necessary that Advocates having to withdraw money or to accept serious responsibility of the kind from and on behalf of a client should even if there be no apparent circumstances to justify a suspicion, do everything in their power to verify the form of the *Vakalatnama,* and furthermore should not accept a *Vakalatnama* unless they have satisfied themselves of the *bona fides* of the person who offers it to them. (*Courtney-Terrell, C.J., Khaja Mahomed and Varma, JJ.*) G., AN ADVOCATE, *In the matter of.* **16 Pat. 488=170 I.C. 339=3 B.R. 745= 10 R.P. 135=17 Pat.L.T. 407=1937 P.W.N. 416 =38 Cr.L.J. 926=A.I.R. 1937 Pat. 433 (S.B.).**

———**S. 10**—*Misconduct—Advocate convicted for sedition and bound over for speeches in connection with labour movement—Tribunal finding him honest and straight in dealings and of good character—Disciplinary action if called for.*

An advocate took a prominent part in Labour and Trade Union Movements and delivered a number of speeches advocating certain reforms. For some of these speeches he was bound over for one year under S. 107, Cr. P. Code. For others, he was prosecuted under S. 124-A, I. P. Code, and convicted thrice. There was no indication that he made any organised or persistent attempt to create a breach of the peace or to incite acts tending to subvert law and order. The general tenor of the speeches was inoffensive and except on some particular occasions his views were not in any way hostile to the Government; and indeed several passages in them advocated obedience to law and order. The Tribunal of the Bar Council which held an enquiry reported that apart from his activities in connection with the labour movement, he was a young man of good character, inexperienced in his profession, honest and straight in his dealings, while acquitting him of professional misconduct, found him guilty of other misconduct and also observed that the case seemed to be very near the border line.

Held, no further action was called for in the case. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R.C. 575=37 Cr.L. J. 534=40 C.W.N. 366=1936 Cr.C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 10**—*"Misconduct"—Conviction under S. 124-A, I. P. Code—If ground for removal from practice.*

A conviction for the offence of sedition under S. 124-A, I. P. Code, cannot be regarded as such misconduct as would, in all circumstances, require action to be taken under the Court's disciplinary jurisdiction and as would demand the removal of the advocate from practice. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R.C. 575=37 Cr.L.J. 534=40 C.W. N. 366=1936 Cr.C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 10**—*Misconduct in other than professional capacity—Disciplinary jurisdiction of High Court—Discretion.*

There is no reason why the words "professional or other misconduct" in S. 10 (1) of the Bar

Councils Act should not be read in their plain and natural meaning. The legislature intended by the aforesaid words to confer on the High Court jurisdiction to take action in all cases of misconduct, misconduct in a professional or other capacity. The Court has discretion to take action in suitable cases. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R.C. 575=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cr. C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 10**—*Professional misconduct—Agreement with client to receive payment in event of success only—Propriety.*

For an advocate to enter into an agreement with his client to receive nothing unless the suit was successful amounts to professional misconduct, and the Court is bound to take serious notice of it. (*Leach, C.J., Gentle and Somayya, JJ.*) RAMANUJACHARIAR, *In re.* **I.L.R. (1940) M. 17=41 Cr.L.J. 83=184 I.C. 606=(1939) M.W.N. 766 =50 L.W. 234=A.I.R. 1939 Mad. 772=(1939) 2 M.L.J. 320 (F.B.).**

———**S. 10**—*Professional misconduct—Employment of unregistered clerk—Negligence in not finding out, if plaint was filed—Failure to account for money.*

An advocate was engaged to file a suit, employed an unregistered clerk and left the plaint with him for presentation. The clerk failed to file the plaint. The advocate however did not take care to see whether the suit had been filed and thus allowed his clerk to cheat his client. Besides this the advocate did not return or account for the money he had taken from his client for stamps and other incidental purposes.

Held, that this amounted to gross misconduct on the part of the advocate. (*Mya Bu, Offg. C. J., Ba U and Dunkley, JJ.*) O., A BARRISTER-AT-LAW, *In the matter of.* **178 I.C. 398=40 Cr.L.J. 53=A.I.R. 1938 Rang. 423 (S.B.).**

———**S. 10**—*Professional misconduct—Findings of facts by Bar Council—If to be interfered with by High Court.*

The question whether a particular advocate has violated the recognized canons of professional etiquette is primarily a matter that concerns the Bar Council and consequently the High Court ordinarily will accept findings on questions of fact recorded by the Bar Tribunal provided they are not perverse. (*Iqbal Ahmad, Rachhpal Singh and Hunter, JJ.*) AN ADVOCATE OF RANIKHET, *In the matter of.* **I.L.R. (1940) All. 60=41 Cr.L.J. 211=1939 A.W.R. (H.C.) 828=1939 A.L. J. 957=1940 A. Cr. C. 10=12 R.A. 367=185 I.C. 611=A.I.R. 1940 All. 1 (F.B.).**

———**S. 10**—*Professional misconduct—Misappropriating client's moneys temporarily—Offence—Proper punishment.*

Per *C.J.,* and *Gentle, J.*—An advocate who misappropriates his client's moneys is not fit to remain a member of an honourable profession of advocates of the High Court, and the High Court should be failing in its duty if it does not direct the advocate's name to be removed from the rolls. The advocate is guilty of a criminal offence and such conduct cannot be condoned as to do so would encourage crimes of that nature and might have a harmful effect on the profession as a whole. The fact that the misappropriation is only

temporary does not lessen the offence or the gravity of the misconduct.

Varadachariar, J.—Though the conduct of an advocate who misappropriates the moneys belonging to his client must be strongly disapproved and though the members of the profession should observe the highest standard of professional conduct, the Court when dealing with the question of punishment, cannot shut its eyes to the fact that those standards have not unfortunately yet come to be generally observed and the way that advocates and clients carry on their pecuniary dealings sometimes leads advocates to imagine that they can persuade their clients to condone the faults on their part in dealing with their client's money. The possibility or even the fact of condonation by the client is, however, no justification for such conduct. (*Leach, C.J., Varadachariar and Gentle, JJ.*) S., ADVOCATE, *In the matter of.* **1937 M. W.N. 1322 (F.B.).**

———**S. 10 AND BAR COUNCIL RULES (Allahabad); R. 3**—*Consultation of counsel—When debars appearance for the opposite party.*

An advocate who has once been consulted by a party is not thereby debarred from appearing for the opposite party for all times. He is free to accept a brief against him, if he has not received any information of a confidential nature from the party who consulted him. The onus of proving that such information was conveyed lies and lies heavily on the party seeking to restrain the advocate's appearance. (*Thom, C.J.*) SAHARANPUR GRAIN CHAMBER, LTD. *v.* MAHARAJ SINGH. **I.L.R. 1040 A. 262=188 I. C.) 376=1940 A.L.J. 170=1940 A.W.R. (H. C.) 165=1940 A. Cr. C. 49=A.I.R. 1940 All. 233.**

———**S. 10 (1)**—*"May"—Scope and effect of—Discretion of High Court—Exercise of—Advocate—Misconduct—Disciplinary jurisdiction—Exercise—Test to be applied.*

The word "may" in S. 10 (1) of the Bar Councils Act makes it plain that while the High Court has unrestricted jurisdiction in all cases of misconduct, a discretion is left to the Court to take action in suitable cases only. It is not possible to lay down any hard and fast rule or any general principles with regard to exercise of such discretion. It must be exercised judicially. The test which the Court has to apply is whether the proved misconduct of the advocate is such that he must be regarded as unworthy to remain a member of the honourable profession to which he has been admitted, or unfit to be entrusted with the responsible duties that an Advocate is called upon to perform. (*Mukerji, A.C.J., Lort Williams and S. K. Ghose, JJ.*) N., AN ADVOCATE, *In the matter of.* **63 Cal. 867=162 I.C. 170=8 R. C. 575=37 Cr.L.J. 534=40 C.W.N. 366=1936 Cr.C. 321=A.I.R. 1936 Cal. 158 (S.B.).**

———**S. 12**—*Findings of tribunal—Interference—Practice.*

It would need very good reason to induce the High Court to throw over the findings of fact which have been arrived at by a tribunal. (*Rankin, C.J., C.C. Ghose and Buckland, JJ.*) ABINASH CHANDRA *v.* HEMANTHA KUMAR. **42 C.W.N. 1111.**

———**S. 12 (1)**—*Sind Rules, R. 12—Enquiry referred to District Judge by High Court—Power of District Judge to delegate.*

Where a case against an advocate for his alleged misconduct is referred for inquiry by the High Court to the District Judge, the District Judge has no power to delegate this inquiry to one of his assistants; the jurisdiction conferred on the District Judge being of a special nature, it is the District Judge alone who can exercise the jurisdiction by following the procedure laid down for enquiry and none else. (*Davis, J. C. and Mehta, A.J.C.*), R., BAR-AT-LAW, *In re.* **168 I. C. 992 =38 Cr.L.J. 664 (1)=9 R.S. 254 (1)=A.I.R. 1937 Sind 98.**

———**S. 12 (3)**—*Complainant—Right to be heard.*

Sub-S, (2) of S, 12 of the Bar Councils Act cannot be intended to exclude the right of the Court to hear any person other than the persons mentioned in that sub-section. It is in the power of the Court, and in any ordinary case it would be its duty to hear the complainant, if he so desires. (*Rankin, C.J., C. C. Ghose and Buckland, JJ.*) ABINASH CHANDRA *v.* HEMANTHA KUMAR. **42 C. W.N. 1111.**

———**S. 12 (5)**—*Assessment of costs.*

In a case where the complainant was unsuccessful before the tribunal whose findings were confirmed by the Court, the complainant was ordered to pay the costs of the Advocate both in the enquiry before the tribunal and in the hearing before the Court. He was also ordered to pay the fees of the short-hand writer and the interpreter in the enquiry before the Bar Council. The costs were directed to be taxed by the Registrar of the original side as of a hearing. (*Derbyshire, C.J. Costello and Mukherjea, JJ.*) REV. FATHER P. MESARIC *v.* RAMANI MOHAN. **178 I.C. 253=42 C.W.N. 1113=A.I.R. 1938 Cal. 766.**

———**S. 14 (1) (b)**—Scope—Counsel's right of audience—Departmental inquiry under Civil Services Rules—Right of Government servants to be represented by counsel. *See* CIVIL SERVICES (CLASSIFICATION CONTROL AND APPEAL) RULES, R. 55. **(1937) 2 M.L.J. 189.**

———**Ss. 14 (2) and 15 (b)**—*Advocate of one High Court—Application for permission to appear in case in another High Court—If to be granted as of right—Discretion and duty of the Chief Justice.*

Where an application is made on behalf of an advocate of one High Court for permission to appear in case in another High Court under the rules framed under the Bar Councils Act, good reasons must be shown for the grant of such permission. The permission cannot be granted on mere application or as a matter of course. The Chief Justice of the High Court must use a judicial discretion in the matter and then grant or refuse permission. The right of an advocate of a particular bar to appear in other High Courts does not exist as a matter of right. Nor is there any question of reciprocity involved in the matter. The Chief Justice will apply his mind to the circumstances of the application and see whether good reasons have been made out for the grant of permission in any particular case. (*Courtney Terrell, C.J.*) EMPEROR *v.* GIRINDRA MOHAN MISHRA. **167 I.C. 486=9 R.P. 406 =38 Cr.L.J 392=1936 Pat.W.N. 822=3 B.R, 303=17 Pat.L.T. 861=A.I.R. 1937 Pat. 122.**

———**S. 15**—*Rules framed under—Rule prohibiting trade or business—Investments by way of money-lending—If amounts to engagement in money-lending business.*

Investment of his savings by an advocate do not necessarily amount to an engagement in money-lending business, the more so when such investments are few and far between and are mostly made to relations and friends. Nevertheless if investments by way of loan are made as a matter of regular business and for gain there can be no escape from the conclusion that such investments constitute engagement in money-lending business. It depends on the facts of each case and is a mixed question of fact and law, as to whether certain transactions amount to a money-lending business. (*Iqbal Ahmad, Rachhpal Singh and Hunter, JJ.*) AN ADVOCATE OF RANIKHET, *In the matter of.* **I.L.R. (1940) All. 60=41 Cr.L.J. 211=12 R.A. 367 =1940 A. Cr.C. 10=185 I.C. 611=1939 A. W.R. (H.C.) 828=1939 A.L.J. 957=A.I.R. 1940 All. 1 (F.B.).**

———**R. 16**—*Rule applies to election of all candidates.*

Rule 16 cannot be restricted to the election of any one candidate; the singular covers the plural and validity of the election of all the elected members can be challenged thereunder. (*Davis, J.C., Rupchand Bilaram and Labo, A.J.Cs.*) UDHARAM PAHLAJARI, *In re.* **163 I.C. 510=9 R.S. 9=A.I.R. 1936 Sind 75 (S.B.).**

BENAMI.

- Advancement.
- Burden of proof.
- Essentials to be proved.
- Evidence.
- Fraudulent transfer.
- Husand and wife.
- Nature of transaction.
- Presumption.
- Proof.
- Res judicata.
- Resulting trust.
- Right to sue.
- Ryot holding ryotwari land.
- Revenue sale.
- Suit by benamidar.

———*Advancement—Burden of proof—Law in Burma.*

In Burma, the doctrine of intended advancement, in connection with transactions in which property is purchased by a father or a father and mother, and in the conveyance the name or names of the children are inserted as transferees, does not form part of the law of the land, as the doctrine is not in consonance either with the sentiment or the practice of the Burmans. Where, therefore, certain persons claim that their parents, although purchasing certain property with their money, have taken the conveyance in their name by way of intended advancement, the burden is on them to prove that the conveyance, which must *prima facie* be presumed to have been made for the benefit of the real purchaser, was in fact intended to operate solely for benefit of children. 4 Rang. 522, 6 Rang. 203, 7 Rang. 751, Overr. (*Page, C.J., Baguley, Mosely, Ba U and Dunkley, JJ.*) MAUNG TUN PE *v.* B. K. HALDER. **14 Rang. 242=163 I.C. 211=8 R.R. 616=A.I.R. 1936 Rang. 256 (F.B.).**

———*Advancement — Presumption — Property purchased in name of wife.*

The rule of English law relating to advancement in favour of a wife is not applicable to transactions by Indians in respect of property situated in India. Where property is purchased at an auction sale in the name of a wife and the money or the purchase is supplied entirely by the husband, the presumption is in favour of the transaction being benami. (*Tek Chand, J.*) JAI KISHAN SINGH *v.* PARMESHRI DAS. **171 I.C. 856=10 R.L. 240=39 P.L.R. 152=A.I.R. 1937 Lah. 471.**

———*Advancement—Hindu father purchasing property out of his own money in son's name—Presumption of benami.*

Where a Hindu father purchases property out of his own money in the name of his son, the presumption is that he intended to make the purchase for his own benefit and not for the benefit of his son. Hence the property so purchased is *prima facie* father's self-acquired separate property. (*Pollock, J.*) GOPAL TRIMBAK *v.* KESHEOSA VISHNOOSA. **I.L.R. (1936) Nag. 65 =165 I.C. 350=9 R.N. 80=A.I.R. 1936 Nag. 185.**

———Advancement—Purchase by Hindu father in son's name with own funds—Inference—If joint family property or property of son—Presumption of benami. *See* HINDU LAW—JOINT FAMILY. **I.L.R. (1936) Nag. 65.**

———*Advancement—Purchase in son's name—Doctrine of advancement—If applicable.*

In England if the conveyance or transfer is made not to a stranger but to the wife or child of the person who provided the consideration, if the transaction is wholly unexplained, the law presumes an intention to benefit the wife or child. In India no such rule exists. Hence where property is purchased by a father in the name of the son and the latter claims the property as his own by alleging that the father intended to make a gift of the property to him, the onus rests upon him to establish such a gift. (*Harries, C.J. and Chatterji, J.*) SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **184 I.C. 113=6 B.R. 14=12 R.P. 225=20 Pat. L.T. 787=A.I.R. 1939 Pat. 462.**

———*Advancement—Purchase in son's name—Mutation and grant of receipts in son's name—Presumption of gift—If arises.*

Where a father has purchased property in the name of his son, the fact that he has obtained mutation of names and granted receipts in the name of the son does not establish a gift by him in favour of the son, as such acts are entirely consistent with the transaction being a purely benami one. Indeed such acts inevitably follow a benami transaction. Experience has shown that frequently benami transactions are entered into in this country for no apparent reason. (*Harries, C.J. and Chatterji, J.*)

SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **184 I.C. 113=6 B.R. 14=12 R.P. 225=20 Pat.L.T. 787=A.I.R. 1939 Pat. 462.**

———*Burden of proof.*

The person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt. (*Dunkley, J.*) S.P. L.A. CHETTIAR FIRM *v.* MA PU. **163 I.C. 604=9 R.R. 33=A.I.R. 1936 Rang. 262.**

———*Burden of proof.*

The burden of proof is on the person seeking to establish that any particular transaction is a benami one. It is notorious that in benami transactions all the subordinate parts are well fitted in to correspond with the benami arrangement in its integrity, and if it is once established that a transaction is benami, the fact that the deeds bear the benamidar's name is necessarily consistent with the benami case and is of no essential weight on one side or the other. Since therefore it is unlikely that there will often be any other relevant circumstances from which the conclusion can be drawn that a transaction is a benami one, the usual mode of proving that a purchase is a benami transaction is by showing that the funds from which the purchase was made were exclusively the funds of the person alleged to be real owner of the property. The main test is to find out the real intention of the parties. All the peculiar circumstances and probabilities of each particular case must be carefully considered. Although no one of those circumstances taken by itself may be of any particular value or afford any conclusive proof of the intention to transfer the ownership from one person to the other, yet a combination of some or all of them, and a proper weighing and appreciation of their value, may well raise such a presumption of real ownership as to shift the burden of proof on to the opposite party, and if the latter is unable to discharge the burden so transferred, he will fail. (*Baguley and Sharp, JJ.*) MOHAMMAD HAJEE *v.* VEDNATH SINGH. **1938 Rang.L.R. 52=174 I.C. 725=10 R.R. 419=A.I.R. 1938 Rang. 26.**

———*Burden of proof—Test to determine character of transaction—Circumstances to be considered—Doctrine of advancement—Applicability in India.*

There is in India no presumption in favour of the advancement of wife or child when property is purchased by the husband or father in their name. In a suit for a declaration that a transaction is benami, the burden lies on the plaintiff. A person cannot be deprived of property upon mere conjecture or surmise. The decision must rest not upon suspicion but upon legal grounds established by legal testimony. In the absence of other relevant circumstances, the criterion of ownership is the source from which the purchase-money comes, but in determining whether a transaction is benami or not, all relevant factors must be taken into consideration, the surrounding circumstances, the position of the parties and their relation to one another, the motives governing their actions and their subsequent conduct. Less evidence is required in India than in England to prove that a transaction is benami. The transaction must be shown to be a bogus or sham transaction, though a slight quantity will suffice to show it. *(Davis, J.C. and Weston, J.)* SABHAGIBAI v. PIRKASH CHAND. **I.L.R. (1940) Kar. 334.**

———*Essential to be proved.*

Before any transaction can be held to be benami, it must be clearly shown that it was not carried out for the benefit of the alleged *benamidar* but for the benefit or for the protection of the interests of the alleged true owner. *(Davis, J. C. and Tyabji, J.)* SARDAR KHATUN *v.* SECRETARY OF STATE. **I.L.R. (1939) Kar. 348=179 I.C. 252=11 R.S. 124=A I.R. 1939 Sind 9.**

———*Evidence—Non-production of draft of document—If material fact.*

In benami cases, the non-production of the draft of the document would ordinarily be a material fact for consideration. *(R. C. Mitter and Edgley, JJ.)* SARAT SUNDARI DEBI *v.* RAM KINKAR RAI. **180 I.C. 445=11 R.C. 685=68 C. L.J. 416=A.I.R. 1939 Cal. 244.**

———*Fraudulent transfer—Alienation by father benami to daughter to cheat son—Fraud not carried out—Suit by benamidar for possession—Defence of benami—Sustainability.*

A Hindu father executed a sale-deed benami in favour of his daughter of certain properties belonging to the joint family in order to cheat his son of his share in that property. The father subsequently sued his son for partition excluding the property conveyed to the daughter. The son objected to such exclusion and the father then consented to the inclusion of that property also and asked that it might be allotted to his share. The suit was compromised and the property in question was allotted to the father and possession also was delivered to him by the son. Subsequently, after the death of the daughter, her sons sued the father for possession of the property comprised in the sale-deed executed to their mother, and the father pleaded that it was a benami transaction entered into by him to cheat his son.

Held, though the father no doubt intended to defraud his son and entered into the transaction with that object in view, since he did not do anything more to carry out his original fraudulent intention but on the contrary compromised the matter and agreed to the inclusion of the property in the partition suit, and no damage had resulted to any body, the plea of benami could be successfully set up and was a valid defence to the suit. *(Beasley, C.J., King and Gentle, JJ.)* VENKATARAMAYYA *v.* PULLAYYA. **59 Mad. 998=164 I.C. 588=9 R.M. 129=1936 M.W.N. 676=44 L.W. 294=A. I. R. 1936 Mad. 717=71 M.L.J. 458 (F.B.).**

———*Husband and wife—Properties purchased and standing in name of Hindu wife—Husband not shown to have debts—Wife having some means of her own—Presumption—Allegation of benami—Onus.*

In the case of properties purchased and standing in the name of a Hindu woman, where there is no suggestion that the husband of the woman had any creditors from whom he desired to screen the properties, but on the other hand there is positive evidence that the woman herself had some means of her own, the onus of proving that they

have been purchased with funds of her husband benami in her name is in the first instance on the person pleading the same. Mere suspicion that the purchase might not have been made wholly with the lady's money will not suffice to establish that the purchase was benami nor even suspicion that moneys of the husband must also have been utilised for the purchase. Even in cases where there is positive evidence that money was contributed by the husband and not the wife, that will not conclude the matter as to its being benami, though that is an important criterion. Where the motive alleged for a benami transaction itself suggests that the purpose in view could be served only by a genuine transfer and not by a benami transaction, the more reasonable inference is that the transfer was intended to be operative as a transfer of the beneficial interest and not as a mere benami transaction. *(Varadachariar and King, JJ.)* SITAMMA *v.* SITAPATIRAO. **I.L.R. (1938) Mad. 220=170 I.C. 535=11 R.M. 103=46 L.W. 651=A.I.R. 1938 Mad. 8=(1937) 2 M.L.J. 606.**

———*Husband and wife—Property purchased in wife's name—Benami or gift—Test.*

Where a husband purchases property out of his own money in the name of his wife, it is the intention of the husband that mainly counts in the determination of the question whether he intended to make an absolute gift in favour of his wife or whether the transaction was merely intended to be a benami transaction, and if a party avers that an absolute gift was intended, clear and cogent and preferably documentary evidence should be produced in support of that allegation. *(Addison and Din Mohammad, JJ.)* MST. NAWAB BEGUM *v.* HUSAIN ALI KHAN. **18 Lah. 149=171 I.C. 831=10 R.L. 232=39 P.L.R. 907=A.I.R. 1937 Lah. 589.**

———*Husband and wife—Purchase by wife—Presumption.*

There is no presumption that when a wife possessed of considerable wealth and considerable income purchases a property in her own name the property must be regarded as one purchased benami for her husband. *(D. N. Mitter and Patterson, JJ.)* SYED MAHOMED MALEEH *v.* SHASI MOULI NAG. **67 C.L.J. 188.**

———*Husband and wife—Purchase of property in name of wife or child—Inference—Resulting trust.*

Where property is purchased or provided by one person in the name of or for another, there is a presumption of a resulting trust in favour of the person who provides or purchases the property and the situation is not altered by the fact that the person in whose name the property is purchased is the child or wife of the purchaser. In the absence of circumstances rebutting such presumption, such property is attachable in execution of a decree against the purchaser. A.I.R. 1914 Lah. 17 and A.I.R. 1916 Lah. 320, Expl.; A.I.R. 1931 P. C. 55 and A.I.R. 1928 P.C. 172, Appr.; A.I.R. 1934 Mad. 671, Dist. *(Middleton, J.C. and Almond, A.J.C.)* UMAR KHAN *v.* MOHAMMAD SHARIF KHAN. **161 I.C. 456=8 R. Pesh. 173=A.I.R. 1936 Pesh. 88.**

———*Nature of transaction.*

A benami transaction is a perfectly genuine transaction which is legally enforceable and the term benami should not be regarded as being equivalent to not genuine. So also to speak of a benami gift is a contradiction in terms, for either there was a gift, in which case the donee obtained title to the property or there was not a genuine or valid gift. A benami transaction has the same effect as a resulting trust. (*Page, C.J., Baguley, Mosely, Ba U and Dunkley, JJ.*) Maung Tun Pe *v.* B. K. Halder. **14 Rang. 242=163 I.C. 211=8 R.R. 616=A.I.R. 1936 Rang. 256 (F.B.).**

———*Nature of transaction—Title of benamidar.*

Where a transaction is once made out to be a mere benami, it is evident that the benamidar absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested, and the title to the property is with the latter. (*Rowland and Varma, JJ.*) Sheo Gobind Koeri *v.* Ram Asray Singh. **180 I.C. 615 =11 R.P. 521=5 B.R. 458=1938 P.W.N. 738 =19 Pat.L.T. 697=A.I.R. 1939 Pat. 5.**

———Presumption of—Life Assurance Policy—Assignment to wife or child—Effect—Assignee, if mere benamidar or nominee of assured. *See* Life Assurance—Policy of. **31 S.L.R. 98= A.I.R. 1937 Sind 181.**

———Presumption—Property in wife's name. *See* Income-tax Act, S. 10 (2). **160 I.C. 611= 8 R.P. 373.**

———*Proof—Custody of documents of title—If conclusive.*

The fact that the documents of title are produced from the custody of certain person, is of importance in considering a question of benami; but the Judge in considering such question, is not bound to come to the conclusion that, in the event of a document being produced from the custody of the person asserting that title, his case is made out. (*Wort and Rowland, JJ.*) Mt. Bibi Zainab *v.* Muhammad Ayub. **161 I.C. 331 (2)=8 R.P. 443=1936 P.W.N. 140=17 Pat.L.T. 366=A.I.R. 1936 Pat. 136.**

———*Proof—Evidence—Sale-deed in name of husband—Latter deed by wife that previous sale was benami—If conclusive.*

A person taking a sale deed in respect of certain properties in his name *prima facie* gets title to the properties; and a mere recital in subsequent deed executed by another person (even though the latter is the wife of the former) that the prior sale-deed represented a benami transaction is insufficient to hold that it is benami. (*A. S. R. Chari and Sreenivasa Rao, JJ.*) Varadachar *v.* Dasappa. **14 Mys.L.J. 256=41 Mys.H.C.R. 30.**

———*Proof—Evidence requisite.*

In order that a property may be shown to be benami, it is not only necessary to show that it was purchased by another's money, but it is necessary to show that it was purchased by that other, benami. But circumstances in India are such and the habits of society are such, that evidence which might not be sufficient in England to show that the property was benami would be sufficient in India. (*Davis, J.C. and Mehta, J.*) Viranbai *v.* Parmanand Thangaldas. **I.L.R. (1939) Kar. 140=178 I.C. 801=11 R.S. 108=A.I.R. 1938 Sind 206.**

———*Res judicata—Decree against benamidar—Real owner—If bound.*

A decree obtained against the benamidar will bind the beneficial owner. (*Dhavle, J.*) Inderjit Pratab Bahadur Sahi *v.* Suraj Narain. **A.I.R. 1940 Pat. 21.**

———*Res judicata—Proceeding against benamidar—True owner, if bound.*

A benamidar is ordinarily deemed to be a trustee or representative of the true owner, and consequently in a proceeding by or against the benamidar the person beneficially entitled is fully affected by the rules of *res judicata.* Exceptions to this rule might exist only when the circumstances disclose a conflict of interest between the benamidar and the real owner. 46 I.A. 1, Rel. on. (*Mukherjea, J.*) Thakur Das Nath *v.* Keshab Chandra Ghosh. **42 C.W.N. 497.**

———*Resulting trust—A purchasing property in* B's *name—Consideration flowing from* A*—Resulting trust in* A's *favour.*

Where property is purchased by *A* in the name of *B* and the consideration has come through *A* the transaction is benami and a resulting trust is created in favour of *A.* (*Dunkley, J.*) U Maung Gale *v.* Maung Po Yin. **169 I.C. 389= 9 R.R. 398=A.I.R. 1937 Rang. 198.**

———Revenue sale during pendency of suit by mortgagee of the property—Purchase benami for mortgagor—Suit by mortgagee after decree to declare sale fraudulent—If barred by S. 36, Bengal Land Revenue Sales Act. *See* Bengal Land Revenue Sales Act, S. 36. **A.I.R. 1939 Pat. 168.**

———Right to sue—Benami purchaser at revenue sale—Right of creditor of real owner. *See* Bengal Land Revenue Sales Act, S. 36. **178 I.C. 357=5 B.R. 91.**

———*Right to sue—Benami purchaser at revenue sale—Right to sue for possession—Bengal Land Revenue Sales Act, S. 37.*

A benamidar is a trustee for the beneficial owner. As the legal title is in him, he can maintain in his own name a suit for possession. The fact that he had before suit admitted that a certain company was the real owner and that he as its director had asserted the claim of the company does not make inapplicable the aforesaid principle. If he is a declared purchaser at a revenue sale, he has also the right to avoid and annul all unprotected under-tenures under the provisions of S. 37 of the Bengal Land Revenue Sales Act. (*Mitter and Rau, JJ.*) Kumar Narendra Nath Roy *v.* Midnapore Zemindary Co., Ltd. **44 C.W.N. 38=70 C.L.J. 218=A.I.R. 1940 Cal. 115.**

———*Right to sue—Right of benamidar—Benami transaction contravening law.*

A benamidar cannot maintain a suit if the benami transaction contravenes the provisions of any law. A benamidar cannot, therefore, sue for possession, where the transaction offends against the provisions of the Punjab Land Alienation Act in so far as it effects a sale as well as a mortgage for an indefinite period, neither of which is permissible under the Act if once it is found that the real transferee is a non-agriculturist. (*Din Mahomed, J.*) Lala *v.* Jage Ram. **40 P.L.R. 784= 181 I.C. 465=11 R.L. 841=A.I.R. 1938 Lah. 789.**

———Ryot holding ryotwari land—If can be benamidar. *See* Land tenure—Ryotwari tenure. **A.I.R. 1937 Nag. 63.**

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BENAMIDAR—SUIT BY BENAMIDAR.

———Suit by benamidar—Dismissal—Appeal by real owner—Permissibility. *See* C. P. Code, S. 146. **50 L.W. 429.**

———*Suit by benamidar—Real owner's right to be joined as party.*

As the benamidar represents the real owner, it is open to the latter to apply to be joined in the action, but whether he is joined or not he is bound by the result of the proceeding unless it is revoked. (*S. K. Ghose and Patterson, JJ.*) Banwari Mukund Das Nandi Dalal *v.* Ajit Kumar Nandi. **67 C.L.J. 320=A.I.R. 1938 Cal. 874.**

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (XII OF 1877), Ss. 3 and 13—*Jurisdiction of Munsif to attach property lying out of his jurisdiction though within the district.*

Although there may be one or more munsifs for every district for mere administrative purpose, each and every munsif is a munsif for the district, although by an administrative order he exercises jurisdiction over a limited part of the district. It is no doubt quite right and proper for a munsif executing a decree to say that, with regard to attachment and sale of property outside his jurisdiction so limited it is a matter of convenience to transfer it to the munsif or another sub-division where the property is situated; but his jurisdiction as munsif of the district is unimpaired, and he has jurisdiction to attach property in any part of the district. (*Courtney Terrell, C.J. and Manohar Lall, J.*) Ram Bilas Mal *v.* Raghunath Sahay. **172 I.C. 30=10 R.P. 330=1937 P.W.N. 757=18 Pat.L.T. 822.**

———**S. 8**—Additional District Judge—Jurisdiction to hear appeal under S. 476-B, Cr. P. Code—Power of District Judge to transfer appeal. *See* Cr. P. Code, S. 476-B. **17 Pat.L.T. 276.**

———**Ss. 11 (1) and 9**—*Transfer of proceeding in Subordinate Judge's Court—Power of District Judge.*

A preliminary decree in a mortgage suit was passed in the Court of the 4th Subordinate Judge of a certain place. That Court was then abolished and the Court of the second Subordinate Judge of that place was placed in charge of the business of the fourth Court and the final decree in the mortgage suit was passed by the second Court. The decree-holder applied for execution of the decree in the second Court but his application was returned to him with a statement that the Court of the third Subordinate Judge of the place had already been placed in charge of the business of the fourth Court. The decree-holder thereupon presented his application for execution to the third Court. There was a sale but that sale was set aside. After that fresh sale processes were served but before the sale date, the execution case was transferred under the District Judge's order to the fourth Court which had been reinstated in the meantime. The sale was held and confirmed by the fourth Court.

Held, that the whole of the proceedings was in order as a result of orders properly made by the District Judge in pursuance of his powers under Ss. 9 and 11 (1) of the Civil Courts Act. (*Derbyshire, C.J. and Mukherjea, J.*) Sisirchandra Dutt Gupta *v.* Gopal Das. **42 C.W.N. 977.**

BENGAL, AGRA AND ASSAM CIVIL COURTS ACT (1877), S. 22.

———**S. 13 (2)**—*Order by District Judge re-distributing work in Courts of Subordinate Judges—If affects jurisdiction of latter.*

Under S. 13 (1) of the Civil Courts Act, the Local Government fixes as well as alters the local limits of the jurisdiction of the Civil Courts. The local jurisdiction of a Subordinate Judge which extends over the whole District, is not altered by an order of the District Judge under Cl. (2) of that section re-distributing the civil business of the District. Such an order under S. 13 (2) therefore cannot operate to take away the jurisdiction of a Subordinate Judge who passed a mortgage decree from executing that decree, although the civil business relating to the local area within which the mortgaged properties are situated is assigned by the District Judge to another Subordinate Judge of the District. (*Bartley and Nasim Ali, JJ.*) Jitendra Nath *v.* Birendra Krishna Roy. **42 C.W.N. 167=175 I.C. 204=10 R.C. 769=A.I.R. 1938 Cal. 193.**

———**S. 13 (2)**—*Several Sub-Judges in one District—Distribution of business among them by District Judge—Effect on their territorial jurisdiction—Plaint filed before one of them returned for presentation to proper Court according to such distribution—Date of institution of suit.*

Where there are more than one Subordinate Judge in a district having territorial jurisdiction over the entire district, and the District Judge has under S. 13 (2) of the Civil Courts Act distributed civil business among them by reference to local limits, and a plaint filed before one of them is returned for presentation to proper Court in accordance with the distribution made by the District Judge, the suit must be taken to have been instituted on the date on which the plaint is filed in the first Court, as that Court, having territorial jurisdiction over the whole District, has territorial jurisdiction to entertain the suit. In such a case, there is no necessity for the plaintiff to invoke the aid of S. 14 of the Limitation Act. (*Mitter and Akram, JJ.*) Billada Sundari Dassi *v.* Nilambara Saha. **44 C.W.N. 225.**

———**S. 21**—*Forum of appeal—Determining factor—Plaint valuation or adjudged valuation.*

To determine the proper appellate forum, it is the value of the original suit as assigned by the plaintig in his plaint that should be looked into and not the value as found by the trial Court and accepted by the plaintiff, unless of course there has been misrepresentation, etc. In fact it is that valuation which controls not only the jurisdiction of the trial Court but of the appellate Court as well. Where a suit for accounts was valued at Rs. 130 but the trial Court decreed the suit for Rs. 7,000 and odd, an appeal lies to the District Judge and not to the High Court under S. 21 of Bengal, Agra and Assam Civil Courts Act. (*Rachpal Singh and Ismail, JJ.*) Ishtiaq Ahmad *v.* Abdul Samad. **I.L.R. (1939) All. 172=181 I.C. 939=11 R.A. 628=1939 A.W.R. (H. C.) 59=1939 A.L.J. 133=A.I.R. 1939 All. 273.**

———**S. 22**—*Order of Munsif refusing to file complaint under S. 476, Cr. P. Code—Appeal to District Judge—Power of latter to transfer it for hearing to Sub-Judge.*

An order of a Munsif refusing to file a complaint under S. 476, Cr. P. Code, does amount to an order within the meaning of S. 22 of the Civil Courts Act. A District Judge has, therefore, jurisdiction to transfer an appeal against that order made to him to a Subordinate Judge under his administrative control for hearing. (*Jack and Henderson, JJ.*) CHANDRA KUMAR *v.* GOPI NATH KAR. **I.L.R. (1938) 2 Cal. 287=68 C.L.J. 86=176 I.C. 823=11 R.C. 172=42 C.W.N. 586=A.I.R. 1938 Cal. 463.**

———**S. 37**—*Family custom modifying personal law—Whether can be allowed to be proved.*

In the case of parties who are Muhammadans, a family custom under which succession is governed by the Hindu Law can be allowed to be proved. Courts are not bound under S. 37 of the Bengal, Agra and Assam Civil Courts Act, to enforce the rule of Mahomedan Law notwithstanding such custom. (*Sulaiman, C.J. and Bennet, J.*) JAFFO *v.* CHITTA. **58 All. 889=163 I.C. 650=9 R.A. 49=1936 A.L.J. 493=1936 A.W.R. 449=A.I.R. 1936 All. 443.**

———**S. 37**—*Question regarding dower—Applicability of Mahomedan Law.*

Though the topics of divorce, dower, betrothal, family relations, are not particularized in S. 37 as in the enactments of other provinces, yet this does not import an intention that the social and family life of Muslims should be differently regarded from province to province. The right of the wife to her dower is a fundamental feature of the marriage contract; it has a pivotal place in the scheme of the domestic relations affecting the mutual rights of the spouses at more than one point. While by the Mahomedan Law, marriage itself is viewed as a civil contract and the agreement to pay a certain amount of dower is a part of the contract of marriage, the mere principles of the law of contract as embodied in the Indian Contract Act are insufficient of themselves to account for the main features of the law of dower. The Mahomedan texts and the principles of Mahomedan law have therefore to be applied to determine every facet of the law of dower among Mahomedans in Bengal, Bihar, Agra and Madras, as in the other provinces. (*Sir George Rankin.*) SABIR HUSSAIN *v.* FARZAND HASAN. **42 C.W.N. 353=1938 A.W.R. (P.C.) 32=1938 A.L.J. 141=173 I.C. 1=47 L.W. 227=65 I.A. 119=I.L.R. (1938) All. 314=1938 O.W.N. 233=19 Pat.L.T. 215=1938 O.L.R. 112=4 B.R. 358=1938 P.W.N. 170=66 C.L.J. 548=1938 A.L.R. 148=10 R.P.C. 211=1938 O.A. 214=1938 M.W.N. 626=40 Bom.L.R. 735=32 S.L.R. 362=A.I.R. 1938 P.C. 80=(1938) 1 M.L.J. 458 (P.C.).**

———**S. 37 (2)**—*Scope and meaning of.*

What is meant by S. 37 (2) of the Bengal, Agra and Assam Civil Courts Act is that where the statute law deals with a subject and allows certain rights, equity cannot be invoked to extend the rights which are provided by the statute. (*Bennet, A.C.J. and Verma, J.*) BEHARIJI MAHARAJ *v.* MANMOHAN DAS. **I.L.R. (1939) All. 24=180 I.C. 699=11 R.A. 502=1938 A.L.J. 1199=1939 A.W.R. (H.C.) 43=A.I.R. 1939 All. 141.**

BENGAL ACTS AND REGULATIONS.

Agricultural Debtors' Act (VII of 1936).
Alluvion and Diluvion Regulation (XI of 1825).

Cess Act (IX of 1880).
Children Act (II of 1922).
Court of Wards Act (IX of 1879).
Criminal Law Amendment Act (VI of 1930).
Embankment Act (II of 1882).
Estates Partition Act (V of 1897).
Excise Act (V of 1919).
Ferries Act (I of 1865).
Food Adulteration Act (VI of 1919).
General Clauses Act (I of 1899).
Irrigation Act (III of 1876).
Landlord and Tenant Procedure Act (VIII of 1869).
Land Redemption and Foreclosure Regulation (XVII of 1806).
Land Registration Act (VII of 1876).
Land Revenue Sales Act (XI of 1859).
Land Revenue Sales (Amendment) Act (III of 1862).
Land Revenue Settlement Regulation (VII of 1822) and (IX of 1825).
Limitation Regulation (II of 1805).
Local Self-Government Act (III of 1885).
Money-Lenders Act (VII of 1933).
Municipal Act (III of 1884).
Municipal Act (XV of 1932).
Patni Taluk Regulation (VIII of 1819).
Public Demands Recovery Act (III of 1913).
Public Gambling Act (II of 1867).
Regulation XXVII of 1793 (Sair).
Rent Act (X of 1859).
Revenue Free Lands (Non-Badshahi Grants) Regulation (XIX of 1793).
Revenue Free Lands Regulation (VIII of 1800).
Revenue Recovery Act (I of 1890).
Sanitary Drainage Act (VIII of 1895).
Supplementary Act (XXIV of 1932).
Suppression of Immoral Traffic Act (VI of 1933).
Suppression of Terrorist Outrages Act (XII of 1932).
Survey Act (V of 1875).
Survey and Settlement Manual (1917).
Tenancy Act (VIII of 1885).
Village Chaukidari Act (VI of 1870).
Village Self-Government Act (V of 1919).
Wakf Act (XIII of 1934).

BENGAL AGRICULTURAL DEBTORS' ACT (VII OF 1936), S. 1 (3)—*Effect of.*

Per *Derbyshire, C.J., Lort Williams and Mitter, JJ.*—The Act extends to the whole of Bengal. The provision in S. 1 (3) that it shall come into force in such areas as the Local Government may by notification direct means that it shall come into force so far as concerns the establishment of Debt Settlement Boards in the local areas as provided in S. 3 and all matters arising under the provisions of the Act consequent upon such establishment. Once these Boards are set up, the Act has come into force in those areas by reason of sub-S. (2), and its provisions apply to the whole of Bengal. 41 C.W.N. 1363, Disappr. (*Derbyshire, C.J., Lort Williams, Bartley, Nasim Ali and Mitter, JJ.*) NARSINGHDAS TANSUKDAS *v.* CHOGEMULL. **I.L.R. (1939) 2 Cal. 93=183 I.C. 113=12 R.C. 129=**

2 Fed.L.J. 71=43 C.W.N. 613=69 C.L.J. 458=A.I.R. 1939 Cal. 435 (S.B.).

———S. 1 (3)—*Notified areas—If should be administrative or judicial districts.*

The areas mentioned in S. 1 (3) of the Bengal Agricultural Debtors' Act need not be administrative or judicial "districts". Under the Act, the Local Government can notify an area the entirety of which lies within the limits of the administrative district, but which does not include the whole of such district, or they may notify an area lying partly in one district and partly in another. (*Panckridge, J.*) Nursingdas Tunsookdas *v.* Chogemull. **178 I.C. 529=11 R.C. 364=42 C.W.N. 293=A.I.R. 1938 Cal. 402.**

———S. 2 (8) (i)—*"Contingent liability"—Liability of defendant in accounts suit.*

The liability of a defendant in an accounts suit is not a "contingent liability" within the meaning of S. 2 (8) (*i*) of the Bengal Agricultural Debtors' Act. The underlying idea in connection with the use of the expression "contingent" seems to be that the liability in question must depend upon some prior occurrence or condition. The liability of the defendant may possibly be unascertained, but, if it exists at all, it is a present liability which does not in any way depend upon the happening of any other event or the fulfilment of any other condition. (*Edgley, J.*) Ravati Mohan Roy *v.* Bhikchand Bhuian. **43 C.W.N. 497=A.I.R. 1939 Cal. 343.**

———S. 2 (8)—"Debt"—If includes one payable under decree of High Court on Original Side. *See* Bengal Agricultural Debtors' Act, S. 34. **43 C.W.N. 886.**

———Ss. 2 (8) and 34—*"Debt"—Plaintiff's liability to repay decretal amount withdrawn from Court, on reversal of decree in appeal—If debt—Execution by defendant against him for that amount stayed on notice from Board—Execution against surety—Permissibility.*

Where the amount due under a decree passed against defendant was deposited by him in Court, and the plaintiff was allowed to withdraw it on furnishing surety, but the decree was reversed on appeal with the result that the plaintiff became liable to refund that money, the liability of the plaintiff to repay the money is a 'debt' within the meaning of the Bengal Agricultural Debtors' Act. If the plaintiff applies to a Debt Settlement Board and on notice from it the execution proceedings taken out by the defendant against him for the money are stayed, the defendant can start execution against the surety. (*Henderson, J.*) Gopendra Narain Dhar *v.* Radha Krishna Dhar. **188 I.C. 388=44 C.W.N. 393=A.I.R. 1940 Cal. 224.**

———S. 9 (2)—*Applicants before Board jointly liable for debt along with others—Right of latter to contribution from applicants—Extent of.*

Per *Mukherjee, J.*—If some of the persons liable in respect of a joint debt apply to the Board for settlement of their debts, the liability of the other persons jointly liable with the applicants and who are not before the Board remains intact and is not in any way affected by the settlement of the debt of the applicants, and the creditor can realise his dues from the other debtors. But the right of contribution of the other debtors from the applicants is limited to such amount as is determined by the Board. (*S. K. Ghose and Mukherjea, JJ.*) Abu Taher Bazulal Rashid *v.* Chandra Moni Saha. **43 C.W.N. 318.**

———Ss. 18 and 20—Validity of notice—Power of Civil Court to consider. *See* Bengal Agricultural Debtors' Act, Ss. 34, 18 and 20, ***infra.*** **41 C.W.N. 1307.**

———Ss. 18 and 20—*Distinction between—Scope of enquiry before Board.*

Per *Mukherjea, J.*—The enquiry by the Board contemplated by S. 18 (1) is not one as to whether the liability amounts to a debt at all within the meaning of the Act but whether a debt as defined by the Act and which is alleged by the party to exist, exists as a fact; and if so, what is its amount. There is a marked difference between Ss. 18 and 20. Under S. 20 if any question arises before the Board as to whether a person is a debtor or not, the Board should decide the matter. (*S. K. Ghose and Mukherjea, JJ.*) Nur Mia *v.* Noakhali Nath Bank, Ltd. **I.L.R. (1939) 1 Cal. 437=184 I.C. 118=12 R.C. 204=43 C.W.N. 322=69 C.L.J. 126=A.I.R. 1939 Cal. 298.**

———S. 20—*Purchaser of equity of redemption against whom decree was passed—If a "debtor."*

A purchaser of the equity of redemption who was made a party to the mortgage suit and against whom the usual mortgage decree was passed is not a "debtor" within the meaning of the Act. The fact that he cannot be made personally liable does not really affect the question. (*Mukherjea, J.*) Kailash Chandra Bhaumik *v.* Ram Kanai Chakravarti. **182 I.C. 408=12 R.C. 60=68 C.L.J. 513=43 C.W.N. 187=A.I.R. 1939 Cal. 177.**

———S. 34—*Appeal from order setting aside execution sale—Notice received by Appellate Court—Jurisdiction to hear appeal.*

As soon as an order setting aside a sale in execution of a decree is passed under O. 21, R. 90, C. P. Code, the debt which was extinguished by the sale is revived. Consequently the Court to which an appeal is filed from the order setting aside the sale, has no jurisdiction to hear the appeal after it receives a notice from the Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors' Act. There can be no doubt that by using the expression "other proceeding" in that section, the legislature intended to include appeals, execution proceedings and matters of any kind connected with litigation relating to debts. (*Edgley, J.*) Braja Bashi Ray *v.* Nagar Bashi Choudhury. **179 I.C. 748=11 R.C. 614=42 C.W.N. 479=A.I.R. 1938 Cal. 362.**

———S. 34—*Applicability—Decree of High Court transferred to Munsif for execution—Notice to Munsif for stay—Legality.*

The definition of 'debt' in S. 2 (8) of the Bengal Agricultural Debtors' Act does not include one payable under a decree of the High Court exercising its original jurisdiction. S. 34 of the Act does not, therefore, apply to such a decree transferred to a Munsif for execution, and the Munsif cannot be called upon by a notice under that section to stay the proceedings. (*Mukherjea and Roxburgh, JJ.*) Tarak Nath Kundu *v.* Panchanan Dutt. **I.L.R. (1939) 2 Cal. 381**

=185 I.C. 131=12 R.C. 338=43 **C.W.N. 886**=69 **C.L.J. 590=A.I.R. 1939 Cal. 564.**

——**S. 34**—*Applicability—High Court decree—High Court transferring its decree to another Court for execution—Procedure on receipt of notice.*

There is nothing in the Bengal Agricultural Debtors' Act which would legitimately exclude decrees of the High Court or other Courts not within the scheduled districts, from the effect of the Act. Where the High Court, after it transfers its decree for execution to another Court in the same or a different province receives the notice under S. 34 of the Act, it is not necessary for it to re-call the decree. It would be sufficient if it makes a note that proceedings in execution are stayed and sends a copy of that note to the executing Court. (*Ameer Ali, J.*) BAIJNATH TAMAKUWALLA *v.* TORMULL. **171 I.C. 151=11 R.C. 484=42 C.W.N. 481=A.I.R. 1938 Cal. 455.**

——**S. 34**—*'Civil Court'—If includes High Court.*

The High Court is a Civil Court within the meaning of S. 34 of the Bengal Agricultural Debtors' Act when it acts as a Court of appeal under S. 16 of the Letters Patent. (*S. K. Ghose and Patterson, JJ.*) SATISH CHANDRA *v.* NAOGAON UNION BANK, LTD. **182 I.C. 480=12 R.C. 70=69 C.L.J. 113=42 C.W.N. 1216=A.I.R. 1938 Cal. 753.**

——**S. 34**—*"Civil Court"—If includes High Court.*

The words "Civil Court" in the Act do not include the High Court in its appellate jurisdiction. (*Derbyshire, C.J., Nasim Ali and R. C. Mitter, JJ.*) KHIRODE CHANDRA GHOSE *v.* NARENDRA NATH. **185 I.C. 256 (1)=12 R.C. 347 (1)=44 C.W.N. 485=A.I.R. 1939 Cal. 599 (S.B.).**

——**Ss. 34 and 40**—*Civil Court receiving notice—Jurisdiction to decide if debtor resides or property is situate within Board's jurisdiction.*

On receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, the Civil Court cannot refuse to take any action on the ground that the debtors do not ordinarily reside or that the mortgaged property is not within the jurisdiction of the Board. This is a matter which is not within the jurisdiction of the Civil Court at all, but is to be decided by the appellate officer appointed under S. 40 of the Act. (*Henderson, J.*) HATEMUDDIN SIRCAR *v.* MUSAJJAMMA SIRCAR. **174 I.C. 880=10 R.C. 737=42 C.W.N. 280=A.I.R. 1938 Cal. 176.**

——**S. 34**—*Civil Court receiving notice for stay—Jurisdiction to decide if applicant before Board is debtor.*

S. 20 of the Bengal Agricultural Debtors' Act provides that if any question arises in connection with proceedings before a Board under this Act, whether a person is a debtor or not, the Board shall decide the matter. This section was, of course, enacted in relation to the definition of 'debtor' under S. 2 of the Act. A Civil Court receiving notice for stay under S. 34 has, therefore, no jurisdiction to decide such a question. (*Henderson, J.*) BASIRUDDIN AHMED CHOWDHURY *v.* NOAKHALI SWADESHI STORE. **66 C.L.J. 539.**

——**S. 34**—*Civil Court receiving notice under—Question if applicant before Board is a debtor—Power to investigate.*

It is not open to a Court to which notice under S. 34 of the Bengal Agricultural Debtors' Act is sent to decide or even consider whether the debtor comes within the Act or whether he does not; that question rests solely with the Board. Thus a Debt Settlement Board can hold up a suit started in the Court of the Subordinate Judge, in which a sum of over Rs. 26,000 is in dispute, and if that Debt Settlement Board comes to the conclusion that the debtors are in fact 'debtors' within the meaning of the Act, the Board can completely oust the Court and adjudicate in effect upon a claim for Rs. 26,000 and the only appeal against their decision will be to a Munsif whose ordinary powers are limited to cases involving not more than one thousand rupees. Thus it seems to be that the Act in its present form is likely to entail consequences of a fantastic description which obviously could not have been realised or foreseen when the Act was drafted or passed. (*Costello, Ag. C. J. and Edgley, J.*) BHAGAWAN DAYAL *v.* CHANDULAL. **I.L.R. (1938) 1 Cal. 256=174 I. C. 51=10 R.C. 612=41 C.W.N. 1363=A.I.R. 1938 Cal. 23.**

——**S. 34**—*Civil Court receiving notice—Question, if applicant before Board is a 'debtor'—Power to investigate.*

The question whether the applicant before the Board is a 'debtor' within the meaning of S. 2 (9) of the Bengal Agricultural Debtors' Act, cannot be investigated by the Civil Court receiving a notice under S. 34 of the Act from the Board. It is, at any rate, in the first instance, for the Board, subject to such right of appeal as the Act gives, to determine whether it can exercise jurisdiction over any particular applicant. (*Panckridge, J.*) NURSINGDAS TUNSOOKDAS *v.* CHOGEMULL. **178 I.C. 529=11 R.C. 364=42 C.W.N. 293=A.I.R. 1938 Cal. 402.**

See also (*Mukherjea, J.*) KAILASH CHANDRA BHAUMIK *v.* RAM KANAI CHAKRAVARTI. **182 I. C. 408=12 R.C. 60=68 C.L.J. 513=43 C.W.N. 187=A.I.R. 1939 Cal. 177.**

——**S. 34**—*Notice received by Civil Court—Jurisdiction to decide whether "debtor" within meaning of the Act.*

Where a notice under S. 34 of the Bengal Agricultural Debtors' Act is received by the Court and no sale has taken place and the debt still exists, so that there is, in fact, a proceeding with regard to the debt which has been included in the application under S. 8 or in the statement under sub-S. (1) of S. 13 as the case may be, the Civil Court has got no jurisdiction to decide the question whether the debtor is a debtor within the meaning of the Act. The Act has set up a special tribunal for the determination of the question whether the person is a debtor or not. It would be inconsistent with the provisions of the Act to hold that the Civil Court is to go into and decide the same question. (*S. K. Ghose and Nasim Ali, JJ.*) SAILABALA DAS *v.* NITYANANDA SARKAR. **I.L.R. (1938) 2 Cal. 168=182 I.C. 462=12 R.C. 69=42 C.W.N. 415=A.I.R. 1938 Cal. 375.**

———S. 34—*Court not situated in District in which Act is in force—If can be compelled to issue stay order.*

No Court situated in a district in which the Bengal Agricultural Debtors' Act has not been brought into force can be compelled to issue the stay order contemplated in the latter portion of S. 34 of that Act. In order to obtain such a stay order, the Act must be in operation both in the district in which the Board is situated to which an application is made for the settlement of a debt and also in the district in which the Court is situated to which the notice under S. 34 of the Act is actually sent. (*Costello, Ag. C.J. and Edgley, J.*) Bhagawan Dayal Sahu *v.* Chandulal Agarwala. **I.L.R. (1938) 1 Cal. 256=174 I.C. 51=10 R.C. 612=41 C.W.N. 1363=A.I.R. 1938 Cal. 23.**

———S. 34—*Court not situated in District in which Act is in force—Notice received by such Court—Duty to issue stay order.*

Sub-S. (3) of S. 1 of the Bengal Agricultural Debtors' Act must be read in conjunction with sub-S. (2) of the same section. Read together, the sub-sections mean that until an area is notified no Debt Settlement Board can be established therein, but when this has been done all Civil Courts in Bengal are to treat the proceedings of such a Board in accordance with the provisions of the Act. Accordingly, a Civil Court in Bengal receiving a notice under S. 34 of the Act from a Board duly established is bound to issue the stay order contemplated in that section, although its territorial jurisdiction does not lie within an area that has been notified under S. 1 (3). 41 C.W.N. 1363, Not foll. (*Panckridge, J.*) Nursingdas Tunsookdas *v.* Chogemull. **178 I.C. 529=11 R.C. 364=42 C.W.N. 293=A.I.R. 1938 Cal. 402.**

———S. 34—Execution against principal debtor stayed on notice from Board—Execution against surety—Permissibility. *See* Bengal Agricultural Debtor's Act, Ss. 2 (8) and 34. **44 C.W.N. 393.**

———S. 34—*Mortgaged property sold to mortgagee decree-holder—Latter allowed to set off price as against his debt, but sale not confirmed—Further execution proceedings—If can be stayed on receipt of notice from Board.*

Where the mortgaged properties had been sold to the mortgagee decree-holder for the exact amount of the debt then due and owing to him and he was allowed to set off the amount of the price as against the amount of the debt due to him from the judgment-debtors, the debt is no longer in existence although the sale has not yet been confirmed. There being no debt, the Court cannot stay further execution proceedings on receipt of a notice from the Debt Settlement Board under S. 34 of the Bengal Agricultural Debtors' Act. (*Costello, Ag. C.J. and Edgley, JJ.*) Manindra Mohan Roy Talukdar *v.* Bepin Behari. **I.L.R. (1938) 1 Cal. 597=41 C.W.N. 1366.**

———S. 34—*Notice given by Board to Court—Duty of Court to stay proceedings.*

Where an application has been made to the Board under S. 8 of the Bengal Agricultural Debtors' Act and the Board has given notice thereof to the Court, the proceedings before that Court should be stayed. It is not for the Court to decide whether the Board is specially empowered under S. 7 or not to deal with the application. (*S. K. Ghose and Patterson, JJ.*) Satyendra Mohan Ghosh *v.* Nibaran Chandra Bose. **I.L.R. (1937) 2 Cal. 478=172 I.C. 236=10 R.C. 353=41 C.W.N. 928=A.I.R. 1937 Cal. 392.**

———S. 34—*Notice issued after decree-holder purchases property and is allowed set-off—Sale not confirmed and application under O. 21, R. 90, C.P. Code, pending—Civil Court, if can stay further proceedings.*

Where in execution of a decree, the decree-holder purchases the property of the judgment-debtor and he is allowed a set-off, the debt is entirely wiped out and there is no proceeding pending in respect of any debt, although the sale has not been confirmed and an application under O. 21, R. 90, C.P. Code, is pending. Consequently, if at this stage a notice is issued to the Civil Court under S. 34, it has no jurisdiction to stay further proceedings in execution. (*Costello, Ag. C.J. and Edgley, J.*). Nrishingha Chandra Nandi Chouduury *v.* Kedar Nath Chaudhury. **I.L.R. (1938) 1 Cal. 345=176 I.C. 330=11 R.C. 77=66 C.L.J. 433=41 C.W.N. 1307=A.I.R. 1937 Cal. 713.**

———S. 34—*Notice is issued but not received by Court—Proceedings, if void.*

The expression "give notice" implies not only the issue of notice but also the receipt of notice by the Court. Before the notice for stay is actually received by the Court in which the suit or proceeding is pending, such suit or proceeding cannot be held to be void simply because a notice has been issued by the Board but not actually received by the Court. (*S.K. Ghose and Patterson, JJ.*) Ahmad Ali *v.* Fajarali Rasuli. **179 I.C. 750=11 R.C. 613=A.I.R. 1938 Cal. 869.**

———S. 34—*Notice issued by Board before consideration of application under S. 12—If premature.*

It is not necessary before the issue of the notice by the Board under S. 34 that a date and place for the consideration of the application by the debtor must be fixed under S. 12, or that notice of such date must be given to the parties and the parties heard. (*M.C. Ghose and Biswas, JJ.*) Jogesh Chandra *v.* Mahes-Chandra. **178 I.C. 1001=11 R.C. 454=42 C.W.N. 1179=A.I.R. 1938 Cal. 750.**

———Ss. 34 and 20—*Notice received by Insolvency Court—Power of latter to decide if insolvent is 'debtor'.*

Under S. 20 of the Bengal Agricultural Debtors' Act if any question arises in connection with proceedings before a Board under this Act, whether a person is a debtor or not, the Board shall decide the matter and it would seem that such a decision must precede any notice issued under S. 34 of the Act. It is not for the Insolvency Court which receives the notice to decide, more especially without taking any evidence whatsoever, whether a person is or is not a debtor within the meaning of the Act. (*Bart-*

ley and Nasim Ali, JJ.) Shib Dulal *v.* Kishoreganj Loan Office, Ltd. **176 I.C. 927 =11 R.C 191=42 C.W.N. 173=A.I.R. 1938 Cal. 194.**

———**S. 34**—*Notice for stay—Application for setting aside sale—Compromise between judgment-debtor and purchaser that sale should be set aside on payment by judgment-debtor—Judgment-debtor thereafter obtaining stay order—Court if bound to stay proceedings.*

On application filed in Court for setting aside an execution sale under O. 21, R. 90, C. P. Code, a compromise was effected between the judgment-debtor and the purchaser. It was agreed that if the judgment-debtor paid to the purchaser a certain sum, the sale would be set aside. Instead of paying, the judgment-debtor obtained a stay order from a Debt Settlement Board.

Held, that the Court was not bound to stay the proceedings. (*Henderson, J.*) Krishna Gobinda *v.* Salamatulla. **44 C.W.N. 789.**

———**S. 34**—*Notice for stay—Powers of Civil Court.*

Per *S.K. Ghose, J.*—The Civil Court receiving notice under S. 34 of the Bengal Agricultural Debtors' Act must see that there is a debt in respect of which proceedings before it are pending, and where the debt does not exist, for instance by reason of the execution sale having taken place, there is nothing to stay and the notice cannot be given effect to. The Court has also jurisdiction to decide whether the notice is in the prescribed manner as provided for by the Act. But where the Board has given an express decision on a question of fact or on a question of mixed law and fact within its jurisdiction as provided for by the Act, as (*e.g.*) that the debtor was a debtor within the meaning of the Act and that he ordinarily resided within its jurisdiction, the Court cannot sit in judgment over such decision and override it and then refuse to stay the proceedings in accordance with the notice. (*S.K. Ghose and Nasim Ali, JJ.*) Harish Chandra Pal *v.* Chandra Nath Saha. **I.L.R. (1938) 2 Cal. 155=181 I.C. 739=11 R.C. 846=42 C.W.N. 411=A.I.R. 1938 Cal. 369.**

———**S. 34**—*Notice for stay in respect of joint debt—Power of Court to enquire if application to Board was valid.*

A Civil Court, on receipt of notice under S. 34 of the Bengal Agricultural Debtors' Act in respect of a debt for which several persons are jointly liable, has no power to enquire whether the application made to the Board was a valid application having regard to the provision of S. 8 (1) (*b*) of the Act. If the Civil Court is satisfied that an application for the settlement of debts has in fact been made to the Board and that such application actually includes a debt in respect of which a suit or other proceeding is pending before it, it has no option but to stay the suit or proceeding. (*Edgley, J.*) Jagat Kishore Acharyya Chowdhury *v.* Hazarat Ali Bepari. **176 I.C. 651=11 R.C. 144=42 C.W.N. 529=A.I.R. 1938 Cal. 447.**

———**S. 34**—*Notice to High Court—Decree passed on Original Side—High Court, if bound to stay execution—'Civil Court'—Meaning of.*

Per *Curiam.*—On receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, the High Court is not bound to stay execution of a decree passed by itself in its ordinary original civil jurisdiction.

Per *Derbyshire, C.J., Bartley and Nasim Ali, JJ.*—The words 'Civil Court' in the Bengal Agricutural Debtors' Act do not include the High Court.

Per *Lort Williams, J.*—The Bengal Agricultural Debtors' Act and especially Ss. 32 to 36 thereof should not be construed as not to apply to the High Court in its original jurisdiction. But the Act, so far as it purports to limit its jurisdiction, is beyond the powers of the Local Legislature.

Per *Mitter, J.*—The words "Civil Court" in S. 34 of the Bengal Agricultural Debtors' Act include the High Court exercising original civil jurisdiction, but the section, so far as it relates to proceedings of the High Court is *ultra vires* of the Bengal Legislatures by reason of S. 80-A (4) and S. 131 (3) of the Government of India Act. (*Derbyshire, C.J., Lort Williams, Bartley, Nasim Ali and Mitter, JJ.*) Narsinghdas Tansukdas *v.* Chogemull. **I.L.R. (1939) 2 Cal. 93=183 I.C. 113=12 R.C. 129=2 Fed. L.J. 71=69 C.L.J. 458=43 C.W.N. 613=A.I.R. 1939 Cal. 435 (S.B.).**

———**S. 34**—*Notice received by Civil Court after sale but before confirmation—Third party auction-purchaser—Proceedings, if must be stayed.*

The Civil Court receiving a notice under S. 34 after the sale in execution of the decree but before its confirmation, is not bound to stay further proceedings, although the auction-purchaser is not the decree-holder himself. The real principle is that on a sale the debt due under the decree under execution ceases to exist. It makes no difference in principle whether the decree-holder or a stranger is the purchaser. (*Latifur Rahman, J.*) Girija Kanta Roy *v.* Tuni Bibi. **43 C.W.N. 978.**

———**S. 34**—*Notice received after sale and before deposit of balance of sale price—Third party auction-purchaser—Proceedings, if must be stayed.*

A Civil Court receiving notice under S. 34 after the execution sale and before the deposit of the balance of the sale price, is bound to stay further proceedings, where the auction-purchaser is not the decree-holder himself but a third party. If the sale price has not been deposited on the date of notice, the sale is not complete on that date and there can be no question of the decretal debt being satisfied either in whole or in part until the sale price is deposited in Court. (*Sen, J.*) Bhabani Charan Law *v.* Baikuntha Shah. **184 I.C. 646=43 C.W.N. 358=69 C.L.J. 117=12 R.C. 264=A.I.R. 1939 Cal. 341.**

———**S. 34**—*Notice in respect of debt and not admitted by applicant—Court, if bound to stay suit.*

The debt need not be an "admitted" liability before a notice under S. 34 can issue in respect thereof. On receipt of a notice from the Board in respect of a debt included by the applicant in his application but in respect of which liability is not admitted by him, the Court is bound to stay the suit in respect of such debt. (*Biswas, J.*) Amiruddin Ahmad *v.* Abdul Rahman. **43 C.W.N. 332.**

———**S. 34**—*Notice—Some of parties not applicants before Board—Entire proceedings, if must be stayed.*

The notice under S. 34 can only refer to proceedings as against those persons who are debtors applicants before the Debt Settlement Board and not others who might be jointly liable. On receipt of such notice, therefore, the Civil Court is bound to stay proceedings only so far as they relate to the applicants before the Board, and it can continue the proceedings as against the other persons jointly liable with them. (*S.K. Ghose and Mukherjea, JJ.*) Abu Taher Bazlul Rashid *v.* Chandra Moni Saha. **43 C.W.N. 318.**

———**S. 34**—*Notice for stay—Question if subject-matter of proceeding is debt—Duty of Court to decide.*

It is the duty of the Civil Court receiving notice under S. 34 of the Bengal Agricultural Debtors' Act to decide the question, if raised, whether the subject-matter of the proceeding pending before it is a debt as defined in the Act. 43 C.W.N. 322, Folld. (*Edgley, J.*) Ravati Mohan Roy *v.* Bhikchand Bhuian. **43 C.W.N. 497=A.I.R. 1939 Cal. 343.**

———**S. 34**—*Notice under—Suit for foreclosure of mortgage by conditional sale—If must be stayed.*

A debt secured by mortgage by conditional sale is a debt within the meaning of S. 34 of the Bengal Agricultural Debtors' Act, and a suit for foreclosure of such a mortgage must, therefore, be stayed by the Court receiving notice under that section. (*Nasim Ali and Rau, JJ.*) Abdul Latif *v.* Abdul Gani. **I.L.R. (1940) 1 Cal. 133=185 I.C. 393=12 R.C. 358=43 C.W.N. 1221=A.I.R. 1939 Cal. 730.**

———**S. 34**—Order staying or refusing to stay execution—Appeal. *See* C. P. Code, S. 47—Appeal. **44 C.W.N. 364.**

———**Ss. 34 and 35**—*Petition filed under S. 8—Power of High Court to decide if it is properly presented—Exclusive jurisdiction of Board.*

After a petition has been filed purporting to be filed under S. 8 of the Bengal Agricultural Debtors' Act and before the events specified in S. 35 (*a*) and (*b*) take place, the High Court cannot, on interlocutory proceedings, decide that the petition should not have been presented. S. 20 of the Act vests the Board with final and exclusive jurisdiction to decide its own jurisdiction. (*Ameer Ali, J.*) Baijnath Tamakuwalla *v.* Tormull. **179 I.C. 151=11 R.C. 484=42 C.W.N. 481=A.I.R. 1938 Cal. 455.**

———**S. 34**—*Plaint registered and time granted for putting in deficit court-fee—Notice received by Court from Board—Filing of deficit court-fee—If should be stayed.*

Where a plaint which was not sufficiently stamped was ordered by the Court to be registered with a direction to the plaintiff to put in the deficit court-fee within a certain time, which was extended on his application, and before the deficit court-fee was put in a notice under S. 34 of the Bengal Agricultural Debtors' Act from the Debt Settlement Board was received by the Court.

Held, that the filing of the deficit court-fee should be stayed till the final disposal of the application before the Board. (*Nazim Ali and Rau, JJ.*) Nath Mull *v.* Golam Jabbar. **I.L.R. (1940) 1 Cal. 10=188 I.C. 523=43 C.W.N. 1146=A.I.R. 1940 Cal. 273.**

———**S. 34**—*Proceeding for delivery of possession started by auction-purchaser—If can be stayed.*

A proceeding for delivery of possession started by an auction-purchaser is not a proceeding in respect of a debt which was already wiped out by the auction-sale and cannot, therefore, be stayed on a notice under S. 34 of the Act. (*Derbyshire, C.J. and Mukherjea, J.*) Jagabandhu Saha *v.* Rashmani Dasya. **I.L.R. (1937) 2 Cal. 625=41 C.W.N. 924.**

———**S. 34**—*"Proceeding in relation to debt"—Appeal pending from order setting aside execution sale—Notice received by appellate Court—Appeal if should be stayed.*

A proceeding under O. 21, R. 90, C.P.C., whether pending before the trial Court or in appeal, is a proceeding in relation to debt. Where, therefore, a notice under S. 34 of the Bengal Agricultural Debtors' Act is issued after the executing Court had set aside the sale and an appeal against that order is pending before the appellate Court, the appellate Court is bound to stay further proceedings in connection with the appeal on receipt of the notice. It cannot be said that the debt is non-existent at the time of the receipt of the notice. (*Mukherjea and Akram, JJ.*) Dulichand *v.* Rajani Kanta. **44 C.W.N. 922.**

———**S. 34**—*Question of rateable distribution pending after sale—Proceedings, if must be stayed.*

Once a sale has taken place, the debt has ceased to exist to the extent of the purchase price and therefore there is no proceeding pending with regard to that amount of the debt in the Civil Court and so at that stage the notice under S. 34 can have no effect. As between the sale and the confirmation thereof various kinds of proceedings may take place, but those will not be treated as keeping the proceedings pending with regard to the debt which is mentioned in the notice. The operation of the Act cannot be extended by reason of other matters coming in after the sale, such as applications for rateable distribution, for setting aside a sale and so on. (*S.K. Ghose and Edgley, JJ.*) Jatindra Mohan Banik *v.* Surendra Mohan Roy. **182 I.C. 656=12 R.C. 91=43 C.W.N. 221=A.I.R. 1938 Cal. 549.**

———**S. 34**—*Sale in execution of decree—Purchase by decree-holder for less than decretal amount—Notice received by Court before confirmation of sale—If bound to stay proceedings.*

Where in execution of a decree certain property is put up to sale and purchased by the decree-holder for less than the decretal amount, the debt ceases to exist to the extent of the price paid for the property and the executing Court is not bound to stay further proceedings on receipt of a notice under S. 34 although the sale has not been confirmed. No doubt, if the decree-holder makes an attempt to realise the balance of the debt, S. 34 would come into play. (*Henderson, J.*) RAMENDRA NATH *v.* DHANANJOY MONDAL. **178 I.C. 186=11 R.C. 329=42 C.W.N. 218=A.I.R. 1938 Cal. 261.**

———**S. 34**—*Sale—Executing Court—Property sold, and money credited to decree—Sale not confirmed—Jurisdiction to stay further proceedings.*

Where the judgment-debtor's properties were sold in pursuance of a money decree and purchased by the decree-holder for a sum which was less than the amount of the decree which sum was credited towards the satisfaction of the decree, the executing Court has no jurisdiction to stay further proceedings on receipt of a notice under S. 34 of the Bengal Agricultural Debtors' Act, although the sale has not been confirmed. (*Bartley and Nasim Ali, JJ.*) JAGABANDHU ROY *v.* BHUSAI BEPARI. **178 I.C. 344 (1)=42 C.W.N. 217=11 R.C. 343=A.I.R. 1938 Cal. 256.**

———**S. 34**—*Sale in execution—Notice received by Court before confirmation of sale—Proceedings, if should be stayed.*

In execution of a mortgage decree the entire mortgaged property was sold for less than the decretal amount and was purchased by the decree-holder. His prayer for set-off was allowed and the decretal debt to the extent of the amount realised by the sale was wiped out. After the sale had taken place and before it was confirmed the Court received notice under S. 34 of the Bengal Agricultural Debtors' Act for stay of further proceedings. This the Court refused to do.

Held, that the debt to the extent to which it was satisfied by the aforesaid sale had ceased to exist, and that as the entire mortgaged property had been sold and there was no application for a penal decree under O. 34, R. 6, C.P. Code there was nothing else for the Court to do, and that, therefore, the Court acted rightly in refusing the stay. (*S.K. Ghose and Nasim Ali, JJ.*) JATINDRA MOHAN MANDAL *v.* ELAHI BUX, **42 C.W.N. 530.**

———**S. 34**—*Stay of insolvency proceedings—Notice received after adjudication order.*

An insolvency proceeding, no doubt, relates to a debt. But after an adjudication order has been passed, there is no proceeding pending before the Court with regard to a debt which may form the subject of an application under S. 8 of the Bengal Agricultural Debtors' Act. Consequently, the Court is not bound to stay insolvency proceedings on receipt of a notice from the Board under S. 34 of that Act after the order of adjudication. (*S. K. Ghose and Patterson, JJ.*) SATISH CHANDRA *v.* NAOGAON UNION BANK, LTD. **182 I.C. 480=12 R.C. 70=42 C.W.N. 1216=69 C.L.J. 113=A.I.R. 1938 Cal. 753.**

———**S 34**—*Stay of suit for rent, damages and ejectment—Petition by plaintiff for leave to withdraw claim for rent and damages—Duty of Court.*

A suit to recover arrears of rent, damages and ejectment was stayed under S. 34 of the Bengal Agricultural Debtors' Act. The plaintiff then filed a petition for permission to withdraw his claim for rent and damages with leave to bring a fresh suit on the same cause of action. The Court directed the petition to be put up for orders after the stay order was vacated.

Held, that in the absence of permission from Court, the claim for rent and damages should be treated as withdrawn, and the Court should proceed with the trial of the ejectment suit. (*Henderson, J.*) BIJOLI BHUSAN GHOSH *v.* MAI HUSUI HAN GOPE. **44 C.W.N. 733.**

———**Ss. 34, 18 and 20**—*Validity of notice—Power of Civil Court to consider.*

Per *Edgley, J.*—Ss. 18 and 20 of the Bengal Agricultural Debtors' Act do not debar the Civil Court from satisfying itself that the valid requirements of any notice which may be issued under S. 34 of the Act actually exist. It is, in fact, the duty of a Civil Court not to stay proceedings on receipt of a notice which purports to be a notice under S. 34 of the Act, unless the Court is satisfied that the notice in question is really a valid notice. (*Costello, Ag. C.J. and Edgley, J,*) NRISHINGHA CHANDRA NANDI CHOUDHURY *v.* KEDAR NATH CHAUDHURY. **I.L.R. (1938) 1 Cal. 345=176 I.C. 330=11 R.C. 77=66 C.L.J. 433=41 C.W.N. 1307=A.I.R. 1937 Cal. 713.**

———**Ss. 34 and 33**—*Notice for stay—Question if subject-matter proceeding amounts to debt—Jurisdiction of Court to consider—Material point of time—Time of application or of notice.*

The Civil Court after receipt of notice under S. 34 of the Bengal Agricultural Debtors' Act has jurisdiction to enter into the question whether the debt, in respect of which the proceeding is pending before it, is a debt within the meaning of S. 2 (8) and if it finds that it does not come within that definition, it should not stay proceedings in pursuance of the notice. In deciding the question whether the subject-matter of the proceeding pending before the Court is a debt, the material point of time is not the time of the application to the Board but the time of the stay order. If what was a debt at the time of the application ceases to be so at the time of the notice, the notice has no force as against the Court and the Court may disregard the notice to stay the proceeding under S. 34.

Per *Mukherjea, J.*—In order that the Civil Court might be called upon to exercise its powers under S. 33 or S. 34 of the Act, it is necessary under both these sections that there must be a suit or proceeding pending in respect of a debt. If the liability had ceased to be a debt at the time when the suit or proceeding was commenced in the Civil Court, it cannot be said that any suit or proceeding in respect of any debt was pending before such a Court and neither of the section obliges the Civil Court to stay its hands under such circumstances. (*S. K. Ghose and Mukherjea, JJ.*) NUR MIA

BENGAL AGRICULTURAL DEBORS' ACT (1936), S. 40.
v. NOAKHALI NATH BANK, LTD. **I.L.R. (1939) 1 Cal. 437=184 I.C. 118=12 R.C. 204=43 C.W.N. 322=69 C.L.J. 126=A.I.R. 1939 Cal. 298.**

——**S.** 40—*Order of Munsif as Special Appellate Officer—High Court's power of revision—C. P. Code, S.* 115.

The High Court has no power to revise under S. 115, C.P. Code, an order of a special Appellate officer appointed under S. 40 of the Bengal Agricultural Debtors' Act, although such officer is a Munsif. (*S. K. Ghose and Edgley, JJ.*) RAM KRISHNA SUKUL *v.* ALI NEWAJ. **178 I.C. 172=42 C.W.N. 892=11 R.C. 328=A.I.R. 1938 Cal. 688.**

——**S.** 52—*Application by debtor dismissed by Board—Subsequent suit by creditor—Extension of limitation.*

A creditor who brings a suit against the debtor under the ordinary procedure after the dismissal of an application filed by the latter before the Debt Settlement Board, is entitled to exclude in calculating the period of limitation for the suit the period during which the application by the debtor was pending before the Board. (*Edgley, J.*) DARAJUDDIN AKANDA *v.* JAHIR MONDAL. **44 C.W.N. 396 (1).**

——**S.** 54—*Prosecution under Ss.* 465, 467 *and* 471, *I.P. Code—Sanction of Collector—If necessary.*

S. 54 of the Agricultural Debtors' Act has no application except in respect of the offences expressly mentioned therein. Sanction of the Collector is, therefore, not necessary for a prosecution in respect of offences under Ss. 465, 467 and 471, I.P. Code. *Khundkar and Edgley, JJ.*) HARI CHARAN *v.* KAUSHIKI CHARAN. **I.L.R. (1940) 2 Cal. 14=44 C.W.N. 530=A.I.R. 1940 Cal. 286.**

——**S. 54 (a)**—*Offence under—Production of document falsely endorsed as to repayments—Collector's permission for prosecution—If necessary.*

The production before the appellate tribunal of mortgage documents falsely endorsed as to the repayments is something more than the offence set out in S. 54 (*a*) of the Bengal Agricultural Debtors' Act. It is an offence of a more serious and general nature coming under the Penal Code. Consequently the permission of the Collector to commence prosecution for such an offence is not necessary. (*Derbyshire, C.J. and Bartley, J.*) SASHI BHUSAN *v.* FULKHAN. **44 C.W.N. 763.**

——**S. 55 and Rule 145**—*Determination of amount of debt—Jurisdiction of Civil Court.*

The question as to what is the amount of a debt of a particular debtor is to be decided by the Board under Rule 145 of the Bengal Agricultural Debtors' Rules. Before the Board determines the amount of the debt, the Civil Court has no jurisdiction to go into that question and refuse to stay proceedings on the ground that as the debt is above Rs. 25,000 the Board has no jurisdiction to deal with the same. (*Nasim Ali and Rau, JJ.*) BHABAGOBINDA *v.* BHOLANATH. **187 I.C. 95=12 R.C. 544=44 C.W.N. 172=A.I.R. 1940 Cal. 112.**

BENGAL ALLUVION AND DILUVION REGULATION (XI OF 1825), Ss. 2 and 4—

BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4.
Accretion—Ownership of identifiable land—Determination—General rule as to—Custom—Onus.

If the land in dispute is identifiable with reference to its physical features, land marks or by measurement, it should be deemed to continue to belong to the former owner, whether its transfer from one side of the river to the other side was by a sudden change in the course of the river or was the result of the river gradually receding on one side and throwing up land on the other, unless a custom to the contrary is established. In this view the burden of proving custom lies on the party who claims the land by accretion. (*Niamatullah and Bajpai, JJ.*) MAHADEO *v.* BALESHWAR PRASAD. **186 I.C. 564=12 R.A. 415=1939 A.L.J. 708=1939 A.W.R. (H.C.) 671=1939 R.D. 493=A.I.R. 1939 All. 626.**

——**Ss. 3 and 4**—*Applicability in Oudh—Villages in valley of river—Change of course—Alteration of boundaries—Procedure—Person adjudicated proprietor without adjudication under Regulation—Proper remedy—U. P. Land Revenue Act, S.* 34.

The boundaries of villages generally are, or should always remain, the boundaries fixed at the first revenue survey. In the case of villages lying between the high bank of a river on one side and the high bank on the other, when there is a change of course of the river, the boundaries would only be altered in conformity with an adjudication under Regulation XI of 1825, which applies in Oudh. If there is no adjudication under that Regulation, but if a person is adjudicated proprietor of lands in any village, his name will be recorded as proprietor of such lands in the records of that village. Such a person has to file his application for correction of records under the Land Revenue Act, S. 34. (*Drake Brockman, S. M.*) PARBATI KUER *v.* RAJENDRA BAHADUR SINGH. **1936 R.D. 528.**

——**S. 4**—*Applicability—Proof of local custom.*

As provided by S. 3 of Reg. XI of 1825, S. 4 has no application where the custom of the deep stream rule and the accretion of alluvion to the zemindars has been proved to exist. In such a case, the accretion belongs to the zemindars and not to the person who owns the particular plot of land to which it is added by the river. (*Bennet and Smith, JJ.*) KESHAVA PRASAD SINGH *v.* BENI KUNWAR. **164 I.C. 877=9 R.A. 199=1936 A.L.J. 1058=1936 R.D. 309=1936 A.L.R. 815=1936 A.W.R. 723=A.I.R. 1936 All. 631.**

——**S. 4**—*Scope—Accreted land held under different proprietor.*

The provisions of Cl. (4) of Regulation XI of 1825, appear to contemplate that the parent holding and the accretion shall together form one single holding and that the estate of the occupier in the accreted land shall be exactly the same as the estate which he enjoys in the parent holding. This is not possible where the accreted land is held, under proprietors other than the proprietors of the parent holding. (*James and Chatterji, JJ.*) RAMASRAY PRASAD CHAUDHURY *v.* RAMSURAT SINGH. **6 B.R. 84=184 I.C. 838=12 R.P. 282=21 Pat.L.T. 181=A.I.R. 1940 Pat. 131.**

——**S. 4 (2)**—*River between two villages suddenly changing course—Land clearly recognizable—Right to—Custom—Reasonableness.*

BENGAL ALLUVION AND DILUVION REGULATION (1825), S. 4.

A river running between two villages suddenly changed its course. The land which was gained by such change was annexed to the land of *L* who claimed it on the ground of an alleged custom, that the river was the boundary between the villages. The custom was not proved and the land was clearly recognizable.

Held, that it should remain the property of its original owner and *L* could not claim it.

Held, further, that the custom alleged was so unreasonable as not to be provable in law. (*Wort and James, JJ.*) BAJRANGI RAUT *v.* JANKI PRASAD. **3 B.R. 135=166 I.C. 198 (2)=9 R.P. 266 =A.I.R. 1936 Pat. 637.**

———**S. 4 (5)**—*Applicability—Apportionment of alluvial accretion—Several estates concerned—Principles and methods of apportionment.*

Regulation XI of 1825 does not lay down any rule for division or apportionment of the alluvial accretion when several estates or interests are concerned and the increment has been to more than one riparian estate or tenure. In all such cases the general provision contained in S. 4, Cl. (5) of the Regulation applies and the Courts are to be guided by the best obtainable evidence of local usage and failing that, by general principles of equity and justice. It would not be proper to lay down any hard and fast rule on the point. The general principle underlying an apportionment should be to secure to each riparian owner a portion of the new waterline which is proportionate to his frontage on the old water line. The division of the accreted lands by lines drawn from the extremities of the estates of the competing frontagers perpendicular to the newly formed coasts may be an equitable and satisfactory method, if circumstances permit. (*Nasim Ali and Mukherjea, JJ.*) SAHABADDIN SARKAR *v.* MOULVI KAFILADDIN TAPADAR. **I.L.R. (1938) 1 Cal. 361=174 I.C. 301=10 R.C. 666=66 C.L.J. 304=41 C.W.N. 1353.**

BENGAL ALLUVION AND DILUVION ACT (IX OF 1847)—*Alluvial lands—Assessment—Powers of Government—Claim to such lands by zamindar on ground of being included in permanently settled estate—Burden of proof.*

The Bengal Alluvion and Diluvion Act empowers the Government to direct the local revenue authorities to make a survey of alluvial lands and to determine the revenue which they are liable to pay to Government; and if any land is thrown up by a large and navigable river and appears to be the property of the Government, the revenue officers are required to take immediate possession of the same on behalf of the Government and to assess and settle it according to the rules in force in that behalf. It is, however, open to the person who claims to be the proprietor thereof on the ground that it was included in and formed part of his estate at the time of the Permanent Settlement, to establish his right in a suit in a competent Court of law. The burden is on him to prove that the land in question belongs to his permanently settled estate and is therefore not liable to be resumed or assessed. The fact that the river in question has been constantly changing its course makes no difference as regards the onus of proof. (*Mukerji and S. K. Ghose, JJ.*) SECRETARY OF STATE *v.* RANJIT PAL. **40 C.W.N. 395.**

———**S. 6**—*"Added" land—Land comprised in permanently settled estate being washed away by water and afterwards reforming on original site—Acceptance by Zemindar of abatement of revenue in respect of such land—If proves abandonment by him.*

Lands comprised in a permanently settled estate which had been washed away by water and afterwards reformed on the original site, cannot be regarded as lands "added to the estate" within the meaning of S. 6 of Act IX of 1847 and are, therefore, not liable to a fresh assessment whether or not an abatement of sadar jama had been granted while they were under water, unless it can be shown that when the assessment was reduced the lands which had been washed away or lost had in some way ceased upon the reduction being made to form a part of the original estate. The fact that the Zamindar accepted an abatement of revenue for the portion of his estate under water cannot be regarded as an abandonment of that portion of the estate for the benefit of the public domain. (*Lord Maugham.*) SECRETARY OF STATE *v.* MIDNAPORE ZAMINDARY CO. **I.L.R. (1937) 2 Cal. 769=64 I.A. 281=169 I.C. 881=1937 O.L.R. 418=1937 P.W.N. 638=10 R.P.C. 46=3 B.R. 722=66 C.L.J. 145=1937 A.L.R. 651=18 Pat. L.T. 689=46 L.W. 943=1937 M.W.N. 1299=41 C.W.N. 1061=A.I.R. 1937 P.C. 244=(1937) 2 M.L.J. 834 (P.C.).**

BENGAL CESS ACT (IX OF 1880)—*Scope—Liability for cess.*

According to the general scheme of the Cess Act, subject to certain statutory exceptions, cess must be paid on all immovable property situate within any district whether rent is paid in respect of such immovable property or such property is rent free. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475 =A.I.R. 1936 Cal. 695.**

———*Strict construction.*

The Bengal Cess Act, being a taxing statute, should be strictly construed. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475=A.I.R. 1936 Cal. 695.**

———**S. 4**—*"Cultivating* raiyat*"—Meaning of.*

In order to claim the privileges of a cultivating *raiyat* under the Bengal Cess Act, a person must be an actual cultivator of the soil, although a *raiyat* may be a tenure-holder under the Act. (*Guha and Bartley, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* JITENDRA NATH RAY. **161 I.C. 210 (2)=8 R.C. 490=62 C.L.J. 541=40 C.W.N. 630=A.I.R. 1936 Cal. 70.**

———**Ss. 4 and 6**—*"Annual value of land"—Fees levied for privilege of selling goods in* hats *—Assessment to cess.*

Where the vendors attending the *hats* do not sit in any particular place and tolls or fees are realised by the plaintiff on the quantity and quality of articles actually sold and no fee is payable if there is no sale, and fees are also realised on sales from hawkers who do not sit in the *hat* but stroll about the *hat* compound, the money realised by the plaintiff from the vendors of articles is not rent, but fees levied for the right or privilege of selling their goods in the *hats* and does not therefore represent the "annual value of land" as defined in S. 4 of the Cess Act. Consequently an assessment to cess under Chapter II of the Act on the basis of such income is illegal and *ultra vires.* (*Mitter *and Biswas, JJ.*) SECRETARY OF STATE *v.* HINGUL KUMARI DASSI. **42 C.W.N. 169=67 C.L.J. 50.**

———**Ss. 5 and 6**—Scope and effect of. *See* LEASE—CONSTRUCTION—MINING LEASE. **42 C.W.N. 1098=176 I.C. 433 (P.C.).**

———**S. 6**—*Royalty on mines from lessee—"If net annual profit".*

In S. 6 of the Cess Act the expression "net annual profit" has reference to the property and not to the individual, and the royalty that is received by the lessor from the occupier of the mines, is as much a part of the annual profits, as the earnings of the occupier himself. 38 Cal. 372 (P.C.), Rel. on. (*Mukherjea and Latifur Rahman, JJ.*) NEW BEERBHOOM COAL CO. *v.* RAI SAHEB CHANDAN MALL KARNANI. **43 C.W.N. 874=69 C.L.J. 501=186 I.C. 253=12 R.C. 460 =A.I.R. 1939 Cal. 690.**

———**Ss. 14 and 16**—*Annual value of land—Necessity for inclusion in returns.*

The annual value of the land is one of the most important details required to be furnished in the returns under S. 16 read with S. 14 in the prescribed form as it is upon the basis of these returns that the valuation roll is prepared by the Collector under S. 34. The Act is a taxing statute and should therefore be strictly construed. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475=A.I.R. 1936 Cal. 695.**

———**Ss. 14 and 16**—*Rent free lands—Inclusion in return—If condition precedent to liability to cess.*

The inclusion of the rent free land in the landlord's return under Ss. 14 and 16 of the Act is a condition precedent to any liability which is imposed upon the holder of rent free land to pay cess in respect thereof. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144= 9 R.C. 475=A.I.R. 1936 Cal. 695.**

———**S. 16**—Collector calling for returns from niskardars and making valuation—Order directing inclusion of niskar lands in estate—Claim for cess from niskar lands—Notice under S. 54—Publication—If condition precedent. *See* BENGAL CESS ACT, Ss. 54 & 56. **A.I.R. 1937 Cal. 26=169 I.C. 690.**

———**S. 16**—*Non-service of notice—Legality of assessment.*

The service of notice under S. 16, Bengal Cess Act, is not merely a matter of procedure but is part of the law with reference to which valuation or re-valuation as contemplated by law can be made by the revenue authorities and liability imposed in the matter of payment of cesses; and non-compliance with the law by failure to serve notice under S. 16 makes the assessment of cesses invalid under law. The service of notice is made imperative by law and where it is not served, the person assessed is entitled to a declaration that the cess re-valuation is *ultra vires,* illegal and not binding on him. (*Guha and Bartley, JJ.*) SECRETARY OF STATE *v.* JITENDRA NATH ROY. **161 I.C. 210 (2)=8 R.C. 490=62 C.L.J. 541=40 C.W.N. 630 =A.I.R. 1936 Cal. 70.**

———**Ss. 21 and 66**—*Scope—Rent free lands omitted from landlord's return—Valuation under S. 21—Notice under S. 66—Necessity.*

The general scheme of the Cess Act demands that as regards rent free lands, the special conditions prescribed by Ch. 4 should be observed before the procedure laid down in Ch. 2 can be brought into operation, and, in this view, the issue of a notice under S. 66 is a condition precedent to the valuation under S. 21 of rent free lands which had been omitted from the landlord's cess returns. (*Edgley, J.*) SUDHANSU SEKHOR *v.* RAI KIRON CHANDRA. **166 I.C. 144=9 R.C. 475=A.I.R. 1936 Cal. 695.**

———**S. 24 Note and Cess Manual, R. 66**—*Whether* ultra vires.

The note to S. 24, Cess Act, and R. 66 in the Cess Manual cannot be held to be *ultra vires* and inoperative, as having been made by the Board of Revenue without jurisdiction. They are not in any way inconsistent with the definition of "cultivating raiyat" as contained in S. 4 of the Act, and re-valuation under the Cess Act made on the basis of the Note to S. 24 and R. 66 of the Cess Manual is not illegal. A raiyat may be a tenure-holder within the meaning of the Cess Act and the distinction between holder of a tenure and a cultivating raiyat and not between holder of tenure and a raiyat must be recognized. 15 C.L.J. 428 and A.I.R. 1928 Cal. 508, Rel. on. (*Guha and Bartley, JJ.*) SECRETARY OF STATE *v.* JITENDRA NATH ROY. **161 I.C. 210 (2)=8 R.C. 490=62 C.L.J. 541=40 C.W.N. 630=A.I.R. 1936 Cal. 70.**

———**S. 37**—*Non-compliance—Tenure escaping assessment—Liability to cess.*

Where the procedure prescribed by S. 37 of the Cess Act is not followed with the result that certain tenures have escaped assessment, no cess would be payable either at the old rate or at any rate at all. (*Harries, C.J. and Manohar Lall, J.*) RANI HARSAMUKHI DASI *v.* AGADHU MOHAPATRA. **18 Pat. 723=6 B.R. 746=21 P.L.T. 637= A.I.R. 1940 Pat. 180.**

———**S. 41 (2)**—*Decree for cess under—If conclusive on question of defendant's status as tenure-holder—Subsequent suit in ejectment as tenant at will or trespasser*—Res judicata.

A mere finding that a person is a tenure-holder for the purposes of the Cess Act does not amount to anything more than that he holds some interest in the land which makes him liable for cess. The holder of a tenure, for purposes of the Cess Act, includes all persons holding any interest in land, whether rent paying or not. The fact that a landlord has obtained a decree for cess against a person in possession of his land does not operate as *res judicata* on the question of the defendant's status as a tenure-holder so as to bar a suit in ejectment as a trespasser or tenant at will. (*Harries, C.J. and Manohar Lall, J.*) SHIVA PRASAD SINGH *v.* MANDIRA KUMARI DEBI. **21 Pat.L.T. 277= A.I.R. 1940 Pat. 438.**

———**S. 45**—*Construction—"Recovered"—Meaning of.*

The word "recovered" in S. 45 of the Bengal Cess Act means "sued for" or "recovered by means of an action." (*Harries, C.J. and Fazl Ali, J.*) MANGTU LAL BAGARIA *v.* SECRETARY OF STATE. **18 Pat. 854=187 I.C. 727=6 B.R. 549= 12 R.P. 647=1940 P.W.N. 45=A.I.R. 1940 Pat. 161.**

———**S. 45**—*Decision of Revenue Court permitting recovery of cess—Suit to set aside—Jurisdiction of Civil Court.*

The question whether cess was recoverable in a particular case under S. 45 of the Cess Act is one to be decided by the Revenue Court which issued the certificate, and if that Court has decided, rightly or wrongly, that the cess was recoverable and the claim was not barred by limitation, a suit cannot be entertained by a Civil Court to set aside that decision. A Civil Court can entertain a suit only if the order of the Revenue Court is without jurisdiction, and not because the decision of that Court is not correct. (*Harries, C.J. and Fazl Ali, J.*) Mangtu Lal Bagaria *v.* Secretary of State. **18 Pat. 854=187 I.C. 727=12 R.P. 647=6 B.R. 549=1940 P.W.N. 45=A.I.R. 1940 Pat. 161.**

———**Ss. 52, 54 and 55**—*Notices under Ss. 52 and 54—If obligatory to deposit them to be available for general inspection at any malkutchery of an estate—Placing of notice in tenures and service on defendants—Sufficiency.*

In a suit by a proprietor of the estate to recover cesses in respect of a certain rent-free holding, copies of a notice under Ss. 52 and 54 of the Bengal Cess Act were placed in the tenures concerned and notice was served also in the houses of defendants.

Held, that this in law was a sufficient publication. It is not obligatory, under S. 55, that a copy of the notice must be put up for general inspection at a malkutchery of an estate. (*M.C. Ghose, J.*) Gosta Behari Dutt *v.* Sarat Chandra Haldar. **66 C.L.J. 84.**

———**Ss. 54 and 56**—*Applicability—Proceedings under S. 66—Order by Collector for returns from niskardars under S. 16—Subsequent valuation—Direction that niskar lands shall be included in estate—If condition precedent to claim for cess.*

Section 54 requires the holder of every estate or tenure-holder, to whom any cess is payable by holders of rent-free lands, to cause a notice to be published in a certain form and in a certain manner requiring the niskardars to pay to him. Such a notice is necessary whenever a new valuation or re-valuation takes effect, and whenever the rate of cesses, and the date fixed by the Board of Revenue under S. 57 for payment of instalment of cesses by holders of rent-free land, are changed. Where, the Collector proceeds under S. 66 and calls for a return from the niskardars under S. 16 and thereafter makes a valuation so far as the niskardars are concerned, and makes an order under the last paragraph of S. 71 directing that for future the niskar lands shall be included in the estate, the provisions of Ss. 54 and 56 are attracted and the proprietors of the estate are not entitled to claim cess in respect of the niskar lands, without first publishing the notice under S. 54, in the manner described therein. (*R. C. Mitter, J.*) Kiran Chandra Roy Bahadur *v.* Brojendra Nath Chatterjee. **169 I.C. 690=10 R.C. 31=A.I.R. 1937 Cal. 26.**

———**S. 54**—*Non-compliance with—Effect.*

The Bengal Cess Act which is a taxation statute must be strictly interpreted, and in view of the mandatory nature of the language of S. 54 of the Act, unless the notices required by S. 54 are properly published with all the details specified in the section, the holder of an estate cannot legally be entitled to sue for cesses under S. 58 of the Act. A mistake as to the dates fixed by the Board of Revenue in the notice and the omission to specify the exact amounts payable constitute not merely an irregularity, but an illegality which vitiates the proceedings. (*N. G. A. Edgley, J.*) Madan Mohan Das *v.* Jitendra Nath Roy. **167 I.C. 248=9 R.C. 664=62 C.L.J. 564=A.I.R. 1936 Cal. 781.**

———**Ss. 54, 56 and 58**—*Non-compliance—Omissions and mistakes in notice—If illegality vitiating notice.*

In view of the mandatory nature of the provisions contained in Ss. 54 and 56, Cess Act, unless notices required by S. 54 of the Act have been properly published with all details specified in S. 54, the zamindar is not entitled under the law to sue for recovery of cesses under S. 58. Omissions and mistakes in the notices issued under S. 54 are not mere irregularities but illegalities which vitiate the notices. (*Guha and Bartley, JJ.*) Jitendra Nath Roy *v.* Madan Mohan Das. **167 I.C. 232=9 R.C. 659=41 C.W.N. 220=A.I.R. 1936 Cal. 813.**

———**S. 54**—*Notice under—Object of.*

The purposes for which S. 54 of the Bengal Cess Act requires a notice to be published are (1) to inform all concerned of the rate which has been fixed for the levy of the cesses, and (2) to require the persons concerned to pay the amount of the specified cesses as it falls due. (*N. G. A. Edgley, J.*) Madan Mohan Das *v.* Jitendra Nath Roy. **167 I.C. 248=9 R.C. 664=62 C.L.J. 564=A.I.R. 1936 Cal. 781.**

———**S. 54**—*Notice under—Presumption that notice was in proper form—Non-production of copy—Effect.*

Where there is the finding of service of notice under S. 54, the Court is entitled to presume unless the contrary is shown that this referred to service of a notice framed in accordance with law. The mere non-production of a copy of the notice cannot be regarded as in any way militating against the presumption of correctness of form. (*Biswas, J.*) Kamal Krishna *v.* Sarat Kumar Roy. **179 I.C. 50=11 R.C. 461=A.I.R. 1938 Cal. 145.**

———**S. 54**—*Re-valuation of estate within which rent-free lands were included by Collector's order—Liability of such lands for cess—Service of notice—If necessary.*

The expression "part of a district" in S. 54 (1) of the Cess Act covers a case where there is a re-valuation of certain specified estates or tenures which contained the rent-free lands or to which the rent-free lands were attached by an order of Collector under S. 71 of the Act. Before, therefore, any liability to pay cess could attach to the holders of such rent-free lands under S. 56, it is necessary to serve notices upon them under S. 54 of the Act. (*Mukherjea, J.*) Bhowanipore Zamindari Co., Ltd. *v.* Bibhuti Bhusan Roy. **44 C.W.N. 389.**

———**S. 56**—*Liability to cess—Issue of notices under Ss. 52 and 54—If a condition precedent.*

It is clear on the wording of S. 56 that the liability of any owner or holder of rent-free lands to pay any cess to the owner of any estate or tenure under Ch. 4 cannot arise unless there has been a due publication of both the notices under Ss. 52 and 54. The issue of such notices is indeed a condition precedent to the accrual of such liability. (*Biswas, J.*) Kamal Krishna *v.* Sarat Kumar Roy. **179 I.C. 50=11 R.C. 461=A.I.R. 1938 Cal. 145.**

———**Ss. 56 and 18**—*Owner of larger estate not submitting return in Sch. A, Part IV—Right to recover cess from owner of rent-free lands comprised in his estate.*

The mere fact that the owner of a larger estate did not render to the Collector a return in the form in Sch. A, Part IV does not disentitle him to recover from the owner of the rent-free lands comprised in his estate the cess payable by the latter under S. 56 of the Cess Act, as it is open to the Collector under S. 18 of that Act to dispense with the return in that form if sufficient cause for so doing is shown to his satisfaction. (*Derbyshire, C. J. and D. N. Mitter, J.*) Kiran Chandra *v.* Sudhansu Sekhar. **169 I.C. 850=10 R.C. 39=41 C.W.N. 654=A.I.R. 1937 Cal. 352.**

———**S. 58**—Suit for cesses under—Non-publication of notices as required by S. 54—Notice omitting details of exact amounts and giving wrong dates—Legality—Maintainability of suit. *See* Bengal Cess Act, S. 54. **62 C.L.J 564.**

———**S. 64-A**—*Scope of—Niskar lands in separate possession of each co-sharer—Liability for cess—Limits.*

S. 64-A of the Bengal Cess Act creates joint and several liability in all persons who may be jointly interested in any rent-free land in respect of the cesses payable for it. Where the niskar lands constituting one single holding are not held jointly by a number of co-sharers but the co-sharers are each in separate possession of specified quantity of land within the niskar, either in khas or through tenants, each such co-sharer will be liable in respect of the land held or owned by him, and the principle of joint and several liability embodied in S. 64-A cannot be extended to make a co-sharer in possession of a separate piece of land liable for the lands separately held by another co-sharer. (*Biswas, J.*) Kamal Krishna *v.* Sarat Kumar Roy. **179 I.C. 50=11 R.C. 461=A.I.R. 1938 Cal. 145.**

———**S. 66**—Proceedings under—Collector making valuation of niskar lands and directing inclusion in estate—Claim by proprietor for cess from niskar lands—Publication of notice under S. 54—If obligatory. *See* Bengal Cess Act, Ss. 54 and 56. **A.I.R. 1937 Cal. 26.**

———**S. 71**—Order including niskar lands in estate after calling for returns from niskardars and after valuation—Claim by proprietor of estate for cess—Notice under S. 54—If condition precedent. *See* Bengal Cess Act, Ss. 54 and 56. **A.I.R. 1937 Cal. 26.**

———**S. 81**—*Owner and occupier—Either paying more than his dues—Rights of contribution.*

Under S. 81 of the Cess Act the burden of cess is equally distributed between the owner and the occupier, and if either has been compelled to pay more than his dues he can certainly recover it from the other by a contribution suit. (*Mukherjea and Latifur Rahman, JJ.*) New Beerbhoom Coal Co. *v.* Rai Saheb Chandan Mall Karnani. **186 I.C. 253=12 R.C. 460=43 C.W.N. 874=69 C.L.J. 501=A.I.R. 1939 Cal. 690.**

———**S. 93**—*Scope—Jurisdiction of Civil Court—Suit questioning valuation by cess department on ground that it is wrong—Bar of.*

The Civil Court has jurisdiction to grant relief in a case where the cess department has acted *ultra vires* and imposed liability for cess on income which is not subject to cess. S. 93 of the Cess Act is no bar to such a suit. The section does not bar a suit to establish that the amounts on which a person has been assessed is not subject to the Cess Act; but it does bar a suit in which the contention is not that the cess department has acted *ultra vires,* but merely that its decision is wrong. (*Agarwala and Varma, JJ.*) Braja Behari Dass *v.* Ram Narayan Rai. **17 Pat. 436=4 B.R. 475=10 R.P. 547=1938 P.W.N. 459=174 I.C. 752=19 Pat.L.T. 352=A.I.R. 1938 Pat. 362.**

———**S. 95**—*Cess returns—Admissibility—Extent and purpose of.*

A cess return is admissible in evidence not only against the persons filing it but also against the heirs and representatives of the persons filing and for all purposes, including the identity of the lands, and also for showing that certain statements made later contrary to the admission in the cess returns are false. (*R. C. Mitter, J.*) Kiran Chandra Roy Bahadur *v.* Tarak Nath Gangopadhyay. **166 I.C. 460=9 I.C. 528=40 C.W.N. 566=A.I.R. 1936 Cal. 456.**

———**S. 99**—*Notification under—Rent payable to tenure holders—Collector's power to Collect.*

After a notification is issued under S. 99 of the Cess Act in respect of an estate which has fallen into arrears of cess, the Collector is not only authorised to collect the rent payable directly to the owners of the estate but also the rent payable by the tenants to the intermediate tenure-holders. The latter have no right to receive any sum due as rent from the tenants which have already been paid to the Collector or which have not yet been paid to him. (*Edgley, J.*) Dilip Kumar Dutta *v.* Sridhar Dalni. **I.L.R. (1940) 1 Cal. 339=44 C.W.N. 259=A.I.R. 1940 Cal. 110.**

———**S. 99**—*Withdrawal of attachment—Power of Collector.*

The Collector has jurisdiction to withdraw an attachment made by him under S. 99 of the Cess Act. (*Mitter and Rau, JJ.*) Kumar Narendra Nath Roy *v.* Midnapore Zemindary Co., Ltd. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

———**Sch. D**—*Words 'his' and 'his lands'—Meaning of.*

The word 'his' in Sch. D means 'heir' and words 'his lands' refer to the lands held by the 'owners and holders' of lands mentioned before. (*Biswas, J.*) Kamal Krishna *v.* Sarat Kumar Roy. **179 R.C. 50=R.C. 461=A.I.R. 1938 Cal. 145.**

BENGAL CHILDREN ACT (II OF 1922), S. 40—*Custody—Meaning of.*

The question whether a person has the custody of another within the meaning of S. 40 of the Bengal Children Act is purely a question of fact, and no question of lawful custody or legal custody arises. (*Bartley and Khundkar, JJ.*) Bhagawati

Dasi v, Emperor. **177 I.C. 943=11 R.C. 302=39 Cr.L.J. 974=42 C.W.N. 983=A.I.R. 1938 Cal. 638.**

BENGAL COURT OF WARDS ACT (IX OF 1879), S. 6—*'Proprietor of an estate'—Executrix and tenant for life under a will—If a proprietor.*

Where a Hindu testator had bequeathed a life-estate in all his properties to his wife and also appointed her as an executrix, the widow after the death of the testator is the 'proprietor of the estate' within the meaning of S. 6 of the Bengal Court of Wards Act. (*Panckridge, J.*) Indumati Debi *v.* Bengal Court of Wards. **I.L.R. (1938) 1 Cal. 476=181 I.C 973=11 R.C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.**

——S. 6 (a)—*Declaration under—If a judicial act—Notice to persons affected—Necessity.*

In making a declaration that a person is a disqualified proprietor under S. 6 (*a*) of the Act the Court of Wards acts judicially. It would be wrong to say that it is a purely administrative act. Hence the person affected by such a declaration is entitled to notice. (*Panckridge, J.*) Indumati Debi *v.* Bengal Court of Wards. **I.L.R. (1938) 1 Cal. 476=181 I.C 973=11 R.C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.**

——S. 6 (a)—Declaration under—If a matter concerning revenue under S. 226 (1) of Government of India Act. *See* Government of India Act, S. 226 (1). **I.L R. (1938) 1 Cal. 476=42 C.W.N. 230=A. I. R. 1938 Cal. 385.**

——**S. 7**—*Taking charge of property—Facts to be considered—Opportunity to person affected to show competency to manage.*

Before the Court of Wards can take charge of the property of a person under S. 7 of the Act after a declaration of the incompetency of the proprietor to manage it, the Court of Wards must consider whether there exist materials to warrant such a declaration. Principles of natural justice require that the proprietor should have an opportunity of testing those materials and of establishing competency to manage. (*Panckridge, J.*) Indumati Debi *v.* Bengal Court of Wards. **I.L R. (1938) 1 Cal. 476=181 I.C. 973=11 R.C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.**

——**(as amended by Act VI of 1936), S. 10-C**—*Applicability—Pending execution proceedings.*

S. 10-C of the Court of Wards Act as amended by Act VI of 1936 applies not only to decrees already obtained before Act VI of 1936 came into force, but also operates upon execution pending at the date of the commencement of the said Act. (*R. C. Mitter and Mukherjea, JJ.*) Habiba Bibi *v.* Ramranjan Mallick. **I.L.R. (1937) 2 Cal. 54=171 I.C. 226=10 R.C. 252=41 C W.N. 401=A.I.R 1937 Cal. 207.**

——**S 10 (c) (as amended by the Amending Act of 1936)**—*Applicability—Co-judgment-debtors with Wards of Court—Section, if can be construed to affect them adversely—Retrospective operation.*

The new S. 10 (*c*) of the Court of Wards Act is retrospective in its operation and its provisions apply only to the person or property of a Ward, and other persons cannot avail themselves of the protection afforded by the section merely because they happen to be co-judgment-debtors with Wards of Court. Nor is there any reason for reading into the section any limitation to the effect that the section is not to operate in cases, where as a result of protecting the property of a ward, the interests of others are adversely affected. (*Costello, Ag.C.J. and Edgley, J.*) Promode Chandra Sinha Sarma *v.* Narendra Narain Majumdar Choudhry. **175 I.C. 172=10 R.C. 797=66 C.L.J. 321=A.I.R. 1938 Cal. 297.**

——**S. 10 (c)**—*Appointment of receiver—Power of Court.*

Under S. 10 (*c*) of the Court of Wards Act, the Court can appoint a receiver in respect of the property under the management of the Court of Wards. But that receiver will not be able to take possession until he can do so in accordance with the terms of the Act. (*Remfry, J.*) National Insurance Co., Ltd. *v.* Gaganendra Nath Tagore. **42 C W.N. 374.**

——**S 10 (c)**—*If confers absolute immunity.*

S. 10 (*c*) of the Court of Wards Act does not confer absolute immunity upon a ward of the Court of Wards. (*Henderson and Sen, JJ.*) K. G. M. Faroqui *v.* Habibur Rahaman Chowdhury. **44 C W N. 749**

——**S. 10 C [inserted by Assam Court of Wards (Amendment) Act, 1937]**—*If void—Government of India Act*, 1935, *S.* 107.

S. 10-C inserted in the Bengal Court of Wards Act in force in Assam by the Assam Court of Wards (Amendment) Act, 1937, is not repugnant to any existing Indian Law and is, therefore, not void by virtue of S. 107 (1) of the Government of India Act. (*Mitter and Rau, JJ.*) G. P. Stewart *v.* Brojendra Kishore Roy. **184 I.C. 689=2 Fed.L J. 112=69 C.L.J. 573=12 R.C. 271=43 C.W.N. 913=A.I.R. 1939 Cal 628.**

——**Ss. 51 and 52**—*Construction and scope—Power of Court of Wards under—Suit against minor represented by manager of Court of Wards as guardian—Power of Court of Wards to remove and make fresh appointment successively—Duty of Court—Procedure.*

When a suit is instituted against a minor who is a ward under the Court of Wards, through the guardianship of the manager of the Court of Wards as required by S. 51 of the Court of Wards Act, the Court of Wards has authority under S. 52 of the Act to appoint another person to represent the minor in place of the manager. They can likewise exercise the power of appointing a guardian successively from time to time as occasion arises. The proper procedure in such a case is to communicate the appointment to the Civil Court which has to recognise the appointment and is bound to substitute the new appointee in place of the person on record as guardian. The Court of Wards is not *functus officio* as soon as it has appointed a guardian. It has the power to remove him and appoint another in his place, and on the communication of such removal and appointment the Civil Court is bound to recognise the same and to make necessary substitution. (*Khaja Mohammad Noor and Saunders, JJ.*) Chhoti Rani Saheba *v.* Kumar Brijdeo Narayan Singh. **15 Pat. 667=167 I.C. 233=9 R.P. 399=3 B R. 288=A.I.R. 1937 Pat. 108.**

—— **S. 51**—*Suit against disqualified proprietor—Court of Wards taking charge pending suit—Representation of ward—Necessity—Nature of*

BENGAL COURT OF WARDS ACT (1879), S. 51.

amendment required—Formal order—Absence—Effect on acts of parties and decrees of Court.

Whether a suit is brought before or after the Court of Wards has assumed charge of the property of a disqualified proprietor, the Court of Wards' manager or the Collector should be made guardian and must represent the ward in the suit. If an amendment is required owing to the Court of Wards taking charge pending the suit, the amendment must produce the result set forth in S. 51. The suit against the proprietor becomes defective upon his becoming a ward of the Court of Wards and the suit is to be reconstituted to satisfy S. 51. A proper formal order to that effect should always be made, but if the proper parties are on the record and are dealt with on the correct footing, the mere want of formality will not make void the bargain of the parties and the decree of the Court. Where therefore in a suit against the proprietor, the manager, Court of Wards, is added as an additional defendant, on the manager assuming charge of the property, and a compromise is arrived at between the parties, the validity of the compromise depends entirely upon whether the Court of Wards consented on behalf of the proprietor. If they did, the absence of a formal order making the manager guardian *ad litem* as distinct from an additional defendant does not invalidate the decree. (*Sir George Rankin.*) Braja Sunder Deb *v.* Rajendra Narayan Bhanj Deo. **65 I.A. 57=40 Bom L.R. 700=32 S.L.R. 290=10 R.P.C. 160=66 C.L.J. 493=172 I.C. 643=42 C.W.N. 289=19 Pat.L.T. 69=1938 O.L.R. 57=1938 A.L.R. 84=4 B.R. 248=1938 P.W.N 129=17 Pat. 1=A.I.R. 1938 P.C. 49=(1938) 1 M.L.J. 590 (P.C.).**

——**Ss. 51 and 56**—*Suit filed in High Court—Manager of Court of Wards—If necessary party.*

The manager appointed by the Court of Wards is not a necessary party to a suit filed in the High Court. S. 51 of the Court of Wards Act is not applicable to the High Court under S. 56, and therefore the ordinary procedure must apply. Wards of Court are not persons under a disability within the meaning of C. P. Code. (*Remfry, J.*) National Insurance Co., Ltd. *v.* Gaganendra Nath Tagore. **42 C.W.N. 374.**

——**S. 55**—*Scope—Suit instituted before estate taken over by Court of Wards—Permission—Necessity.*

S. 55, Court of Wards Act, simply prohibits initiation of litigation on behalf of a ward by the Manager except with the authorisation of a Court of Wards. The prohibition does not extend to a litigation which is already in progress when the Court of Wards assumes charge of the estate of the wards. The Act sufficiently provides for such a case in S. 51 under which the manager is to be named as next friend or guardian for the suit and to represent the ward. Where therefore a suit is instituted by the plaintiffs before their estate is taken over by the Court of Wards, the mere fact that the estate is taken over by the Court of Wards during the pendency of suit does not take away the jurisdiction of the Court to try the suit by reason of the suit having been instituted without the permission of the Court of Wards. A.I.R. 1920 Cal. 197, Ref. (*Macpherson and Dhavle, JJ.*) Mt. Laikunnissa *v.* Durga Dass. **15 Pat.**

BENG. EMBANKMENT ACT (1882), S. 6.

382=161 I C. 18=8 R.P. 435=1936 P.W.N. 127 =17 Pat.L.T. 118=A.I.R. 1936 Pat. 114.

——**S. 59-A**—*Manager of estate under Court of Wards—Public servant.*

The manager of an estate under the Court of Wards in Chota Nagpur is, by the operation of S. 59-A of the Court of Wards Act, a public servant within the meaning of the Penal Code. (*Harries, C.J. and Manohar Lall, JJ.*) Angelo *v.* Kandan Manjhi. **185 I C. 738=6 B.R. 241=12 R.P 440=41 Cr L.J. 221=1940 P.W.N. 233=A.I.R. 1940 Pat. 316.**

——**Ss. 69 and 70**—*Rule* 115—*If* ultra vires.

R. 115 of the rules made under the Court of Wards Act is not *ultra vires.* Ss. 69 and 70 empower the making of such a rule. (*Harries, C.J. and Manohar Lall, J.*) Angelo *v.* Kandan Manjhi. **185 I C. 738=6 B.R. 241=12 R.P. 440 =41 Cr.L.J. 221=1940 P.W.N. 233=A.I.R 1940 Pat. 316**

BENGAL COURT OF WARDS REGULATION (X OF 1793), Cl. 33—*Applicability to Oudh.*

The Bengal Regulation X of 1793 applied to Oudh and a disqualified proprietor could not without the previous consent of the Court of Wards give authority to his widow to adopt. (*Thomas, J.*) Mata Baksh Singh *v.* Ajodhia Baksh Singh. **163 I.C. 770=9 R.O. 1=1936 O.L.R 378=A.I.R. 1936 Oudh 340.**

BENGAL CRIMINAL LAW AMENDMENT ACT (VI OF 1930), S 2 (1)—*Order not reviewed within one year—Prosecution for its disobedience.*

An order was made on 7th January, 1933 and was amended on 31st May, 1933. There was a further order on 14th June, 1934. There was no review of the orders dated 7th January, 1933 and 31st May, 1933 within the time required by law but accused was charged with disobeying the order on 2nd July, 1934.

Held, that the order was no longer in force at the time when the accused was alleged to have disobeyed it on 2nd July, 1934. (*Lort Williams and Jack, JJ.*) Hiranmoy Bhowmik *v.* Emperor. **160 I.C. 743=8 R.C. 452=37 Cr.L.J. 377=1936 Cr.C 72=A.I.R. 1936 Cal 16.**

BENGAL CRUELTY TO ANIMALS ACT (I OF 1920), S. 6—*Charge of performing* phooka *on milch animal—Conviction for being owner of that animal—Legality—Re-trial.*

There are two branches to S. 6 of the Bengal Cruelty to Animals Act The first makes punishable the offence of performing the operation of *phooka* on a milch animal and the second lays a penalty upon the owner of an animal upon which the operation is performed. If an accused person who was charged only under the first branch is convicted under the second branch, it is necessary in the interest of justice that he should be re-tried for the offence of which he has been convicted. (*Khundkar and Edgley, JJ.*) Dargahi Miah *v.* Emperor. **44 C.W.N. 398=71 C.L.J. 179=A.I.R. 1940 Cal. 328.**

BENGAL EMBANKMENT ACT (II OF 1882), S. 3—"Water-course"—If includes "a river." *See* S. 76 (*b*) *infra.* **43 C.W.N. 391.**

——**S. 6**—*Publication of notification under—Absence of direct proof—Effect—Evidence Act,* S. 114—*Presumption under, if available.*

Apart from the difficulty of getting direct proof of local publication of notification under S. 6, Bengal Embankment Act, relating to the provisions of S. 76 (*b*) of the Act, after an interval of time exceeding 25 years, the Crown can be permitted to rely on the presumption under S. 114, Cls. (*e*) and (*f*), Evidence Act, namely, that judicial and official acts have been regularly performed and that the common course of business has been followed in particular cases. (*Rowland, J.*) RAMADHIKARI SINGH *v.* EMPEROR. **166 I.C. 699=9 R.P. 337=38 Cr.L.J. 266=3 B.R. 214=A.I.R. 1937 Pat. 14.**

——**Ss 56 and 57**—*Notice under—If condition precedent to creation of liability.*

A notice under S. 56 or 57 of the Bengal Embankment Act is a condition precedent to creation of liability of the proprietor or the tenure-holder, as the case may be, and unless and until due publication or service of the notice is proved the very foundation of the liability is taken away. (*Mukherjea and Latifur Rahman, JJ.*) JADUNATH BANERJEE *v.* SECRETARY OF STATE. **I.L.R. (1939) 2 Cal 268=187 I.C. 477=12 R.C. 581=43 C.W.N. 1021=A.I.R. 1939 Cal. 617.**

——**S. 76 (b)**—*Offence under—Obstruction of river.*

S. 76 (*b*) of the Bengal Embankment Act clearly applies in a case in which there has been a diversion or obstruction of a river, as the expression "water-course" in S. 3 of the Act includes a river. (*Edgley, J.*) PASUPATI KARMAKAR *v.* EMPEROR. **I.L.R (1939) 1 Cal. 334=183 I.C. 470=40 Cr L.J. 808=12 R.C. 162=43 C.W.N. 391=A.I.R. 1939 Cal. 528.**

——S. 76 (b)—Prosecution under—Notification extending Act to area—Absence of direct proof—Effect — Presumption as to official acts under S. 114, Evidence Act—If sufficient. *See* BENGAL EMBANKMENT ACT, S. 6. **A.I.R. 1937 Pat. 14.**

——**Ss. 76 (b) and 79**—*Accidental breach in embankment—Repair without Collector's permission—Conviction by Sub-Deputy Magistrate—Order to remove obstruction within fortnight—Propriety—Order by District Magistrate after period of limitation modifying order for removal—Jurisdiction to pass.*

Certain tenants who repaired accidental breaches in an embankment without the permission of the Collector were convicted and fined under S. 76 (*b*) of the Bengal Embankment Act by a Sub-Deputy Magistrate. He made no investigation and without giving much consideration to the matter also added an order, apparently under S. 79, "to remove the obstruction within a fortnight." A third party then applied to the Magistrate to stop the removal of the obstruction, but the Magistrate, holding that he had no jurisdiction to revise his order, directed him to the District Magistrate. The latter, long after the period of appeal had expired, modified the order of the Magistrate, by setting forth that the order for removal of the obstruction need not be carried out.

Held, in revision, that the order of the District Magistrate modifying the order of the Magistrate and the order of the Magistrate to remove the obstruction were both improper and without jurisdiction and must therefore be set aside. (*Macpherson, J.*) KAMESHWAR SINGH BAHADUR *v.* EMPEROR. **163 I. C. 965=9 R.P. 74=37 Cr.**

L.J. 875=17 Pat.L.T. 412=1936 P.W.N. 383=1936 Cr.C. 660=A.I.R. 1936 Pat. 413.

——**S. 79**—*Procedure—Conviction under S. 76 (b)—Proper order—Restoration of* status quo.

The system of embankments in North Bihar is very complex and it is extremely hazardous to interefere with them in any way without the advice of a competent engineer and full inquiry. The Bengal Embankment Act is largely composed of provisions designed for the maintenance of the *status quo* and to prevent interference therewith except by competent persons or under competent advice or sanction. Where therefore certain persons erecting a new embankment are convicted under S. 75 (*b*), the proper order to be passed under S. 79 is one directing them to demolish so much of the embankment as is a new embankment and to remove so much of the new earth as is an addition to the existing embankment, thus restoring the locality as nearly as possible to its *status quo ante*. (*Rowland, J.*) RAMADHIKARI SINGH *v.* EMPEROR. **166 I.C. 699=9 R.P. 337=38 Cr.L.J. 266=3 B.R. 214=A.I.R. 1937 Pat. 14.**

——**S. 80**—*Publication under—Whether mandatory.*

The publication under S. 80 is directory and not mandatory. (*Rowland, J.*) RAMADHIKARI SINGH *v.* EMPEROR. **166 I.C. 699=9 R.P. 337=38 Cr L.J. 266=3 B.R. 214=A.I.R. 1937 Pat. 14.**

——**S. 86**—*Order of Collector under—Jurisdiction of Civil Court.*

An order of apportionment of costs passed by the Collector under S. 85 of the Bengal Embankments Act cannot be questioned in a Civil Court. Such an order would not be *ultra vires* simply because the Collector apportioned costs on certain lands which he should not have done under the provisions of the Act. It may be at the most an erroneous decision or an irregular exercise of the jurisdiction which the Collector undoubtedly possessed, and in no sense it can be said to be an usurpation of jurisdiction by the Collector which would make the order a nullity or without jurisdiction. (*Mukherjea and Latifur Rahman, JJ.*) JADUNATH BANERJEE *v.* SECRETARY OF STATE. **I.L.R. (1939) 2 Cal. 268=187 I.C. 477=12 R.C. 581=43 C.W.N. 1021=A.I.R. 1939 Cal. 617.**

BENGAL ESTATES PARTITION ACT (V OF 1897), Ss. 5 (2) and 28—*Decree declaring proprietor's interest over specific plots in estate—Jurisdiction of Civil Court to make—Executability when partition proceedings are pending and when they have terminated.*

It is competent to a Civil Court to make a decree declaring the plaintiff's proprietary right in an estate and the extent of his interest in respect of specified plots in the estate, whether partition proceedings by the revenue authorities are pending or have terminated. Such a decree cannot be regarded as one not warranted by law. The decree must be made in recognition of the partition proceedings and framed in such a manner that the partition proceedings may not be nullified. If the partition proceedings are still in progress, the successful litigant in the Civil Court may ask for a sub division in the new estate into which the lands claimed by him have fallen, whereas if the partition proceedings have concluded, he occupies merely the position of a co-owner with the proprietors of the new estate within which the disputed lands have been included.

The decree can be given effect to in either case. If the proceedings are pending, the new estate into which the disputed lands have fallen can be sub-divided. If, on the other hand, they have been completed, the plaintiff is entitled to have assigned to him as his separate estate the specific lands under S. 5 (2) of the Act. The decision of the Civil Court must be taken in effect to be a direction to divide off the lands from the new estate and to assign to the plaintiff as a separate estate in accordance with S. 28 of the Act. (*Nazim Ali and Hendersan, JJ.*) Sasi Kanta Acharjee Choudhury *v.* Rajendra Kumar Chakravarty. **40 C.W.N. 112.**

———**S. 7**—*Suit for partition of zemindari—Admission of prior partition of* bakasht *lands—Pattidars collecting rents separately from tenants—Effect—Power of Court to pass decree.*

Where it is admitted in a partition suit, that the *bakasht* lands of the estate or zemindari were divided sometime previously, but the land in the occupation of the tenants was not divided although each of the pattidars collected his share of the rents separately from the tenants, that amounts to a complete partition of the proprietary interest, and the Court cannot pass a decree for partition. If the Civil Court passes a decree for partition in such a case, it must be vacated. (*Agarwala and Varma, JJ*) Mukund Jha *v.* Dhorup Narain Jha. **160 I.C. 921 (1)=8 R.P. 397 (1)=1936 P.W.N. 23=17 Pat.L.T. 104=A.I.R. 1936 Pat. 77.**

———**Ss. 22 and 25**—*Partition by Collector—Lands claimed as raiyati treated as* bakasht—*Suit in Civil Court for declaration that such land is occupancy jote or falls under S. 22 (2), B. T. Act, and for decree directing to be entered as jama in batwara papers—Maintainability—Specific Relief Act, S. 42—Jurisdiction of Civil Court.*

The High Court (or a Civil Court) cannot set aside or alter a partition which has been effected by a Revenue Court of competent jurisdiction; it cannot be said that the Revenue Court was acting without jurisdiction merely because, regarding a matter for which there is no special provision in the Bengal Estates Partition Act, it adopted a view which, though contrary to the view taken by the High Court, cannot yet be said to have been unreasonable. A co-sharer landlord of a village which has been partitioned by the Collector, who was a party to the collectorate partition proceedings and was allotted his due share of the assets of the *mahal* which was fixed in his presence, cannot maintain a suit for a declaration that certain lands treated as *bakasht* lands in such partition are his occupancy jote and in the alternative that he has the peculiar right in them which is defined in S. 22 (2) of the Bengal Tenancy Act and for a decree directing that the amount of rental payable by him before the partition may be entered in the batwara papers as the jama of the said lands. To give a decree to the plaintiff co-sharer in such terms would involve the re-adjustment of the assets not only so far as he is concerned, but also so far as the other co-sharer-landlords are concerned. Such an order is clearly beyond the jurisdiction of the High Court or Civil Court. Nor can a mere declaration of the plaintiff's right under S. 22 (2) of the B. T. Act be granted, though he would be entitled to it, because no consequential relief can be granted to him. In view of S. 42, Specific Relief Act, and the settled practice of the Court not to grant any declaratory decree when that would be of no avail to the party seeking it, the suit cannot be maintained. It is a matter for the revenue authorities to decide whether the partition should be re-opened in order to relieve the plaintiff of the hardship involved. (*Fazl Ali and Madan, JJ.*) Bhairo Singh *v.* Shamsundar Prasad. **173 I.C. 849=10 R.P. 453=4 B.R. 347=18 Pat L.T. 843=1937 P.W.N 816=A.I.R. 1938 Pat. 76.**

———**Ss 23 to 27**—*Question of extent of proprietor's interest in estate—Jurisdiction to decide—Partition proceedings—Claim to separate possession of specific plots on basis of private arrangement—Finding of no partition and no separate possession—Subsequent suit for declaration of proprietary interest over such plots—Jurisdiction of Civil Court—If barred under S. 119.*

Ss. 23 to 27 of the Bengal Estates Partition Act show that a Civil Court has jurisdiction to decide questions of title or extent of interest not only between a proprietor and a stranger, but also between proprietors themselves. The revenue authorities have no power under the Act to determine finally the question of extent of interest or of right or title. Where a Partition Deputy Collector partitions an estate on the footing that the estate was not divided by private arrangement formally agreed to by all the proprietors and that the proprietors were not in possession of separate lands representing their interest in the estate, as alleged by the plaintiff co-sharer-proprietor, a suit by the co-sharer proprietor for a declaration that the interest in the parent estate is the proprietary right over certain specific lands claimed by him on the basis of the private arrangement set up, can be entertained by the Civil Court. Such a suit is not barred under S. 119 of the Estates Partition Act, the question raised in the suit being a question about the extent of plaintiff's interest in the estate. (*Nasim Ali and Henderson, JJ.*) Sasi Kanta Acharjee Choudhury *v.* Rajendra Kumar Chakravarty. **40 C.W.N. 112.**

———**S. 25**—*Partition order by Revenue Court—Interference by Civil Court—Injunction to* batwara *Court to stay proceedings—Civil Court's jurisdiction to issue—Allotment of lands—Jurisdiction.*

The Civil Court has no power to issue injunction to the *batwara* Court. It should be very slow to interfere with the jurisdiction which is exercised by a Revenue Court upon powers conferred by the Revenue Court by the Estates Partition Act. When such interference is invoked, the facts must be scrutinised with particular care. It falls to the Revenue Officers during the *batwara* to consider and decide for themselves whether or not S. 77 of the Act should be applied to the case in the matter of allotment of lands. In such matters the jurisdiction of the Civil Court is limited. (*Dhavle and Agarwala, JJ.*) Gopalji Jha *v* Gajendra Narayan Singh. **15 Pat. 404=162 I.C. 210=8 R.P. 513=1936 Pat. W.N. 109=17 Pat.L.T. 109=A.I.R. 1936 Pat. 226.**

———**S. 48**—Record of existing rents and assets published under—If admissible as public or official record. *See* EVIDENCE ACT, Ss. 13 AND 35. **40 C W.N. 821.**

———S. 77—Allotment of lands—Application of S. 77—Jurisdiction of Civil and Revenue Courts. *See* BENGAL ESTATES PARTITION ACT, S. 25. **17 Pat.L T. 109=A.I.R. 1936 Pat. 226.**

———**S. 81**—*Rent fixed by Batwara officer on basis of illegal enhancement made prior to partition—Party holding landlord's interest as well as tenant's interest not objecting—Subsequent plea of illegal enhancement in suit for rent—If open.*

A party who, having two capacities in a village, both of a landlord and of a tenant, allows the partition to proceed on a certain basis and gets advantage under it, cannot be allowed later on to claim that his right as a *raiyat* has been interfered with and thereby practically ask the whole partition to be reopened. The plaintiffs and the defendants and some other persons held a separate *patti* of eight annas in a village. In that *patti,* the defendants, in addition to their having some other land as well, had a holding, of which the rent was enhanced by some contract to a figure which was undoubtedly illegal under S 29 of the Bihar Tenancy Act. Subsequently there was a collectorate partition in which the plaintiffs were allotted a separate estate for their share in the parent estate, which included five plots out of the holding of the defendants. Under S. 81 of the Estates Partition Act, the Batwara officer fixed the rent payable by the defendants to the plaintiffs on the basis of the enhanced rent. The defendants allowed the partition to proceed on that basis and raised no objection, and got assets in respect of their own share on that basis. In a suit by the plaintiffs for rent fixed under S. 81, the defendants pleaded that the enhancement of rent prior to partition was void under S. 29 of the Bihar Tenancy Act and hence illegal.

Held, that the defendants, having got the advantage of an enhanced asset for the purposes of the partition and having allowed the plaintiffs to get their *takhta* on that basis, could not be allowed to turn round and say that the rent fixed by the Collector under S. 81 of the Partition Act was illegal and irrecoverable. (*Noor, J.*) KISHORE RAMAN PRASAD *v.* HANUMAN SINGH. **178 I.C. 567=11 R.P. 275=5 B R. 113=1938 P. W.N. 147=A.I.R. 1938 Pat. 509**

———**Ss. 81 and 99**—*Construction and scope—Holding under some landlords under pattidari arrangement between co-sharer landlords—Dispossession of tenant from one plot and consequent suspension of rent—Subsequent* batwara *by Collector—Allotment of dispossessed plot and another to one landlord—Right of tenant to claim suspension of rent—If "encumbrance."*

The plaintiff landlord became the owner of a holding consisting of two plots of land as the result of a collectorate *batwara.* Prior to the *batwara,* the tenant-defendant who was a settled raiyat had a cash holding consisting of 10 plots in the *takhta* of one set of landlords under a *pattidari* arrangement among all the landlords in the nature of an imperfect partition. Out of the 10 plots the landlords dispossessed the tenant from one plot, which led to the result that the tenant was held entitled to suspension of rent as regards all the other plots including one of the two plots

comprising the holding of the plaintiff. The latter having sued the defendant for rent of the holding, the tenant defendant pleaded suspension of rent in respect of that plot in bar of suit.

Held, (1) that the tenant's right to suspension of rent was not affected by the *batwara* proceedings and that the dispossession of the tenant from the one plot could not be regarded as an encumbrance created by the evicting landlords under S 99 of the Estates Partition Act; (2) that the provisions of S. 81 of the Act did not entitle the tenant-defendant effectively to insist in the *batwara* proceedings that his holding shall or shall not be divided in a particular way; (3) that the Estates Partition Act did not contain any provisions which could be regarded as depriving the tenant, by reason of the *batwara,* of his right to suspension of rent for the balance of his holding; (4) that the dispossession of the tenant from the plot having benefited all the landlords by reason of its conversion into *bakasht,* it was not unfair that the bar of suspension of rent should continue to apply to all the plots of the tenant's old holding, in whichever *pattis* they might fall as a result of the *batwara*; and (5) that consequently the defendant must be held entitled to suspension of rent in regard to the dispossessed plot and should be made liable for the rent of that part only of the present holding which did not form part of the old holding. (*Courtney-Terrell, C. J. and Dhavle, J.*) KHUBLAL SINGH *v.* ISHRI PRASAD. **15 Pat. 443=161 I C. 109=8 R.P. 433=17 Pat. L.T. 155=1936 P.W.N. 236=A.I.R. 1937 Pat. 200.**

———**S. 81**—*Order under—If can be challenged in rent suit.*

An order passed by a partition officer while acting under S. 81, exercising the powers of quasi-judicial officer, cannot be challenged by way of defence to a suit for rent in absence of other parties to the partition. It can only be challenged by a suit or proceeding in which all the parties to the partition are parties. 29 C.W. N. 221, Foll. (*Jack, J*) NABENDRA KISHORE ROY *v.* KERAMAT ALI MUNSHI. **161 I.C. 214=8 R.C. 489=A.I.R. 1936 Cal. 63.**

———**S. 81 (3)**—*Partition of estate—Presumption as to service of notice.*

In case of partition of an estate the presumption is that the proceedings were regularly taken and that partition would not have been carried out unless the regular notices as required by S. 81 (3) have been served (*Jack, J.*) NABENDRA KISHORE ROY *v.* KERAMAT ALI MUNSHI. **161 I.C. 214=8 R.C 489=A.I R 1936 Cal. 63.**

———**S. 99**—*Applicability—Co-sharers*—Bakasht *lands—Some co-sharers placed in possession for convenience of management—Settlement of raiyats by latter in course of management—Acquisition of occupancy rights—Subsequent partition—Lands allotted by partition to co-sharer subject to tenancy—Right to eject tenants.*

Where all the co-sharers put one of their number in sole possession of a particular portion of the estate, there is an implied authority giving him the right to represent them for all the ordinary details of management, including the settling of raiyats upon estate land for convenience of cultivation. Of course it would extend only to acts done in good faith for the benefit of the estate. Such settlements made in good faith would not be encumbrances so as to attract the operation of S. 99 of the Estates Partition Act. Certain *bakasht* lands were in possession of some of the co-sharers under a private arrangement made for convenience; the co-sharers in possession gave the defendants a raiyati settlement in 1314 fasli, since when the defendants remained in cultivating possession. The defendants were settled raiyats of the village and the settlement was made in the ordinary course of management of the estate and was a prudent act. There was no protest at any time by the other co-sharers, one of whom was the plaintiff. In 1923, there were partition proceedings under the Estates Partition Act, and on their conclusion in 1927, the different proprietors were given delivery of possession over the *takhtas* or allotments assigned to them respectively. The *bakasht* lands which had been settled with the defendants were allotted to the plaintiff's *takhta* on partition subject to the tenancy. The plaintiff, who was one of the co-sharers, brought a suit for recovery of possession by ejecting the defendants and for mesne profits.

Held, (1) that S. 99 of the Estates Partition Act had no application to the case; (2) that the settlement of the defendants on the land having been made in the ordinary course of management, and having been a prudent act, the defendants had become the tenants of the plaintiff and had acquired occupancy rights under him, and could not be ejected under S. 99 of the Estates Partition Act, otherwise than under the principles governing the Bihar Tenancy Act; (3) that the plaintiff having been allotted the lands in the partition or *batwara* proceedings subject to the tenancy, could not get khas possession in the suit, without in the first instance getting the partition set aside, if at all. (*Agarwala and Meredith, JJ.*) RAJENDRA NARAYAN *v* HARGOBIND **19 Pat. 275=21 Pat. L.T. 185=1940 P.W.N. 212.**

——S. 99—*Applicability—Lessee admitted by one co-sharer—Possession for over 12 years continuously—Effect of—Right of other co-sharers to eject.*

In applying the provisions of S. 99 of the Bengal Estates Partition Act, a distinction must be made between occupancy rights which are the creation of statute, and the rights of a lessee or a tenure-holder which are the result of a contract between a co-sharer and the person in possession. It is doubtful if after occupancy rights have accrued by 12 years continuous possession, any other co-sharer would be entitled to eject the raiyat or lessee under the provisions of S. 99. (*Courtney-Terrell, C.J. and James, J.*) RAJA RAM RAI *v.* NIRANJAN RAI. **17 Pat. 143=1938 P.W.N. 371=19 Pat.L.T. 387=175 I.C. 943=11 R.P. 35=4 B.R. 658=A.I.R. 1938 Pat. 297.**

——S. 99—Co-sharers landlords—One in exclusive possession—Grant of thika—Settled raiyat of land inducted on to land by thikadar—Subsequent partition—Land allotted to another co-sharer—Suit by latter for ejectment of raiyat—Maintainability—Occupancy rights—Accrual of. *See* B. T. ACT, S. 22. **1940 P.W.N. 221=21 Pat.L.T. 201.**

——S. 99—"Encumbrance"—Dispossession by landlords of tenant from one plot in holding—If encumbrance. *See* BENGAL ESTATES PARTITION ACT, Ss. 81 AND 99. **17 Pat.L.T. 155.**

——S. 99—*Scope of—If affects accrual of occupancy rights under Bihar Tenancy Act—Settlement of raiyat by co-sharer in possession on behalf of all co-sharers—Effect of—Occupancy rights—Accrual of—If effective after partition.*

S. 99 of the Bengal Estates Partition Act cannot override the provisions of the Bihar Tenancy Act or prevent the accrual of occupancy rights. Where a raiyati settlement is made by a co-sharer in possession in the ordinary course of prudent management, the incidents of a raiyati tenancy will be applicable as against the co-sharers. In cases where it can be held that a co-sharer in possession has an implied authority to induct tenants on land, and does represent the entire body of landlords by virtue of that implied authority, a settlement made by him is binding on all. A tenancy interest is then created under the entire body of landlords and nothing in S. 99 of the Estates Partition Act can prevent the accrual of occupancy rights in appropriate cases which will be effective even after partition. (*Agarwala and Meredith, JJ.*) RAJENDRA NARAIN *v.* HARGOBIND. **19 Pat. 275=21 Pat.L.T. 185=1940 P.W.N. 212.**

——S. 113—*Appeal to Board of Revenue from Commissioner's order directing fresh partition by Collecter—Orders passed on—If* ultra vires—*Suit to declare null and void—Jurisdiction of Civil Court.*

The Board of Revenue is incompetent to entertain and hear an appeal against an order of the Commissioner directing the Collector to make a fresh partition, and it acts *ultra vires* in interfering with the Commissioner's order. The appeal being without jurisdiction all the proceedings from the point when the Board entertains the appeal are void and of no effect. The Civil Court in such a case has jurisdiction to entertain a suit by the aggrieved party and declare the proceedings before the Board of Revenue a nullity. The finality of the orders of the Revenue Courts has effect so long as the acts of such Courts are not *ultra vires* the statute. When they act in excess of their limited jurisdiction, their acts are liable to be scrutinised by the Civil Court and to be set aside. (*D. N. Mitter and Patterson, JJ.*) FATEMA BANOO *v.* KUMAR KAMALA RANJAN ROY. **161 I.C. 744=8 R.C. 547=40 C.W.N. 539=A.I.R. 1936 Cal. 138.**

——S. 113—*Collector confirming partition—Commissioner in appeal remanding case for fresh partition—Appeal to Board of Revenue—Competency—Orders on such appeal—If null and void—Suit in Civil Court to declare void—Maintainability.*

An order made by the Commissioner in an appeal from the Collector's order confirming a partition, sending the case back to the Collector and directing him to make a fresh partition cannot by any stretch of language be regarded as an order "amending" the partition within the meaning of S. 113 (*c*) of the Bengal Estates Partition Act, and is therefore not appealable to the Board of Revenue. The scheme of the Act is that there should be appeals only from final orders made by the Commissioner either confirming or amending the partition and not where he directs a fresh partition. Where the Board entertains and hears such an appeal, it acts without jurisdiction and all the proceedings and the order passed by the Board are null and void, and the order can consequently be challenged in a Civil Court. *(D. N. Mitter and Patterson, JJ.)* FATEMA BANOO *v.* KUMAR KAMALA RANJAN ROY. **161 I.C 744=8 R.C. 547=40 C W.N. 539=A.I.R 1936 Cal. 138**

——S. 119—*Construction and scope—Jurisdiction of Civil Court—When excluded.*

S. 119 of the Bengal Estates Partition Act excludes the jurisdiction of the Civil Court when the question raised before it relates to apportionment of Government Revenue between the separate estates formed out of the parent estate or to the details of partition, but it does not oust the jurisdiction of the Civil Court in matters which involve questions of title or questions of the extent of the plaintiff's interest in the estates. *(Nasim Ali and Henderson, JJ.)* SASI KANTA ACHARJEE CHOUDHURY *v.* RAJENDRA KUMAR CHAKRAVARTY. **40 C.W.N. 112.**

——S. 119—Objection in partition proceedings disposed of without deciding real point at issue—Declaratory suit. *See* LIMITATION ACT, ARTS. 14 AND 120. **A.I.R. 1939 Cal. 749.**

——S 119 - Scope - Partition by Deputy Collector—Finding of no private partition and no separate possession—Suit in Civil Court for declaration of proprietary right over certain specific plots—If barred. *See* BENGAL ESTATES PARTITION ACT, Ss. 23 TO 27. **40 C.W.N. 112.**

BENGAL EXCISE ACT (V OF 1919), Ss. 46 and 62—*Accused charged under S. 46 having previous conviction—Summons case procedure—Legality.*

Where the accused who is charged with an offence under S. 46 of the Bengal Excise Act is liable to enhanced punishment under S. 62 of that Act by reason of a previous conviction, and the Magistrate is cognisant of this fact at the commencement of the trial, the proper procedure for him to adopt is that laid down for a warrant case. The irregularity of following the summons case procedure instead of the procedure for a warrant case is not a mere matter of form and would not be cured by S. 537, Cr. P. Code. *(Biswas, J.)* SUFAL GOLUI *v.* EMPEROR. **42 C.W.N. 222=174 I.C 454=10 R.C. 674=39 Cr.L.J. 438=A I.R. 1938 Cal. 205.**

——S. 63—*Liquor in Excise and Customs bond.*

The liquor in Excise and Customs bond is not liable to confiscation under any of the provisions of the Bengal Excise Act. *(Bartley and Narsing Rau, JJ.)* GUBBAY *v.* EMPEROR. **188 I.C 267=41 Cr L.J. 556=A.I.R. 1940 Cal. 205.**

——S. 63—*Order for confiscation—Identity of premises—If material.*

Under S. 63 what is material is not identity of premises but identity of the possessor. A.I.R. 1939 Cal. 346, Foll *(Bartley and Narsing Rau, JJ.)* GUBBAY *v.* EMPEROR. **188 I.C 267=41 Cr. L.J 556=A.I.R. 1940 Cal 205.**

——S. 63 (2)—*Bonded liquor—If liable to confiscation.*

Under S. 63 (2) of the Bengal Excise Act, one quantity of liquor cannot be said to be "had in possession along with or in addition to" another, unless the possessor of both is the same. As liquor in the excise bond and the customs bond is in the dual possession of the Revenue authorities and the party and not in the sole possession of the latter, it is not liable to confiscation under S. 63 (2). *(Bartley and Rau, JJ.)* EZEKIEL EPHRAIM *v.* EMPEROR. **I.L.R (1939) 1 Cal. 549=181 I.C. 955=11 R.C. 875=40 Cr.L J. 608=43 C.W.N. 522=A I R. 1939 Cal. 346.**

——S. 63 (2)—*Liquor lawfully had in possession—Liability to confiscation.*

Under S. 63 (2) of the Bengal Excise Act, any liquor lawfully "had in possession along with or in addition to" any liquor liable to confiscation under sub-s. (1), is likewise liable to confiscation. It is immaterial who is the person in possession; all that the sub-section requires is that some person should be in possession at some point of time subsequent to the commission of an excise offence, both of the illicit liquor and also of some licit liquor. The fact that the latter liquor is on different premises is immaterial. The sub-section does not say that the person in possession need be guilty of any offence. *(Bartley and Rau, JJ)* EZEKIEL EPHRAIM *v* EMPEROR. **I L R (1939) 1 Cal. 549=181 I.C. 955 =11 R.C 875=40 Cr L.J. 608=43 C.W.N 522 =A.I R. 1939 Cal. 346.**

——S. 64—*Confiscation of things lying outside territorial limits—Jurisdiction of Magistrate.*

According to S. 64 the Magistrate who tries a case under the Act has power to confiscate anything in Bengal which is liable to confiscation under S. 63, whether it is within or without the district where the case is tried. A.I.R. 1939 Cal. 346, Foll. *(Bartley and Narsing Rau, JJ.)* GUBBAY *v.* EMPEROR **188 I.C. 267=41 Cr.L.J. 556= A.I.R. 1940 Cal. 205.**

——S. 64 (1)—*Confiscation of things lying outside territorial limits—Jurisdiction of Magistrate.*

S. 64 (1) of the Bengal Excise Act contains no territorial limitation. The Magistrate who tries the case has power to order confiscation of anything in Bengal which is liable to confiscation under S. 63, whether it is within or without the district where the case is tried. *(Bartley and Rau, JJ.)* EZEKIEL EPHRAIM *v.* EMPEROR **I L.R. (1939) 1 Cal. 549=181 I.C. 955=11 R.C. 875= 40 Cr L J. 608=43 C.W.N. 522=A.I.R. 1939 Cal. 346.**

——S. 64 (1)—*Confiscation—Omission to give notice to interested parties—Effect.*

The omission to give notice to interested parties before an order of confiscation is made under S. 64 (1) of the Bengal Excise Act, might in ordinary circumstances be fatal to the order. But where facts sufficient for a decision of the question of liability to confiscation are stated by the petitioner himself in his application for revision, and the omission to give the notice has not caused any real prejudice, the Court of revision will not interfere. *(Bartley and Rau, JJ.)* EZEKIEL EPHRAIM *v.* EMPEROR. **I.L.R. (1939) 1 Cal. 549=181 I.C. 955=11 R.C 875=40 Cr.L.J. 608=43 C.W.N. 522=A.I.R. 1939 Cal. 346.**

——Ss. 74 and 81—*Investigation by Excise Authorities—Procedure applicable.*

The provisions contained in Ss. 74 and 81 make the provisions of the Criminal Procedure Code applicable to investigations by Excise Officers. The Bengal Excise Act does not lay down a complete procedure for investigation of offences under the Act and the provisions of Ch. 9 of the

Act, relating to the procedure in the matter of detection, investigation and other matters including trial of offences. in which Ss 74 and 81 find place, make it clear that it is mainly the procedure laid down in the Criminal Procedure Code that has to be followed in investigations into offences under the Bengal Excise Act. A Magistrate is, therefore, empowered under S. 5, Identification of Prisoners Act, to order a person to be measured and photographed for the purpose of any investigation or proceeding under the Code of Criminal Procedure. (*Guha and Bartley, JJ.*) GUBBAY *v.* EMPEROR. **63 Cal 780=161 I C. 238=8 R C. 499=37 Cr.L J. 438=40 C W.N. 415=1936 Cr.C. 196=A I.R. 1936 Cal. 65.**

BENGAL FERRIES ACT (I OF 1885), S. 6—*Notification under—If confers right to embark or disembark passengers on private property.*

When the Crown grants a ferry and purports to declare the limits within which it is to run, the termini must be on places over which the public may have the right to embark or disembark. The Legislature has not expressed in the Act any intention to convert all lands within such limits into highways. Such conversion would, in effect, amount to confiscation of private property without a corresponding award or compensation and would be tantamount to a declaration in favour of the public of an incorporeal hereditament over private property over which no such right accrued under the ordinary laws of the land. Such words as are contained either in the definition of ferry (S. 5) or the defining of the limits (S. 6) do not express any intention of taking away rights of private individuals or vesting any rights in the public. And unless such intention is very clearly expressed no inference of such intention would be permissible. The land, if it is to be converted into a highway, has to be converted, under the law as it stands either by obtaining a dedication absolute or restricted or by acquisition voluntary or compulsory. By merely calling a piece of land a ferry or a landing stage the Legislature cannot be taken to have affected private rights of individuals. The notification under S. 6, therefore, the whole scope of which is to define the limits of the ferry, taken along with the definition of ferry as including a landing stage, does not confer any right on the owner of a ferry to embark or disembark the passengers and cargo of the ferry so long as the lands to be used as landing stages have not been made into highways by such means as the law allows. (*Derbyshire, C. J. and D N. Mitter, J.*) CHAIRMAN, MIDNAPORE DISTRICT BOARD *v.* MONMOTHANATH MONDAL. **171 I C. 815=10 R C. 312=A.I.R. 1937 Cal. 289.**

——**Ss 16 and 28**—*Liability under—Carrying of passengers on ferry in contravention of Act—Person liable to punishment—Lessor or lessee.*

Under S. 28 read with S. 16 of the Bengal Ferries Act, the person responsible and liable to conviction is not the person who has leased out the ferry right, but the person who conveys passengers for hire, *i.e*, the former, lessee, thikadar or ghatwala, by whichever name he may be called, who actually convey passengers for hire and collect tolls from passengers so conveyed. (*James and Verma, JJ.*) KHAJA ABDUL GHANI *v.* KING-EMPEROR. **15 Pat. 655=167 I.C. 757=9 R. P. 425=38 Cr L J. 454=3 B.R. 328=1936 P.W. N. 880=17 Pat.L T 845=A.I.R. 1937 Pat. 144.**

——S. 28—Liability under—Conveyance of passengers in contravention of S. 16—Liability to punishment—Lessor of ferry or lessee. *See* BENGAL FERRIES ACT, SS. 16 AND 28. **15 Pat. 655.**

BENGAL FOOD ADULTERATION ACT (VI OF 1919), Ss. 4 and 6—*Mustard oil—Saponification value found excessive—Presumption under S. 4—Rebuttal—Proof required.*

In the case of mustard oil, if the analyst finds that the saponification value is excessive, the presumption under S. 4 of the Bengal Food Adulteration Act that it is not genuine is raised. But if it is proved that none of the common adulterants are present and that different mustard seeds give different saponification value owing to the peculiar properties of the seeds, the presumption is rebutted. An accused person cannot be tied down to any particular method in rebutting the presumption raised against him under S. 4 of the Bengal Food Adulteration Act. In the case of mustard oil, he need not rebut the presumption by following the oil from the mustard seeds throughout the process of manufacture right up to its arrival in his shop and demonstrate that no deleterious substance had been introduced. The presumption is rebutted if the accused calls evidence which satisfies the Court that the article in question is derived exclusively from mustard seeds. Mere proof that none of the common adulterants is present will not rebut the presumption. (*Henderson and Khundkar, JJ.*) SUPERINTENDENT AND REMEMBRANCER OF LEGAL AFFAIRS, BENGAL *v.* KSHITISH CHANDRA BANERJEE. **I L. R. (1939) 2 Cal 465=184 I C 423=12 R C. 229=43 C.W N. 1030=A I.R. 1939 Cal. 667.**

——**Ss. 4 and 6**—*Scope of—Powers of Local Government—Presumption arising under S. 4—Applicability.*

Per *Henderson, J.*- Under S. 4 of the Bengal Food Adulteration Act the local Government has power to declare the normal constituents of the articles of food specified in S. 6. The two sections are really dealing with different matters. The former is concerned merely with the constituents of different articles of food and the latter with the conditions under which they may be sold. It follows, therefore, that the presumption arising under S. 4 and the rules made thereunder would apply in respect of those articles of which the normal constituents have actually been declared. But in the case of ghee the notification is more severe than the conditions laid down in S. 6 and the presumption therefore would be of very little help to the prosecution. (*Henderson and Khundkar, JJ*) NOWRANGA LAL *v.* CHAIRMAN, MIDNAPORE MUNICIPALITY. **I.L.R. (1940) 2 Cal. 82=44 C W.N 615=A.I.R. 1940 Cal 324.**

——**Ss. 6 (1) and 21**—*Offence under—Ghee sold not fulfilling conditions but unadulterated—Presumption arising under S. 4—Whether applies.*

If a person sells an article of food specified in S. 6 of the Bengal Food Adulteration Act which does not fulfil the conditions laid down in that section or such conditions as are prescribed by the Local Government, he is guilty of an offence under S. 6 (1) read with S. 21 of the Act. In the case of ghee the Local Government has by a notification under S. 6 fixed a standard of quality, and in so doing has prescribed conditions within the meaning of S. 6. If the ghee sold does not comply with the requirements of the notification, an offence is committed whether or not the ghee is adulterated. S. 6 enacts an absolute prohibition and renders any presumption arising under S 4 and the rules made thereunder that the ghee is not genuine or is injurious to health entirely superfluous. This anomaly does not arise from any necessary conflict or overlapping as between Ss. 4 and 6, but arises from the manner in which the rules framed under these two sections are expressed. In the presence of the essential and irrebuttable condition prescribed in respect of ghee by the notification under S. 6, it was unnecessary for the Local Government to make the declaration under S. 4. (*Henderson and Khundkar, JJ*) NOWRANGA LAL *v* CHAIRMAN, MIDNAPORE MUNICIPALITY. **I.L.R. (1940) 2 Cal. 82=44 C.W.N. 615=A.I.R. 1940 Cal. 324.**

——S, 6 (1) (e)—*Offence under—Magistrate acquitting accused and directing return of tins of oil to him—Order of acquittal not appealed from —Power of Sessions Judge on appeal to direct forfeiture of tins if report of public analyst is against accused.*

Where in a case under S. 6 (1) (*e*) of the Bengal Food Adulteration Act the Magistrate acquitted the accused and directed the return of the tins of mustard oil to him, and the order of acquittal was not appealed from, the Sessions Judge cannot, on appeal, proceed on the basis that the order of acquittal is wrong and direct the forfeiture of the tins in case the report of the public analyst is against the accused. (*Guha and Lethbridge, JJ.*) KISHAN LAL *v.* SASHI BHUSAN. **42 C.W.N. 220.**

——S. 6 (4)—*Ghee in transit—Presumption of storing for sale—If can be drawn.*

The fact that the ghee was in a cart for the purpose of being carried and was not deposited in any place for the purpose of sale, in other words, that it was in transit, need not militate against the presumption of storing for sale. (*Biswas, J.*) RAM CHARITA RAM BHAKAT *v.* DISTRICT BOARD OF RAJSHAHI. **I.L.R (1938) 1 Cal. 420=172 I.C 869=10 R C 469=39 Cr.L.J. 252=41 C.W.N. 1213=A.I.R. 1937 Cal. 7'0.**

——S. 6 (4)—*Habit of storing ghee for sale—Proof.*

Where the evidence showed that the accused had a very big shop dealing in ghee and was getting consignments of ghee from other places but there was not a word in the evidence as to what the consignments were intended for, nor as to what used to be done at the accused's shop, it cannot be said that the only inference that can be drawn from the evidence is that the accused is in the habit of storing ghee for sale. (*Biswas, J.*) RAM CHARITA RAM BHAKAT *v.* DISTRICT BOARD OF RAJSHAHI. **I.L.R. (1938) 1 Cal. 420=172 I C. 869=10 R.C 469=39 Cr L.J. 252=41 C.W.N. 1213=A.I R. 1937 Cal. 710.**

——S. 6(4)—*'Possession'—If includes constructive possession.*

'Possession' in S. 6 (4) of the Bengal Food Adulteration Act means actual physical possession and does not include constructive possession. Where, therefore, at the time when a consignment of adulterated mustard oil was seized by the Sanitary Inspector it was merely in transit from the railway station to the shop of the accused and was, then in the possession of the accused's carter, the presumption raised by S 6 (4) of the Act can have no application. (*Edgley, J.*) SACHI NANDAN PIRI *v.* THE CHAIRMAN, MIDNAPORE DISTRICT BOARD. **I.L.R. (1940) 1 Cal. 333=188 I.C 398=41 Cr.L.J. 582=44 C.W.N. 173=A.I.R. 1940 Cal. 213.**

——S. 6 (4)—*Presumption.*

The word 'possession' in S. 6 (4) of the Bengal Food Adulteration Act must be given a strict interpretation, and cannot be extended to include "constructive possession." It means only actual possession. Accordingly the presumption under that sub-section cannot be invoked against the master where the articles mentioned therein are seized from the possession of his servant while they are in transit to him (*Biswas, J.*) RAM CHARITARAM BHAKAT *v* DISTRICT BOARD OF RAJSHAHI. **I.L.R. (1938) 1 Cal. 420=172 I.C. 869=10 R.C. 469=39 Cr.L.J. 252=41 C.W.N. 1213=A.I.R. 1937 Cal. 710.**

——Ss. 9 and 10—*Sanitary Inspector not specially authorized under S. 10—Powers of.*

A Sanitary Inspector of a Municipality took some samples from a ghee shop and sent them to public analyst. It was proved that Sanitary Inspector was not specially authorized under S. 10, Bengal Food Adulteration Act, to act under Ss. 10 and 12 of the same Act.

Held, that Sanitary Inspector could take the samples and send them to public analyst for examination by the provision of the Act, as a private individual under S. 9. (*Henderson and Mitter, JJ.*) MANINDRA NATH BANERJEE *v.* JYOTISH CHANDRA DATTA. **I.L.R. (1937) 1 Cal. 765=169 I.C 251=9 R.C. 910=38 Cr. L.J. 745=A.I.R 1937 Cal. 60.**

——S. 11—*Compliance with—Notification of intention—Form of.*

The person buying the articles is bound by the statute to notify to the seller his intention to have the article analysed. But no particular form of words is required, nor even any words at all. What is necessary is that the seller must know that the samples are to be taken for the purpose of analysis so that he may see that the samples are to be fairly taken. (*Henderson and Mitter, JJ.*) MANINDRA NATH BANERJEE *v.* JYOTISH CHANDRA DATTA. **I.L.R. (1937) 1 Cal. 765=169 I.C. 251=9 R.C. 910=38 Cr.L.J. 745=A.I.R. 1937 Cal. 60.**

——S. 13 (2)—*Sample taken from one of several tins of a consignment—Order forfeiting entire consignment—Legality.*

Where the several tins of a consignment were of the same brand and formed part of one consignment, a forfeiture order under S. 13 (2) of the Act with regard to the whole of the consignment is quite proper, although a sample was taken from one tin only. (*Edgley, J.*) SACHI NANDAN PIRI *v* THE CHAIRMAN, MIDNAPORE DISTRICT BOARD. **I.L.R. (1940) 1 Cal. 333=188 I.C. 398=41 Cr.L J. 582=44 C.W.N. 173=A.I R. 1940 Cal 213.**

——S. 13 (2)—*Some out of several tins seized from accused found to contain adulterated ghee—Order of forfeiture in respect of all tins—Appellate Court setting aside that order and directing samples from rest of tins to be sent to Public Analyst—Legality.*

Fifteen tins of ghee were seized from the accused and the ghee in two of them was found to be adulterated. The Magistrate convicted the accused under S. 216 (1) of the Bengal Food Adulteration Act and passed an order under S. 13 (2) of that Act, directing that all the 15 tins of ghee should be forfeited. On appeal, the Sessions Judge upheld that conviction but set aside the order of forfeiture in respect of 13 tins. He then ordered that samples should be taken from them and sent to the Public Analyst after which those found to be adulterated ghee would be destroyed.

Held, that when the Sessions Judge set aside the order passed with regard to 13 tins of ghee, he should have made a direction to return the tins to the accused, (*Henderson, J.*) Benarsi Lal *v.* Chairman, Asansol Municipality. **42 C.W.N. 731.**

——**S. 14 (2)**—*Article of food sent for analysis before case—Costs of analysis—Power of Court to order their payment.*

S. 14 (2) of the Bengal Food Adulteration Act applies only to cases in which an article of food is sent for analysis under an order of the Court before which a case under the Act is pending. It does not apply to a case in which such article was sent to the Chemical Examiner by the Health Officer of the Municipality before the institution of the case and without the intervention of any Court. In such a case, therefore, the Court cannot order for payment of the costs of analysis under S. 14 (2) of the Act. (*Patterson, J.*) Atul Chandra Modak *v.* Emperor. **42 C.W N. 760.**

——**S. 20**—*Rule-making power of Local Government—Scope of.*

Henderson, J.—Under S. 20 of the Bengal Food Adulteration Act, the Local Government may make rules determining what deficiencies in or additions to any article of food, the normal constituents of which have been declared under S. 4, shall raise the presumption that such article is not genuine or is injurious to health. The essential thing, therefore, is that the rules should refer to deficiencies in or additions to any article of food, that is to say, they must lay down the absence of something or the presence of something. They cannot lay down a new rule of evidence to the effect that if certain chemical results are not obtained there is to be a presumption that the article is not genuine. The presumption in the Act is a rule of evidence made by S. 4 itself. It is not open to the Local Government to make a further rule of evidence under S. 20. (*Henderson and Khundkar, JJ.*) Nowranga Lal *v.* Chairman, Midnapore Municipality. **I.L.R. (1940) 2 Cal. 82=44 C.W.N. 615=A I R. 1940 Cal 324**

BENGAL GENERAL CLAUSES ACT (I OF 1899), S. 8—*Scope and applicability.*

S. 8 of the Bengal General Clauses Act does not contemplate a case where the procedure only is changed, leaving the rights of the parties intact. It contemplates a case where the repealing enactment repeals a substantive right as well as the procedure by which it was enforced, and in such cases if the rights are saved in respect of transactions completed prior to the repealing of the statute, the remedies in respect of such rights, as laid down in the repealed statute are also saved and the litigant can institute or continue proceedings in the same way for the enforcement

of his rights as if the repealing Act had not come into force. (*Mukherjea and Akram, JJ.*) Dhirendra Nath Roy *v.* Ijjetali Miah. **44 C.W.N. 729=A.I.R. 1940 Cal. 423.**

——**S 8 (e)**—*"Instituted, continued or enforced"—Interpretation.*

The words "instituted, continued or enforced" in S 8 (*e*) of the Bengal General Clauses Act, are to be taken with each of the words "investigation legal proceeding or remedy" so far as they seem to be appropriate. (*Mukherjea and Akram, JJ.*) Dhirendra Nath Roy *v.* Ijjetali Miah. **44 C.W.N. 729=A.I.R. 1940 Cal. 423.**

——**S. 25**—Applicability—Extension of Act to area by Notification—Act repealed by later Act—Later Act not extended to area—Effect. *See* Calcutta Hackney Carriage Act (II of 1891), S. 45. **40 C.W.N. 1353.**

——**S 25**—Applicability. *See* Calcutta Hackney Carriage Act (I of 1919), S. 60. **40 C.W.N. 1353=A.I.R. 1936 Cal. 707.**

BENGAL IRRIGATION ACT (III OF 1876), Ss 47, 59 and 63—*Right to sue for rent for use of channel—Registered owner—Suit by—Plea of ownership in some one else—Maintainability.*

Under the Bengal Irrigation Act, no one other than a registered owner who has been awarded by the canal department the right to realise rent can sue for rent for use of the channels; and when such an owner brings a suit, the defendant cannot plead that the rent was due to some one else also. (*Khaja Mahammad Noor, J.*) Deonandan Pandey *v.* Ram Pirita Rai. **181 I.C. 844=5 B R. 683=11 R.P. 644=19 Pat. L.T. 897=A.I.R. 1939 Pat. 188.**

BENGAL LANDLORD AND TENANT PROCEDURE ACT (VIII OF 1869)—*Agricultural lease—Forfeiture clause—Validity—Termination of lease on forfeiture—Form of notice.*

Act VIII of 1869 leaves landlords and agricultural tenants free to regulate their rights by contract. There is nothing in that Act which would render invalid a forfeiture clause in an agricultural lease. It cannot be contended that a forfeiture could be availed of by the landlord, in spite of a contract to the contrary contained in a written lease, only at the end of the agricultural year. This being the position, no particular form of notice is required under the law to terminate a tenancy forfeited according to a covenant contained in the lease. If the landlord intimates to the tenant before suit his election to determine the lease, there is a valid termination of the lease. (*Mitter and Biswas, JJ.*) Pravat Chandra Syam *v.* Bengal Central Bank, Ltd. **I.L.R. (1938) 2 Cal. 434=42 C.W.N. 761=68 C.L.J. 519=A.I.R. 1938 Cal. 589.**

——*Occupancy rights—Grant by landlord to tenant—Competency—Bengal Tenancy Act.*

Occupancy rights are creatures of statutes, or of custom adopted by statute, only in the sense that the acquisition of such rights by *ryots* does not depend upon the bounty or gift of the landlord, but they can be acquired against his will. But this does not imply that the landlord cannot by grant confer on his tenant rights exactly similar to rights of occupancy. Where in a locality governed by the Bengal Landlord and Tenant Procedure Act, a landlord inducts a tenant on this land and grants him a *potta*, giving him *tota* rights therein and rights of occupancy, the tenant gets a permanent right to occupy the land, and the landlord cannot eject him by giving him a notice to quit.

Obiter.—It is competent to a landlord by a grant to confer on a person inducted by him on the land, rights exactly similar to rights of occupancy even in a village in Bengal where the Bengal Tenancy Act is in force. (*Guha and Bartley, JJ.*) JOGENDRA NARAYAN DHAR *v.* ASKARULLA. **I.L.R. (1937) 1 Cal. 455=169 I C. 700=10 R.C. 26=40 C.W.N. 1301=A.I R. 1937 Cal. 27.**

——**Ss. 38 and 39**—*Decision of Collector—Second appeal.*

No second appeal lies from a decision by the Collector under S. 38 of the Landlord and Tenant Procedure Act. (*Henderson and Sen, JJ.*) NAJMUL ISLAM *v.* SASHI BHUSAN. **44 C.W N. 753**

BENGAL LAND REDEMPTION AND FORECLOSURE REGULATION (XVII OF 1806), Ss. 7 and 8—*Applicability—Some portion of property with mortgagor and another with mortgagee—Foreclosure—Remedy.*

Where a portion of the property is in possession of the mortgagors, whereas another portion of the property is in possession of the mortgagee, it is impossible to apply the terms of the Regulation or to take action for foreclosure under it; the only remedy provided is the general remedy given by O 34, R. 2, C. P. Code. (*Tek Chand and Dalip Singh, JJ.*) AHMAD SAYYEED KHAN *v.* NARAIN SINGH. **167 I.C. 681=9 R.L. 517=A.I. R. 1936 Lah. 982.**

——**Ss. 7 and 8**—*Proceedings under, carried out—Foreclosure, if automatic.*

Once proceedings have been taken under the Bengal Regulation and they have been duly carried out, foreclosure takes place automatically and title passes by virtue of the clause in the mortgage deed to the mortgagee. Any suit brought thereafter is not a suit for foreclosure under the Civil Procedure Code, but is a suit for possession as owner. (*Tek Chand and Dalip Singh, JJ.*) AHMAD SAYYEED KHAN *v.* NARAIN SINGH. **167 I.C. 681=9 R.L. 517=A.I R. 1936 Lah. 982.**

——**S. 8**—*Regularity of proceedings—Burden of proof.*

The Courts have been very stringent in the matter of the application of Regulation XVII of 1806, and a mortgagee who relies upon it is bound to show that the proceedings were quite in accordance with S. 8 of that Regulation. (*Din Mohammad, J.*) AHSAN ELAHI *v.* ALLA-UD-DIN. **179 I.C. 752=11 R.L. 622=40 P.L.R. 798=A.I. R. 1938 Lah. 809.**

BENGAL LAND REGISTRATION ACT (VII OF 1876)—*Scope and object of*—Debutter *estate*—Shebaits *opening separate accounts in their names in respect of shares held as* shebaits—*If* ultra vires.

The whole object of the system of land registration under the Land Registration Act as well as the Regulations preceding it, has been to keep a proper record of possessory titles in landed properties so as to have a knowledge of the persons who are in actual possession and are responsible for the discharge of their duties. The object has never been to make an inquisition into titles either in revenue paying or revenue-free properties, but to identify the individuals on whom the legislature has imposed duties and obligation in virtue of their being in possession of land as proprietors. In the case of *debutter* property, where the deity is the property of the estate, it is competent to the *shebaits* of the deity to open separate accounts in their own names in respect of shares in the Touzi or estate to which they are entitled as *shebaits*. Such opening of separate accounts is not *ultra vires*, although the entire estate is the property of deity. (*Mukherji and S.K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C.W.N. 271.**

——**S. 55**—*Reference to Civil Court—Irregular exercise of jurisdiction by Deputy Collector—Jurisdiction of Civil Court—If affected.*

S. 55 of Bengal Land Registration Act expressly gives the Land Registration Deputy Collector jurisdiction to make a reference to the Civil Court, and however illegal or irregular the exercise of that jurisdiction may have been, that does not affect the jurisdiction of the Civil Court to entertain the matter referred to it. (*Wort, J.*) SHREE SHREE NARAYAN THAKUR *v.* KAMALRANI DEBI. **159 I C. 821=8 R.P. 310=17 Pat.L.T. 414=A.I.R. 1936 Pat. 167.**

——**Ss. 57 and 84**—*Decision in mutation proceeding—If conclusive as to possession.*

The plaintiff brought a suit against the defendant for possession of certain lands on the ground that they were purchased by him out of his own funds. The plaintiff and the defendant were members of a Mahomedan family. The lands were mutated in the plaintiff's name alone. The defendant contended that he got them on partition but it was found that he never tried to get them mutated in his own name. The lands were sold in 1931 by the defendant to another who applied in 1932 for mutation of his own name in the record of rights. But his application was rejected by the Sub-Divisional Officer in 1932. He however got his name entered in 1933 in the settlement records.

Held, that the decision of the Sub-Divisional Officer in the mutation proceedings of 1932 was conclusive as to the plaintiff's possession of the lands in suit under S. 57. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND. **176 I.C. 706=11 R.C. 159=66 C.L.J. 455=A.I.R. 1938 Cal 117.**

——**S. 74**—*Suit under — Apportionment of revenue—Duty of Civil Court—Basis of apportionment.*

It is incumbent upon the Civil Court deciding a suit contemplated by S. 74 of the Land Registration Act to determine the plaintiff's share of revenue on the materials placed before it, when no agreement among the proprietors on the point is admitted or found. In determining the revenue payable by him, the Civil Court is not bound to have a survey of the assets. It should determine the revenue payable by a sharer by following a method which appears to it to be reasonable and proper under the circumstances. If there is no evidence that the quality of lands varies from place to place within the *Tausi*, the allotment of revenue on the basis of area is not improper or illegal. (*M.C. Ghose and Mukherjea, JJ.*) BENGAL YOUNG MEN'S CO-OPERATIVE SOCIETY CO., LTD *v.* NRITYA GOPAL GUHA. **I.L.R. (1937) 1 Cal. 665=**

171 I.C. 237=10 R.C 255=66 C L.J. 180=41 C. W.N. 281=A.I.R. 1937 Cal. 159.

——S. 74—*Suit under—Claim for refund of excess payments of revenue—Whether can be included.*

It is true that a suit instituted in pursuance of an order made under S 74, Land Registration Act, does not ordinarily contemplate a refund of money on account of excess payments of revenue made by the plaintiff. But there is nothing wrong in instituting a suit of a more comprehensive character, in which relief of an incidental nature which flows from the main relief, is claimed by parties, on payment of proper court-fees. (*M. C. Ghose and Mukherjea, JJ.*) BENGAL YOUNG MEN'S CO-OPERATIVE SOCIETY CO., LTD. *v.* NRITYA GOPAL GUHA. **I L R. (1937) 1 Cal. 665=171 I. C 237=10 R C. 255=66 C.L.J. 180=41 C.W.N. 281=A.I R. 1937 Cal. 159.**

——S. 78—*Co-sharer in possession of larger share in some mauzas of estate and less share in others—Suit for rent by—If barred.*

A co-sharer who by an amicable arrangement among the co sharers has been put in possession of a larger share than his registered share in some mauzas of an estate and a less share or no share in others, is not debarred from obtaining a decree for the rent due to him, so long as the total interest which he holds in all the mauzas represents his registered interest in the entire estate. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I C. 522=9 R.P. 33=1936 P.W.N 314=A.I.R. 1936 Pat. 414.**

——S. 78—*Scope and effect of—Entry in Collector's Register—Evidentiary value as regards possession of property.*

The registers maintained by the Collector under the Land Registration Act purport to be a record of possession of the persons whose names are there entered. S. 78 of the Act bars a suit for rent by a person whose name is not entered in the register. When this statutory provision recognizes the person whose name is entered in the register as the person exclusively entitled to recover rent the entries in the register must be held to afford evidence that that person whose name appears in the register is the person in possession of the property. (*James and Agarwala, JJ.*) EKRAM HUSSAIN *v.* ALI HUSSAIN. **17 Pat. L.T. 423.**

——S. 78—*Scope and effect of—If bars right to rent—Suit within time—Subsequent registration after limitation—If bars claim.*

S. 78 of the Bengal Land Registration Act merely puts an impediment in the way of the proprietor realising the rent until he has complied with the law by obtaining registration of his name as a proprietor. It does not take away his right to recover the rent. The right to the rent of an estate being the proprietor, though not registered, the section does not take it away. When a suit has been instituted within the period of limitation, the fact that the registration is effected only subsequently and beyond the period of limitation will not make the claim in the suit time-barred. The section does not bar the right to sue if the rent is due; its only effect is that the liability for rent cannot be enforced in the absence of registration. (*Fazl Ali and Chatterji, JJ.*) DOMAN SAHU *v.* GANGU NAYEK. **185 I.C. 638=**

1940 P.W.N. 566=12 R P. 404=21 Pat.L T. 165=6 B.R. 229=A.I.R. 1940 Pat. 300.

——S. 78—*Unregistered mortgagee—If can sue for rent.*

S. 78 precludes unregistered mortgagees from suing for rent. (*Wort and Rowland, JJ.*) DILDAR HUSSAIN *v.* SADDIQ. **172 I C. 935=10 R.P. 366=1938 P.W N. 15=4 B R. 206=18 Pat.L.T. 925=A.I.R 1938 Pat. 35.**

——Ss. 78 and 81 —*Applicability—Contract between plaintiffs and defendants' assignors—Defendants notifying plaintiffs of assignment and offering to be bound by contract and tendering rent—Right to recover rent—Non-registration of plaintiffs' name—If a bar.*

When there is a contract between the plaintiffs and the assignors of the defendants, and the defendants after taking assignment of the contract give notice to the plaintiffs stating that they were henceforth bound by the contract, actually making a tender of rent, it cannot be said that the relationship is not created by a written contract to which each have become a party. S. 81 of the Bengal Land Registration Act applies to such a case, and S 78 of the Act is no bar to the plaintiff suing to recover rent on the ground of non-registration of the plaintiffs' name. (*James and Rowland, JJ.*) DEONANDAN PRASAD *v.* GIRDHAR. **182 I C. 863=5 B.R. 839=12 R.P. 82=20 Pat.L.T. 697=1939 P.W.N. 120=A.I.R. 1939 Pat. 272.**

——S. 79—*Burden of proof—Bihar Tenancy Act, Ss. 60 and 72.*

A defendant in a suit for rent, who claims indemnity under S. 79 of the Bengal Land Registration Act and under Ss. 60 and 72 of the Bihar Tenancy Act, must prove that he had in fact paid rent to the proprietor subsequent to the expiry of the term of *thica* or lease (*Agarwala, J.*) BACHU NARAIN SINGH *v.* MAHOMED UMROO. **21 Pat.L.T. 336.**

——S. 81—*'Contract'—If must be between parties themselves—Contract by predecessor-in title of plaintiff—Right to realise rent on basis of.*

The contract referred to in S. 81 of the Bengal Land Registration Act need not be a contract between the parties themselves. It includes a contract entered into between the predecessors of the parties. There is no reason why the contract of the predecessors of the parties by which their successors are bound should not have exactly the same effect as the contract between the parties. Therefore, a plaintiff, whose name is not recorded in the Land Registration Register can realise rent from a tenant by virtue of a contract between his predecessor-in-title and the predecessor-in-title of the tenant. (*Jack, J.*) SATYENDRA NATH MONDOL *v.* NANDALAL CHOUDHURY. **40 C. W.N 588.**

BENGAL LAND REVENUE ASSESSMENT (RESUMED LANDS) REGULATION (II OF 1819)—Debuttar *land resumed by Government—Land, if continues to be* debuttar *after resumption.*

Where land which was *debuttar* was resumed by Government under Regulation II of 1819, it does not necessarily follow that the tenancy is the same after the resumption and that the land continues to remain *debuttar.* (*Jack, J.*) GOPE MOHAN JEO THAKUR *v.* BEPIN BEHARI BHAKAT.

173 I.C. 358=10 R.C. 507=65 **C.L.J. 325=A.I.R. 1937 Cal. 371.**

——S. 3—Scope—Resumption proceedings—Intention and object of—Invalid Lakhiraj—Position of holders on resumption. *See* BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION, Ss. 4, 5 AND 6. **63 C L J 593**

BENGAL LAND REVENUE ASSESSMENT (RESUMED) REGULATION (III OF 1828), S. 13—*Government granting lands in Sunderbans area—Government if a 'landlord'—Demand described as 'revenue', if only 'rent'—Grantee, if can claim abatement of rent in case of diluvion—B. T. Act, S. 52.*

By the force of S. 13 of the Regulation III of 1828 alone, the state does not become a 'landlord' as defined in the Bengal Tenancy Act, when it grants to a person a tract of the Sunderbans forest. A grant by Government of lands in the Sunderbans area in favour of a person under S. 13 of the Regulation, does not create as between the Government and the grantee, the jural relationship of 'landlord' and 'tenant' and the Government demand described as 'revenue' in the grant cannot be construed to mean 'rent'. Hence in respect of such a land a grantee cannot claim abatement of rent under S. 52 of the Bengal Tenancy Act on account of some portion of his lands being diluviated. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURANI *v.* SECRETARY OF STATE. **I.L R. (1938) 2 Cal 1=182 I.C. 121=12 R.C. 5=42 C W.N. 239=A.I.R. 1938 Cal 229.**

——S 13—*Grant of waste land in Sunderbans to lotdar under Waste Land Rules—Effect of—Part of grant diluviated—Claim for abatement under S. 52, B. T. Act—If sustainable.*

The right of property in the Sunderbans claimed and declared to be vested in the State by S. 13, Bengal Land Revenue Assessment Regulation (III of 1828), is not of the same category as the right of property vested in a private person which may in a sense be regarded as a derivative right. The right of property so asserted in the State in the said section is the right of property in Sovereign by reason of conquest. Such proprietary right in the Government was not of the same class as its property right in what are technically known as khas mehals, where its position is that of a private proprietor. By the force of S. 13 of the Regulation III of 1828 alone, the State does not therefore become a 'landlord' as defined in the Bengal Tenancy Act, when it grants to a person a tract of the Sunderban forest. If the terms of the actual grant or assignment make it a landlord, that is, another matter, for the State can also grant leases of its property in such a capacity. A lotdar of the Sunderbans was granted a large block of waste land under the Waste Lands Rules of 1853. The potta conferred in terms a "proprietary right in the grant" on the grantee, his heirs, executors and assigns. It gave the grantee a right to engage with Government on conditions applicable to owners of temporarily settled estates. The grant was for a term of 99 years, giving the grantee the right to have the lands measured once and only once between the 20th and 30th year of the grant. The adjustment of the Government demand, which was termed 'revenue' on the results of the said measurements was to be the only adjustment during the currency of the term of 99 years. The grant was included in the Register A maintained under the Land Registration Act as Touzi. The lotdar claimed abatement of the amount payable by him to the Government under his engagement, on account of some portion of his grant being diluviated under the provisions of S. 52, B. T. Act.

Held, that the grant was an 'estate' as defined in S. 3 (4), B. T. Act, and the plaintiff was its proprietor as defined in S. 3 (11), B. T. Act. The relationship between the Government and the grantee not being that of a landlord and tenant, the claim for abatement was not sustainable in Civil Court as what was payable by him was revenue and not rent.

Held also (*obiter*) that the Crown Grants Act applied to grants by Government of Sundarban lands. The Crown had unfettered discretion to impose any condition, limitation or restriction in its grants and the rights, privileges and obligations of the grantee were regulated according to the terms of the grant, notwithstanding any provisions of any statutory or common law. The grant in suit assuming to be a lease was against the right conferred by S. 52 (2), B. T. Act, which must consequently give way in view of the provisions of the Crown Grants Act. (*R. C. Mitter and Biswas, JJ.*) SURJA KANTA ROY CHOUDHURY *v.* SECRETARY OF STATE. **I L R (1938) 2 Cal. 1=182 I C. 121=12 R.C. 5=42 C.W.N. 239=A.I. R. 1938 Cal 229.**

BENGAL LAND REVENUE SALES ACT (XI OF 1859)—*Procedure under—Applicability—*Raiyati *holding in Government khas mahal—Sales of, for arrears of revenue.*

A *raiyati* holding in a Government khas mahal can properly be sold for arrears of revenue under the same procedure as under Act XI of 1859 (*S. K. Ghose and Patterson, JJ.*) MOHAMMAD ESLAM *v.* ANIMESH CHANDRA SEN. **43 C W.N. 46.**

——*Sale for arrears of revenue—Rights of purchaser—Avoidance of intermediate tenures and encumbrances.*

So far as the legal position of a purchaser at a revenue sale is concerned what passes to such a purchaser in law is the interest of the Crown subject to the payment of the Government assessment and he is remitted to all the rights possessed by the original settlor at the date of the settlement and may take advantage of that position to sweep away or get rid of all the intermediate tenures and encumbrances created by the preceding zamindar since that date. (*Wort and Fazl Ali, JJ.*) KAMESHAR SINGH BAHADUR *v.* RAMDHARI MANDAL. **168 I.C. 281=9 R.P. 472=3 B.R. 399=A.I R. 1937 Pat 88.**

——**Ss. 2 and 3**—*Notice to proprietor under S. 94, Estates Partition Act—No separate engagement by him—*Kists *mentioned in notice—If kist days or latest days of payment.*

Where the notice served on the proprietor of a separated estate under S. 94 of the Estates Partition Act mentions that the revenue of such estate is payable in two *kists*, January and March, and the proprietor does not enter into a separate engagement thereafter, the only possible interpretation of the notice is that the January and March *kists* are the *kist* days referred to under S. 2 of Act XI of 1859, and not the latest days of payment under S. 3 of that Act. (*Henderson and Latifur Rahman, JJ.*) MANINDRA CHANDRA SEN *v.* SHAMSUL HUQ MUKHTEAR. **I.L.R. (1939) 2 Cal. 157=186 I.C. 134=12 R.C. 446=A.I.R. 1940 Cal. 17.**

——Ss. 2 and 3—*12th January and 28th March fixed in tauzi ledger as latest dates in each year for payment of arrears of land revenue—Sum demanded as payable in respect of January kist not paid before 12th January—Sale held after 12th January—Validity.*

The expression 'kist', as explained in the Tauzi Manual issued by the Board of Revenue, Bengal, means the period between one latest day for payment of arrears of revenue and the next, and is not used in the restricted meaning assigned to it in S. 2 of the Act. Thus, where in pursuance of S. 3, the Board of Revenue has, in tauzi ledger, fixed for an estate paying an annual revenue, 12th January and 28th March in each year as the latest dates, on or before which, an arrear of land revenue must be paid, the expression "January kist" means the period beginning on 29th September and ending on 12th January, and the "kist day" means the latest day of payment on which that period expires, that is 12th January. Hence where a sum is demanded as payable in respect of January kist and is not paid on or before 12th January, the date fixed for the payment of arrears the estate becomes liable to sale, and the sale held on 22nd March after the latest date for payment of arrears, is within the jurisdiction of the Collector. (*Sir Shadi Lal*) DINABANDHU *v.* ASHUTOSH. **65 I.A 380=I.L.R. (1938) 2 Cal 665=32 S.L.R 931=19 Pat.L.T. 705=176 I.C. 881=42 C. W N. 1245=1938 P.W N. 715=11 R P.C. 74=1938 A L.R. 736=4 B.R. 832=68 C.L J. 275=1938 O.L.R. 384=A.I R. 1938 P.C 248=(1938) 2 M.L J. 734 (P.C.).**

——Ss 2, 3 and 33—*'Arrear of Revenue'—Determination—Factors to be taken note of.*

It is necessary to find out three factors in cases where a question arises as to whether there was any arrear of land revenue, first the date of payment of instalment in accordance with the lease, secondly the date on which an instalment remaining unpaid would be an arrear of revenue in accordance with S. 2, Bengal Land Revenue Sales Act, and thirdly the latest date of payment as fixed by the Board of Revenue in accordance with S. 3 of the Act. The kist dates on the Touji Ledger are really the latest dates of payment as fixed by the Board of Revenue, but it does not follow that they are also the latest dates of payment in accordance with the Settlement. (*S.K. Ghose and Patterson, JJ.*) MAKBUL ALI CHOWDHURY *v.* AMRITA LAL GHOSE. **174 I.C. 698=10 R.C. 709=A I R. 1937 Cal 703.**

——Ss. 2 and 3—*Construction*—Kistbandi *dates —Meaning of—*Kist *dates under S.2—If* kistbandi *—Dates fixed in June, September, January and March—If* kistbandis *or latest dates of payment.*

It is well-known that in Bihar the original *kistbandis* fixed under the engagements entered into with the proprietors for payment of the Government revenue were almost invariably according to *Fasli* era and the four dates in June, September, January and March fixed, for the payment of the Government revenue are the latest dates of payment determined by the Board of Revenue under S. 3 of the Revenue Sales Act and not *kistbandi* dates of the *Fasli* era. Where the original

kistbandi under S. 2 of the Act is unknown and forgotten, the latest dates fixed under S. 3 are properly known as *kist* dates. They are not *kistbandi* dates as provided by S. 2 but only the latest dates of payment as fixed by the Board of Revenue under S 3. *Kistbandi* dates of the *Fasli* era under S. 2 are usually eleven or twelve while latest days of payment under S. 3 are usually the four dates in the months of June, September, January and March. These latter are shown as instalment dates in the *Tauzi* ledger. In the case of estates where the annual revenue is a small amount, there would be only two, instead of the four, latest days of payment. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* MT. KASEDA KUMARI. **15 Pat. 272=162 I.C. 1004=8 R.P. 604=16 Pat.L.T. 915=A.I.R. 1936 Pat. 260.**

——Ss. 2, 3 and 5—*Revenue when becomes arrear—Jurisdiction of Collector to sell*—Kistbandi *and* kist—*Non-payment of revenue on last day of payment — Liability to sale — When arises.*

Though normally, as a rule, the *kistbandis* are fixed according to the *Fasli* era under the engagements with the proprietors of the estate, there are abnormal or exceptional cases where the latest dates of payment under S. 3, or popular "*kist*" dates, as they have come to be known, are found to coincide with the original *kistbandi* dates (or some of them) under S. 2. It is also possible that after a regular partition the Collector, whether inadvertently or not, may have made a new *kistbandi* in this manner. In determining the jurisdiction of the Collector to sell an estate for arrears of revenue, in the case of an estate where the revenue is payable in one instalment, it has to be considered whether the date of payment is the latest date of payment under S. 3 or merely the date under S. 2 on which the revenue is due. If it is the latest date of payment within the meaning of S. 3, and the *Tauzi mahal*, the Collector has jurisdiction to sell the estate before the expiry of the last date of payment for the *Fasli* year. If it is merely the *kist* or instalment of any month of the era according to which the settlement or *kistbandi* of the *mahal* has been regulated it does not become an arrear of revenue under S. 2, and the Collector has no jurisdiction to sell until the latest date of payment prescribed under S. 3. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* MT. KASEDA KUMARI. **15 Pat. 272=162 I.C. 1004=8 R.P. 604=16 Pat. L.T. 915=A.I.R. 1936 Pat. 260.**

——S. 3—*Revenue payable in four* kists—*Latest date for payment of arrears in respect of one* kist.

According to the Collectorate registers there were four dates for payment of arrears of revenue, namely 28th June, 28th September, 12th January and 28th March, the revenue being payable in four *kists*. Certain amount was in arrears on 28th March, 1932. The revenue sale in respect of this amount took place on 9th January, 1933.

Held, that the *kists* were also the same as the latest dates for payment mentioned in the Land Revenue Roll. Consequently an arrear in respect of one *kist* that is 28th September, 1932, would have its latest date of payment on the date of the next *kist* that is on 12th January, 1933, following. The sale before this date therefore was void. (*S. K. Ghose and Patterson, JJ.*) JAGADISH CHANDRA MITRA *v.* KUNJA MOHAN SHAH. **171 I.C. 822=10 R.C. 310=A.I.R. 1937 Cal. 273.**

——S. 5—*Applicability—Part only of estate under attachment.*

S. 5 of Act XI of 1859 requires the publication of a special notification before an estate which is under attachment by an order of a Civil Court can be sold by the Collector for arrears of revenue. If only a part or share of the estate is under attachment S. 5 also applies. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARI CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal 115.**

——**S. 5**—*Non-compliance with—Objections not taken in appeal to Commissioner—Sale, if can be challenged in Civil Court.*

A sale held without complying with S. 5 where that section is attracted, is a sale contrary to the Act and such sale cannot be challenged on that ground in a Civil Court, unless such a ground had been specified in an appeal made to the Commissioner. (*R. C. Mitter, J.*) SUBODHBALA GHOSE *v.* HARENDRA NATH DAY. **181 I.C. 47=11 R.C. 769=A.I.R. 1938 Cal 584.**

——S. 5—*Notice including arrears of current and preceding years—Validity.*

It is true that S. 5 of Act XI of 1859 only contemplates arrears other than those of the current year or of the year immediately preceding it. But if the arrears of the current year or of the preceding year are included along with the arrears which come within the purview of S. 5 that cannot invalidate the notice. (*Nasim Ali and Henderson, JJ.*) KUSUM KAMINI ROY *v.* APURBA KUMAR HAZRA. **159 I.C. 1074=8 R.C. 384=A.I.R. 1935 Cal. 743.**

——S. 5—*Scope—Estate under attachment by Civil Court—Notification—Necessity—Want of knowledge of attachment on the part of the Collector—If dispenses with notification—Legality of attachment—If material.*

Under S. 5 of the Land Revenue Sales Act, when there is an attachment by a Civil Court in respect of any share in the estate sought to be sold under the Act, the issue of a special notification under S. 5 is positively imperative. Whether such attachment is proper or wrongful is not material. If there is in fact an attachment, there must be a notification; and it must be issued irrespective of any question of knowledge or want of knowledge on the part of the Collector of the attachment. When the sale is held without the issuing of a notice under S. 5, it is not mere defect or irregularity which can be cured by S. 8 of Bengal Act VII of 1868. The omission renders the sale one held in contravention of an express provision of the law, although the sale in itself is not null and void. (*Mukerji and S. K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal 629=40 C.W.N. 271.**

——S. 5—*Scope—Notice showing amounts which have become arrears and amounts which have not—Sale—If void*

When there is an arrear in respect of certain kists of revenue but the notice under S. 5 of the Revenue Sale Law shows not only the amount of those arrears but also other sums which have not yet become an arrear, the sale held in pursuance of such a notice cannot be said to be a sale otherwise than under the Act and is not void. Although S. 5 is contravened, there being an arrear of duty, there is a sale under the Act and such a sale is hit by the provisions of S. 33 of the Act, and cannot be set aside; and if a proprietor appropriates a portion of the purchase-money towards the payment of a different debt of his, he cannot subsequently contest the legality of the sale, notwithstanding that such appropriation is made after the institution by him of a suit to set aside the sale. (*Patterson, J.*) RAM PRASAD CHOUDHURY *v.* RAM JADU LAHIRI. **40 C.W.N. 1054.**

——S. 6—*Notice of sale—Mention of arrears of revenue as well as of arrears of cess—If renders sale illegal.*

It is well established that in a case even of amalgamation of cesses with revenue payable in respect of an estate, the sale for arrears of revenue cannot be set aside on the ground that it is illegal or *ultra vires*. In a case when the amount due on account of cesses is mentioned separately from the amount of revenue in arrear, and not amalgamated with, or included in, the revenue, in the sale notification, that cannot, therefore, make the sale illegal under the law. (*Guha and Bartley, JJ.*) RAM RANJAN MULLIK *v.* JAMINI SUNDARI DASSYA. **40 C.W.N. 1114=64 C.L.J. 486=166 I.C. 485=9 R.C. 535=A.I.R. 1936 Cal. 415.**

——**Ss. 6 and 14**—*Payment in respect of separate account after latest day of payment—Effect on sale ordered under S. 14.*

The provisions of the last paragraph of S. 6 of the Act are attracted to sales not only of the entire estate, but also of shares of estate. The payment by the defaulting proprietor of the arrears due in respect of a separate account after the latest day of payment cannot, therefore, in any way interfere with the sale ordered under S. 14 of the Act. (*Nasim Ali and Henderson, JJ.*) NIRMAL NALINI DASI *v.* RANI HARSAMUKHI DASI. **I.L.R. (1938) 2 Cal 549=180 I.C. 665=11 R.C. 709=42 C.W.N. 1203=A.I.R. 1939 Cal. 233.**

——**Ss. 6 and 33**—*Sale notice issued by Collector describing owners of the property to be sold as 'X and another"—Sale notice published in newspaper not mentioning share to be sold as residuary share—Irregularity—Annulment of sale.*

Under S. 6 of Act XI of 1859, the specification of the property to be sold in the sale notification must be sufficiently definite and clear to induce likely purchasers to appear and bid at the sale. Where the sale notice issued by the Collector described the owners of the property to be sold as "X and another," and the sale notice published in the local newspaper did not mention the share to be sold as a residuary share.

Held, that the specification of the property to be sold in the sale notices did not meet the requirements of S. 6 of the Act and that if the low price fetched at the sale was due to paucity of genuine and substantial bidders in consequence of the absence of proper specification in the sale notices, it was incumbent on the Court, regard being had to the provisions of S. 33 of the Act, to annul the sale. (*Guha and Bartley, JJ.*) SIBADAS

Chakravarty *v.* **Hem Chandra Kar. 170 I.C. 611=10 R.C. 162=64 C.L.J. 571=A.I.R. 1937 Cal. 473.**

——**S. 6**—*Scope—Proclamation of sale in Gazette within 30 days of sale—If rendered sale void.*

S. 6 of the Bengal Revenue Sale Law does not prescribe a period of 30 days in the matter of publication in the Gazette of the notification of sale, and the fact that the publication in the Gazette of the sale is made at a time within 30 days before the sale does not render the sale void. Assuming that such a publication in the Gazette is not in accordance with the provisions of S. 6, it only amounts to an irregularity; if the party aggrieved wants to get the sale set aside on that ground, he must make out that he has suffered substantial injury by reason of that irregularity. (*Guha and Bartley, JJ.*) **Ram Ranjan Mullik** *v* **Jamini Sundari Dassya. 9 R C. 535=166 I.C 485=64 C.L.J. 486=40 C W.N. 1114=A.I.R. 1936 Cal. 415.**

——**S. 8**—*Revenue received by Collector by money order on last date—Money not credited to intended taluk owing to mistake in description of taluk—Sale of taluk—If void.*

A Collector received the revenue by money order on the last date for payment of revenue. This money could not be credited to the account of the intended taluk on account of mistake in the description of the taluk. The Collector kept the money in deposit and the acknowledgment receipt with certain remarks in red ink was sent to the remitter. The remitter did not rectify the mistake within time with the result that the taluk was sold on the footing that there was an arrear of revenue due.

Held, that as the description of the taluk was not correctly given, it could not be reasonably said that the money was undoubtedly placed in the hands of the Collector for crediting the same in respect of the defaulting taluk. The sale therefore could not be said to have been without jurisdiction. (*Bartley and Nasim Ali, JJ.*) **Sayed Ahamed** *v.* **Samsuddin Ahamed. 175 I.C. 745=11 R.C. 6=A I.R 1938 Cal. 275.**

——**Ss. 13 and 14**—*Sale of separate account—Proceeds insufficient to liquidate arrears—Other separate accounts also in arrears—Powers of Collector to order sale of entire estate before putting them to sale.*

If a separate account in arrears is put up to sale and the sale proceeds do not satisfy the arrears due thereon, S. 14 of the Bengal Land Revenue Sales Act comes into operation at once and the Collector can order the sale of the entire estate under that section without putting to sale the other separate accounts which are also in arrears. It would be useless for the Collector to put them to sale as the sale proceeds, if any, of those accounts could not be utilised to wipe off the arrears or the balance of arrears due on the separate account first exposed to sale. (*Nasim Ali and Henderson, JJ.*) **Nirmal Nalini Dasi** *v* **Harsamukhi Dasi. I.L.R. (1938) 2 Cal. 549=180 I.C. 665=11 R.C. 709=42 C.W.N. 1203=A.I.R. 1939 Cal 233.**

——**S. 14**—*Construction—"Other recorded co-sharer"—Meaning of—Defaulting co-sharer—Right of to purchase.*

The expression "other recorded co-sharer" in S. 14 of the Bengal Land Revenue Sales Act means a recorded sharer of a share other than the share exposed for sale. The defaulting co-sharer, who, having had ample opportunity of paying in the arrears, fails to do so, has no right to purchase the estate as "other recorded co-sharer." (*Mukerji and S. K. Ghose, JJ.*) **Monindra Deb Roy** *v.* **Hanseswari Thakurani. 63 Cal. 629=40 C.W N. 271.**

——**S. 14**—*Declaration under—Neglect of other proprietors to purchase share in default—Effect of.*

The effect of a declaration under S. 14 followed by the neglect of the other recorded proprietors to purchase the share in default by paying up the arrears due in respect thereof is that the separate accounts are closed. On the closing of the separate accounts, a general account of the receipts of revenue in respect of the entire estate must be made and if on such account being made, there appears an arrear of the revenue, the entire estate is to be notified for sale. (*R.C. Mitter, J.*) **Subodhbala Ghose** *v.* **Harendra Nath Day. 181 I.C. 47=11 R C 769=A.I.R. 1938 Cal 584.**

——**S. 14**—*Entire estate, when can be sold—Duty of Collector before sale—Separate accounts, if to be closed.*

Before the declaration made by the Collector under S. 14 of Act XI of 1859 can be followed up by him, it is necessary that there must be an arrear of revenue due from the entire estate. The accounts of the separate shares in respect of which separate accounts had been opened under S. 10 must accordingly be merged into one account, the credits and the revenue demands must be totalled up and the balance struck. If the balance so struck is a deficit one then and then only can the Collector sell the entire estate. If the Collector without striking such a balance brings the entire estate to sale, the sale will be held to be a good one—a sale with jurisdiction—if it is shown to the Civil Court when the sale is challenged that on the balance being struck there was in fact an arrear due from the entire estate. For the purpose of satisfying himself that the entire estate is in arrear the Collector in practice merges all the accounts into one, and he ought to do so. It is not necessary that the Collector must by an order close the separate accounts before he holds a sale of the entire estate under S. 14 of Act XI of 1859. (*Mitter and Rau, JJ.*) **Kumar Narendra Nath Roy** *v.* **Midnapore Zamindari Co., Ltd. 70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

——**S. 14**—*One co-sharer paying entire arrears—Purchase, if becomes complete—Subsequent payment of same amount by other co-sharers—Effect of.*

When one co-sharer has paid the entire arrears due, any other co-sharer or co-sharers by subsequently paying the money, even within ten days cannot rank as co-purchasers with him. As soon as the full amount of arrears is paid by one co-sharer, the offer made by the Collector must be deemed to be accepted, and the purchase becomes complete. That the subsequent payments were also made by recorded co-sharers within ten days cannot affect the position. (*Mukherjea and Roxburgh, JJ.*) **Kamal Krishna** *v.* **Hemendra**

Krishna. 187 I.C. 286=12 R.C. 556=71 C.L.J. **413=44 C.W.N. 129=A.I.R. 1940 Cal. 39.**

———S. 14—*Sale under—When effected.*

A sale under S. 14 is not really made by the Collector after the period of ten days has expired, and after all the moneys are put in. The sale is effected by the first payment of the entire arrears. If there are no materials, upon which the Collector can find as to whether one payment is earlier than the other, the obvious course would be to regard these payments as simultaneous, and declare both of them as the joint purchasers. (*Mukherjea and Roxburgh, JJ.*) Kamal Krishna *v.* Hemendra Krishna. **187 I.C. 286=12 R.C. 556=71 C.L.J. 413=44 C.W.N. 129=A.I.R. 1940 Cal. 39.**

———**S. 14**—*Ten days period expiring on holiday—Period, it extended till reopening day.*

Per *Roxburgh, J.*: *Obiter.*—The ten days period in S. 14 is not absolute. If the period of ten days has expired on a holiday, the period is extended till the reopening day. (*Mukherjea and Roxburgh, JJ.*) Kamal Krishna *v.* Hamendra Krishna. **187 I.C. 286=12 R.C. 556=71 C.L.J. 413=44 C.W.N. 129=A.I.R. 1940 Cal 39.**

———**Ss. 14, para. 2 and 53**—*Purchase by sharer of another separate account or residuary share in default—Effect of—Suit to enforce charge on share in default pending at time of purchase—Decree, if can be executed against purchaser.*

If a recorded sharer or sharers purchase under paragraph 2 of S. 14 of Act XI of 1859 another separate account or residuary share in default, he would only acquire the right, title and interest of the defaulting sharer and would not acquire the said share free from all incumbrances. The opening words of S. 53 of the Act are an exception only to the provisions of S. 37 and not to those of S. 14 of the Act. Consequently, if at the time of the purchase a suit to enforce a charge on the share in default was pending against the defaulting sharer, the purchaser becomes a representative in interest of the judgment-debtor and can, therefore, be rightly made a party to the execution proceedings so that execution may proceed against the share purchased by him. (*Mitter and Khundkar, JJ.*) Bhramar Singh Nahar *v.* Umesh Chandra Das Barman. **43 C.W.N. 803.**

———**S. 17**—*Applicability — Attachment under S. 99 of Cess Act—Sale of estate under attachment—Jurisdiction of Collector.*

An attachment by the Collector under the provisions of S. 99 of the Cess Act would come within S 17 of Act XI of 1859 S. 17 of Act XI of 1859 does not say that the Collector shall have no jurisdiction to sell during the subsistence of the attachment, but that he will have no jurisdiction to sell for *arrears of revenue which had accrued* whilst the estate was under attachment. (*Mitter and Rau, JJ.*) Kumar Narendra Nath Roy *v.* Midnapore Zamindary Co., Ltd. **44 C.W.N. 38=70 C L J. 218=A.I.R. 1940 Cal. 115.**

———**S 31**—*Revenue sale—Surplus sale proceeds paid to recorded proprietor—Prior sale by him to plaintiff—Suit by plaintiff to recover amount—Cause of action—Interest.*

Plaintiff sued to recover the surplus sale proceeds of certain property of which the defendant was the recorded proprietor. The property, however, had been sold to the plaintiff prior to the date upon which the revenue sale was held. The defendant having been paid the surplus sale proceeds by the Collector under S. 31 of Act XI of 1859, this action was brought by the plaintiff.

Held, (*i*) S. 31 merely directs payment by the Revenue Officer to a certain person, that person being the person whose name is entered as proprietor and there is nothing in that section which in any way governs the right of a person who is in fact entitled to the surplus sale proceeds recovering them from the person paid by the Collector under the section; (*ii*) that the real test in the case is not the knowledge of the Collector as to whom the money really belonged, not the question as to whether the defendant had rightfully received the money from the Collector but to whom the money rightfully belonged; (*iii*) that the cause of action is for money had and received to the plaintiff's use, and that in considering that cause of action the Court is applying no specific provision of the law of India as there is none, but the rule of justice, equity and good conscience (*i.e.*) the law of England; (*iv*) that the plaintiff is entitled to interest only from the date upon which the demand was made by him. (*Wort and Rowland, JJ.*) Bhagwati Saran Singh *v.* Rai Kishunji. **15 Pat. 433=161 I.C. 171=8 R.P. 426=17 Pat.L.T. 663=A.I.R. 1936 Pat. 370.**

———**Ss. 31 and 13**—*Sale proceeds of one separate account—If can be appropriated towards arrears due from other separate account.*

The proceeds of sale of one separate account held under S 13 of the Act can be appropriated only towards the arrears due from that account and not towards the arrears due from other separate account or accounts. (*Nazim Ali and Henderson, JJ*) Nirmal Nalini Dasi *v.* Harsamukhi Dasi. **I L.R (1938) 2 Cal. 549=42 C W. N. 1203=180 I.C. 665=11 R.C. 709=A.I.R. 1939 Cal. 233.**

———**S. 33**—*Annulment of sale by Civil Court—Conditions.*

In order that a sale for arrears of revenue can be annulled by a Civil Court, two conditions are necessary: the sale must have been held contrary to the provisions of Act XI of 1859, and it must be proved by the plaintiff that he has sustained substantial injury by reason of the irregularity which evidently includes illegalities as well. (*Nazim Ali and Henderson, JJ.*) Kusum Kamini Roy *v* Apurba Kumar Hazra. **159 I.C. 1074=8 R.C. 384=A.I.R. 1935 Cal. 743.**

———**S. 33**—*Appeal to Commissioner not presented in time—Suit in Civil Court on ground that sale was contrary to Act—Maintainability.*

The appeal contemplated in S. 33, Bengal Land Revenue Sales Act, is an appeal made to the Commissioner under S. 2 of Act VII of 1868, that is, an appeal which it would be "lawful for Commissioner of Revenue to receive", that is an appeal presented to him within 60 days of the sale or one presented to the Collector within 45 days of the sale for transmission to the Commissioner. An appeal not so presented is to be treated as no appeal and no attack can be launched on the sale in a suit on the ground that the sale was contrary to the provisions of the Act, the estate being admittedly in arrears. (*R. C. Mitter, J.*) Subodh-

Bala Ghose *v.* Harendra Nath Day. **181 I.C. 47=11 R.C 769=A.I.R 1938 Cal. 584.**

——S. 33—*Applicability—Sale illegal for non-compliance with S. 5—Setting aside—Grounds—"Irregularity."*

S. 33 of the Land Revenue Sales Act applies not merely to cases where the sale has been irregularly conducted, but also where the sale has been illegal in consequence of contravention of some express provision, *e.g.*, the omission to issue a notice as required by S. 5 of the Act. What is meant by irregularity under S. 33 is the fact of the sale having been contrary to the provisions of the Act; and there is no distinction between illegality and irregularity. Non-compliance with S. 5 of the Act does not therefore make the sale null and void; it only renders the sale liable to be set aside on the ground that a party has sustained substantial injury by reason of the illegality or irregularity complained of, and only on that ground. (*Mukerji and S. K. Ghose, JJ*) Monindra Deb Roy *v.* Hanseswari Thakurani. **63 Cal. 629=40 C.W.N. 271.**

——S 33—Applicability—Sale in contravention of S. 5—Suit to challenge—Appropriation by proprietor of part of sale proceeds for payment of different debt—Effect—Suit, if barred. *See* Bengal Land Revenue Sales Act, S. 5. **40 C.W.N. 1054.**

——S. 33—*Applicability—Suit by co-sharer for declaration that he has preferential title and that sale should stand entirely in his favour.*

It may be assumed that S. 33 is not confined to sales by public auction under the Act, but also applies to a sale under S. 14 of the Act. But in order to attract the operation of S. 33 the suit must be one to annul the sale and this presupposes that the party suing is the defaulting co-sharer or any other person who derives his title from him. Where a co-sharer impeaches the rights of the other co-sharers to become purchasers by reason of the subsequent deposits they made, and wants at the same time that the sale should stand and stand entirely in his favour, it is really a suit by one purchaser against another for a declaration that he has a preferential title. Such a suit does not come within the purview of S. 33. Under these circumstances a suit would certainly lie in a Civil Court, quite apart from S 33 of Act XI of 1859, for having a declaration that the plaintiff is the sole purchaser, and no title was vested in any of the other co-sharers by reason of the payments they made under S. 14 of the Revenue Sale Law. (*Mukerjea and Roxburgh, JJ.*) Kamal Krishna *v* Hemendra Krishna **187 I C. 286=12 R C. 556=71 C L.J. 413=44 C W.N. 129=A.I.R. 1940 Cal. 39.**

——S. 33—Arrear of revenue—Absence of—Determination—Factors to be taken note of. *See* Bengal Land Revenue Sales Act, Ss 2, 3 and 33. **A.I.R. 1937 Cal. 703**

——S. 33—*Entire amount of revenue not being arrear—Sale, if liable to be set aside.*

Where the entire amount of revenue for which the sale was held was not an arrear and thus there was a material irregularity in the sale and the price fetched at the sale was inadequate causing substantial loss.

Held. the sale was liable to be set aside under S. 33 of the Act. (*S. K. Ghose and Patterson, JJ.*) Jagadish Chandra Mitra *v.* Kunja Mohan Shah **171 I.C. 822=10 R C. 310=A.I.R, 1937 Cal. 273.**

——S. 33—*Ground not specifically set forth before Commissioner—If can be raised in suit.*

The wording of S. 33 of the Revenue Sale Law is very particular; and as worded, that section requires that the ground should be declared and specified. There can be no question that apart from anything else, omission to take the ground in a definite form and with sufficient particularity before the Commissioner is a bar to the ground being put forward as a ground in a suit to set aside the sale. (*Mukerjee, Ag.C.J. and S. K. Ghose, J.*) Manindra Nath Sen *v.* Kudiram Das. **161 I.C. 735=8 R.C. 541=A.I.R. 1936 Cal. 142.**

——S 33—*Payment—Taking out money order in office of origin—If amounts to payment.*

In no part of the rules in the Tauzi Manual is it suggested that the Government have agreed that the post office should be the agent for the purpose of receiving payment and hence it cannot be held that the taking out of a money order in the office of origin can be considered a payment to the Collector of the revenue. (*Wort and Agarwala, JJ*) Inderjit Rai *v.* Bulak Chand. **179 I.C. 861=11 R.P. 420=5 B.R. 305=1939 P.W.N. 265=20 Pat.L.T 300=A I.R. 1939 Pat. 76.**

——S. 33—*Question of substantial injury not made specific ground of appeal before Commissioner—Maintainability of suit.*

It is certainly incumbent upon the plaintiff in a suit under S. 33 to establish that he has suffered substantial injury by reason of the irregularity complained of, but it is not necessary that the question of substantial injury must also be made a specific ground of appeal before the Commissioner. (*Mukerjea and Roxburgh, JJ.*) Kamal Krishna *v* Hemendra Krishna **187 I.C. 286=12 R.C 556=71 C.L.J. 413=44 C.W.N. 129=A.I.R. 1940 Cal. 39**

—— S 33—*Revenue sale—Setting aside—Money paid to credit of estate—Misdescription of touzi—Effect of.*

In a suit for a declaration that the sale was a nullity on the ground that there were no arrears, the existence of which alone could authorize the Collector to hold the sale, it is incumbent upon the plaintiff to establish that the Collector was in possession of money belonging to the plaintiff and indisputably placed to his credit. When the estate has been correctly described and money paid to the credit of the estate, no sale under law is permissible and it is immaterial that certain erroneous debit entries were made by the Collectorate officers to which the proprietor was not a party. When however there is a misdescription of the touzi and it is not undisputed that money has been placed to the credit of a particular estate, different considerations arise. The Collector may in such cases justly hesitate to credit the amount to one estate rather than to the other. The rules framed by the Revenue Department make detailed provisions, as to the duties of the Collectorate officers who are entrusted with the charge of receiving these payments in such cases. Where there is a violation of these rules by the officers concerned and the proprietor is not given an opportunity to rectify the mistakes, a sale without giving the proprietor such opportunity is without jurisdiction. (*B. K. Mukerjea, J.*) MANODA MOHINI DAS *v* SAKINA BIBI. **43 C.W.N. 43=A.I R. 1938 Cal. 738.**

———S. 33—*"Sale"—Meaning of.*

Per *Roxburgh, J.*—'Sale' necessarily includes the whole procedure from issue of notices under Ss. 5 and 6 up till the final completion of the 'sale' in its narrower sense as the corollary to 'purchase.' A 'sale' is conducted contrary to the provisions of the Act within the meaning of S. 33 if there is any defect in any of these proceedings, not merely for defect at the time of actual auction. (*Mukerjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HEMENDRA KRISHNA. **187 I.C. 286=12 R.C. 556=71 C.L.J. 413=44 C.W.N. 129=A.I R. 1940 Cal. 39.**

———S. 33—*Scope—Appeal preferred to Commissioner beyond time—Effect—Dismissal—Suit in Civil Court on grounds urged in appeal—Maintainability.*

An appeal provided for by S. 25 of the Land Revenue Sales Act must be preferred on or before the 60th day of the date of sale; an appeal presented beyond the 60th day is no valid appeal. When such an appeal has been dismissed as being barred, a civil suit to set aside the sale on the same grounds as alleged in the appeal is not maintainable under S. 33 of the Act. (*Macpherson and Khaja Mohammad Noor, JJ.*) NANAK PRASAD SAHU *v.* KASEDA KUMARI. **15 Pat. 272=162 I.C. 1004=8 R.P. 604=16 Pat.L.T. 915=A.I.R. 1936 Pat 260.**

———S. 33—*Scope—No arrears of land revenue—Sale—Suit to set aside—If barred.*

Where a sale is held for arrears of land revenue in cases where there were no such arrears, a suit to set aside the sale is not barred under S 33. (*Wort and Agarwala, JJ.*) INDERJIT RAI *v.* BULAK CHAND. **179 I.C. 861=11 R.P. 420=5 B.R. 305=1939 P.W.N. 265=20 Pat.L. T. 300=A.I.R. 1939 Pat. 76.**

———S. 33—*Scope—Revenue sale—Suit to declare illegal and* ultra vires—*Maintainability without consequential relief.*

Obiter.—A suit merely for a declaration that a revenue sale is illegal and *ultra vires* and without any force and effect is not maintainable under the law in the absence of a prayer for setting aside the sale by way of consequential relief. (*Guha and Bartley, JJ.*) RAM RANJAN MULLIK *v.* JAMINI SUNDARI DASSYA. **40 C W.N. 1114=9 R C. 535=166 I.C. 485=64 C.L.J. 486=A.I.R. 1936 Cal. 415.**

———S. 33—*Scope—Suit to declare that sale would not affect plaintiff's reversionary rights—Allegation of fraud—Suit, if barred.*

S 33 does not bar a suit by a reversioner for a declaration to the effect that the revenue sale held under the Act did not affect his rights as reversioner in respect of the property sold, when such a suit is based on the allegation that the sale was a fraudulent transaction, and the reversioner will be entitled to the relief if he proves that fraud had been committed and the reversionary right residing in him had been adversely affected. (*S K. Ghose and Edgley, JJ.*) ASHUTOSH SANYAL *v.* RAM SANKAR GHOSE. **162 I. C. 695=8 R.C. 645=A.I.R. 1936 Cal. 198.**

———S 33—*"Substantial injury"—Meaning of—Inadequacy of price.*

Pecuniary loss is not the only kind of injury contemplated by the words "substantial injury" in S. 33, although inadequacy of price fetched at the sale is the most common form of injury that is asserted. (*Mukerji and S. K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C.W.N 271.**

———S. 33—*Substantial injury—Proof of—Onus—Omission to issue notice under S. 5—Inadequacy of price fetched at sale—Substantial injury—Inference of—Permissibility.*

When a revenue sale is sought to be set aside on the ground of omission to issue a notice as required by S. 5 of the Act, the fact that the irregularity complained of has resulted in substantial injury within the meaning of S. 33 is a fact which the party impeaching the sale must make out. The object of the notification under S 5 is to protect the interest of an attaching creditor, and the omission to issue the notice under the section would not by itself mean that an inadequacy in the price fetched by the sale is the result of that omission. (*Mukerji and S. K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C W.N. 271.**

——— S. 34—*Effect of annulment of sale.*

Per *Roxburgh, J.*—The effect of an annulment of sale is dealt with in S. 34 of the Act which clearly contemplates restoration of the defaulter, assumed to be decree-holder, on certain terms and conditions. (*Mukherjea and Roxburgh, JJ.*) KAMAL KRISHNA *v.* HEMENDRA KRISHNA. **187 I. C. 286=12 R.C 556=71 C.L J. 413=44 C.W.N. 129=A.I R. 1940 Cal 39.**

———S. 34—*Sale of holding for arrears of revenue—Title suit by owner against purchaser—Sale set aside on compromise—Compromise decree not executed within six months—Effect on sale.*

A *raiyati* holding in a Government *khas* mahal was sold for arrears of revenue under Act XI of 1859. The owner, after an unsuccessful appeal to the Commissioner, brought a title suit against the purchaser to have the sale set aside alleging that processes required to be served under the Act were not served and that caused substantial injury to him. The suit ended in a compromise decree. According to the terms of compromise, the revenue sale was set aside on the ground that the Collector had no jurisdiction to sell a *raiyati* holding under the Act.

Held, that there was no judicial determination of the question whether the sale was valid or not, that the sale was not set aside on the ground that it was a nullity, that, therefore, S. 34 of the Act applied to the compromise decree, and that the failure to apply for its execution within six months from the date thereof would make the sale and the right acquired by the purchaser under it stand good. (*S. K. Ghose and Patterson, JJ.*) MOHAMMAD ESLAM *v.* ANIMESH CHANDRA SEN. **43 C.W.N. 46.**

———S. 36—*Object of—Revenue sale during pendency of suit by mortgagee of the property—Purchase,* benami *for mortgagor—Suit by mortgagee after decree to declare sale fraudulent, if barred by S. 36.*

The object of S. 36 of the Bengal Land Revenue Sales Act is to discourage *benami* purchases at sales and with that in view the Legislature has said that a suit to oust the *benamidar* shall not lie. What the Legislature intends to prohibit appears to be this; that a purchaser having elected to make his purchase in a *benami* name, he could not thereafter come into Court to have the *benami* character of the transaction established and the *benamidar* ousted by Court. The section is not to be construed so as to enable the sham title of a *benamidar* to be set up against a creditor of the real owner. Where during the pendency of a mortgage suit, the estate was sold for default in the payment of the land revenue by the mortgagor proprietor, under the Bengal Land Revenue Sales Act, and it is purchased in auction in the name of a third person *benami* for the mortgagor, and where after the passing of a preliminary decree in the mortgage suit, the purchaser obtains possession, it is open to the mortgagee decree-holder to institute a suit to declare that the revenue sale was fraudulent and void and inoperative as against his mortgage lien and S. 36 of the Act could not be pleaded in bar of such a suit, for that section has no application at all to such a case. (*Dhavle and Rowland, JJ.*) CHATRADHARI LAL *v.* BHAGWATI PRASHAD. **178 I.C. 357=5 B R. 91=1939 P.W.N. 46=A.I.R. 1939 Pat. 168.**

——S. 37—*Annulment of tenure—Tenure-holder claiming* nishkar *title—Proof required.*

Where in a case in which it is sought to annul a tenure under S. 37 of Act XI of 1859 the tenure-holder claims protection by reason of his *nishkar* title, the proof of long possession without payment of rent must be of a very definite and convincing nature such as would be sufficient to enable the Court to draw the inference that the *nishkar* grant in respect of the tenure had been made prior to the permanent settlement. (*Edgley, J.*) ASHA MOYI BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **I.L.R. (1939) 2 Cal. 330=187 I.C. 535=12 R.C. 584=A.I.R. 1940 Cal. 141.**

——S. 37—*Annulment of tenure—Tenure held partly under* touzi *purchased at sale and partly under other* touzis*—Purchaser's right to recover possession.*

Where a tenure is held partly under the *touzi* purchased at the revenue sale and partly under other *touzis*, it cannot be annulled in part by the purchaser under S. 37 of Act XI of 1859, and he is not, therefore, entitled to recover possession of any portion of the land appertaining to the tenure. (*Edgley, J.*) ASHA MOYI BASU *v.* BARANAGORE JUTE FACTORY CO, LTD. **I.L.R. (1939) 2 Cal. 330=12 R.C. 584=187 I.C. 535=A.I.R. 1940 Cal. 141.**

——S. 37—"Incumbrance"—Meaning — Same word in Bengal Tenancy Act—Distinction. *See* BENGAL TENANCY ACT, S. 167. **A.I.R. 1937 Cal. 36.**

——S. 37—*Occupancy holding at fixed rate of rent—Mokarari right created subsequent to permanent settlement—Right of purchaser to enhance rent.*

Raiyats having a right of occupancy at a fixed rate of rent are not liable to be ejected under S. 37 of the Revenue Sales Law (Act XI of 1859). But if their mokarari right was created subsequent to the permanent settlement, the purchasers at the revenue sale are entitled to treat them as occupancy raiyats whose rents are liable to enhancement according to law. (*M. C. Ghose, J.*) JANAKI NATH DE SARKAR *v.* RAJANI NATH KAR. **67 C.L.J. 470.**

——S. 37—*Part only of under-tenure within estate—Right of auction-purchaser to eject under-tenant.*

Under S. 37 of the Bengal Land Revenue Sales Act, the auction-purchaser is entitled to eject all under-tenants who hold their land entirely within his estate, but he is not entitled to eject an under-tenant who holds an under-tenure partly within his estate and partly within other estates. (*Ghose and Bartley, JJ.*) SM. ASHAMOYEE BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **70 C.L.J. 34.**

——S. 37—*Recovery of possession on basis of revenue sale—Suit for—Onus of proof.*

In a case in which the plaintiff is seeking to recover possession of property on the basis of a revenue sale, the initial onus lies on the plaintiff to show that the land lies within his regularly assessed estate or *mahal* and not merely that it lies within the ambit of his *zamindari*. If he discharges this initial onus, it would be for the defendant to prove that his case would fall within one of the exceptions to S. 37 of Act XI of 1859. (*Edgley, J.*) ASHA MOYI BASU *v.* BARANAGORE JUTE FACTORY CO., LTD. **I.L.R (1939) 2 Cal. 330=187 I.C. 535=12 R.C. 584=A.I.R. 1940 Cal. 141.**

——Ss. 37, 38 and 39—*Registration of tenure in respect of undivided share of land—Protection of tenure-holder.*

A tenure can in law comprise undivided parcels of land. All that is required is that the tenure must be held immediately under the proprietor or proprietors of the estate. If this condition be fulfilled the tenure-holder, provided he applies in time, is entitled to have his tenure registered in the common register, and if it is registered he is entitled to enjoy the protection given by the third exception mentioned in S. 37 of Act XI of 1859. (*Mitter and Rau, JJ.*) KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARI CO., LTD. **70 C.L. J. 218=44 C.W.N. 38=A I.R. 1940 Cal. 115.**

——S. 37—*Scope—Occupancy raiyat subsequently taking* mukarrari *lease—Sale of land for arrears of revenue—Notice by purchaser to annul* mukarrari *lease—Right to actual possession as against tenant.*

Where a raiyat with occupancy rights is granted by the landlord a permanent lease by way of *mukarrari*, a purchaser of the lands at a sale for arrears of revenue is not entitled to recover khas possession of the lands from the tenant, by serving a notice on the tenant of his intention to cancel the *mukarrari* as an encumbrance. If the *mukarrari* right is annihilated the person in whose interest it is annihilated can only get the proprietary interest free from the *mukarrari* right, but he cannot get the actual lands which the *mukarraridar* held as an occupancy raiyat prior to the creation of the *mukarrari* right and independently of the *mukarrari* lease. (*Wort and Fasl Ali, JJ.*) KALI SINGH *v.* MATRU SINGH. **15 Pat 584=167 I C. 781=1936 P.W.N. 791=9 R.P. 435=3 B.R. 346=A.I.R. 1937 Pat. 189.**

——S. 37, Proviso—*'Raiyat'—Meaning of.*

There being no definition of raiyat in Act XI of 1859, it must be read in its ordinary sense of a cultivator. Where a wealthy inhabitant of a town who carries on business has not cultivated the land nor has taken the land for purposes of cultivation, he is not an agriculturist and is not therefore competent to invoke the Proviso to S.37 in his favour even if fruits and flowers were grown on a portion of the land which is used as a garden house. A.I.R. 1931 P.C. 314, Rel. on. *(Mukherjea and Latifur Rahman, JJ.)* ASHAMOYI *v.* SARBATOSH SEN. **I.L.R. (1939) 2 Cal. 236=184 I.C. 892=A.I R. 1939 Cal. 526.**

——S. 37, Excep. 1—Scope—Jagir granted to invalided soldiers under Regulation XLIII of 1793—If protected. *See* BENGAL REGULATION (XLIII OF 1793), S. 33 (1). **A.I R. 1940 Pat. 275 (F.B.).**

——S. 37, Excep. 2—*'Settlement'—Meaning of —Settlement of estate for term and re-settlement after expiry of term—Tenure created by settlement-holder before re-settlement—If protected from annulment.*

The word "settlement" in the second exception to S. 37 of Act XI of 1859 means the settlement of the estate. Where an estate was settled by the Government for a term of 40 years with the option of re-settlement for a period of 30 years after the expiry of that term, and the settlement-holder created a tenure and after the expiry of 40 years a re-settlement was made of the estate which was subsequently sold for arrears of revenue.

Held, that the re-settlement was not completely a new settlement although the term in the re-settlement was altered but was only a continuation of the original settlement, and that as the tenure was not in existence at the time of the original settlement, it was not protected from annulment after the revenue sale under the second exception to S. 37 of the Act. *(S. K. Ghose and Edgley, JJ.)* NILIMA PROVA DUTTA *v.* P. S. MANTOSH. **42 C.W.N. 864.**

——S. 37 (4)—*'Lease'—Meaning of.*

The word "lease" has been used in the ordinary sense of a tenancy and though a tenancy must be based upon a contract either express or implied, mere non-payment of rent is not conclusive to show that there is no tenancy. It is well known that agricultural tenancies do frequently come into existence in Bengal without a definite stipulation as to the amount of rent payable, it being understood that the tenant would pay the amount of rent which is customary or which is fair and equitable. If a man holds land under another person with his consent either express or implied and is legally liable to pay rent to the latter for the land he holds, a tenancy will be constituted, even if the amount of rent is not determined, and no rent is actually paid. *(Mukherjea and Latifur Rahman, JJ.)* ASHAMOYI *v.* SARBATOSH SEN. **I.L.R. (1939) 2 Cal. 236=184 I.C. 892=A.I.R. 1939 Cal. 526.**

——S. 40—*Application not containing all particulars—Registration of tenure—Effect of.*

S 40 of Act XI of 1859 mentions the particulars which are to be given in an application for registration. The applicant is to state the said particulars "so far as they are ascertainable." If his application does not contain all the particulars mentioned therein it is for the Collector and Collector alone to ask him to fill up the gaps. But if the Collector does, in spite of defects in his application, register his tenure, the tenure itself is protected. The tenure-holder cannot be ejected by the purchaser at a revenue sale from any portion of the lands included in the tenure. *(Mitter and Rau, JJ.)* KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARI CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

——S. 48—*Scope—Registration of tenures—Validity of—Right of revenue purchaser to question.*

S. 48 of Act XI of 1859 contemplates a suit between the grantor and persons claiming under him on the one part and the grantee and his representatives on the other. A purchaser of an entire estate at a revenue sale does not claim through the old proprietor who may have created the tenure. He has a paramount right. The revenue sale may take place years after the grant. His rights are declared by the main provisions of S. 37. He who claims protection must bring his case within one of the exceptions. If he relies upon exception 3 he will have to prove that the tenure had been duly registered (*i.e.*) registered in accordance with the provisions of the Act dealing with registration of tenures. If the tenure has been registered either in the common or the special Register, the presumption would be that it had been duly registered but the revenue purchaser cannot be precluded by any principle of law from showing that it was not duly registered. Such a purchaser can show that the Collector had no jurisdiction by reason of the breach of S. 45 to register the tenure and that the act of registration was *ultra vires.* *(Mitter and Rao, JJ.)* KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARY CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

BENGAL LAND REVENUE SALES (AMENDMENT) ACT (III OF 1862), S. 2— *Registration of tenures— Limitation— Starting point.*

Tenures created after the 4th May, 1859, are divided into two classes, those created before the 21st April, 1862 and those created after. The period of limitation for application for registration of both these classes is the same, namely, three months but the starting point is different. In respect of those created between the 4th May, 1859 and the 21st April, 1862, the starting point is expressly stated to be from the 21st April, 1862 and in respect of other tenures created after 21st April, 1862, the starting point is to be the date of creation. *(Mitter and Rau, JJ.)* KUMAR NARENDRA NATH ROY *v.* MIDNAPORE ZEMINDARY CO., LTD. **70 C.L.J. 218=44 C.W.N. 38=A.I.R. 1940 Cal. 115.**

BENGAL LAND REVENUE SALES ACT (VII OF 1868), S. 8—*Applicability and scope—Sale of estate for arrears of revenue—Non-compliance with S. 5 of the Land Revenue Sales Act—Effect of—Omission—If cured by S. 8.*

S. 8 of Bengal Act VII of 1868 cures only the defects, if there be any, in the procedure to be observed regarding the service and posting of the notices required to be served or posted under Act XI of 1859; but the section has no application when no order has been passed for the issue of a notice under S. 5 of the latter Act, and when no such notice is in fact issued. (*Mukerji and S.K. Ghose, JJ.*) MONINDRA DEB ROY *v.* HANSESWARI THAKURANI. **63 Cal. 629=40 C.W.N. 271.**

BENGAL LAND REVENUE SETTLEMENT REGULATION (VII OF 1822) AND REGULATION (IX OF 1825)—*Suit by Secretary of State for possession of* khas mahal *lands —Dismissal—Declaration of right to assess fair rent on the lands by properly framed suit--Assessment of rent by Collector—Issue of certificate for arrears of rent—Legality.*

The Secretary of State for India in Council instituted a suit against the appellant in 1921 for *khas* possession of lands in a *khas mahal*. The claim for *khas* possession was dismissed, but the Court passed a decree declaring his title to 5 cottas 15 chattaks of land as proprietor, holding that he was entitled to get possession of the land through the tenants and to get fair and equitable rent for the land, to be determined in a properly framed suit. The decree was affirmed in appeal on 4—2—1927. The rent was assessed in 1928, and the appellant was given notice of the assessment of rent by the *khas mahal* Deputy Collector. Appellant did not accept the rent assessed by the Revenue authorities and, therefore, recourse was had to the certificate procedure, and a certificate was issued to recover arrears of rent due. Appellant challenged the certificate.

Held, that Regulation VII of 1822 and Regulation IX of 1825 applied to the case, that the conjoint effect of S. 20 of Regulation IX of 1825 and of the provisions of Regulation VII of 1822 was that the assessment of rent made was legal and that the assessment of rent having been made validly under the law, the issue of a certificate for realisation of the arrears of rent was neither *ultra vires* nor without jurisdiction in any way.

Held, further, that the direction contained in the decree in the suit of 1921, that the rent was to be determined in a properly framed suit could not operate as *res judicata*, so as to bar the assessment of rent in accordance with law under the Regulations, as it was perfectly open to the Collector to assess rent without having recourse to a suit. There could be no estoppel against statute and against statutory rights exercisable by the Secretary of State in the matter of assessment of rent payable in respect of *khas mahal* lands. (*Guha and Bartley, JJ.*) SARBARANJAN BASAK *v.* SECRETARY OF STATR FOR INDIA. **40 C.W.N. 341.**

——**Ss. 9 and 10**—*Rules framed under—Raiyatwari settlements concluded by Collector—If bind Government.*

In view of S. 9, Second, of Regulation VII of 1822, and the statutory rules made under S. 10, First, of the said Regulation, which sections have been extended by Regulation IX of 1825 to the whole of Bengal, raiyatwari settlements concluded by the Collector which are not summary settlements of land revenue up to Rs. 500 or settlements for colonisation are not binding on the Government unless and until confirmed by the Board of Revenue. The acceptance of a kabuliyat by the Collector is of no effect against the Government, if the Board of Revenue subsequently overrules the Collector. (*Mitter and Edgley, JJ.*) BROJESH CHARAN SEN *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal. 573=179 I.C. 724=11 R.C. 603=67 C.L.J. 56=42 C.W.N. 996=A.I.R. 1939 Cal. 81.**

——**S. 10 (4) and (5)**—*Notices issued to all proprietors of mahal—Appearance by some only of them—Joint settlement made with them—Non-appearing proprietor—If entitled to malikana from them.*

When notices were issued under Cl. (4) of S. 10 of the Bengal Land Revenue Settlement Regulation upon all the co-sharer proprietors of a mahal but only some of them appeared and a joint settlement was made with them, a non-appearing proprietor is bound by the terms of the settlement and is not entitled to get malikana from those with whom the settlement was made. (*Rau and Mukherjea, JJ.*) ABDUL LATIF CHOWDHURY *v.* DHIRENDRA CHANDRA ROY. **44 C.W.N. 323.**

BENGAL LIMITATION REGULATION (II OF 1805), S. 11, Second—*Assessment of invalid* lakhiraj *with revenue—Cause of action—When arises.*

Under S. 11, Second, of the Bengal Regulation II of 1805, the cause of action in respect of the right of the Government to assess invalid *lakhirajes* with revenue arises on the date of the invalid grant, at least when possession is taken on the basis of such grant. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

——**S. 11, Second**—*Claim barred under—If revived by subsequent repeal of Regulation.*

If the Government's right to assess invalid *lakhirajes* becomes barred under S. 11, second, of the Regulation II of 1805, the subsequent repeal of that Regulation by Act VIII of 1868 would not revive that right. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

——**S. 11, Second**—*If impliedly repealed by Act XIV of* 1859.

S. 11, Second, of Bengal Regulation II of 1805 was not repealed by necessary implication by Act XIV of 1859. It was expressly repealed by Act VIII of 1868 as having become unnecessary by lapse of time. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

BENGAL LOCAL SELF-GOVERNMENT ACT (III OF 1885)—*District Board—Lease by —Validity—Lease contravening R. 95 of Rules published by Local Government.*

A lease for 15 years granted by the District Board without the previous sanction of the Divisional Commissioner contravenes the provisions of R. 94 of the Rules published under the statutory authority by the Local Government and is, therefore, *ultra vires*. (*R.C. Mitter, J.*) AMOLOK CHAND RAPARIA *v.* KESHAB PATI. **68 C.L.J. 116.**

——**S. 5**—*District Magistrate—Delegation of powers by—Effect.*

The word 'includes' in the definition of the "Magistrate of the District" in S. 5, Bengal Local Self-Government Act, indicates that the District Magistrate is not divested of his authority after he delegates his powers to a Subordinate Magistrate. Therefore the Magistrate of the District under S. 5 has a continuing authority to delegate his powers under R. 1-A of the Election Rules. His powers are the same as those under S. 21, General Clauses Act. (*Nasim Ali and Remfry, JJ.*) SUBODH CHANDRA CHAKRAVARTY *v.* JNANENDRA NATH. **I L R (1938) 1 Cal. 62=42 C.W.N. 177=173 I.C. 846=10 R.C. 581=A.I.R. 1937 Cal. 718.**

——**Ss. 9 (2) and 138-A and R. 59**—*Scope and effect of—Person not qualified to vote at Union Board election—If qualified to be member of District Board.*

Under S. 9 (2) of the Bengal Local Self-Government Act, a person who is qualified to vote at an election to a Union Board within the area under the authority of a Local Board is entitled to be a member of a Local Board, if duly elected thereto; and under S. 59 of the rules framed under S. 138-A of the same Act, only persons qualified for election as members of the Local Board in the District are qualified for election as members of the District Board. The combined effect of S. 9 (2) and R. 59 is that only electors qualified to vote at a Union Board election can become members of the District Board. (*Jack, J.*) KASIRUDDIN *v* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

——**S. 53**—*Construction and scope—If exhaustive—Resolution of District Board sanctioning expenditure for propaganda work in favour of Union Board—Legality—If* ultra vires—*S.* 100 (4).

The power of a body corporate are not confined to what is expressly stated in the Act or statute constituting it but also extend to what is necessary and properly required for carrying into effect the undertakings and works which the Act has expressly sanctioned. S 53 of the Bengal Local Self-Government Act must, however, be construed as being exhaustive of the purposes for which the District Board can spend the District Fund. It enumerates exhaustively the objects and purposes for which the Fund can be spent, and in the second place it indicates the order of priority of these payments. Though the section does not militate in any way against the implied powers of a corporation, Cl (5), Sub-S. (*a*) (*iii*) expressly lays down that the District Fund shall be applicable to "the performance of duties imposed and the exercise of powers conferred by the Act," and Sub-S. (*d*) of the same clause authorises payments of any sum to a Local Board or to a Union Board constituted under the Act. The spending of money for starting a propaganda in favour of Union Boards for the purpose of educating public opinion is not one of the purposes coming expressly or impliedly within the scope of the powers and duties of the District Board. A resolution passed by the District Board sanctioning expenditure for purposes of such propaganda work to be carried is therefore illegal and *ultra vires*. Such propaganda work does not also come within the residuary provision in S. 100 (4). The words in S. 100 (4), "works likely to promote the health, comfort or convenience of the public, etc." must be construed *ejusdem generis* to mean and include those things which are of the same nature as those specifically provided for in the Act. (*M.C. Ghose and Mukherjea, JJ.*) JESSORE DISTRICT BOARD *v.* SURENDRA NATH HALDAR. **I.L.R. (1937) 1 Cal. 646=169 I C. 726=10 R.C. 24=41 C.W.N 151=A.I R. 1937 Cal. 127.**

——**S 53-A**—*Scope—Resolution of District Board sanctioning expenditure of Fund on unauthorised purpose—If cured or legalised.*

S. 53-A of the Act, though it must cure a defect regarding money already spent by the District Board on an unauthorised object cannot be invoked to legalise a resolution passed by the Board, which is illegal and *ultra vires*, sanctioning the expenditure of the District Fund on an unauthorised object. (*M. C. Ghose and Mukherjea, JJ.*) JESSORE DISTRICT BOARD *v.* SURENDRA NATH HALDAR. **I.L.R. (1937) 1 Cal. 646=169 I.C. 726=10 R.C 24=41 C.W.N 151=A.I.R. 1937 Cal. 127.**

——**Ss. 73 and 75**—*Roads under control of District Board—Title of District Board.*

S. 73 of the Local Self-Government Act merely transfers the control of roads hitherto under the control of certain authorities to the District Board. It does not say that the title of the District Board in the land held by it under Ss. 73 and 75 respectively would be different. (*Sen, J.*) SECRETARY OF STATE *v* DISTRICT BOARD OF RANGPUR. **185 I.C 454=12 R.C. 373=70 C.L.J. 126=A.I.R. 1939 Cal. 758.**

——**S. 100 (4)**—Construction—"Works likely to promote the health, comfort or convenience of the public, etc."—Propaganda work in favour of Union Board—If comes under. *See* BENGAL LOCAL SELF-GOVERNMENT ACT, S. 53. **I.L.R. (1937) 1 Cal. 646=41 C.W.N. 151=A.I.R. 1937 Cal. 127.**

——**S. 120**—Removal of Chairman of Union Board by District Board—Jurisdiction of Civil Court. *See* BENGAL VILLAGE SELF-GOVERNMENT ACT, S. 16. **44 C W.N, 362.**

——**S 138 (a)**—*Authority appointed under, to settle election disputes*—Persona designata *or 'Court'*.

The authority appointed under S. 138 (*a*), Bengal Local Self-Government Act, to determine election disputes does not function as *persona designata* but as a Court. (*Costello, Ag. C.J. and Edgley, J.*) SACHINDRA NATH DAS *v.* SURYA KANTA MISRA. **I L R (1938) 1 Cal. 146=176 I. C. 515=11 R.C. 114=42 C.W.N. 54=A.I.R. 1937 Cal. 720.**

——**S. 138 (a)**—*R.* 1-*A of Rules framed under—Decision of District Magistrate—Revision—Government of India Act, S.* 107.

A District Magistrate in deciding a dispute under R. 1-A of the Rules under the Local Self-Government Act is acting judicially and is not merely a *persona designata*. His decision may, therefore, in proper cases, be revised by the High Court under the provisions of S. 107 of the Government of India Act. (*Jack and Patterson, JJ.*) CHANDRA KISHORE MANDAL *v* SHASINDRA KUMAR ROY. **41 C.W N. 441=10 R.C 266=171 I.C 365=65 C.L.J. 172=A.I.R 1937 Cal. 174.**

[But under S. 224 of the new Government of India Act of 1935, the High Court is deprived of its revisional powers under S. 107 of the old Act.]

——**S. 138 (a)**—*R.* 1-*A of Rules framed under—Decision of scrutinizing officer—Power of District Magistrate to interfere,*

Per *Patterson, J.*—The District Magistrate is not empowered by R. 1-A of the Rules under the Local Self-Government Act to interfere with the decision of the scrutinizing officer, as R. 30 provides that such decision is final. (*Jack and Patterson, JJ.*) CHANDRA KISHORE MANDAL *v.* SHASINDRA KUMAR ROY. **171 I.C. 365=41 C.W.N. 441=10 R.C. 266=65 C.L.J. 172=A.I.R. 1937 Cal. 174.**

——**Ss. 138 (a) and 148**—*R. 1-A of Rules framed under—Order of Sub-Divisional Officer rejecting nomination paper of candidate—If can be questioned in Civil Court.*

An order of a Sub Divisional Officer rejecting the nomination paper of a candidate for election to the Local Board, is final, and cannot be questioned in a Civil Court. Under R. 1-A of the Local Government Rules framed under S. 138 (*a*) of the Local Self-Government Act, the proper authority to decide a dispute relating to the validity of a nomination paper is the Magistrate of the District, and his decision is final. S. 5 of the Act makes it clear that the Sub-Divisional Officer could be a Magistrate of the District for purposes of the rules, but even if he is not, the remedy of the candidate whose nomination paper is rejected by the Sub-Divisional Officer is to approach the Magistrate of the District whoever he may be, for redress of his grievances. He cannot come to the Civil Court. (*Mukherjea, J.*) ABALA KANTA GHOSE *v.* SYED JALALUDDIN. **174 I.C. 501=10 R. C. 681=41 C.W.N. 986=A.I.R. 1937 Cal. 487.**

——**S. 138-A, Rr. 1-A and 56**—*Construction and scope—Dispute as to qualification of members of District Board—Election to District Board of persons not qualified to be elected—Suit to declare constitution of Board illegal and* ultra vires—*Jurisdiction of Civil Court.*

Any dispute as to the qualification for membership of a District Board is a dispute under the rules for election framed under S. 138-A of the Local Self-Government Act and under Rr. 1-A and 56 of the Election Rules, such a dispute shall be decided by the District Magistrate and his decision is to be final. The Civil Court has no jurisdiction in such a matter, and a suit for declaration that the constitution of a District Board is illegal, and *ultra vires* on the ground that certain members elected thereto are not qualified for election is, therefore, not maintainable in the Civil Court. (*Jack, J.*) KASIBUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

——**S. 138-A, R. 57**—*Scope—Invalid election of member to District Board—If ground for declaring invalid election of Chairman or Vice-Chairman—Right of member from one Local Board to question election of member from another Local Board.*

The mere fact that one of the members of a District Board is found not to be duly qualified to be elected would not invalidate the whole election, and when it is not shown that the invalid election of a member to the Board has in any way affected the election of the Chairman or Vice-Chairman, the election of these latter cannot be declared invalid.

Quaere.—Whether a member elected to the District Board from one Local Board can question the validity of the election to the District Board of a member from another Local Board. (*Jack, J.*) KASIRUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I.C 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

——**S. 146**—*Period of one month's notice—If can be excluded.*

Under S. 146 of the Bengal Local Self-Government Act, the period of one month's notice can be excluded from the period of three months provided for limitation. (*Henderson, J.*) DISTRICT BOARD, CHITTAGONG *v.* EMDADAL HOQUE. **44 C.W.N. 362=A.I.R. 1940 Cal. 305.**

——**Ss. 148 and 138 (a)**—Bengal Government Rules, R. 1-A—Order of Sub-Divisional Officer rejecting nomination paper of candidate—If can be questioned in Civil Court. *See* BENGAL LOCAL SELF-GOVERNMENT ACT, Ss. 138 (*a*) AND 148. **41 C.W.N. 986.**

——(**as amended by Act XXIV of 1932**), **S. 148**—*Jurisdiction of High Court to interfere in revision.*

The provisions of S. 148, Bengal Local Self-Government Act, as amended by Act XXIV of 1932, are so wide and definite in their terms that the jurisdiction of the High Court is excluded altogether whether in appeal or in revision. The terms of S. 148 are so comprehensive that the jurisdiction of the High Court is ousted whether it can be rightly said that what the High Court is concerned with is not a decision but a right to decide and whether or not the High Court is concerned with the decision of an authority which has never been properly constituted. The High Court cannot therefore interfere in revision with the decision of the authority appointed under S. 138 (*a*) of the Act to determine election disputes, however flagrantly illegal his decision may be or even if such authority has exercised jurisdiction not vested in him by law or acted in the exercise of his jurisdiction illegally and with material irregularity as such decision is final under S. 148 of the Act. (*Costello, Ag.C.J. and Edgley, J.*) SACHINDRA NATH DAS *v.* SURYA KANTA MISRA. **I.L.R. (1938) 1 Cal. 146=176 I.C. 515=11 R.C. 114=42 C.W.N. 54=A.I.R. 1937 Cal. 720.**

——**S. 148.**

S. 148 of the Local Self-Government Act precludes interference by High Court by way of revision with any order made by the authority lawfully appointed to decide disputes relating to elections under S. 138 (*a*) of the Act. (*Bartley and Nasim Ali, JJ.*) PHANINDRA NATH SARKAR *v.* MAULVI DEDAR HUSSAIN KHAN CHOWDHURY. **174 I.C. 879=10 R.C. 738=42 C.W.N. 283=A.I.R. 1938 Cal. 240.**

——**S. 148.**

An application in revision under S. 115, C.P. Code, does not lie to the High Court from an order passed by the District Magistrate on a petition filed under R. 1-A of the Election Rules. (*S.K. Ghose and Nasim Ali, JJ.*) TARA PROSAD SUKUL *v.* ABUL KASAM KHUNDKAR. **179 I.C. 746=11 R.C. 611=69 C.L.J. 148=42 C.W.N. 441=A.I.R. 1938 Cal. 359.**

BENGAL MONEY-LENDERS' ACT (VII OF 1933)—*Scope--Rate of interest--Whether proper or excessive—Onus of proof—Usurious Loans Act—Relative scope*

Cunliffe, J.—The scheme of the Bengal Money-Lenders' Act is to benefit the borrowers; and the provisions of the Act in favour of the borrowers are more advantageous than the Usurious Loans Act. Whereas under the Usurious Loans Act the borrower has the onus on him to prove that the interest was harsh and unconscionable, the reverse is the case under the Bengal Act VII of 1933, and the creditor has to show that the interest charged by him is not excessive. (*Cunliffe and Henderson, JJ.*) MRINALINI DEBI *v.* HARI LAL ROY. **168 I.C. 902=9 R.C. 881=63 C.L.J. 117=A.I.R. 1936 Cal. 339.**

——S. 3—*Applicability—Provision for compound interest at rate not exceeding* 15 *per cent.*

If a mortgage bond provides for compound interest at a rate not exceeding 15 per cent. and provides for rests at intervals of six months or more, the case does not come within the purview of S. 3 of the Bengal Money-Lenders' Act. The rate of 15 per cent. mentioned in the section does not mean 15 per cent. simple interest only. (*Mitter and Roxburg, JJ.*) SURESH CHANDRA *v.* SATYENDRA KUMAR DAS **44 C.W.N. 694.**

——**Ss. 3 and 4**—*Applicability—Decision before Act—Appeal pending—If governed by Act.*

S. 3 of the Bengal Money-Lenders' Act is not retrospective and applies only to such suits as are instituted after the commencement of the Act or as are pending at the time when the Act comes into operation. Neither S. 3 nor S. 4 can therefore apply to a suit which had already been decided by the trial Court prior to the coming into force of the Act and against the decision in which an appeal is pending at the time the Act comes into force. (*D. N. Mitter and Patterson, JJ.*) RADHARANEE DASSYA *v.* KSHETRA MOHAN CHAKRAVARTY. **40 C.W.N. 409.**

——S. 3.

It is doubtful whether the provision of S. 3, Bengal Money-Lenders' Act, can be applied to a case where the decision of the trial Court was given before the Act came into force (*R.C. Mitter, J.*) INDRA CHANDRA BAG *v.* HIRALAL RONG. **167 I C. 441=9 R.C. 689=40 C.W.N. 696=62 C.L.J. 545=A.I.R. 1936 Cal. 127.**

——**Ss. 3 and 4**—*Applicability—Loans in kind—Usurious Loans Act—Loan of paddy—Agreement to pay half of principal as profits or interest—Enforceability.*

Ss. 3 and 4 of the Bengal Money-Lenders' Act do not apply to the case of a loan in kind, as the Act contemplates loans of money only. But under the Usurious Loans Act, loan means a loan whether of money or in kind. An agreement to pay fifty per cent. of the principal as profit or interest for each year, in the case of a loan of paddy, is substantially unfair, and the Court has power to reduce the interest. (*Nasim Ali, J.*) AMIRUDDIN *v.* RADHA RANI. **41 C.W.N. 181.**

——S 3—*Harsh and unfair transaction—Test—Construction—Charged.*

The word 'charged' in S. 3, Bengal Money-lenders' Act undoubtedly qualifies the words 'money lent' and it means 'charged' or payable under the contract of loan. It is the nature of the stipulation between the parties at the time of the contract that determines the question as to whether the transaction is one which can be called harsh or unfair within the meaning of the section and both the two clauses mentioned in the section have reference to the actual stipulations in the contract itself regarding the amount of interest or the period of rests irrespective of the claim made by the plaintiff in the suit. (*Mukherjea, J.*) RAJ KUMAR BISWAS *v.* GOPAL GUNJ INDUSTRIAL BANK. **173 I.C. 138=10 R.C. 487=A.I.R. 1937 Cal. 415.**

——S. 3—*Interpretation.*

S. 3 only raises a presumption that a rate of interest exceeding 25 per cent. is excessive and that the transaction was harsh and unconscionable and is substantially unfair. It does not say that if any loan before the passing of the Act was given, the Court shall not in any circumstances allow interest at a rate more than 25 per cent. per month, if the loan is unsecured. The section raises a presumption of fact which the lender can by evidence rebut. (*R. C. Mitter, J.*) INDRA CHANDRA BAG *v.* HIRALAL RONG. **167 I.C. 441=9 R.C. 689=40 C.W.N. 696=62 C.L.J. 545=A.I.R. 1936 Cal. 127.**

——**S. 4**—*Applicability—Interest already paid.*

S. 4 of the Bengal Money-Lenders' Act only applies to arrears of interest. It has nothing to do with interest that has already been paid. (*Henderson, J.*) AUNAR ALI *v.* JEBAR MULLICK. **182 I.C. 230=12 R.C. 22=43 C.W.N. 495=A.I.R. 1939 Cal. 338.**

——**S. 4**—*Applicability—Interest on money lent by persons other than money-lender.*

S. 4 of the Bengal Money-Lenders' Act does not apply to arrears of interest due on money lent by persons other than the money-lender in suit. (*Henderson, J.*) AUNAR ALI *v.* JEBAR MULLICK. **182 I C. 230=12 R.C. 22=43 C.W.N. 495=A.I.R. 1939 Cal. 338.**

——**S. 4**—*Applicability—Pending suits.*

Obiter.—S. 4 of the Bengal Money-Lenders' Act does not apply to a suit which had already been instituted and was pending in the trial Court at the date when the said Act came into force. (*Mitter and Roxburgh, JJ.*) SURESH CHANDRA *v.* SATYENDRA KUMAR DAS. **44 C.W.N. 694.**

——**S. 4**—*Applicability—Pending suits.*

S. 4 of the Bengal Money-Lenders' Act does not apply to suits instituted before the commencement of that Act. (*Nasim Ali and Henderson, JJ.*) HARI MOHAN GOVINDA CHANDRA DAS *v.* AMRITALAL CHOWDHURY **179 I.C. 365=11 R.C. 534=42 C W.N. 975=A.I.R. 1938 Cal. 665.**

——**S. 4.**

S. 4 of the Money-Lenders' Act is not applicable to a suit which was instituted before that Act came into force. (*S. K Ghose and Patterson, JJ.*) LALMOHAN RAUTH *v.* KUNJA BEHARI DAS. **41 C.W.N. 499.**

——**S. 4.**

(*Cunliffe, J.*) *Obiter.*—S. 4 of the Money-Lenders' Act is undoubtedly retrospective and applies to suits already instituted prior to the Act coming into operation.

Henderson, J.—S. 4 has no retrospective operation and does not apply to suits instituted before the Act came into force. It applies, however, to suits relating to money lent before the Act came into force. The words "before the commencement of this Act" in S. 4 are intended to qualify only the words "money lent by a money lender". (*Cunliffe and Henderson, JJ.*) MRINALINI DEBI *v.* HARI LAL ROY. **168 I.C. 902=9 R.C. 881=63 C.L.J. 117=A.I.R. 1936 Cal. 339.**

——S. 4—*Applicability—Suits for redemption.*

The applicability of S. 4 of the Bengal Money-Lenders' Act to suits for redemption is open to argument. The words "unless it is satisfied that the money-lender had reasonable grounds for not enforcing his claim earlier" seem to suggest that in the suit in question the creditor must be the plaintiff. (*Henderson, J.*) AUNAR ALI *v.* JEBAR MULLICK. **182 I.C. 230=12 R.C. 22=43 C.W.N. 495=A.I.R. 1939 Cal. 338**

BENGAL MUNICIPAL ACT (III OF 1884), S. 15—*Frame of suit.*

The fact that a suit is filed against the Chairman of the Municipality and not against the Municipal Commissioners is a technical flaw, and no importance should be attached to it if the commissioners duly appeared in Court and contested the suit. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY. **181 I.C. 762=11 R.C 852=68 C.L.J. 267=42 C.W.N. 768=A.I.R. 1939 Cal. 178.**

—— **(as amended by Act IV of 1894), S. 30**—*Construction—Roads—Public having right of way—If vest in municipality—Private ownership—Permissibility.*

Per *Mukherji, D.N. Mitter and Patterson, JJ.*—Roads over which the public have a right of way, if they are not private property, vest in the municipality under the Bengal Municipal Act of 1884, S. 30, as amended by Act IV of 1894. There may, however, be roads over which the public have a right of way and yet the road *qua* road may still be private property; but part of a road which is included in the rent free property of a private individual over which the public in general, and not the residents of the neighbourhood only, have a right of way cannot *qua* road still be private property, especially when there has been no instance of any member of the public having been ever disallowed the use of that part of land as road.

Quaere.—To what extent the proprietary rights of private persons as owners of the land are lost to them by the operation of the Act and the consequent vesting of the property in the municipality?

Per *Jack and S.K. Bose, JJ.*—Roads over which the public have a right of way in the municipality vest in the municipal commissioners. Such roads as roads cannot be regarded as private property. (*Mukherji, Jack, D.N. Mitter, S.K. Ghose and Patterson, JJ.*) NIROD CHANDRA MUKERJEE *v.* CHAIRMAN, KAMARHATI MUNICIPALITY. **I.L.R. (1937) 1 Cal. 25=164 I.C. 500=9 R.C. 233=40 C.W.N. 1070=63 C.L.J. 426=A.I.R. 1936 Cal. 506 (F.B.).**

——**S. 34**—*Election offence—Right to make complaint—Person having no vote in ward in which election takes place.*

The words "electoral roll" in S. 34 of the Bengal Municipal Act refer to the whole municipality, and any person whose name is on it is entitled to make a complaint of an offence committed in connection with an election, although he is not in the list of voters of the particular ward in which the election has taken place. (*Henderson and Khundkar, JJ.*) KAZI ALI HAIDER *v.* UPENDRA NATH. **I.L.R. (1939) 2 Cal. 442=184 I.C. 451 (2)=12 R.C. 234=43 C.W.N. 1063=41 Cr.L.J. 17 (2)=A.I.R. 1939 Cal. 662.**

——**S. 34 (b)**—*Limitation for complaints.*

In S. 34 (*b*) of the Bengal Municipal Act, the period of 14 days relates to offences committed in connection with an election, and the shorter period to other offences, as (*e.g.*) offences enacted in S. 28 which have nothing to do with an election. (*Henderson and Khundkar, JJ.*) KASI ALI HAIDER *v.* UPENDRA NATH. **I.L.R (1939) 2 Cal. 442=184 I.C. 451 (2)=12 R.C. 234=43 C.W.N. 1063=41 Cr.L.J. 17 (2)=A.I.R. 1939 Cal. 662.**

——**Ss. 119, 120 and 121**—*Construction—Notice of demand for tax—Application for review—Further notices of demand for other quarters at original rate—Rate reduced on review—Single demand notice for all instalments with copy bills at altered rate—Copy bills beyond six months—Distress warrant within three months of notice—Legality—Tender of tax for last quarter under protest—Refusal — Propriety — Computation of three months' time for distress.*

Plaintiff who was the owner and occupier of certain premises within a municipality was originally served with a bill and notice of demand at a certain rate in respect of tax on his property for the first quarter of 1927-28 on 6-9-1927. On 20-6-1927, he applied for a review pending which bills at the original rate continued to be served on him for five more quarters, the last of them being on 20-6-1928. On 17-10-1928, as a result of the review the tax was reduced; on 29-11-1928 a bill at the original rate was served for a subsequent quarter. On 7-2-1929 a bill for a subsequent quarter at the reduced rate was again served. No payment was, however, made on any of these bills. There was no notice of demand in connection with any of these bills. On 16-3-1929, a second notice of demand was served on the plaintiff for a sum representing a total amount due in respect of all the eight quarters of 1927-28 and 1928-29. This notice of demand was accompanied with eight 'copy bills' purporting to be bills for the eight quarters. On 28-3-1929, plaintiff tended the tax due for the last quarter of 1928-29 under protest. But it was refused by the municipality. On 20-4-1929, a distress warrant was issued against the plaintiff for the second, third and fourth quarters of 1927-28 and for all the four quarters of 1928-29. The distress was levied and plaintiff's goods were seized on 27-4-1929. Plaintiff gave a notice of suit on 13-6-1929, and instituted the suit on 16-7-1929. But on 15-7-1929, the goods were sold.

Held, though the notice of demand, the distress and the sale in respect of the tax for 1927-28 and for the first three quarters of 1928-29 were taken correctly and within the time prescribed and were in order, the refusal of the municipality to accept the tender made by the plaintiff on 28-3-1929 was wholly illegal. The demands in respect of the several quarters were distinct and the amount due for the last quarter of 1928-29 which had been tendered within 15 days of the notice of demand had not yet become 'an arrear due' within the meaning of the second paragraph of S. 121 of the Bengal Municipal Act. It necessarily followed that the warrant issued including the amount of tax due for the last quarter of 1928-29 was illegal and the distress and sale held thereunder must be held *ultra vires*

The fact that the warrant was a good warrant so far as the taxes for the other quarters were concerned did not alter the position, and plaintiff was entitled to the full value of the goods lost to him as damages without any deduction for the tax due. (*Mukerji and Jack, JJ.*) Bhabani Prasanna Lahiri *v.* Chairman of the Municipal Commissioners of the Rangpur Municipality. **166 I.C. 333=9 R.C. 500=40 C.W.N. 977=A.I.R. 1936 Cal. 542.**

——**Ss. 120 and 121**—*Construction—Limitation—Object of—Intention of legislature—Tax reduced on review under S. 118—Distress warrant—Legality.*

The provisions as to time in Ss. 120 and 121 of the Bengal Municipal Act cannot be construed as indicating that the protection of the tax-payer was the sole concern of the legislature. A more sensible interpretation is that the legislature intended that if the process for distress is to be allowed, the municipality will have to begin with presentation of the bill within six months, but may wait for such a reasonable time at their option, subject to the general law of limitation, as the circumstances of the case may demand, and then issue a notice of demand; and that once such notice is served it must give the party 15 days' time for payment; but if no payment is made it must levy distress within three months of the service or of the order on review as the case may be. It is not permissible to assume that a remedy by way of distress was not favoured by the legislature in a case where the tax is reduced on review. (*Mukerji and Jack, JJ.*) Bhabani Prasanna Lahiri *v.* Chairman of the Municipal Commissioners of the Rangpur Municipality. **166 I.C. 333=9 R.C. 500=40 C.W.N. 977=A.I.R. 1936 Cal. 542.**

——**(XV OF 1932), S. 2**—*Sanction lapsed before new Act—If can be saved.*

If the sanction had lapsed before the new Act came into force, there is nothing which could be preserved under S. 2. (*Henderson and Mohamed Akram, JJ.*) Amulya Charan Paul *v.* Kanchrapara Municipality. **71 C.L.J. 588=A.I.R. 1940 Cal. 336.**

——**S. 2, proviso**—Valuation list prepared under old Act—If saved. *See* Bengal Municipal Act, Ss. 3, 123, 133 and 2, Proviso. **44 C.W. N. 277.**

——**Ss. 3 (38) and 129 (b)**—*"Owner"—Definition if exhaustive—Commissioners deciding "occupancy raiyats" as owners—Decision, if* ultra vires.

S. 129 of the Act leaves the decision of the matter of deciding "ownership" to the Commissioners themselves and not to the Court. It may be stated that the definition of "owner" in S. 3 (38) is not exhausive. It begins with "owner includes, etc." But there may be "owner" other than what is stated in the definition. An owner may be a person who actually occupies the land. It depends upon the circumstances of each case. In a case where the plaintiffs are the occupancy raiyats holding agricultural lands within the Municiaplity and they receive rent from nobody but on the contrary they pay rent to the landlords, the term "owner" may be applied both to the holder of the occupancy right in the land and to his landlord. In the Municipal Act it is left to the discretion of the Commissioners to determine which of the two shall be taken to be the owner. Where the Commissioners thought fit to decide that the owners of the occupancy right shall be considered to be the owner within the Municipality, it cannot be said that they have exceeded their right. The right is given to them absolutely under S. 129 (*b*). (*M. C. Ghose, J.*) Dharnikar Parah *v.* Chairman of Commissioners of Tamlak Municipality. **168 I.C. 460=9 R.C. 825=A.I.R. 1936 Cal. 641.**

——**S. 15**—*Plaint by municipality—Cause-title.*

Where the plaintiffs are stated in the plaint to be "the Commissioners of the *P* Municipality represented by the chairman Mr. B" the designation of the plaintiffs in the plaint is in substantial compliance with the provisions of S. 15 of the Bengal Municipal Act. In any case, if the Court is inclined to be meticulous, an amendment ought to be allowed. (*Biswas, J.*) Municipal Commissioners of Pabna Town *v.* Anukul Chandra Moitra. **180 I.C. 673=11 R.C. 719=43 C.W.N. 194=A.I.R. 1939 Cal. 79.**

——**S. 15**—*Suit filed against Municipal Chairman instead of against Commissioners—Subsequent amendment of plaint—If relates back to date of suit.*

After the commencement of the Bengal Municipal Act of 1932, a suit was filed against the Chairman of the Municipal Commissioners of a Municipality challenging the validity of certain resolutions and proceedings of the Commissioners and praying for a declaration that an assessment purporting to have been made by them was *ultra vires* and illegal and for an injunction. The mistake was discovered subsequently and the plaint was then amended so as to implead the Municipal Commissioners themselves as required by the new Act.

Held, that it was clear from the nature of the allegations in the plaint and of the relief sought that the suit was from its very inception a suit against the Municipal Corporation, that the effect of the amendment of the plaint was, therefore, not to substitute or add a new party or to convert the suit into a new suit, and that in those circumstances the amendment related back to the date of the suit as originally filed. (*Rau and Mukherjea, JJ.*) Municipal Commissioners of Dacca *v.* Gangamani. **187 I C 605=12 R.C. 596=70 C. L.J. 583=44 C.W.N. 277=A.I.R. 1940 Cal. 153.**

——**S. 18 (1), Cls. (1) and (2)**—*Action under one clause alone—If can be taken.*

In sub-S. (1) of S. 18, Cls. (1) and (2) are to be read not conjunctively but disjunctively; in other words when the Local Government takes action under Cl. (1) of sub-S. (1) it is not at the same time bound to take action under Cl. (2). (*Mukerji, Ag C.J. and S. K. Ghose, J.*) Aparna Prosad Chunder *v.* Chairman, Garulia Municipality. **161 I.C. 749 (2)=8 R.C. 546=40 C.W. N. 533=A.I.R. 1936 Cal. 123.**

——**Ss. 39-B and 43**—*Order of District Judge under S. 36—Power of High Court to interfere.*

The provisions of Ss. 39-B and 43 of the Bengal Municipal Act preclude the High Court from making any order by way of interference with the order of the District Judge setting aside an election on a petition filed under S. 36 of the Act on the ground that the nomination paper of the petitioner had been improperly rejected. The High

Court cannot intervene under S. 224 of the Government of India Act. (*Bartley and Nasim Ali, JJ.*) Ban Bihari Mukherji *v.* Makhan Lal Mukherji. **I.L.R. (1938) 2 Cal. 69=178 I. C. 848 (2)=11 R.C. 419=42 C.W.N. 282=A.I. R. 1938 Cal. 768.**

——Ss. 39-B and 43.

In view of the provisions laid down in Ss. 39-B and 43 of the Bengal Municipal Act, the High Court has no power under S. 115, C. P. Code, to revise an order of the District Judge deciding an application contesting an election under S. 36 of the Act. (*S.K. Ghose and Nasim Ali, JJ.*) Radha Nath Saha *v.* Hari Mohan Saha. **179 I.C. 759 =11 R.C. 616=42 C.W.N. 647=A.I.R. 1938 Cal. 465.**

——S. 51—*Remission of rates by chairman not authorised by Act—If binds municipality.*

S. 51 of the Bengal Municipal Act merely authorises the chairman to exercise the powers vested in the Commissioners by the Act and will not obviously confer on him any delegated authority to act on behalf of the Commissioners in respect of matters not authorised by the Act. If, therefore, the chairman allows a reduction or remission of rates without acting in conformity with the provisions of the Act, the Municipality cannot be bound by such act. (*Biswas, J.*) Municipal Commissioners of Pabna Town *v.* Anukul Chandra Moitra. **180 I.C. 673=11 R. C. 719=43 C.W.N. 194=A.I.R. 1939 Cal. 79.**

——S. 71—*Offence under—If continuing offence—Date of offence—Proof—Duty of prosecution.*

Offence under S. 71 is not a continuing offence. As soon as a sweeper withdraws from his service, the offence is complete and he does not go on committing it merely by working under some other municipal body. It is the business of the prosecution to establish on what date the offence under S. 71 (2) is alleged to have been committed. (*Henderson and Latifur Rahman, JJ.*) Bhagia *v.* Chittagong Municipality. **184 I C. 585 (1)=41 Cr.L.J. 47=44 C.W.N. 481=A.I.R. 1939 Cal. 608.**

——S. 95 (a)—*Scope—If has altered the law.*

S. 95 (*a*) of the Bengal Municipal Act of 1932 has not made any substantial change in the law in respect of the rights of the Municipality in such pathways as the Act purports to deal with. The section is merely declaratory. (*Mukerji, Jack, D. N. Mitter, S. K. Ghose and Patterson, JJ.*) Nirod Chandra Mukerjee *v.* Chairman, Kamarhati Municipality. **I.L.R. (1937) 1 Cal. 25=164 I C 500=9 R.C 233=63 C.L J. 426=40 C.W.N. 1070=A.I.R. 1936 Cal. 506 (F.B.).**

——Ss. 123, 133 and 2, Proviso—*Assessment of conservancy rate—Valuation list not prepared—Validity of assessment.*

An assessment of property to a conservancy rate under S. 123 of the Bengal Municipal Act, 1932, without preparing a valuation list as provided in S. 133 of that Act, is *ultra vires.* A valuation list prepared under the old Act of 1884 is not saved by the proviso to S. 2 of the new Act so as to make the preparation of a fresh list unnecessary. (*Rau and Mukherjea, JJ.*) Municipal Commissioners of Dacca *v.* Gangamani. **187 I.C. 605=12 R C. 596=70 C.L.J. 583=44 C.W.N. 277=A I.R. 1940 Cal. 153.**

——S. 182 and Sch. IV, Class 1—*"Transacting business for profit"—Meaning.*

Per *Jack, J.*—It is perfectly obvious, when class 1 of Sch. IV is read along with S. 182, that the Legislature intended to impose a tax on all trades carried on by companies. Class 1 of Sch. IV specifies in one class all trades carried on by companies just as class 2 of the Schedule specifies in one class all wholesale trades.

Per *Patterson, J.*—Under S. 182, a company, like a private individual can only be required to take out a licence if it exercises in the Municipality one or more of the trades, professions or callings specified in Sch. IV. The expression "transacting business for profit" in class 1 of that schedule might be applied to almost any kind of trade, profession or calling and it is quite impossible to hold that it amounts to a *specification* of a trade, profession or calling. That being so, a company cannot be taxed as coming under class 1 alone, without any reference to the other three classes. (*Jack and Patterson, JJ.*) The Municipal Commissioners of Baranagore *v.* The Baranagore Jute Factory Co., Ltd. **I.L R. (1937) 2 Cal. 211=173 I.C. 900=10 R.C. 586=41 C.W.N. 662=65 C.L.J. 156=A.I.R. 1937 Cal. 324.**

——S. 182 and Sch. IV, Class 1.

A certain company bought raw jute in Calcutta and elsewhere, made it into hessians, etc., at its mill at Baranagore and sold the finished products in Calcutta. The work of manufacture carried on at Baranagore was controlled from Calcutta and the profit-earning contracts of the company were also entered into in Calcutta.

Held, that in carrying on the business of the manufacture of jute within the Baranagore Municipality, the company did not come under class 1 of Sch. IV of the Bengal Municipal Act, for it could not be said to "transact business for profit" within that Municipality and that, therefore, the company was not liable to be taxed under S. 182 read with class 1 of Sch. IV of the Act. (*Jack and Patterson, JJ.*) The Municipal Commissioners of Baranagore *v.* The Baranagore Jute Factory Co., Ltd. **I.L.R (1937) 2 Cal. 211=173 I.C. 900=10 R.C. 586=41 C.W.N. 662=65 C.L. J. 156=A.I.R. 1937 Cal. 324.**

——Ss 182, 123 (1) (f) and Sch. IV, Class 1—

The expression "transacting business for profit" used in class 1 of Sch. IV of the Bengal Municipal Act in the case of companies, is sufficient to constitute specification of a trade as required by S. 182 or S. 123 (1) (*f*) of that Act, although no particular trade is indicated thereby. A company answering to that designation is, therefore, liable to take out a licence and pay the tax under S. 182. (*Henderson and Biswas, JJ.*) Landal and Clark, Ltd. *v.* Chairman, Jalpaigiri Municipality. **I L.R. (1938) 1 Cal. 35=174 I.C. 673=10 R.C. 704=41 C.W.N. 1022=A.I.R. 1937 Cal. 551.**

——Ss. 278 and 281—*Municipality not providing adequate drainage — Suit, if lies — Proper remedy.*

No suit lies against the Municipality for non-feasance in respect of their duty under S. 278 of the Bengal Municipal Act to provide adequate drainage. The only remedy in such a case is under S. 281 of that Act, which gives a right of intervention to the Local Government. (*M.C.*

Ghose and Bartley, JJ.) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY **181 I C. 762=11 R.C. 852=68 C L.J. 267=42 C.W.N. 768=A.I.R. 1939 Cal. 178.**

——S. 295—*Maintenance of meter in good condition—Duty of Municipality.*

Under S. 295 of the Bengal Municipal Act, the duty of maintaining the meter in good order rests upon the Municipality and not on the owner or occupier of the house. It is true that under rules framed by Government which were adopted as bye-laws by the Municipality, the entire costs of house connection including the expenses of a meter had to be borne by the owner or occupier of the house, but there is no rule or bye-law that the costs of maintaining the meter in good order have to be met by the house-owner and not by the Municipality. *(B·K. Mukherjea, J.)* SARAT CHANDRA GUHA *v.* KALIPADA RAY. **180 I.C 391=11 R.C. 682=68 C L.J. 463=A.I.R. 1939 Cal. 254.**

——S. 302 (2)—*Excess water consumed by sole occupier—Liability of owner.*

Sub-S. (2) of S. 302 of the Bengal Municipal Act means that when there is only one occupier of a house under an owner and there is excess water consumed by the occupier, he, the occupier, shall be liable for the excess water. In such a case, the occupier alone is liable and not the owner. *(M C. Ghose, J.)* NARENDRA NATH SEN *v.* COMMISSIONER OF THE DUM-DUM MUNICIPALITY. **41 C.W.N. 222.**

——S. 309 (d)—*Non-repair of meter—Power of Commissioner to cut off water.*

S. 309, Cl. (*d*) of the Bengal Municipal Act does not empower the Commissioner to cut off water supply on the ground of any defect in or non-repair of the meter. *(B.K. Mukerjea, J.)* SARAT CHANDRA GUHA *v.* KALIPADA RAY. **180 I C. 391=11 R.C. 682=68 C.L.J. 463=A.I.R. 1939 Cal. 254.**

——S. 317—*Scope.*

S. 317 applies to persons who intend to erect a building. It has nothing to do with persons who start to erect surreptitious buildings, are caught red-handed and then stopped. *(Henderson and Mohamed Akram, JJ.)* AMULYA CHARAN PAUL *v.* KANCHRAPARA MUNICIPALITY. **71 C.L.J. 588=A.I.R 1940 Cal. 336.**

——(as amended), Ss. 326 and 501—*Material alteration—Person removing partition wall within building.*

S. 326 (2), Bengal Municipal Act, only refers to increase in the cubical capacity of a building or any part thereof. Where a person removes a partition wall in the building and thereby increases the area of the rooms, it does not necessarily result in the increase of the cubical capacity of the building as distinguished from the rooms within the building and unless it is shown that the cubical capacity of the building is affected, it cannot be said that there has been a material alteration within the meaning of S. 326 of the Act. Hence permission of the Commissioners under S. 501 is not required. *(Jack, J.)* RAM RATAN LALL *v.* CHAIRMAN OF THE ASANSOL MUNICIPALITY. **173 I.C. 63=10 R.C. 484=39 Cr.L.J. 258=41 C.W.N. 1316=A.I.R. 1937 Cal. 556.**

——S. 370 (1) (ix)—*Offence of burning bricks without licence—Resolution of Commissioners—Interpretation.*

The resolution of the Municipal Commissioners passed at a meeting was in two paragraphs. In the first paragraph the relevant words were these:—"It was unanimously resolved that the following rates, taxes and fees be in force within the limits of the Municipality under S. 123 of the Bengal Municipal Act, 1932 and at the rate and scale specified against each". Then began the second paragraph:—"It was unanimously resolved that under S. 370 of the Bengal Municipal Act licences be leviable for the following purposes at the scale mentioned against each." The accused persons were convicted by the lower Court under S. 370 (1) (ix) of the Bengal Municipal Act for having without licence burnt bricks on different premises. It was contended for them that as the words "within the limits of the Municipality" were used only in the first paragraph of the resolution and not in the second, no limits were fixed by the Municipality for the operation of S. 370 and if that be so the levying of fees was *ultra vires*.

Held, that on a plain reading of the resolution, it was clear that it was the intention of the Municipal Commissioners that S. 370 should apply to the whole of the Municipality and that as the accused persons proceeded to make bricks and burn them and made profit thereby without taking licences which they were directed by the municipal officers to take, they had no defence on the merits. *(M. C. Ghose, J.)* EMPEROR *v.* KRISHNA CHANDRA BANERJI. **64 C.L.J. 524.**

——S. 535—*Applicability—Defective hackney stand—Nuisance resulting from—Suit for permanent injunction and damages.*

S. 535 of the Bengal Municipal Act has no application to a suit for a permanent injunction and damages in respect of a continuing nuisance resulting from the erection of a defective hackney carriage stand with no suitable contrivance for drainage. *(R. C. Mitter, J.)* NIRMAL CHANDRA SANYAL *v.* MUNICIPAL COMMISSIONER OF PABNA TOWN. **I.L.R. (1937) 1 Cal 407=167 I.C. 254=9 R.C. 665=40 C.W.N. 1353=A.I.R. 1936 Cal. 707.**

——S. 535—*Notice not mentioning all reliefs claimed in suit—If invalid.*

The fact that a notice under S. 535 of the Bengal Municipal Act does not mention all the reliefs claimed in the suit, does not make it invalid. *(S. K. Ghose, J.)* MUNICIPAL COMMISSIONERS OF NABADWIP MUNICIPALITY *v.* SATISH CHANDRA MODAK. **70 C.L.J. 41.**

——S. 535—*Scope and applicability.*

S. 535 of the Bengal Municipal Act cannot be taken to apply only in those cases where the plaintiff claims damages or compensation for some wrongful act committed by the Commissioners. It is clear from the wording of the section that it applies to all suits for any act purported to be done under the Act. A suit for a mere declaration would, no doubt, be exempted, but not a suit for a declaration combined with a suit for confirmation of possession and injunction. *(Jack, J.)* BIDHU BHUSAN MAJUMDAR *v.* COMMISSIONERS OF THE BARANAGORE MUNICIPALITY. **42 C.W.N. 467.**

——S. 535—*Suit for illegal omission of Municipality—Notice, if necessary.*

The words "for any act purporting to be done under this Act" in S. 535 of the Bengal Municipal

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Act include an illegal omission. Consequently a suit for a non-feasance or illegal omission of the Municipality would be bad, if the notice required by the section is not given. (*M. C. Ghose and Bartley, JJ.*) JOGENDRA NATH BANERJEE *v.* TOLLYGUNJ MUNICIPALITY. **181 I.C. 762=11 R.C. 852 =68 C L.J. 267=42 C.W.N. 768=A.I.R. 1939 Cal. 178**

——**Sch. IV, Class I**—'Construction—Transacting business for profit'. *See* BENGAL MUNICIPAL ACT, S. 182 AND SCH. IV, CLASS I. **41 C.W.N. 636=A.I.R. 1937 Cal. 324.**

——**Sch. IV, Class I**—*Profit, it must accrue within municipality.*

It is not necessary under class 1 of Sch. IV of the Bengal Municipal Act that the profit must be received or realised by the company within the Municipality, or that all the operations connected with the business constituting the trade of the company should be carried on within the Municipality. It would be enough of the transactions within the Municipality are carried on as part of the business. (*Henderson and Biswas, JJ*) LANDALE AND CLARK, LTD. *v.* CHAIRMAN, JALPAIGIRI MUNICIPALITY. **I.L.R. (1938) 1 Cal. 35=174 I.C. 673=10 R.C. 704=41 C.W.N. 1022=A.I.R. 1937 Cal. 551.**

BENGAL N. W. PROVINCE AND ASSAM CIVIL COURTS ACT (XII OF 1877). *See* BENGAL AGRA AND ASSAM CIVIL COURTS ACT.

BENGAL OPIUM SMOKING ACT (X OF 1932), S. 8—*Presumption under—When arises.*

The fact that the accused and two other persons were sitting in a room together and that one of them was smoking a preparation of opium, establishes the presumption referred to in S 8 of the Bengal Opium Smoking Act, and if this presumption has not been rebutted in any way, the conviction of the accused under S. 7 of the Act cannot be questioned. (*Bartley and Henderson, JJ.*) PULIN BEHARI DUTTA *v.* EMPEROR. **42 C.W N. 384.**

BENGAL PATNI REGULATION (VIII OF 1819)—*Liability to sale under—Presumption—Putnis created subsequent to the passing of the Regulation—Principles governing applicability of the Regulation to such Putnis—Pottah describing tenure as Putni—Construction.*

After the Patni Regulation was passed, the expression 'Putni Taluk', acquired a distinct technical meaning. In a case therefore where a Putni Taluk specifically described as such, is created after the year 1819 the general principle is that the parties must be intended to have created a Taluk of the denomination given in the Regulation itself with all the incidents attached to it under the Regulation. On a contention that there were certain clauses in the Pottah in question which limited the incidents of this Putni Taluk.

Held, that the words in the document indicated that the parties did not intend to give up their rights under the Patni Regulation. (*Nasim Ali and Mukherjea, JJ.*) GADAHAR ROY CHOUDHURY *v* DHIRENDRA NATH GHOSE. **175 I.C. 128=10 R.C. 747=66 C L.J. 97=A.I.R. 1938 Cal. 180.**

——**S. 8**—*Cess,* lakheraj *cess and costs—Right of zemindar to include in advertised balance—Bengal Cess Act, S. 47.*

In view of the provisions of S. 47 of the Cess Act, the zemindar is entitled to include the arrears of cess in the demand which is made under S. 8 of the Patni Regulation. The arrears of *lakheraj* cess can also be included by the zemindar within whose estate the rent-free lands are situated. Costs which are incidental to the demand for rent can also be included in the advertised balance. (*S.K. Ghose and Patterson, JJ.*) PROVAT KUMAR SINHA *v.* BIJOY CHAND MAHATAB. **41 C.W.N. 946.**

——**S. 8**—*Patni taluk held under more than one zemindar—Application for its sale—If must be made by all.*

Where there are more than one zemindar under whom a *patni taluk* is held, the application to the Collector for its sale under S. 8 of the Patni Regulation must be a joint application made by all of them. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 8**—*Publication of notice — Mode of—Onus of proof.*

Notice under S. 8 of the Patni Regulation must be published at the *katchery* on the land of the defaulter, and only if there is no such *katchery*, then at the principal town or village appertaining to the *taluk* sought to be sold. The onus is entirely upon the zemindar to prove that the notice has been served in terms of the Regulation. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 8**—*Service of notice — Signatures of three substantial persons obtained—Name of one of them signed by one of the others—Formalities, if complied with.*

Where the sale notice is served by obtaining the signatures of three substantial persons, there is sufficient compliance with the requirements of the section although the name of one of them, who was an illiterate person, was with his consent signed by one of the others. (*S.K. Ghose and Patterson, JJ.*) PROVAT KUMAR SINGH *v.* BIJOY CHAND MAHATAB. **41 C.W.N 946.**

——**Ss. 8 and 9**—*Intermediate tenure created by zemindar over existing putni—Validity—Interest of such tenure holder—Whether can be sold under the Regulation.*

It is quite legal and proper on the part of a zemindar to create an intermediate tenure over an existing putni. The interest of such an intermediate tenure-holder can be sold under the provisions of the summary sale as laid down in the Putni Regulation, provided there is a distinct agreement to that effect between the zemindar and the intermediate tenure holder. Such an agreement would be perfectly valid, though it could not operate in any way to the injury of the existing putnidar. The provision for summary sale in the Putni Regulation is not confined to putni tenures in the strict sense of the word, but extends to every kind of saleable tenure, provided there is clear stipulation for such sale in the lease. (*M.C. Ghose and Mukherjea, JJ.*) DURGAKANTA MAJUMDAR *v.* SURENDRA PRASAD LAHIRI CHOWDHURY. **I.L.R. (1937) 1 Cal. 788=41 C.W.N. 364.**

——S. 10—*Receipt of notice—If to be read.*

The expression "until the receipt of the notice shall have been read" occurring in the second clause of S. 10 cannot be interpreted to mean that the notice may be read privately and that it has no more force than that some document is taken "as read" at a proceeding. The object of this provision is clearly to ensure correctness and publicity. (*S.K. Ghose and Patterson, JJ.*) Jaladhi Chandra Mukherji *v.* Parpati Charan Mukherji **172 I.C. 827=10 R C. 433=41 C.W.N. 1262=65 C.L.J. 534=A I.R. 1937 Cal. 673.**

——S. 11—*"Incumbrance"— Commutation of rent in kind into cash rent by patnidar—If amounts to.*

An arrangement made by a patnidar with a tenant for payment of cash rent for the holding, instead of rent in kind, cannot be said to amount to an incumbrance. It is merely a *bona fide* engagement made with the tenant and is, therefore, covered by Cl. (3) of S. 11 of the Bengal Patni Taluk Regulation. (*Edgley, J.*) Bijoy Chand Mahatab *v.* Bepin Behari Mandal. **44 C.W.N. 230.**

——S. 11 (1)—*Grant of mokarari right to cultivator—If an incumbrance.*

When no under-tenure is created between the putnidar and the actual cultivator, but the latter himself is given a right of fixity of rent, the grant of *mokarari* right by the putnidar is an incumbrance within the meaning of S. 11, Cl. (1) of the Putni Regulation, and the right cannot subsist after the *putni* sale, unless it comes within the exception, provided for in Cl. (3) of S. 11. (*Mukherjea, J.*) Annada Prasanna *v.* Ram Saran Kower. **172 I.C. 602=11 R C. 133=41 C.W N. 1234=A.I R. 1937 Cal. 686.**

——S. 11 (3)—*Engagement relating to fixity of rent between* putnidar *and* raiyat—*If binds purchaser at* putni *sale.*

An engagement relating to fixity of rent between the defaulting *putnidar* and a *raiyat*, is not binding on the purchaser at a *putni* sale under the provision of Cl. (*iii*), S. 11 of the Putni Regulation. After the *putni* sale, the *mokarari* character of the tenancy would be lost and the future right of the parties would be governed by the law for the time being in force. The purchaser would, therefore, be able to claim enhancement of rent for any reason for which a landlord is entitled in law to claim enhancement. (*Mukherjea, J.*) Annada Prasanna *v.* Ram Saran Kower. **172 I.C. 602=11 R.C. 133=41 C.W.N. 1234=A.I.R. 1937 Cal. 686.**

——S. 11 (3)—*Settled* raiyat—*If a* khudkasht raiyat.

It cannot be said that a settled *raiyat* must necessarily be a *khudkasht raiyat* within the meaning of S. 11, Cl. (3) of the Patni Regulation. The essential thing in a *khudkasht raiyat* is that he is a resident cultivator, who holds land in the village in which he has his fixed residence. Even a non-resident cultivator can acquire the status of a settled *raiyat* by holding and cultivating lands in a village for a period of twelve years. (*Mukherjea, J.*) Annada Prasanna *v.* Ram Saran Kower. **172 I C. 602=11 R.C. 133=41 C.W.N. 1234=A.I.R. 1937 Cal. 686.**

——S. 13—Putnidar's *liability for* putni *rent—Transfer of interest by* putnidar—*Transfer not registered in landlord's* serista—*Effect*—Putnidar, *if bound by law to pay* putni *rent.*

A *putnidar* is liable to pay the zemindar's *putni* rent and cannot seek to avoid liability for the same on the ground that he has transferred his interest to another, when such transfer has not been registered in the zemindar's *serista*, under S. 13 of the Putni Regulation, the zemindar is not bound to recognize the *putnidar's* transferee until certain conditions are fulfilled, until the name of the purchaser of a *putni* tenure is registered in the zemindar's *serista*, the transfer does not affect the zemindar's right to hold the recorded *putnidar* liable for rent and may ignore the transferee. In spite of the transfer the *putnidar* continues liable for rent, and is the person "bound by law" to pay the rent within the meaning of S. 69 of the Contract Act. (*D.N. Mitter and Patterson, JJ.*) Adhar Chandra Mandal *v.* Dolgobinda Das. **63 Cal 1172=167 I C 604 (2)=9 R.C. 707 =63 C.L.J. 287=40 C.W.N. 1037=A.I.R. 1936 Cal. 663**

——S 14—*Defaulting* putnidar—*Right to sue to set aside sale.*

A defaulting *putnidar* is entitled to sue to set aside a *putni* sale on the ground that it was vitiated by error in the procedure and the sale has caused serious prejudice to him. (*S.K. Ghose and Patterson, JJ.*) Jaladhi Chandra Mukherji *v.* Parbati Charan Mukherji. **172 I.C. 827=10 R.C. 433=41 C.W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal 673.**

——S. 14—Patnidar *paying direct to zemindar on date of sale—Right to stop sale.*

There is nothing in the provisions of the Patni Regulation which disentitles the *putnidar* from paying the demand up to date direct to the zemindar even on the date of the sale. But unless the payment is made within the period of the notice, it cannot be said that the *putnidar* has a statutory right to stop the sale by such payment to the zemindar. (*S. K. Ghose and Patterson, JJ.*) Jaladhi Chandra Mukherji *v.* Parbati Charan Mukherji **172 I C. 827=10 R.C. 433=41 C.W. N. 1262=65 C L.J. 534=A.I.R. 1937 Cal. 673.**

——S. 14—Putni *sale—Liability to be set aside —Mistaken impression on part of auction-purchaser.*

A mere mistaken impression on the part of the auction-purchaser will not be sufficient to justify the setting aside of a *putni* sale. It will have to be shown further that there was an error in the statutory procedure which led to such a wrong impression, if any. (*S. K. Ghose and Patterson, JJ.*) Jaladhi Chandra Mukherji *v.* Parbati Charan Mukherji. **172 I C. 827=10 R.C. 433 =44 C W.N. 1262=65 C.L.J. 534=A.I.R. 1937 Cal 673.**

——S. 14—*Scope—Deposit of amount—Sale, if must be stayed.*

S. 14 does not refer to payments made in satisfaction of the demand but provides for deposits being made to stay the sale. The lodging of the amount claimed is a condition precedent under both clauses of S. 14. But even if this condition is complied with, it does not follow that the sale must be stayed. The zemindar is made exclusively responsible for saying whether the demand is satisfied or not, and where the summary investigation is not finished in time, the lot will be put up to sale nevertheless at the risk of the zemindar. (*S. K. Ghose and Patterson, JJ.*) JALADHI CHANDRA MUKHERJI *v.* PARBATI CHARAN MUKHERJI. **172 I.C. 827=10 R.C. 433=41 C.W.N 1262=65 C.L.J. 534=A.I.R. 1937 Cal. 673.**

——**S. 14**—*Scope—If exhaustive—Suit to declare that patni sale is collusive and fraudulent and not binding—Maintainability— Proper frame of suit—Amendment of plaint—Permissibility at late stage.*

The only remedy open to a person who wishes to challenge a *patni* sale is that provided by S. 14 of the Bengal Patni Regulation, and he is not entitled to any relief unless he proceeds in accordance with the provisions of that section. That is to say he must sue to set aside the sale. A suit for a declaration that a patni sale is void and not binding by reason of collusion and fraud on the part of the defendant is not maintainable. Where the suit as framed is objected to as not maintainable in the written statement of the defendant, but application to amend the plaint is made at a late stage, at the very close of the suit and after the expiry of the period of limitation for the suit, the Court acts properly in rejecting the amendment sought to be made. Such an amendment, if allowed, would interfere with the rights of the purchaser at the sale. The fact that the purchaser is a party to the suit does not affect the matter. The discretion exercised by the lower Courts in rejecting the application for amendment will not be interfered with in second appeal. (*Jack and Edgley. JJ*) MAHOMED BADSHA MIA *v.* KUMAR ARUN CHANDRA SINGH BAHADUR. **40 C. W.N. 1233.**

——**S. 14-A**—*Application—Shortage in deposit —If can be waived—Zemindar not objecting to deposit—Power of Court to set aside sale.*

As a general rule it is no doubt true that a person can waive a benefit intended solely for him, and it would make no difference whether such benefit is conferred on him by contract or by statute. It is equally well settled that if such a provision made in a statute, though for his benefit, is also intended for the benefit of or protection of the interest of others or is based on public policy, there can be no scope for the application of the principle of waiver. By a sale of a patni under the regulation the auction-purchaser acquires very valuable rights. Hence there is no scope for the application of the principle of waiver in applying S 14-A of the Patni Regulation and the mere statement by the zemindar that he has no objection to set aside the sale will not cure the illegality of shortage of deposit. (*R. C. Mitter, J.*) NANDA KUMAR PANDE *v.* SOURENDRA NATH GHOSE. **166 I.C. 452=9 R.C. 532=40 C. W.N. 792=A.I.R. 1936 Cal. 129.**

——**S. 14, First**—*Ground for reversal of sale— Non-deposit of 15 per cent. of purchase-money on date of sale.*

The fact that 15 per cent of the purchase-money was not deposited on the date of sale in terms of S. 9 of the Patni Regulation is not such an irregularity which would entitle a party to have a *patni* sale reversed, when the whole amount of the purchase-money was deposited within 8 days of the sale and was accepted by the Collector. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442**

=71 C.L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.

——**S. 14, First**—*Ground for reversal of sale— Notice under S. 8 making excess claim.*

If the notice issued under S. 8 of the Patni Regulation includes a claim to interest on the arrears of rent which the zemindar is not entitled to, and the excess claim made is for a substantial amount, there is sufficient ground for the reversal of the sale. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal 442=71 C.L.J. 110=44 C.W.N. 415=A I R. 1940 Cal 306.**

——**S. 14, First**—*Ground for reversal of sale— "On any other ground"—Interpretation.*

The second paragraph of the first part of S. 14 of the Patni Regulation does not indicate exhaustively the grounds for which a patni sale can be reversed. One specific ground is indicated, namely, there being no balance, but the words following, namely, "on any other ground" cannot be construed on the principle of *ejusdem generis*, that is to say other grounds need not be of a nature similar to the ground of total absence of arrears. Any ground which may affect the right of the zemindar to make that questioned sale would be sufficient. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L R. (1940) 1 Cal 442=71 C.L.J. 110=44 C. W N. 415=A.I R. 1940 Cal. 306**

——**S. 14, First**—*Reversal of patni sale— Remedy of patnidar.*

The second paragraph of the first part of S. 14 of the Patni Regulation confers on the defaulting patnidar the right to sue the zemindar in the Civil Court for reversal of the sale. That is the only form of remedy given to him for a patni sale cannot be attacked collaterally and holds good till it is reversed in a suit brought under that sub-section. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L. R (1940) 1 Cal. 442=71 C L.J. 110=44 C.W.N. 415=A.I R. 1940 Cal 306.**

——**S. 14, Second**—*Summary investigation by Collector—Patnidar, if bound to ask for.*

Under the second part of S. 14 of the Patni Regulation, the patnidar can, no doubt, ask for a summary investigation by the Collector not only when his case is that no balance was due but also when he contends that the balance claimed was more than what the zemindar was entitled to. But he is not bound to ask for it but may reserve it for a suit for reversal of the sale under the section. (*Mitter and Roxburgh, JJ,*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R (1940) 1 Cal. 442=71 C L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

——**S. 15 (2)**—*Application by purchaser for issue of proclamation—Application resisted by* darputnidars—*Power of Court to decide questions raised between parties.*

If an application under S. 15 (2) of the Patni Regulation is made by a purchaser of a *putni* taluk for the issue of a proclamation, there is a duty cast upon the Judge before whom the application is made to consider and determine, at any rate in a summary fashion whether the circumstances are such that the purchaser can justly have a proclamation issued in his favour. If the *darputnidars* appear in the proceedings and resist the term. The zemindar is not entitled to assess rents upon the jagirdars not to realize direct the malikanah payable to him nor to resume the lands upon the death of the invalid or his heirs. In truth the grant of this kind of jagir is a grant by the Government by virtue of its paramount power of a piece of land to its invalided soldiers which would remain in perpetuity in the possession of the heirs of the jagirdar provided the heirs complied with the terms in the regulations. Therefore the jagirdar is not a tenant of the zemindar in any sense of the term. S. 33 (1) merely defines the status of the heir of the grantee in the village hierarchy and does not in the least derogate from the rights which the Government was providing anxiously by means of the various regulations prior to and after Regulation XLIII of 1793 to enable the heirs of the grantee to remain upon the land in perpetuity. Therefore the rights of the heirs of the grantee to continue to hold the land in perpetuity agreeably to the holders and their heirs observing the terms of the various regulations are not at all affected by a revenue sale and are protected from annulment under S. 37, Excep. 1, Bengal Revenue Sale Law. The legislation of 1859 (Revenue Sale Law) was clearly not intended to get rid of the permanent mukarrari character given to these grants by the old regulations, nor did it have the effect of repealing the special protective provisions previously enacted. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) BISHUN PRASAD *v.* KAMTA PRASAD. **19 Pat. 553=1940 P.W.N. 528 =21 P.L.T. 552=6 B.R. 602=188 I C. 154=12 R.P 666=A.I.R. 1940 Pat. 275 (F.B.).**

BENGAL RENT ACT (X OF 1859)—*Applicability—Jote nan-agricultural.*

When a jote in suit is non-agricultural in character, provisions of the Bengal Rent Act have no application. (*S.K. Ghose and Patterson, JJ.*) PRASANNADEB RAIKAT *v.* TABIUR RAHAMAN. **I.L.R. (1939) 1 Cal. 101=179 I.C 479=11 R.C. 546=68 C.L.J. 381=A.I.R. 1938 Cal. 866.**

———**S. 13**—*Enhancement—Grounds — Contents of notice.*

An under-tenure-holder is liable to pay at enhanced rate, on grounds which must be intimated to him by the landlord by a notice and which grounds must be fair and equitable on consideration of prevailing customary rates of similar tenures in the neighbourhood. Scheduled Districts Act (XIV of 1874) does not in any way affect this privilege of tenure-holders of paying customary rates. (*S. K. Ghose and Patterson, JJ.*) PRASANNADEB RAIKAT *v.* TABIUR RAHAMAN. **I.L. R. (1939) 1 Cal. 101=179 I.C. 479=11 R.C. 546 =68 C.L J. 381=A.I.R. 1938 Cal 866.**

———**S. 18**—*Scope—Occupancy tenant—Right to abatement of rent—Effect of Bengal Tenancy Act, Ss. 38 and 52.*

S. 18 of the Bengal Rent Act of 1859 which provides for the abatement of rent in the case of an occupancy ryot in case of diluvion, or deterioration or otherwise, has since been split up and re-enacted in two separate sections, namely, S. 38 and S. 52 of the Bengal Tenancy Act of 1885. S. 38 provides for cases where the soil of the holding has, without the fault of the *raiyat*, become permanently deteriorated by deposit of sand or other specific causes, sudden or gradual. S. 52 deals with cases where the whole or part of the tenant's

land is lost to him by reason of diluvion or other similar causes. But while S. 52 is general and applies to all classes of tenants, S. 38 applies only to an occupancy tenant. S. 52 is more general than S. 38 and applies even to a tenant holding under a *mukarrari lease.* (*Courtney-Terrell, C. J., Macpherson and Fazl Ali, JJ.*) DUKHA LAL CHAUDHURY *v.* MST. MANABATI **15 Pat 594=163 I.C. 1003=9 R.P. 69=17 Pat.L.T. 339=1936 P.W. N. 373=A.I.R. 1936 Pat. 341 (S.B.).**

BENGAL REVENUE FREE LANDS (NON-BADSHAHI GRANTS) REGULATION (XIX OF 1793), Ss. 4, 5 and 6—*Scope—Resumption proceedings—Effect on holders of invalid lakhiraj grants—Right to hold lands—Land Revenue Assessment (Resumed Lands) Regulation, S. 3.*

The provisions of Ss. 4 to 6 of the Bengal Revenue Free Lands Regulation of 1793 and S. 3 of the Land Revenue Assessment Regulation of 1819 make it clear that there was no intention in the resumption proceedings to dispossess the holders of invalid lakhiraj, but rather to assess them to revenue where the land exceeded 100 bighas, or to rent under the proprietors of the estates within whose boundaries they were included where the area was less than 100 bighas. The successors of the original holders of the invalid lakhiraj resumed are entitled to continue to hold the lands as tenants of the proprietors of the estate to which they belong. (*Pearson and Jack, JJ.*) JUGAL CHARAN MONDAL *v.* RAI DWENDRA NATH BALLAV BAHADUR. **63 C.L.J. 593.**

———**S. 10**—*Suit purporting to be under—Suit for resumption of lands on ground that they formed part of mal lands of plaintiff and that defendants were possessing them without any right—Plea by defendants that they were holding them as* lakheraj *grant from before 1790 — Decree in favour of plaintiff—Effect of—Whether interrupts adverse possession of defendants.*

In 1862, a suit was instituted by the predecessor of the plaintiff for resumption of certain lands on the ground that they formed part of the *mal* lands of their *Touzi* and that the predecessors-in-interest of the defendants came into possession of these lands after 1790 and were possessing them without any right. The suit purported to be one under S 30 of Regulation II of 1819 for resumption of lands under S. 10 of Regulation XIX of 1793 which gives right to the zemindar to dispossess the grantee of the *lakheraj* grant made since 1790, and there was no prayer for ejectment. The predecessors of defendants in that suit contended that they were holding these lands as *lakheraj* from before 1st December, 1790. This suit was decreed in favour of the plaintiff. It was held in that case that there had been no *lakheraj* grant in respect of these lands either before or after 1790 and that the defendant's predecessors were in wrongful possession of the lands. Thereafter the proprietors of the *Touzi* did not take any steps to eject the defendant's predecessors from the lands or to assess rent on them. In 1932, the plaintiff instituted a suit for assessment of rent in respect of these lands.

Held, that as the case of both the parties in the suit of 1862 was that there had been no *lakheraj* grant in favour of the defendants since 1st December, 1790, the effect of the decree in that suit could not be the same as that of a decree passed in a suit for resumption of *lakheraj* grants since 1st December, 1790, under S. 10 of Regulation XIX of 1793 or S. 28 of Act X of 1859, that this decree did not and could not convert the adverse possession of the defendants into permissive possession and no relationship of landlord and tenant between the parties was, therefore, created by this decree, and that the rights of the plaintiff and his predecessor to recover possession of the property and their right to the property were, therefore, extinguished.

Held also, that as the plaintiff had lost his right to recover possession of the lands from the predecessors of the defendants who were denying the plaintiff's proprietary right to the lands all along and were asserting their *lakheraj* right to the lands on the basis of grants before 1790, no action could be brought now to assess or recover rent in respect of these lands. (*Nasim Ali and R. C. Mitter, JJ.*) BEJOY GOPAL DEY *v.* GOPIDAS ROY. **I.L.R. (1937) 2 Cal. 234=41 C.W.N. 688.**

BENGAL REVENUE FREE LANDS REGULATION (VIII OF 1800), S. 10—*No entry in Pergunah register relating to* lakhiraj—*Non-registration of grant—Presumption.*

From the mere fact that there is no entry in the *lakhiraj* part of the Pergunah register relating to a particular *lakhiraj*, it cannot be taken or presumed that the *lakhirajdar* had omitted to take steps to register his grant so as to entitle the Government to assess to revenue land included in the grant. (*Mitter and Akram, JJ.*) PROVINCE OF BENGAL *v.* MRITUNJOY. **I.L.R. (1940) 1 Cal. 216=44 C.W.N. 101.**

BENGAL REVENUE RECOVERY ACT (I OF 1890), S 4 (2)—*Applicability—Certificate in respect of amount due to public body or local authority—Proceedings in execution—Payment under protest—Suit to recover sum paid under protest—Forum—Jurisdiction.*

Reading Ss. 3 and 5 of the Bengal Revenue Recovery Act, it is clear that whether the amount stated in a certificate is recoverable as payable to the Collector or as payable to any public body or any local authority other than the Collector, the proceedings taken against the defaulter must be proceedings referred to in S. 3 of the Act. That would bring the case directly within S. 4 of the Act, and S. 4 (2) becomes applicable and a suit for recovery of the amount paid under protest, on the ground that the plaintiff was not liable to the amount claimed from him or any part thereof must be filed in the Civil Court of the Province where the office of the Collector who made the collection is situate and not at the place where a sale in pursuance of the certificate is held. (*Fazl Ali and James, JJ.*) BHARATH BHUSHAN PRASAD SINGH *v.* SECRETARY OF STATE. **182 I.C 223=5 B.R 734=12 R.P. 7=A.I.R. 1939 Pat. 517.**

BENGAL SAIR REGULATION (XXVII OF 1793), Art. 2—*Scope—Consolidated amount payable by occupant of* gola *to landlord on grains, etc., stored by him on* gola—*If tax or duty prohibited by Regulation.*

A consolidated amount of dues payable by the occupant of a *gola* to the landlord on the sales of various articles there stored by him, *e.g.*, grains, tobacco, mustard oil and so on, must be held to be a tax or duty within the meaning of Art. (2) of the Bengal Regulation of 1793; and the levy of same is prohibited. (*Wort, J.*) BIKAN MAHURI *v.* MT BIBI WALIAN. **183 I.C. 763=5 B.R. 983=12 R.P. 189=20 Pat.L.T. 671=A.I.R. 1939 Pat. 633.**

[Note Reg. XXVII of 1793 repealed by Act XXIX of 1871.]

BENGAL SANITARY DRAINAGE ACT (VIII OF 1895), S. 23—*Claim for cess—Limitation.*

Where the amount due by the tenure-holders by way of drainage cess is not ascertained definitely by the Government at the time when the original assessment is made in 1920, as required by the provisions of the Cess Act, and the proprietor brings a suit against the tenure-holders in 1932, after the record-of-rights in 1930 is published which fixes the amount due from the tenure-holders, claiming the cess due from 1920, the suit can be decreed for the period of four years only up to date of the institution of the suit, for though the provisions of the Cess Act require this amount to be settled by the Government, this fact cannot affect the limitation as regards the amount due from the tenure-holder. (*Jack and S. K. Ghose, JJ.*) ADMINISTRATOR-GENERAL OF BENGAL *v.* JNANADAYINI DEVI. **173 I.C. 334=10 R.C. 502=A.I.R. 1937 Cal. 483.**

———S. 23.

The landlord is entitled to a decree for cess only for a period of 4 years up to the date of the institution of the suit (*S.K. Ghose and Mukherjea, JJ*) JOGENDRA KRISHNA BANERJEA *v.* ADMINISTRATOR-GENERAL OF BENGAL. **186 I.C. 522=12 R.C. 475=70 C.L.J. 194=A.I.R. 1940 Cal. 87.**

BENGAL SUPPRESSION OF IMMORAL TRAFFIC ACT (VI OF 1933), S 6 (5)—*Applicability—Service of notice to quit by landlord on tenant—Order on landlord and sub tenant under S. 6 (2)—Landlord unable to take steps for eviction on account of Courts being closed—Conviction—Sustainability.*

After the landlord had served a notice to quit on his tenant, an order was served on him as well as on the sub-tenant of his tenant under S 6 (2) of the Suppression of Immoral Traffic Act. The sub-tenant did not vacate and the Civil Courts closed for the Puja Vacation, making it impossible for the landlord to eject the sub-tenant. Before the suit could be filed for ejectment in accordance with the notice to quit, a prosecution was started against him under S. 6 (5) of the Act on the ground that he allowed the house to be used as a brothel after the order under S. 6 (2).

Held, the landlord could not, under the circumstances, be held guilty of any offence. (*Nasim Ali, J.*) MAHADEO PRASAD *v.* EMPEROR. **40 C.W. N. 350.**

———S. 9—*Intention — Nature of — Trial of offence—Duty of Judge.*

The intention specified in S. 9 is not necessarily an intention that the girl should become an inmate of an existing brothel. Where in a trial for an offence under S. 9, Bengal Suppression of Immoral Traffic Act, the Judge omits to point out to the jury that the prosecution must prove that the girl alleged to have been taken by the accused to a house, was taken there for prostitution but tells the jury that the offence would be committed even if the house was not a brothel within the definition of S. 3 of the Act, it amounts to a serious misdirection. (*Bartley and Henderson, JJ.*) Ekkari Das *v.* Emperor. **182 I.C. 447=12 R.C. 65=40 Cr.L.J. 660=43 C.W.N. 668=A.I.R. 1939 Cal. 290.**

BENGAL SUPPRESSION OF TERRORIST OUTRAGES ACT (XII OF 1932)—Sentence under—Revision by High Court—Competency—Government of India Act, S. 107. *See* Government of India Act, 1919, S. 107. **40 C.W.N 735.**

——**Ss. 24 and 25**—*Special Magistrate—Power to tender pardon under S. 337, Cr. P. Code.*

Per *Full Bench* (*Mukherji, J.*, contra).—A special Magistrate appointed under S. 24 of Bengal Suppression of Terrorist Outrages Act (XII of 1932), has power to tender a pardon under S. 337, Cr. P. Code, even though he has no power to commit the accused to the Court of Session or High Court. The Magistrate may, acting under S. 337 (1), tender a conditional pardon, and under S. 337 (2) examine the pardoned man as a witness in his Court, but must, acting under the Bengal Suppression of Terrorist Outrages Act, 1932, try the accused himself instead of committing him for trial to the Court of Session on the High Court, as S. 337 (2-A) of the Code provides. 1933 Cal. 557 and 1935 Cal 281, Appr.

Mukherji, J.—The special Magistrate has no power to tender pardon under S. 337, Cr. P. Code, for the following reasons:—(1) The words used in S. 25 are that "such person shall be tried." If a Magistrate proceeds to tender pardon to an accused person he stops his trial and does something which he has no jurisdiction to do He thereby ceases to proceed with the trial of that particular accused person, the object of which is to determine his guilt or innocence and does something which is not covered by the direction under which he has jurisdiction to act. No doubt, in a case in which a prosecutor withdraws from the prosecution of an accused, the trial of that accused is also stopped; but such act is the act of the prosecutor. Hence tendering pardon is not trial of such person. (2) S. 337, Cr.P.Code, cannot be taken in compartments, and it cannot be held that all the compartments, with the exception of that which ensures the right to have the case committed to the Court of Session, may be availed of by the Special Magistrate. 1933 Cal. 537, Dist.

Per *Panckridge, J.*—The various powers and directions given to Magistrates by S. 337 are so distinct and independent that each is a provision within the meaning of the Local Act. The argument that the Special Magistrate is only clothed with power to "try" the accused under S. 25 of Local Act and not with the power to "pardon," construes "try" and "trial" in an artificial and unnecessarily narrow fashion. S. 337, Cr. P. Code, is part of Ch. 24 which contains "General Provisions as to Inquiries and Trials," and the power to tender a pardon can be exercised "at any stage of the investigation or inquiry into, or the trial of the offence." The special Magistrate authorized under S. 25 (1) has all the powers which the Code confers on Magistrates trying such cases, save such powers as are clearly inconsistent with the Local Act. (*Derbyshire, C.J., Mukerji Panckridge, M.C. Ghose and Bartley, JJ.*) Harihar

Sinha *v.* Emperor. **163 I.C. 9=8 R C. 698=37 Cr.L J. 758=63 C.L.J. 307=40 C W N. 876=1936 Cr C 583=A.I.R. 1936 Cal 356 (F.B.).**

——S 25—*Construction—Evidence* prima facie *disclosing offence punishable with death—Jurisdiction of Local Government to direct trial by Special Magistrate.*

S. 25 of the Bengal Suppression of Terrorist Outrages Act empowers the Local Government to appoint a Special Magistrate to try only those offences of a terrorist nature which are not punishable with death. Where a case of an offence punishable with death is *prima facie* disclosed by the prosecution evidence, the Local Government has no power under the section to appoint a Special Magistrate to try that offences. (*Cunliffe and Henderson, JJ.*) Sasadhar Chatterji *v.* Emperor. **40 C.W.N. 959.**

——**S. 25.**

S. 25 does not empower the Local Government to order a trial before Special Magistrate where a case of murder is *prima facie* disclosed by prosecution evidence, and trial by the special Magistrate under such circumstances is without jurisdiction.

Per *Henderson, J.*—An opinion of the Local Government merely that an accused person has committed an offence not punishable with death would not give it jurisdiction to appoint a special Magistrate to try him. The Local Government have not in their power to decide finally that a particular accused person has not committed an offence punishable with death and to ignore the most serious part of the crime altogether simply to give jurisdiction to a Special Magistrate. (*Cunliffe and Henderson, JJ*) Netai Chandra Jana *v.* Emperor. **165 I.C 162=37 Cr.L.J. 1092=9 R.C. 351=40 C W.N 959=64 C.L J. 421 =1936 Cr.C. 785=A.I.R. 1936 Cal. 529.**

——**S. 25**—*Opinion of Local Government—If final—Power of Court.*

The opinion of the Local Government is not decisive under S. 25. An accused person can show that the order for trial by a Special Magistrate was made without jurisdiction.

Per *Henderson, J.*—Although it is not open to a convicted person to suggest in appeal to the High Court that the crime was not committed in furtherance of or in connection with the terrorist movement, he can show that the order for trial by a Special Magistrate is without jurisdiction, and also that the conviction by the Magistrate is improper. (*Cunliffe and Henderson, JJ.*) Sasadhar Chatterjee *v.* Emperor. **40 C.W.N. 959.**

——**S. 35**—*'Knowingly'—Meaning of.*

Under S. 35 (*a*) of the Act, the word 'knowingly' qualifies the word 'possession' in the same section. So mere constructive possession is not enough. The possession must be known to the person. It is immaterial whether he had knowledge of the notification or not. (*Henderson, and R C. Mitter, JJ.*) Haripada Sen Gupta *v.* Emperor. **I.L R. (1937) 1 Cal. 774=169 I.C. 60 =9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——**S.35**—*Sentence—Considerations—Character of book—Relevancy.*

Under S 35 of the Act, it is the duty of the Court to take into account the character of the book when considering the sentence to be awarded. If the book in question is a violent one advocating terrorism or terrorist crimes, the sentence ought to be substantial. If it is an innocent one, it may be unfortunate that authority to file complaint has been given by the District Magistrate, but the Court must take the character of the book into consideration in passing sentence (*Henderson and R.C. Mitter, JJ.*) Haripada Gupta *v.* Emperor **I.L.R. (1937) 1 Cal. 774=169 I.C. 60=9 R C. 889=38 Cr L J. 691=A.I.R. 1937 Cal 49.**

——S. 35 (a)—*Offence—Possession of book.*

An offence under S. 35(*a*) of the Act, in respect of a book is committed, if it could have been rightfully seized by the Chief Customs Officer at the time of its importation under the Sea Customs Act, 1878. (*Henderson and R C. Mitter, JJ.*) Haripada Sen Gupta *v.* Emperor. **I.L.R. (1937) 1 Cal. 774=169 I.C. 60=9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——S. 35 (a)—*Sanction under—Power of Court to go behind*

Under S. 35 (*a*) of the Act, once the Local Government or the District Magistrate sanctions the prosecution, the Court cannot go behind the sanction or question the propriety of the judgment of the sanctioning authority. (*Henderson and R.C. Mitter, JJ.*) Haripada Sen Gupta *v.* Emperor. **I.L R. (1937) 1 Cal. 774=169 I.C. 60 =9 R.C. 889=38 Cr.L.J. 691=A.I.R. 1937 Cal. 49.**

——Ss. 35 (b) and 38—*Possession of prescribed book—Prosecution for—Magistrate's knowledge as to* prima facie *presumption of guilt—Sentence—Book not connected with or* per se *encouraging terrorist movement—Accused described in newspaper as prominent Congress worker—Severe sentence—If called for.*

In a prosecution for possession of a proscribed book under S. 35 (*b*) of the Bengal Suppression of Terrorist Outrages Act, which can be launched only after following the requisites laid down in S. 38 of the Act, it may safely be said that the trying magistrate, before he comes to the judicial determination of the case, is well aware that responsible persons have made up their minds that there is a *prima facie* presumption of guilt against the person who is prosecuted. Though the book may be a proscribed book, if it has nothing to do with the terrorist movement, and does not *per se* encourage the terrorist movement no severe sentence is called for. The mere fact that the accused is described by a journalist in a newspaper as a prominent congress worker is no evidence of his being such and is no proof of his status in the movement; nor does it have any real significance as to his connection with the terrorists. That does not justify a severe sentence. (*Cunliffe and Henderson, JJ.*) Rabindra Nath Chandra *v.* Emperor. **172 I.C. 133=10 R.C. 341 =39 Cr.L.J. 61=64 C.L J. 417=A.I.R. 1937 Cal. 652.**

——**Ss. 36 and 38**—*Scope and effect.*

S. 38 of the Suppression of Terrorist Outrages Act lays down certain conditions to be fulfilled before a prosecution under S. 35 or S. 36 is instituted. These provisions relate to the filing of a complaint and have nothing whatever to do with the provisions of S. 36 which defines the substantive offence. When, therefore, it is established that a person has in his possession any document of the nature defined in S. 36, that person is liable to conviction unless he proves the circumstances indicated in sub-S. (*b*) (*i*) or (*b*) (*ii*) of S. 36 of the Act. (*M C. Ghose and Bartley JJ.*) Sasanka Ghosal *v.* Emperor. **42 C.W.N. 732.**

——**(SUPPLEMENTARY) ACT (XXIV OF 1932), S. 3 (1) and (2)**—*Appeals from convictions under Bengal Suppression of Terrorists Outrages Act—Powers of High Court in.*

The Judges of the High Court hearing appeals from convictions for offences alleged to have been committed under the Bengal Suppression of Terrorists Outrages Act retain their full rights of procedure and their full rights of alteration or acquittal as provided for in Chap. 31, Cr.P. Code, unless there is some specific language in any part of the Acts which qualifies these rights, and they are entitled to act as they would act in similar circumstances in an ordinary appeal. (*Cunliffe and Henderson, JJ*) Netai Chandra Jana *v.* Emperor. **165 I C. 162=37 Cr.L.J. 1092=9 R. C. 351=40 C.W N 959=64 C.L.J. 421=1936 Cr. C. 785=A.I.R. 1936 Cal. 529.**

—— S. 3 (2)—*Powers of High Court under.*

The High Court, in hearing appeals from conviction under the Bengal Suppression of Terrorists Outrages Act, has all the powers which the Appellate Side of the High Court has been given under Ch. 3 of the Cr P. Code. The High Court has full rights of procedure and full rights of alteration or acquittal. It has all the powers referred to in S. 423, Cr P. Code.

Per *Henderson, J.*—If the order of the Special Magistrate is improper, though not without jurisdiction, the High Court has power to set aside that order and pass consequential orders. (*Cunliffe and Henderson JJ.*) Sasadhar Chatterjee *v.* Emperor. **40 C.W N. 959.**

BENGAL SURVEY ACT (V OF 1875), S. 40—*Decision under—Effect of—If operates to make possession adverse.*

Where a dispute about the bounbary between two mouzas was decided in favour of one party under S 40, Survey Act, the decision operated as a Civil Court decree and created rights under it until the other party set it aside by a proper suit. But where the legal successors of the other party did not dispute the decision against them within twelve years from the date of decision and allowed limitation to run against them, their title to property would be extinguished. (*M. C. Ghose, J.*) Humayun Raja Choudhury *v.* Jotirmoyee Debi. **168 I.C. 270=9 R.C. 789=A.I.R. 1936 Cal. 452.**

——**S. 41**—*Adoption of boundary line given in record of rights of neighbouring mauza—Effect of.*

Adoption of a boundary line given in the record-of-rights of a neighbouring mauza, does amount to determination of boundary according to actual possession within the meaning of S. 41. (*Dhavle and Agarwala, JJ.*) Bhup Narayan Singh *v.* Hira Lal. **161 I.C 709=8 R.P. 475 (2) =17 Pat.L.T. 405=A.I.R. 1936 Pat. 185.**

——**Ss. 41 and 62**—*Order determining boundary line dispute passed—Suit for confirmation of possession, on allegation that plaintiff in possession before order—If barred.*

BENGAL SURVEY ACT (1875), S. 62.

S 62 is a bar to a suit by a plaintiff against whom an order determining a boundary dispute has been made under the Survey Act, for confirmation of possession on the allegation that he has been in continuous possession from before the order, such an order having, under S. 41, the effect of a Civil Court decree which is binding on the parties as regards the question of possession. 14 C W N 316, Foll (*Dhavle and Agarwala, JJ.*) BHUP NARAYAN SINGH *v.* HIRA LAL. **161 I.C. 709 =8 R P 475 (2)=17 Pat L.T. 405=A.I.R. 1936 Pat. 185.**

———S. 62—*Applicability—Entry in record-of-rights relating to boundary between mauzas.*

Entry in the record-of-rights relating to the boundary between two mauzas unlike many other entries is governed by S. 62. 14 C.W.N. 366, Foll. (*Dhavle and Agarwala, JJ.*) BHUP NARAYAN SINGH *v.* HIRA LAL. **161 I.C. 709=8 R.P. 475 (2)=17 Pat L T. 405=A.I R 1935 Pat. 185.**

BENGAL SURVEY AND SETTLEMENT MANUAL (1917), R. 414 —Annulment of *patnis* by purchaser zamindari in revenue sale—Liability for costs of settlement operations under certificates issued against patnidars prior to sale—Purchaser in possession—If liable. *See* B. T. ACT, S. 114. **64 C L.J 126=A I.R. 1937 Cal. 94.**

BENGAL TAUZI MANUAL, R. 1—"*Kist*"—*Meaning of*—Tauzi *roll*—*Effect of.*

It is set out in R. 1 of the Bengal *Tauzi* Manual that the *Tauzi* roll of a district is the list of the estates from which the land and police revenue of the district is collected, showing the revenue assessed upon each estate divided into the amounts due on each latest day of payment. The word "*Kist*" as defined in the Manual indicates the period between one latest day for payment of arrears of revenue and the next and that the word is not used therein in the restricted sense assigned to it by S 2 of the Revenue Sales Act. (*Macpherson and Khaja Mohammad Noor, JJ*) NANAK PRASAD SAHU *v.* MT. KASEDA KUMARI. **15 Pat. 272=162 I C 1004=8 R.P 604=16 Pat. L.T. 915=A.I R. 1936 Pat. 260.**

BENGAL TENANCY ACT (VIII OF 1885).

Abatement, S. 52.
Abatement of rent, S. 38.
Abandonment, S. 87.
Abwab, S. 74
Accretions, S. 52.
Additional rent, S. 52.
Appeal, Ss. 153 and 174.
Assessment of rent, Ss 52, 153 and 188.
Assignee of decree for arrears of rent, S 148 (o).
Attachment, Ss. 163, 170 (1) and 171.
Burden of Proof, S. 103 B.
Common manager, S. 95.
Continuous possession, S. 48-C.
Contract, S. 178.
Co sharers, Ss. 22, 26-E, 146-A (3), 148 and 148-A
Co-sharer tenant, S. 170.
Custom, Ss 26 and 120.
Damages, S 68 (2).
Dispossession, Sch. III, Art. 3.
Ejectment, S. 178.
Encroachment, Ss. 7, 29 30, 50 and 105.
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BENGAL TENANCY ACT (1885).

Evidence, S. 120.
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Fees, S. 26-D.
Fixity of rent, Ss 29 and 50.
Homestead, Ss. 146-A and 182.
Incumbrance, Ss. 161, 167 and 170.
Interest, Ss 178 and 179.
Joint landlord, S. 188
Landlord's transfer-fee, Ss. 26-D and 26-J.
Liability for rent, S. 73.
Limitation, Sch. III, Arts. 2 and 3.
Occupancy raiyat, Ss 21 and 20 (1).
Occupancy right, Ss. 21, 22 and 26.
Patni rent, Ss. 178 and 179.
Penalties, S. 68 (2).
Pre-emption, S. 26-F.
Presumption under the Act, S. 50 (2).
Prevailing rata, S 30-A.
Procedure in rent suits, S. 148.
Proprietor's private land, S. 120.
Protected interest, Ss. 159 and 167.
Record-of-rights, Ss. 102, 104 J, 105, 109 and 111-A.
Reduction of rent, S. 38. *See* ABATEMENT OF RENT.
Rent decree of a co-sharer landlord, Ss. 148-A (1) and 153.
Res judicata, S. 148.
Sale for arrears of rent, Ss. 163, 170 and 174.
Setting aside sale, Ss. 146 and 174.
Suit for rent, Ss. 148 and 148-A.
Usage, S. 120. *See* CUSTOM.
Words.
LANDLORD, S. 3 (3).

———*Applicability — Rent decree — Execution against property other than that in respect of which rent is due—Rights of landlord—Decree for rent against Hindu joint family—Execution against family properties —Conditions of right.*

It is not obligatory upon the landlord to execute a rent decree against the rent paying property and not against other properties belonging to the judgment-debtor. He may, if he thinks fit, proceed to execute the decree against other properties owned by the judgment-debtor; but if he does so he will not have the advantage of the provisions of the Bengal Tenancy Act with regard to rent decrees and would be thrown back into the position of having a money decree in execution of which he can sell the property of the joint family in case the judgment-debtor happens to be a member of joint Hindu family one in those circumstances under which a joint family property would be liable. (*Wort, J.*) MUKHRAM MAHTO *v* KESHO PRASAD SINGH BAHADUR. **162 I.C. 879=8 R.P. 597=1936 P.W.N. 461=A.I.R. 1936 Pat. 258.**

———*Applicability—Under-raiyati of homestead and agricultural land—Settlement of homestead alone by under-raiyat—Incidents of lease—T. P. Act.*

Where, after the passing of the Bengal Tenancy Act, an under-raiyat with a holding of homestead and agricultural lands carves out the homestead portion only and settles it with another, the incidents of the tenancy so created would be governed by the provisions of the B. T. Act, and the person with whom the homestead land is settled would be an under-raiyat of the second degree.

The provisions of the T. P. Act are not applicable to the case. (*R. C. Mitter, J.*) Pankajini Debi *v.* Satish Behara. **165 I.C. 208=9 R.C. 360=40 C.W.N. 86.**

—— Occupancy rights—Acquisition—Grant by landlord—If can confer such rights. *See* Bengal Land and Tenant Procedure Act. **40 C.W.N. 1301.**

——*Rent sale—Effect of—Sale under C. P. Code —Distinction.*

The effect of a sale under the Bengal Tenancy Act and that of a sale under the Civil Procedure Code are two very different things. (*Wort, J.*) Ramjanam Singh *v.* Ramphal Lal. **167 I.C. 692 (1)=9 R.P. 419=3 B.R. 312 (1)=A.I.R. 1937 Pat. 93.**

——*Suit for settlement of fair rent on ground of accretion—Plea that at the time of passing of Act predecessors of landlord had no right to additional rent—Burden of proof.*

Where a suit is instituted under the Bengal Tenancy Act by a landlord for settlement of fair rent for certain lands on the ground of accretion to the tenure of the tenants and the tenants contend that at the time the Bengal Tenancy Act was enacted, the predecessors of the landlord had no right to additional rent, the burden of proof of establishing the plea taken by them rests on them. They must show that at the time of the passing of the Bengal Tenancy Act the predecessors of the landlords had no right to enhancement of rent. (*Cunliffe and Henderson, JJ.*) Khaje Habibulla *v.* Bepin Chandra. **168 I.C. 375=9 R.C. 811= A.I.R. 1936 Cal. 454.**

—— *Under-raiyat with rights of occupancy—Interest of—Heritability.*

The interest of an under-raiyat with occupancy rights is not heritable under the law. Hereditability is a right which has been attached by legislation to the tenure of an occupancy raiyat in Bengal, Bihar and Orissa, but it is not a necessary condition attaching to the enjoyment of an occupancy right for life. The question whether an under-raiyat who acquires occupancy right acquire also the rights of an occupancy raiyat as defined by the Tenancy Acts depends entirely on local custom. (*Dhavle, J.*) Jugesh Chandra Bose *v.* Maqbul Hossain. **163 I.C. 415=9 R.P. 9=17 Pat.L.T. 202=1936 P.W.N. 333=A.I.R. 1936 Pat. 384**

—— S. 3 (3)—'Complete usufructuary mortgage'—Mortgage with possession for certain period—Period considered sufficient to extinguish loan—Personal covenant to indemnify mortgagee if loan is not so extinguished—Nature of mortgage. *See* Bengal Tenancy Act, Ss. 26-G (5) and 3 (3). **44 C.W.N. 726.**

——**S. 3 (3)**—'Landlord'—Proprietor of resumed mahal with whom no settlement has been made. *See* B. T. Act, Ss. 26-F and 3 (3). **43 C. W.N. 274.**

——**Ss. 3 (3) and 26-G (5)**—*Mortgagee in possession in lieu of interest—Covenants giving to mortgagee right to sue for money and to mortgagor right of proportionate redemption—Character of mortgage.*

Where from the terms of a mortgage bond it is clear that the mortgagees are in possession of the occupancy holding in lieu of the interest due on the money advanced by them on the mortgage, the existence of covenants giving to the mortgagees a right to bring a suit for recovery of the mortgage-money if they are dispossessed and to the mortgagor a right to redeem a part of the mortgaged property on payment of a proportionate amount of the total mortgage-money does not in any way effect the character of the mortgage as an usufructuary mortgage. In view of the definition of a complete usufructuary mortgage in S. 3, the mortgage is liable to be extinguished under S. 26-G (5) of the Bengal Tenancy Act. (*Nasim Ali and Rau, JJ.*) Gadadhar Mandal *v.* Chinta Moni Das. **188 I.C. 382=12 R.C. 670=44 C.W.N. 171=A.I.R. 1940 Cal. 210 (2).**

—— (as amended in 1928), S. 3 (17)—*Applicability—Bargadar agreeing to cultivate land and pay half produce to landlord—Suit by landlord for produce for period subsequent to year* 1929.

The question whether a Bargadar in a particular case is a tenant or not is a question to be decided on facts of each case. Certain land formerly belonged to *A*. Subsequently *A* and his co-sharers transferred their raiyati interest to *B* and obtained from him a barga kabuliat by which *A* agreed to cultivate the land and pay half produce to *B*. *B* brought a suit for produce for the period subsequent to the year 1929.

Held, that on facts as well as according to the amendment of S. 3 (17) which applied to the case as the suit was in respect of years subsequent to 1929, the bargadar was not a tenant and this being so, the Court of Small Causes had jurisdiction to entertain the suit. (*M. C. Ghose, J.*) Sishu Mohan Koyal *v.* Rajendra Nath Sarkar. **179 I.C. 263=11 R.C. 511=A.I.R. 1938 Cal. 707.**

—— **S. 4**—*Under*-raiyat—*Status of—Power to sub-lease—Purchaser of under*-raiyati's *right—If can eject sub-lessee.*

Under S. 4 of the B. T. Act an under-*raiyat* is a tenant. He may either be directly a tenant under a *raiyat* or under an under-*raiyat*. In either case he is not a trespasser but a tenant having the status of an under-*raiyat*. S. 4 (3) gives an indication that under-*raiyats* have power to sub let their under-*raiyatis* and the sub-lessees are tenants. Where such a sub-lessee has acquired a right of occupancy to the land by a local custom, he could not be ejected by a purchaser of the under-*raiyati* at a sale in execution. (*Nasim Ali and Remfry, JJ.*) Dwarka Mandal *v.* Nalini Kanta Mitra. **I.L.R. (1937) 2 Cal. 689=175 I.C. 509=10 R.C. 794=A.I.R. 1938 Cal. 223.**

—— **Ss. 5 and 20**—*Tenant holding undivided shares in parcels of land—If raiyat.*

Under the Bengal Tenancy Act, even before the amendment of 1928, a tenant holding undivided shares in parcels of land would be a raiyat, and could be a settled raiyat of a village by reason of occupation of such lands for a period of 12 years, for S. 20 of the Act requires that the tenant should be a raiyat and must hold the "land" as such continuously for 12 years. 8 C. W. N. 192 and 751, Rel. on. (*Mitter, J.*) Sripati Charan De *v.* Kailash Chandra Jana. **166 I. C. 448=9 R. C. 523=A. I. R. 1936 Cal. 331.**

—— **S. 5 (2)**—*Heir of* raiyat *not accepting inheritance—Liability for rent.*

If a heir of a *raiyat* does not accept the inheritance, there is no privity of estate by succession and he is, therefore, not liable to pay rent

Absence of possession or cultivation by him by itself cannot exonerate him from the liability to pay rent. But absence of possession is cogent evidence to be taken into consideration with other facts in determining whether the inheritance was accepted or not. (*Nasim Ali and Remfry, JJ.*) Prodyot Coomar Tagore *v.* Hamidar Rahaman Mia. **41 C.W.N. 1154.**

——S. 5 (4)—*Status of lessee—Raiyat or tenure-holder—Test to decide.*

Where the object of the lease is that the lessee should himself cultivate the lands and should never settle them with any tenant, the lessee is a raiyat and not a tenure-holder. The use of words like 'mustajiri' in the lease is irrelevant as the dominant factor in determining whether a lessee is a raiyat or a tenure-holder is the purpose of the tenancy. (*Fazl Ali and Chatterjee, JJ.*) Suraj Mohan Thakur *v.* Ganesh Prasad. **175 I.C. 501=4 B.R. 592=10 R P. 633=A.I.R. 1938 Pat. 235.**

——S. 5 (5)—100 *standard bighas—If must be under same title.*

There is nothing in S. 5 (5), which supports the suggestion that the tenant must hold 100 standard bighas under one and the same title. (*Remfry, J.*) Krishna Chandra Mukherjee *v.* Manik Lal Mukherjee. **178 I.C. 892=11 R.C. 435=A.I.R 1938 Cal. 246.**

——Ss. 6 (a) and 7—*Tenure existing from time of Permanent Settlement—Landlord's right to enhancement of rent—Method of assessment.*

If a tenure has been in existence from the time of the Permanent Settlement and enhancibility is one of its incidents, the landlord is entitled to an enhancement of rent under Cl. (*a*) of S. 6 of the Bengal Tenancy Act. If there has not been any contract between the parties to regulate the principle on which or the amount by which, the enhancement is to be given, the case would come within either of the two methods of assessment of rent prescribed in S. 7 of the Act, notwithstanding the fact that the tenure was in existence from the time of the Permanent Settlement. But if there was a contract between the parties regulating the amount of enhancement or the principle of enhancement, that contract must be given effect to and the two methods of assessment indicated in S. 7, which section is expressly made subject to any contract between the landlord and the tenant, would not be the proper methods to apply. (*R. C. Mitter, J.*) Sreemanta Narayan Sarkar *v.* Maharaja Srish Chandra Nandi. **68 C.L.J. 120.**

——S. 7—*Enhancement of rent of tenures.*

Once it is found that the lands do constitute tenures, S. 7 must necessarily be attracted if the rent is proved to be enhancible but that must always be subject to a contract between the parties. (*Mukherjea, J.*) Basanta Kumar Dutta *v.* Sukumari Das Gupta. **177 I.C. 175=11 R C. 215=A.I R. 1938 Cal. 442.**

——S. 7—*Scope—Permanent lease by shebait—Claim to enhancement of rent by succeeding shebait—Maintainability.*

The power of a shebait of an idol to make an alienation is a limited power. Ordinarily a shebait cannot grant a permanent lease at a fixed rent, but he may do so in cases of unavoidable necessity. Where therefore the predecessor of the shebaits has granted a permanent tenure, even though no justifying necessity like the preservation of the property was proved, the rent under the tenure is liable to enhancement under S. 7. The Court can in such a case consider the question as to what should be the fair and equitable rent (40 per cent. of the gross collection allowed as fair rent to the landlord). (*M. C. Ghose, J.*) Hrishikesh Ray *v.* Upendra Nath Mandal. **166 I C. 757=9 R.C. 581=56 C.L.J. 28=A.I.R. 1936 Cal. 432.**

——S. 7—*Suit for enhancement of rent by plaintiffs as intermediate holders—Plaintiffs also holding the inferior tenure with defendants—Form of suit.*

Where the plaintiffs who were intermediate holders over a tenure sued as superior holders only the defendants for enhancement of rent, though the plaintiffs also held the inferior tenure together with the defendants,

Held, that the form of the suit was not bad though the plaintiffs should have been well advised to have first separated the share of the defendants and then sued the defendants for enhancement of rent. (*M. C. Ghose, J.*) Uday Chandra Chakravarty *v.* Ambika Charan Chakravarty. **170 I C. 259=10 R.C. 125=64 C.L.J. 547=A.I.R 1937 Cal. 455.**

——S. 7 (2)—*Landlord adducing evidence to show absence of customary rent—Tenant not rebutting this evidence—Enhancement of rent—Power of Court.*

In a suit for enhancement of rent the landlord in his plaint expressly stated that there was no customary rent in the locality and adduced evidence for the purpose of showing the absence of any customary rate. The tenant in his written statement did not challenge this position nor was any evidence adduced on his behalf to rebut the evidence adduced on behalf of the landlord.

Held, that under the circumstances it could be taken to be established that there was no customary rate of rent in the locality and as such the Court was at liberty to enhance the rental up to such limit as it thought fair and equitable under S. 7 (2). (*Mukheriea, J.*) Basanta Kumar Dutta *v.* Sukumari Das Gupta. **177 I.C. 175=11 R.C. 215=A.I.R. 1938 Cal. 442.**

——S. 12—*Transfer of putni—Transferor's liability for rent.*

A putnidar is not relieved of his liability to pay rent to the landlord by his transferring the putni to another, when there is no proof that the transfer fee had been paid or that the transfer had been recognised by the landlord. (*Henderson, J.*) Ram Das Aulia *v.* Bazley Karim Fazley Maula. **70 C.L.J. 284=A.I.R. 1940 Cal. 83.**

——Ss. 18 (2) and 23 (as amended in 1928)—*Scope and effect of—Tenant at fixed rate—If governed by S. 23—Liability to ejectment.*

S. 18 (2) of the B. T. Act, as amended in 1928, has made no alteration in law as regards the applicability or non-applicability of S. 23 to tenants holding at a fixed rate of rent. Though the clause in question states that S. 23-A, etc., shall not apply to holdings at fixed rates, the provisions of that clause do not affect S. 23. S. 23 had no application to tenancies at fixed rate under the previous law; and it has clearly no application even under the amended Act in the absence of any evidence of a breach of contract between the landlord and tenant under the terms of which the tenant is liable to be ejected. In the case of a raiyat at a fixed rate of rent, even if the amended Act of 1928 be held to be applicable, the old Act and not the amended Act will govern a case where the cause of action for the suit in ejectment arose before the amended Act came into force. (*Jack, J.*) SHIB CHANDRA SARKAR *v.* PANCHANAN KOLAY. **64 C.L.J. 71.**

———**S. 18-A**—*Sale certificate—If instrument of transfer.*

Under S. 18-A of the B T. Act, a sale certificate cannot be treated as an instrument of transfer by the tenant. (*Akram, J.*) BASANTA KUMARI DASI *v.* JNANENDRA NATH GHOSH **71 C.L.J. 504.**

———**S. 20 (7)**—*Applicability—Kabuliyat providing for rent at highest rate—Suit for rent of entire holding including portion not included in Kabuliyat, on basis of Kabuliyat—If one for enhancement—Tenant—If to be presumed occupancy raiyat.*

Per *Jack, J.*—A suit for recovery of rent on the basis of a *Kabuliyat* stipulating for payment of rent at the highest rate of rent payable in respect of lands in the locality, on the entire area in possession of the tenant, which is found to be larger than the area mentioned in the *Kabuliyat*, is not really a suit for enhancement of rent, but one for adjustment of rent in accordance with the terms of the contract between the landlord and the tenant. Such a suit not being a proceeding under the Act, the tenant cannot be presumed to be an occupancy *raiyat* under the terms of S. 20 of the Bengal Tenancy Act. In the absence of evidence to the contrary it must be assumed that the tenant was not an occupancy *raiyat*. (*Guha and Bartley, JJ.*) SANNYASI BASAR *v.* RATNESWAR GHATAK. **167 I.C 170=9 R.C. 650=41 C.W.N. 169=A.I.R. 1937 Cal. 8.**

[Letters Patent Appeal from the judgment of Jack, J.]

———**S. 21**—*Applicability — Government lands under management of Railway Company without power of leasing—Agreement by company for cultivation of special crop for limited period—Cultivator settled raiyat of village—Occupancy rights—If acquired.*

The Bengal Tenancy Act, in dealing with the acquisition of occupancy rights was intended to apply to the ordinary agricultural relationship of zamindars, tenure-holders and raiyats under them. If a zamindar brings a settled raiyat on waste land and gives him an interest in that land for the purpose of cultivation for however short a time, and even if the crop to be cultivated be of a limited kind, the provision of S. 21 of the Act might apply so as to enable the raiyat to acquire occupancy rights in that land. But when a Railway Company in possession of lands entrusted to them by Government enters into a special agreement with a person and brings him on the land normally held by them for railway purpose, for the cultivating it and for growing a special crop for a very short and specified term, the company themselves having no power to grant a lease or tenancy, the contract or agreement is one which was never contemplated by the Bengal Tenancy Act. The agreement or arrangement is taken out of the operation of the Act and no occupancy rights are acquired in that land, though the cultivator to whom the lands are let happens to be a settled raiyat of the village in which the lands are situated. (*Courtney Terrell, C.J. and Agarwala, J.*) BENGAL NORTH-WESTERN RAILWAY CO., LTD. *v.* JANKI PRASAD. **163 I.C. 525=9 R.P. 26=1936 P.W.N. 298=17 Pat.L.T. 206=A.I.R. 1936 Pat. 362.**

———**Ss. 21 and 29**—*Applicability—Usufructuary mortgagee of village making* raiyati *settlement of part of land—Mortgagor subsequently redeeming four annas share of village*—Raiyats *agreeing to pay enhanced rent to mortgagor—Liability of—Agreement—If void.*

The usufructuary mortgagee of a village made a *raiyati* settlement of a portion of land with the defendants at an annual rent of Rs. 670. Two years after the defendants were in occupation of the land as *raiyats*, the mortgagor redeemed four annas share in the village. Thereupon, the defendants agreed with the mortgagor to pay him an annual rent of Rs. 433 for his one-fourth share. On a suit by the mortgagor for the arrears of rent against the defendants,

Held, that when the mortgagee in possession who was then the *de facto* landlord of the village gave tenancy to the defendants as settled *raiyats* of the village, the *raiyats* acquired occupancy rights by operation of law under S. 21, Bengal Tenancy Act. The subsequent agreement with the mortgagor which had the effect of enhancing the rent from Rs. 670 to Rs. 985 was void by virtue of S. 29 of the Act and could not therefore be enforced. (*James, J.*) DWARKA PRASAD *v.* PARMESHWARI RAI. **171 I.C. 425=10 R.P. 209=4 B.R. 23=A I.R. 1937 Pat. 541.**

———**S. 21**—*Mortgagee in possession granting* mokarari *lease pending redemption suit—Settled* raiyat—*Liability to ejectment—Transfer of Property Act, Ss. 52 and 76 (1).*

S. 52 of the Transfer of Property Act does not take away the rights of mortgagees in possession under S. 76 (1) of that Act after the redemption suit is instituted. The mortgagee has the right to lease the property for the period of his possession after the suit for redemption is instituted. If, therefore, a mortgagee of a *mouza* grants, during the pendency of the redemption suit, a *mokarari raiyati* lease to a settled *raiyat* of that *mouza*, the lease, though not operative as a *mokarari* lease, confers on the settled *raiyat* such right as the mortgagee in possession is then capable of conferring. The settled *raiyat*, therefore, acquires a right to cultivate the leased lands as a *raiyat*, and if he is in possession as a *raiyat* till the mortgage is redeemed, he acquires occupancy right in the lands under S. 21 of the Bengal Tenancy Act and is not liable to be ejected. (*Nasim Ali and R.C. Mitter, JJ.*) PRAMATHA NATH BHATTACHARJYA *v.* SASHI BHOOSHAN BANERJI. **I.L.R. (1937) 2 Cal. 181=174 I.C. 88=10 R.C 614=A.I.R. 1937 Cal. 763.**

———**S. 22** — Applicability — Non-transferable occupancy holding —Purchase of part by co-sharer landlord—Effect — Subsequent batwara proceedings—Effect – Position of co-sharer-purchaser. *See* BIHAR TENANCY ACT, S. 26-N. **18 Pat.L.T. 173.**

———**S. 22**—*Applicability—Transferable holding —Purchase by co-sharer landlord of holding with consent of other co-sharers.*

Section 22 applying obviously to the case of a transferable holding without the consent of the landlords would also apply to those cases in which the landlords had given their consent; that is to say, the purchase by the co-sharer landlord of a holding of one of the tenants with the consent of his co-sharers would place the purchaser co-sharer landlord in the position provided for by S. 22 (2), B. T. Act. (*Wort, J.*) NAGA RAI *v.* BUCHI RAI. **162 I.C. 875=8 R.P. 594=A.I.R. 1936 Pat. 285.**

——S. 22—*Co-sharer landlord in exclusive possession—*Thikadar *under—Settlement of land on settled raiyat owning share in proprietary interest—Accrual of occupancy rights—Subsequent collectorate partition—Land allotted to another co-sharer—Right of latter to recover possession—Bengal Estates Partition Act, S. 99.*

Where a co-sharer landlord is placed in exclusive possession of joint land for convenience by mutual arrangement among all the co-sharers gives a *thika* of the land, and the *thikadar,* in the ordinary course of management, inducts on to the land a settled raiyat of the village, *bona fide,* the tenant so settled on the land *bona fide* acquires occupancy rights in the land. The statutory rights which accrue to such a tenant by operation of the Tenancy Act cannot be affected by a subsequent partition between the owners of the estate in which the land is situate, and the tenant cannot be ejected under S. 99 of the Bengal Estates Partition Act by any other co-sharer to whom the land in question is allotted at a subsequent collectorate partition. The fact that the tenant settled on the land has a share in the proprietary right to the land in dispute will not entitle the co-sharer to whom the land is allotted at the partition to recover possession. The tenant is entitled under S. 22 of the Bengal Tenancy Act to hold the land as part proprietor on the conditions mentioned in S. 22. (*Agarwala and Rowland, JJ.*) INDER CHANDRA *v.* SHRI RADHA KRISHNAJI. **1940 P.W.N. 221=21 Pat.L.T. 201.**

——**Ss. 22 and 159**—*Landlord auction-purchaser—Right to annul incumbrance.*

S. 22 (1) of the B. T. Act undoubtedly effects a merger of the raiyati interest with the superior interest of the landlord, if the latter happens to be the purchaser at the rent sale, but the landlord purchaser is certainly competent in exercise of his powers under S. 159 of the Act to annul the under-raiyati as an incumbrance, and this right cannot in any way be affected by the provision of S. 22 (1). If he does not choose to exercise this right or becomes incapable of exercising it, and the under-raiyat is treated as a tenant, the consequence of the disppearance of the raiyati right might be to make the under-raiyat a raiyat in the eye of law. (*Mukherjea and Roxburgh, JJ.*) PROMOTHA NATH *v.* JITENDRA NATH. **43 C.W.N. 1102.**

——**S. 22**—Raiyat *acquiring* shikmi taluki *right —Merger of* raiyati *interest.*

On the acquisition of a *shikmi taluki* right by a *raiyat,* his *raiyat* interest does not merge in the superior rights of a *shikmi talukdar.* It is impossible to hold that when the immediate landlord simply creates an intermediate tenancy right between him and the actual *raiyat,* there would be a merger under S. 22 of the B. T. Act simply because the intermediate tenant happened to be the *raiyat.* (*M.C. Ghose and Mukherjea, JJ.*) SHASHEE KUMAR MAJUMDAR *v.* GOLAP BANU. **I.L.R. (1937) 1 Cal. 679=173 I.C. 590=10 R.C. 546=A.I.R. 1937 Cal. 669.**

——**S. 22 (1)**—*Merger—Entire raiyati interest purchased by co-sharer proprietors — Purchase not in proportion to their shares.*

S. 22 (1) of the B. T. Act applies to a case where the acquisition of the whole raiyati interest is by all the co-sharer proprietors, even though they may not have acquired the raiyati interest in the same proportions as their shares in the proprietary interest, and there is a merger of the raiyati and proprietary interests when the purchase of the former by the proprietors is complete. (*Roxburgh, J.*) ASAD ALI *v.* WAHED ALI. **70 C.L.J. 594=A.I.R. 1940 Cal. 145.**

——**S. 22 (1)**—*"Proprietor."*

The word 'proprietor' in sub-S. (1) of S. 22 includes the proprietor of a temporarily settled estate. (*R.C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I.L.R. (1939) 1 Cal. 349=180 I.C. 278=11 R.C. 659=69 C.L.J. 51=43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——**S. 22 (2)** (before amendment)—*Acquisition by co-sharer patnidar of occupancy right in holding by inheritance—Merger.*

The first two sub-sections of S. 22 of the B. T. Act as it stood before the amendment of 1928, should be read together. Where, therefore, a co-sharer patnidar of a holding acquires by inheritance the occupancy right therein, the occupancy interest merges in his proprietary interest under that section. This will be so even if the holding is non-transferable. (*Edgley, J.*) RADHAGOBINDA BISHAYE *v.* JNANENDRA CHANDRA. **42 C.W.N. 495.**

——**S. 22 (2)**—*Co-sharer landlord purchasing holding in execution of rent decree—Position of.*

Under S. 22 (2), a purchase by co-sharer landlord in execution even of a decree which has the effect of a money decree must be deemed to extinguish the tenancy and any lease subsequently granted by him would create a raiyati interest and not a mere under-raiyati interest. Hence where a co-sharer landlord in execution of rent decree against his tenant purchases the holding of the tenant which is transferable and sublets it to a third person, the third person acquires a raiyati interest and the purchaser in the subsequent sale in execution of a rent decree obtained by another co-sharer landlord against the same holding would acquire nothing by his purchase. But if the holding is not transferable, the position of the co-sharer landlord who purchased in the previous sale would be that of an unrecognized transferee of an occupancy holding and there would be no merger. Hence, in a subsequent sale in execution of a rent decree obtained by other co-sharer landlord, the entire holding would pass to the purchaser. (*Khundkar, J.*) KHIRABALA DEBI *v.* SURESH CHANDRA. **177 I.C. 184=11 R.C. 207=A.I.R. 1938 Cal. 452.**

——**S. 22 (2)**—*Co sharer landlord purchasing occupancy holding— Status of — If a raiyat— Transferee from such a co-sharer—Sub-lessee from—Position of.*

The status of a co-sharer landlord who has purchased an occupancy holding is not the status of a raiyat but a peculiar status. His right is that of a proprietor entitled to retain possession of the land subject to payment to his co-proprietors of their shares of the rent. The status is a peculiar status which attaches to the co-sharer so long as he remains a co-sharer. If he ceases to be a co-sharer and his proprietary interest is lost, then he has no right to retain possession of the land and it would pass on to the person who acquires the interest of that co-sharer. The person who acquires such interest can sub-let the same to another who thereupon becomes a raiyat of the holding. (*Rowland and Chatterji, JJ.*) SUKHDEO PANDEY *v.* RAMESHWAR PRASAD. **6 B.R. 200 =180 I.C. 557=12 R.P. 381=A.I.R. 1939 Pat. 522.**

——S. 22 (2)—*Co-sharer landlord—Purchase of non-transferable holding at money sale—Right of other co-sharers to joint possession with purchaser.*

If a co-sharer landlord purchases the interest of the tenant of a non-transferable occupancy holding in a sale in execution of a money decree, the other co-sharer landlords are not entitled to joint possession with the purchaser if the tenant has not abandoned the holding. (*Sen, J.*) ABINASH CHANDRA ROY *v.* ROHINI LAL ROY. **43 C.W.N. 379=A.I.R 1939 Cal. 295.**

——Ss. 22 (2) and 158-B—*Co-proprietor purchasing* raiyati *lands in execution sale—Right to hold such lands after partition.*

S. 22 (2) of the Bengal Tenancy Act does not disentitle a co-proprietor to hold *raiyati* lands purchased by him in rent executions subject to the payment of rent under the clause, after he has ceased to be a co-proprietor by reason of a partition of the holding among the co-sharers, undue stress should not be laid on the word "co-proprietor" in S. 22 (2). The words "subject to the provisions of S. 22 (2)," occurring in S. 158-B of the Act, do not really introduce any new consideration, but only take one back to S. 22. It is not correct or justifiable to read into the affirmative proposition contained in S. 22 (2) a negative provision that the purchasing co-sharer, will have no right at all to the land as soon as he ceases to be a co-sharer by reason of the partition. It is only as long as there are others interested in the land as co-proprietors that it is necessary to deal with specifically with the purchasing co-sharer's right to hold the land. The partition does not put an end to that right or make a present of it to the co-proprietors who purchased nothing. What is really available for partition is not the land itself, but the rent that would have been paid for the land by the occupancy *raiyats* whose place has been taken by the purchasing co-proprietor. The result is that the latter becomes liable to the other co-sharers until partition for a proportionate share of the rent; and these rents, and not the land purchased by him, would be taken into account in the partition. (*Courtney Terrell, C.J. and Dhavle, J.*) DHANESHWAR KUER *v.* CHANDRADHARI SINGH. **162 I C 820=8 R P. 579 =1936 P W N. 336=17 Pat L.T. 97=A.I.R. 1936 Pat. 317**

——Ss. 22 (3)—*Construction of kabuliyat—Farming lease.*

A company obtained a settlement from Government of a *khas* mahal. The company recognized the Government as a proprietor. The settlement was expressed not to be a ryotwari settlement. The status of the grantee was described as farmer. However, in certain clause of the settlement, the payment which the company was liable to make to the Government was described as revenue and it was further provided that in case of default in payment the Government had right to cancel the lease and to realize its dues by the procedure under Public Demands Recovery Act,

Held, that the use of the word 'revenue' and the provision for realization of dues by procedure under the Public Demands Recovery Act did not signify that the relationship of landlord and tenant was not being created by the settlement. Under the settlement the company became not the farmer of revenue but the farmer of rent or ijardar within the meaning of S. 22 (3). (*R. C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I L R. (1939) 1 Cal. 349=180 I. C. 278=11 R.C. 659=69 C.L.J. 51= 43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——(prior to amendment of 1907), S. 22 (3)—*Purchase by ijardar of occupancy holding—Effect of.*

Ordinarily by an amendment, the Legislature must be taken to have intended a change in the law, but it does not necessarily follow that such is the intendment in every case. An amendment may also be intended to clarify matters. The word "acquire" is a word wide enough to connote acquisition by purchase and by inheritance, and the Legislature had not indicated its intention in other parts of the statute as existing before 1907 to cut down the ordinary meaning of that word. Hence S. 22 (3) as it stood before 1907 debarred an ijardar from acquiring occupancy right by purchase or otherwise in the land of his ijara, but it did not debar him from acquiring a non-occupancy ryoti interest. The result is that if an ijardar purchases an occupancy holding, he acquires it as a non-occupancy holding. (*R. C. Mitter and Sen, JJ.*) MIDNAPORE ZAMINDARY CO. *v.* SECRETARY OF STATE. **I.L R. (1939) 1 Cal 349 =180 I.C. 278=11 R C 659=69 C.L.J. 51=43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——S. 23—Tenancy for horticultural purposes—Structures erected by tenant—Suit for mandatory injunction by landlord dismissed as time-barred—Structures subsequently destroyed by fire—Transferee from tenant erecting fresh structure on same site—Landlord, if can bring fresh suit. *See* LIMITATION ACT, S. 28. **42 C.W. N. 758.**

——S. 23 (as amended in 1928)—Applicability—Fixed rate tenant—Liability to ejectment—Conditions—Cause of action arising prior to 1928—If governed by amended Act. *See* B. T. ACT, Ss. 18 (2) AND 23. **64 C.L.J. 71.**

——Ss 23 and 23-A—*Scope—Tenants' right to fell trees in spite of assessment of* falkar—*Right to remission of* falkar *in respect of trees felled.*

Subject to the provisions of S. 23, B. T. Act, even if the assessment of *falkar* formed part of the original rent at the time of the inception of the tenancies, the tenants are at liberty to fell trees and would thereafter be entitled to a remission of *falkar* in respect of the trees so felled. So also the landlords are not entitled to levy *falkar* in respect of any trees planted by the tenants after their induction. (*Edgley, J.*) K. C. DE *v.* HIRA BEWA. **I L.R. (1937) 1 Cal. 491=167 I.C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

——S. 26—*Death of one of joint occupancy tenants without heir—Effect of—Landlord's right to take possession of his share*.

If one of the joint occupancy tenants dies without leaving any heir, the occupancy right must be deemed to be extinguished *pro tanto*, so far as the share of the deceased tenant extended. The landlord, in such circumstances, can take possession of the holding to the extent of the share of the deceased tenant. (*Mukherjea, J.*) TRAILOKYA NATH PAL *v.* AMBICA CHARAN DE. **I.L.R (1937) 2 Cal. 684=173 I.C. 551=10 R C 540=67 C.L.J. 55=41 C W.N. 1148=A.I.R 1937 Cal. 545.**

——S. 26-A—*Transfer of portion of occupancy holding—Transfer fee levied and notice of transfer sent to landlord—Landlord allowing mutation of purchaser—If can question validity of transfer.*

Where on a transfer of a portion of an occupancy holding, the transfer fee was duly levied from the purchaser and the notice of the transfer was sent to the landlord who far from denying the rights of the purchaser in due course allowed him mutation, the landlord must be deemed to have accepted the transfer as a valid transfer and he cannot, therefore, question its validity on the ground that the purchaser purchased it from a person who was not recognised by the landlord. (*M. C. Ghose and Bartley, JJ.*) AMULYA CHARAN MISRA *v.* PRAN KRISHNA ADHIKARY. **179 I. C. 334=11 R C. 532=42 C W.N. 755=A. I. R. 1938 Cal. 531.**

——**S 26-B (as amended in 1928)**—*If retrospective—Effect on landlord's right to re enter under S. 87.*

S. 26-B is not retrospective in its purpose and cannot, therefore, operate to compel the landlord to recognize as his tenant a person to whom a portion of a holding had been transferred before the amendment Act of 1928 came into operation. Further as the right conferred by S. 26-B is subject to the provisions of the Act, the new section does not affect the right of the landlord to re-enter under S. 87 of the Act is the tenant vacated his holding without arranging for the payment of his rent as it fell due. (*Edgley, J.*) ANNADA PROSAD *v.* RAMJAN SARKAR **I L R. (1939) 2 Cal. 471=186 I.C 555=12 R.C 478=70 C.L.J. 501=44 C W N. 118=A I R. 1940 Cal 6.**

——**(as amended), S. 26(B), (C), (D) and (J)**—*Construction and scope—Contract by landlord before amendment giving tenant right to transfer holding—Transfer fee—Liability for.*

On a fair interpretation of S. 26 (B), (C), (D) and (J), the transfer fee of 20 per cent. is not to be imposed on a holding where, by a special contract, made before the Amendment of the Bengal Tenancy Act, the landlord has given the right of transfer to the tenant. The amendment is not intended to make worse the position of a tenant who has by a contract obtained from the landlord a right to transfer his holding. (*M.C. Ghose, J.*) JOY CHANDRA BHOWMIK *v.* KALI KINKAR NATH. **64 C L.J. 545=41 C.W N. 149**

——**Ss. 26 C and 26-J**—*Construction and scope—Transfer of holding pending attachment in execution of rent decree—Subsequent sale in execution—Landlord's right to transfer fee—Liability of transferee—If dependent on validity of transfer or consent of landlord.*

The landlord's right to the transfer fee under S. 26-C of the new Bengal Tenancy Act is a statutory right, and once there is a transfer of the

holding the landlord is entitled to the transfer fee. A landlord who has caused the holding to be sold in execution of a rent decree is nevertheless entitled to recover transfer fee from a transferee who has taken a conveyance from the tenant prior to such execution sale. Nor does the fact that the transfer was effected pending an attachment in execution disentitle the landlord from recovering his fee. When there has been a transfer in fact, the transferee who has accepted such transfer is bound under S. 26-C read with S. 26 J to pay the transfer fee to the landlord in full. The question whether the transfer is legal and operates to pass title is entirely foreign to the enquiry held by the Court under S. 26-J. All that is necessary to attract the operation of S. 26-J is that there must be a transfer in fact, *i.e.*, the transfer must be accepted by the transferee. It is not necessary that the landlord should signify his acceptance of the transfer. (*Mitter, J.*) SHARFUDDIN AHMED *v.* JAGADISH NATH ROY BAHADUR. **63 Cal. 900=165 I.C 426=9 R.C. 397=63 C.L.J. 255=40 C.W.N. 502=A.I.R. 1936 Cal. 304.**

——**S. 26-C**—*Occupancy holding—Transfer of—When complete—Receipt of notice by landlord—If condition precedent.*

As soon as the document by which an occupancy tenant transfers his holding is registered, the title to the holding passes from the transferor to the transferee with retrospective effect from the date of the execution of the deed of conveyance. The question whether the landlord is served with the notice of transfer or whether he receives the transfer fee or not is not material. The transfer is complete even as against the landlord even if he receives the notice of transfer and his fees only later on. (*R. C. Mitter, J*) MAHARAJ BAHADUR SING *v.* NARI MOLLANI. **63 Cal. 1117=165 I.C. 17=9 R.C. 363=40 C.W.N. 683=A.I.R. 1936 Cal. 279.**

——**S. 26-C (2)**—*Instrument of transfer stating sale price as Rs. 200—Recital in body that certain mortgage debts were satisfied—Amount of such debts not stated—Validity of registration.*

Where an instrument of transfer stated the sale price as Rs. 200 and in the body of the instrument one mortgage in favour of the transferee and another mortgage decree in favour of his son were recited and stated to have been satisfied but the amount due on the mortgage or on the mortgage decree was not mentioned, and the registering officer accepted Rs. 200 as the sale price of the holding and on that footing registered the document,

Held, that the document was validly registered as contemplated by S. 26-C, Cl. (2) of the B. T. Act. (*Bartley and Nasim Ali, JJ.*) KUNJA KAMINI *v.* MANGAL CHANDRA. **I.L.R. (1938) 1 Cal. 695=42 C.W.N. 209.**

——**Ss. 26 D and 26-F**—*Applicability—Pre-emption proceedings by landlord—Plea of fixed rate tenancy—Question expressly left open—Suit by tenant for declaration that tenancy was one at fixed rate of rent—Kobala not reciting fixity of rent—Payment of landlord's fee at time of registration of kobala—If raises estoppel against purchaser.*

Where in a proceeding under S. 26-F, B. T. Act, when the landlord wanted to exercise his right to pre-emption, he is met with an objection that the tenancy was at a fixed rate of rent, and the application is allowed, leaving the question of the status of the tenant whether he was tenant at fixed rate of rent is expressly left open, the fact that in the kobala by which the purchaser purchased the holding, there was no mention of the fixity of rent, and that the purchaser paid the landlord's fees at the time of the registration of the kobala, does not give rise to any estoppel against the purchaser in a suit by the latter for a declaration that he was a tenant at fixed rate of rent in respect of the holding, and Ss. 26-D and 26-F, Bengal Tenancy Act, have no application. (*Guha and Bartley, JJ.*) Ferdinand Perier *v.* Kumar Krishna Nandy Choudhury. **167 I.C. 596=9 R.C. 705=A.I.R. 1936 Cal. 582.**

——**S. 26-D (b)**—*Transferred holding liable to be assessed to rent but not so assessed—Landlord's fee, if payable.*

Under S. 26-D (*b*) of the Bengal Tenancy Act landlord's fee is payable if the transferred holding is liable to be assessed with money rent at some future date, even though such an assessment has never taken place before the date of the transfer. (*Edgley, J.*) Promode Kumar Banerjee *v.* Kusum Kamini Dassya. **43 C.W.N. 217.**

——**S. 26-E**—*Failure to deposit landlord's fee—Re-sale—Conditions of validity—Omission to fix time for deposit—Effect—Power to order re-sale without order of forfeiture.*

Though S. 26-E (1) does not state that the landlord's fees are to be deposited within a time to be fixed by the Court, the Court should fix a time within which the deposit required by S. 26-E (1) is to be made. If the auction-purchaser fails to make the deposit within the time so specified, the Court may then make an order for the forfeiture of the purchase money, and for re-sale of the property. The Court may not order re-sale without first making an order of forfeiture; and there can be no re-sale under S. 26-E (3) until the time specified has expired. The sale, however, cannot be treated as a nullity merely because the landlord's fee is not deposited, or because no time is specified for making the deposit of the landlord's fee or because the Court overlooks the fact that such time had been specified, and the Court, when it has made an order of full satisfaction cannot treat the sale as a nullity and set aside the order of full satisfaction on the ground that the decree-holder purchaser fails to deposit the fee. If the only defect is the failure to deposit the landlord's fee, and if the decree holder so requires a re-sale can be held under S. 26-E (3), and the provisions of S. 26-E (3) must be complied with. Where no order of forfeiture has been made and when no reason is given for not making such an order of forfeiture, no order for re-sale can be made. The fact that the decree holder is the auction-purchaser does not affect his liability to be penalised for failure to deposit the landlord's fee. (*Guha and Lodge, JJ.*) Durga Charan Das *v.* Chairman of the Labanga Samabai Samity. **162 I.C. 135=8 R.C. 570=40 C.W.N. 143=62 C.L.J. 372=A.I.R. 1936 Cal. 171.**

——**S. 26-E**—*Landlord's fee—Landlord's right to retain—Sale set aside on appeal.*

If a sale of an occupancy holding held in execution of a money decree is subsequently set aside on appeal, the landlord is not entitled to retain the landlord's fee which has been in the meantime withdrawn by him. (*Edgley, J.*) Saraswati Dasi *v.* Benode Behari. **44 C.W.N. 484.**

——**S. 26-E**—*Transfer fee—Amount of—Right of landlord.*

The landlord is entitled, under S. 26-E of the Bengal Tenancy Act, to either five times the annual rent of the holding or twenty per cent. of the purchase whichever sum is greater. (*R. C. Mitter, J.*) Sashi Kanta Acharya Bahadur *v.* Nasirabad Loan Office Co. **168 I.C. 849=9 R.C. 819=63 C.L.J. 105=A.I.R. 1936 Cal. 786.**

——**S. 26-E (1)**—*Applicability—Rent decree in respect of share of holding.*

The provision in sub-S. (1) of S. 26-E applies to the case of a decree for arrears of rent due in respect of the entire holding. The reason behind the exception in the case of such a decree appears to be that the decree-holder of such a decree is the landlord himself and there is no necessity to serve notice upon him or to pay the landlord's fee when he himself is the auction-purchaser. But the position is different when the decree is in respect of a share of a holding and the other co-sharer landlord has been made a party. (*S. K. Ghose and Patterson, JJ.*) Atul Chandra *v.* Mohini Mohan. **182 I.C. 751=12 R.C. 102=A.I.R. 1939 Cal. 28.**

——**S. 26-E (1)**—*Sale of tenure and occupancy holding together—Landlord's fees so far as tenure deposited—Sale of tenure confirmed and that of occupancy field set aside—Validity.*

In execution of a mortgage decree, *A* purchased and obtained possession of a tenure and an occupancy field in one lot. He deposited landlord's fees so far as the tenure only was concerned. While confirming the sale, the executing Court confirmed the sale of the tenure and set it aside so far as the occupancy holding was concerned. Later on, landlord sold the tenure in execution of rent decree without making *A* as party and purchased it himself and took symbolical possession. Therefore *A* brought a suit against the landlord for declaration of his title to the tenure. Landlord contended that the order of confirmation of the tenure only was illegal as the tenure and occupancy field were sold in one lot and the entire sale should have been set aside. He further contended that the Court should ignore the order of confirmation of the tenure.

Held, that there was no violation of the provision of S. 26-E.

Held, further, that the non-compliance with S. 26-E (1) did not oust the jurisdiction of the Court and any order made by it cannot be treated as nullity and be ignored unless it has been properly set aside. (*B.K. Mukherjea, J.*) Basiruddin Mahomed *v.* Prasanna Deb Rai Kat. **177 I.C. 758=11 R.C. 271=A.I.R. 1938 Cal. 282.**

——**S. 26-E (3)**—*Re-sale under—Procedure—Fresh execution application—Necessity for.*

S. 26-E (3) does not contemplate fresh execution proceedings for the purpose of a re-sale; it provides for fresh sale in the execution proceedings then pending. (*Guha and Lodge, JJ.*) Durga Charan Das *v.* Chairman of the Labanga Samabai Samity. **162 I.C. 135=8 R.C. 570=40 C.W.N. 143=62 C.L.J. 372=A.I.R. 1936 Cal. 171.**

——**S. 26-F**—*Applicability—Co-sharer landlords—Partition of holdings under Estates*

Partition Act—Suit for rent of holding for period anterior to partition by some co-sharers and decree—Execution sale—Application for pre-emption by remaining co-sharer.

A, *B* and *C* were co-sharer landlords in respect of three occupancy holdings. Later on, under a proceeding under the Bengal Estates Partition Act, two holdings were allotted exclusively to *A* and the third holding was allotted partly to *A* and partly to *B* and *C*. *B* and *C* instituted a suit for rent for the three holdings for a period anterior to the partition without impleading *A* and obtained decrees and in execution thereof purchased the three holdings. *A* applied for pre-emption.

Held, that his application was competent. (*R. C. Mitter, J.*) Ramshashi Ghose *v.* Mohendra Nath Sinha **162 I C. 664 (1)=8 R.C. 632 (1)=A.I.R 1936 Cal. 223.**

——**S. 26-F (as amended)**—*Applicability—Document of transfer executed before and registered after section coming into force.*

S. 26-F of the B. T. Act as amended by the Amending Act of 1938 is, no doubt not retrospective in its operation and it does not take away any vested right that accrued under the old section. But both under the old Act as well as under the new, no right of pre-emption could possibly secure until the document of transfer was registered. The material date is the date of registration and not the date of execution. The provisions of the new section would, therefore, be applicable to transfers registered after it became operative, although they were executed while the old section was in force. (*Mukherjea and Akram, JJ.*) Gobardhan Bar *v.* Gunadhar Bar. **44 C.W.N. 802.**

——**S. 26-F**—*Application by landlords mentioned in transfer deed—Rejection of, on ground that certain idol is landlord and applicants are merely shebaits—Propriety—Applicants who are members of Mitakshara family not impleading their sons and nephews—Effect.*

An application for pre-emption under S. 26-F of the Bengal Tenancy Act presented by the persons described as the landlords in the deed of transfer cannot be rejected on the ground that a certain idol is the landlord and that the applicants are merely the shebaits, when there is no mention of the idol in the transfer-deed. Nor can the application be rejected on the ground that the applicants are members of a Mitakshara family and have not joined in their application their sons and nephews as co-sharers, when they are the adult members, who actually manage the properties. (*M. C. Ghose, J.*) Mahendra Nath Das *v.* Radhashyam Mandal. **173 I.C. 686=10 R.C. 561=41 C.W.N. 1185=A.I.R. 1937 Cal. 577.**

——**S. 26-F**—*Application made before repeal of section—Order passed after its repeal—Validity—Act VI of 1938.*

An order passed under S. 26-F of the Bengal Tenancy Act after its repeal by Act VI of 1938 is valid, if the application for pre-emption was made at a time when the section was operative. Neither the language of the new enactment nor the primary object for which it was passed furnishes any indication that the Legislature intended to give a retrospective operation to the new Act so as to affect suits or proceedings already pending at that time. (*Mukherjea and Akram, JJ.*) Bepin Chandra Ghosh *v.* Srimati Bityutlata Roy. **71 C.L.J. 400.**

——**S. 26-F**—*Application for pre-emption filed before its repeal—Order passed thereon after repeal—Validity.*

Where the application for pre-emption was made at a time when S. 26-F of the Bengal Tenancy Act was operative, an order can be validly made on that application after its repeal by Act VI of 1938. Neither the language of the new enactment nor the primary object for which it was passed furnishes any indication that the legislature intended to give a retrospective operation to the new Act so as to affect suits or proceedings already pending at that time. (*Mukherjea and Akram, JJ.*) Bepin Chandra *v.* Mahim Chandra. **44 C.W.N 640.**

——**S. 26-F**—*Application for pre-emption—Benamidar of co-sharer landlords made party—Sufficiency.*

A benamidar fully represents in a suit or proceeding the beneficial owner. Where therefore in an application for pre-emption under S. 26-F of the Act, the benamidar of certain co-sharer landlords is made a party, the application is not defective by reason of failure to implead the co-sharer landlords. The benamidar represents the co-sharer landlords and the co-sharer landlords can at any time be added as parties in place of the benamidar, in case they want to come in and represent themselves instead of their benamidar representing them. (*R. C. Mitter, J.*) Mukti Devi *v* Monorama Mitra. **I.L.R. (1937) 1 Cal. 194=169 I.C. 862=10 R.C. 45=40 C.W.N. 1211=53 C.L.J. 566=A.I.R. 1936 Cal. 490.**

——**S 26-F**—*Application for pre-emption—Co-sharer impleaded as party getting notice after one month—Right to apply as co-applicant.*

Whether a co-sharer landlord impleaded as an opposite party to an application for pre-emption by a co-sharer under S 26-F of the B. T. Act can apply for pre-emption as a co-applicant when he gets through Court notice of the application for pre-emption after a month of its filing, whether he is made a party originally or added as party afterwards within a month from the date of filing of the application. (*R. C. Mitter, J.*) Gajendra Nath Mandal *v.* Kunja Behari Mistri. **166 I.C. 492=9 R.C. 538=40 C.W.N. 506=A.I.R. 1936 Cal. 388.**

——**Ss. 26-F and 188**—*Application for pre-emption—Joinder of minor as one of opposite parties—Application if defective—Subsequent proceedings without appointment of guardian—Validity.*

An application for pre-emption under S. 26-F is not defective merely because one of the opposite parties impleaded in it is a minor and no guardian is appointed to act for him. The minor must be taken to have been made a party for purposes of S. 188. The subsequent proceedings are however irregular if the Court fails to appoint a guardian to act for the minor and the order for pre-emption passed therein is liable to be discharged and the case remitted to the lower Court in order that the proceedings may be continued after appointment of a guardian of the minor. If after the appointment of the guardian the minor wants to be made a co-applicant, his application is competent, although made after the period of limitation for making it is over, provided it is made promptly. The minor should not be allowed to suffer by reason of the failure of the Court to discharge its duty. (*R. C. Mitter, J.*) Mukti Devi *v.* Monorama Mitra. **I.L.R (1937) 1 Cal. 194=169 I C. 862=10 R C 45=40 C.W.N. 1211=63 C.L J. 566=A.I.R. 1936 Cal. 490.**

——**S. 26-F**—*Application for pre-emption by co-sharer landlord—Addition of other co-sharers as parties—Limitation.*

Where some of the co-sharer landlords file the application for pre-emption, an application by the applicants for addition of their co-sharer landlords as opposite parties must be made within the two periods mentioned in sub-S 4 (*a*) of S. 26-F of the B. T. Act, namely either within two months of the service of notice issued under S. 26-C or S. 26-E, or within one month of the application for pre-emption. But though all co-sharer landlords are necessary parties to an application, for pre-emption, it is not necessary that such of them as are left out in the original application for pre-emption should be added within two months of the date of service of notice under S. 26-C or S. 26-E, on the co-sharer who has filed the application for pre-emption. (*Mitter, J.*) Gajendra Nath Mandal *v* Kunja Behari Mistri. **166 I C 492=9 R. C. 538=40 C.W.N. 506=A.I.R. 1936 Cal. 388.**

——**S. 26-F**—*Application for pre-emption by some of co-sharer landlords—Others made parties after limitation—Application, if barred—Limitation Act, S. 22.*

An application for pre-emption under S. 26 F of the B T.Act must be made by all the co-sharer landlords. If some of the co-sharers only apply within time and the others are made parties after the expiry of the period of limitation, the application is barred by limitation. By operation of S. 29 (2) (*a*) of the Limitation Act, the provisions of S. 22 of that Act apply to an application under S. 26-F of the B. T Act. (*Bartley and Nasim Ali, JJ.*) Dinesh Chandra Choudhury *v.* Rajendra Chandra Kar. **177 I.C. 798=11 R. C. 276=42 C.W.N. 316=A.I.R. 1938 Cal. 324.**

——**S. 26-F**—*Application for pre-emption dismissed for technical defects—Second application—If maintainable.*

Where an application for pre-emption under S. 26-F of the B.T. Act is dismissed for technical defects and not on the merits, a second application could lawfully be made. (*M. C. Ghose, J.*) Ananta Lal Saha *v.* Kamakhya Charan Das. **41 C.W.N. 1371.**

——**S. 26-F**—*Application for pre-emption with the required deposit—Dismissal for default—Fraudulent attachment of deposit and withdrawal in execution of decree against co-sharer landlord—Subsequent restoration of application—Order for refund of deposit withdrawn—Non-compliance—Order calling on applicant to make fresh deposit—Default—Proper procedure.*

An application by certain co-sharer landlords for pre-emption of an occupancy holding under S. 26-F of the Bengal Tenancy Act, accompanied by the necessary deposit required by law, having been dismissed for default, certain holders of a decree against such applicants acting in collusion with the transferee and by surreptitiously suppressing all processes attached the deposit in execution of their decree and withdrew the same from Court. The co-sharers subsequently applied and got their application restored on showing good cause and then applied to the executing Court to call upon the decree-holders to refund the amount withdrawn by them. The Court made such an order but it was not complied with. The pre-emption Court then called on the co-sharers to make a fresh deposit under S. 26-F, and on their failure to do so within the time fixed dismissed their application for pre-emption for want of the necessary deposit in Court. The Judge who passed the orders for deposit and the order of dismissal was the Judge who as the Judge of the executing Court, passed the order calling on the decree-holders to refund the money withdrawn by them in execution.

Held, (*i*) that the order dismissing the application for pre-emption was wrong and must be set aside; and that the Court below should be directed to hear the application on the merits and to pass an order of pre-emption if the co-sharers made out their right for pre-emption, but the Court should postpone passing of the order for payment of the price and 10 per cent. to the purchaser or transferee, etc., till the money is brought into Court by the decree-holders who withdrew it; (*ii*) that where the deposit required by the statute is made with the application for pre-emption, and that within the time limited, the requirements of S. 26-F are complied with, and the application cannot be dismissed as defective, merely because the deposit has been withdrawn by holders of decree against the applicants fraudulently; (*iii*) that S. 26-F (5) contemplates two orders, one for pre-emption in favour of the applicant if he is entitled to it, and a further and distinct order in favour of the purchaser or transferee, which is no doubt dependent on an order for pre-emption in favour of the applicant. (*R. C. Mitter, J.*) Rakhal Das Som *v.* Sarala Bala Haldar. **I.L R. (1937) 1 Cal. 223=66 C.L.J. 73 =40 C.W N. 1182.**

——**S. 26-F**—*Application under—Money deposited into treasury on following day—Application if barred.*

If at the time of making an application under S. 26-F of the B. T. Act, the applicant brings the money with him in Court but it could not be deposited into the Treasury until the next day owing to the rules of procedure, the Court cannot reject the application as time-barred. (*Henderson, J.*) Manilal Pal *v.* Gour Chandra Das. **178 I.C 1008=11 R.C. 453=67 C.L.J. 80=A.I. R. 1938 Cal.792.**

——**S. 26-F**—*Application under—Question if applicant is landlord—Jurisdiction of Court to entertain.*

On an application under S. 26-F of the B. T. Act, the Court has jurisdiction to entertain the question whether the applicant is a landlord. The mere fact that the applicant has been served with notice as landlord does not give him the right to get the reliefs which may be granted by the Court under that section. (*Sen, J.*) Birendra Kumar Roy *v.* Jagat Kishore Acharjya. **43 C.W.N. 274.**

——**S. 26-F**—*Application under old section after amendment—Maintainability—Transfer before amendment.*

An application for pre-emption filed under the old S. 26-F of the B. T. Act after the Amendment

Act of 1938 by which it was amended has come into operation, is not entertainable although the transfer took place before the amendment. (*Nasim Ali and Rau, JJ.*) PRAFULLA CHANDRA *v.* RAJMOHAN DAS. **186 I C. 589=12 R. C. 502=43 C.W.N 1172=A.I.R. 1940 Cal. 81**

——S. 26-F—*Holding purchased by decree-holder in execution for less than decretal amount—Application by landlord for pre-emption—Sale subsequently set aside and so pre-emption application also dismissed—Sale again restored on decree-holder agreeing to discharge judgment-debtor from entire liability—Landlord's right to pre-empt—Deposit necessary.*

In execution of a money decree, an occupancy holding belonging to the judgment-debtor was sold for less than the decretal amount and purchased by the decree-holder, and the sale was confirmed. The landlord thereupon applied for pre-emption under S. 26-F of the B. T. Act and made the necessary deposit, and his application was allowed. Subsequently an application previously made by the judgment-debtor under O.21, R. 90, C. P. Code, was allowed *ex parte* and the sale was set aside. The Court thereupon allowed the landlord to withdraw the money deposited by him and dismissed the application for pre-emption. Subsequently the decree-holder applied for setting aside the *ex parte* order by which the sale was set aside. The decree-holder and the judgment-debtor entered into a compromise by which the decree-holder agreed to discharge the judgment-debtor from the entire liability under the decree. The application of the decree-holder was thereupon allowed and the order confirming the sale was restored. On application by the landlord for re-depositing the amount which was paid by him in Court for pre-emption of the holding and also for possession of the holding under S. 26-F **(6) (*iii*),**

Held, that the effect of the revival of the order confirming the sale was to restore the order for pre-emption previously made and that, therefore, the application of the landlord must be allowed.

Held also, that the landlord was bound to deposit the amount for which the holding was originally sold and not the entire decretal amount. (*Nasim Ali, J.*) CHAND MIA *v.* MAHARAJA BIR VIKRAMKISHORE MANIKYA BAHADUR. **42 C.W.N. 644.**

——S. 26-F—*Instrument of transfer stating sale price as Rs. 200—Notice under S. 26-C also stating same amount—Recital in body of instrument that certain mortgage debts were satisfied—Amount of such debts not stated—Amount to be deposited by landlord for pre-emption.*

Where the instrument of transfer and the notice issued to the landlord under S. 26-C of the B. T. Act stated the sale price as Rs. 200 and in the body of the instrument one mortgage in favour of the transferee and another mortgage decree in favour of his son were recited and stated to have been satisfied but the amount due on them was not mentioned and it appeared that the mortgage was in respect of a different property and the mortgage decree directed a sale not only of the holding sold but also of other properties.

Held, that the transferee was not entitled to ask the Court to consider the amount payable on the mortgage or the mortgage decree as part of the consideration for the purposes of S. 26-F of the Act, and that the landlord was not bound to deposit for pre-emption anything more than what was stated in the instrument of transfer and in the notice issued under S. 2) (*c*). (*Bartley and Nasim Ali, JJ.*) KUNJA KAMINI *v* MANGAL CHANDRA. **I.L.R. (1938) 1 Cal. 695=42 C.W.N. 209.**

——S. 26-F—*Notice of application served on co-sharer landlord as purchaser—Latter not invited to join in application—Application, if maintainable.*

Where a co-sharer landlord who is himself the purchaser is served with notice of the application for pre-emption under S. 26-F of the B. T. Act, the application is maintainable although no notice is served on him describing him as a co-sharer and inviting him to join in the application for pre-emption of his share. (*M. C. Ghose, J.*) ANANTA LAL SAHA *v.* KAMAKHYA CHARAN DAS. **41 C.W.N. 1371.**

——S. 26-F—*Order for pre-emption—Validity—Power of third persons to question—Holding sold to minor—Minor not represented in pre-emption proceeding.*

The proceeding by which the landlord exercises his right of pre-emption under S. 26-F of the B. T. Act cannot be challenged as void by third persons on the ground that the purchaser of the occupancy holding, who was a minor, was not properly represented in such proceeding. There is no real analogy between a decree of a Civil Court and an order for pre-emption passed under S. 26-F of the Act. The right of the landlord to pre-emption does not depend upon any decision by the Court. It flows automatically from the transfer itself and no duty is cast upon the landlord to give any notice to the purchaser. Where the purchaser describes himself in the *Kobala* as a major, the Court can only serve the notice in accordance with its terms. (*Henderson, J.*) DEBENDRA CHANDRA DE *v.* JAMINI KUMAR DEY. **I. L.R (1940) 1 Cal. 156=185 I.C. 704=12 R.C. 402=43 C.W.N. 1209=A I.R. 1939 Cal. 744.**

——S. 26 F—*Proceeding under—Judgment of competent Court declaring transfer by tenant void—Admissibility—Evidence Act, S. 43.*

In a summary proceeding for pre-emption under S. 26-F of the Bengal Tenancy Act, which is based upon the assumption that a transfer from a tenant to a third party has taken place, a judgment of a Court of competent jurisdiction declaring that transfer void must be regarded as a fact in issue under S. 43 of the Evidence Act and as such is admissible in evidence, and the Court has no jurisdiction to allow pre-emption to the pre-empting landlords. (*Edgley, J.*) BASANTA KUMAR *v.* DURGANATH PAL. **I L.R. (1939) 1 Cal. 558=183 I.C 489=12 R.C. 165=43 C.W.N. 549 =A.I R 1939 Cal. 432.**

——S. 26-F—*Proceeding under—Minor party—Compromise entered into by guardian—Sanction of Court—If necessary—Order of Court—If can be challenged by suit—C. P. Code, O. 32, R. 7.*

By virtue of S. 141, C. P. Code, O. 32, R. 7 of the Code applies to proceedings under S. 26-F of the Bengal Tenancy Act and express sanction must be given by the Court to a compromise where a minor is concerned. An order passed on an application made under S. 26-F of the Bengal Tenancy Act can be challenged by a suit on the ground of fraud and can also be challenged by a suit by a minor on attaining majority if it was the result of a compromise entered into by his guardian without the leave of the Court expressly recorded. (*Guha and Mitter, JJ.*) Syed Mahommed Ali *v.* Ajit Kumar Das. **42 C.W.N. 154.**

——**S. 26-F**—*Proceedings under—Nature of—Vendee a minor—Appointment of guardian* ad *litem—If essential.*

Pre-emption proceedings under S. 26-F are in the nature of suits. Hence if the vendee be a minor the appointment of a guardian *ad litem* is mandatory and an order passed in a proceeding under S. 26-F against a minor where no guardian is appointed is a nullity. And where in a suit by the minor the order in the pre-emption proceedings is declared null and void and the pre-emptor files an appeal, the appellate Court has no jurisdiction to direct the lower Court to revive the pre-emption proceedings after giving an opportunity to the appellant of getting the minor properly represented by a guardian. (*Sen, J.*) Bimal Kumar Hui *v.* Purnima Dasi. **179 I.C. 199=11 R.C 490=A.I.R. 1938 Cal. 736.**

——**S. 26-F**—*Proceeding under—Objection regarding nature of holding raised at late stage, disallowed by lower Court—Interference in revision.*

Where in a proceeding under S. 26-F of the B. T. Act an objection regarding the nature of the holding which was raised at a late stage was disallowed by the lower Court, the High Court sitting in revision will not interfere with that order. (*Henderson, J.*) Kali Mohan Pal *v.* Sachindra Mohan Ray. **67 C.L.J. 5.**

——**S. 26-F (as amended)**—*Proceeding under—Parties—Co-sharer tenants—If necessary parties.*

There is no provision in the B. T. Act which makes it necessary that the co-sharer tenant who seeks to exercise his right of repurchase under S. 26-F of the new Act should make the other co-sharers parties to the proceeding. The non-joinder of the other co-sharer tenants would not therefore, in any way make the proceeding defective. (*Mukherjea and Akram, JJ.*) Gobardhan Bar *v.* Gunadhar Bar. **44 C.W.N. 802.**

——**S. 26-F**—*Proceeding under—Scope of enquiry—Rights of third party—If can be adjudicated.*

S. 26-F of the Bengal Tenancy Act requires certain matters to be proved and upon proof thereof the landlord is entitled to pre-emption. It is not open to the transferee to raise independent issues which are not contemplated by the section nor can he be allowed to say that the deed of transfer upon which the pre-emption is claimed is not what it purports to be. The party must be held bound by the statements in the deed itself. S. 26-F does not contemplate the adjudication of the rights of a third party. (*M. C. Ghose, J.*) Jogendra Nath Chowdhury *v.* Golam Samdani. **65 C.L.J. 472=41 C.W.N. 1155.**

——**S. 26-F**—*Proceeding under—Vendor, if necessary party.*

The question as to whether or not the vendor has *locus standi* to contest an application for pre-emption under S. 26-F of the Bengal Tenancy Act depends entirely upon the circumstances of the case. Where the position adopted by the vendor is that there had not been an effective transfer of his holding which the landlord is seeking to pre-empt, that he intended to execute a mortgage-deed but owing to fraud on the part of the transferee, he had been made to execute a deed of transfer, the vendor is vitally interested in the result of the application for pre-emption and has every right to be made a party to the pre-emption proceedings in order to contest the same. (*Edgley, J.*) Basanta Kumar *v.* Durganath Pal **I.L.R. (1939) 1 Cal. 558=183 I.C. 489=12 R.C. 165=43 C.W.N. 549=A.I.R. 1939 Cal. 432.**

——**S. 26-F**—*Right of pre-emption—Applicant, if must be immediate landlord at time of order.*

The right of pre-emption under S. 26-F of the Bengal Tenancy Act depends upon the applicant being an immediate landlord of the holding not only at the time he makes his application but also at the time when an order for pre-emption is made under sub-S. 5 (5). (*Henderson, J.*) Ramendranath Ray Chowdhury *v.* Jitendra Nath Chakravarty. **I.L.R. (1938) 2 Cal 85=42 C.W.N. 382=176 I.C 810=11 R.C. 181=67 C.L.J. 76=A.I.R 1938 Cal. 351.**

——**S. 26-F**—*Right to apply—Unrecognised purchaser of share of occupancy holding.*

A person who had purchased a share of an occupancy holding before the Bengal Tenancy Act of 1928 came into operation but had never been recognised as a tenant by the landlord, does not acquire the status of a tenant within the meaning of the Act. He has, therefore, no *locus standi* to apply for pre-emption under S. 26-F of the Act. (*Edgley, J.*) Abdul Majid *v.* Altab Ali. **I.L.R. (1940) 1 Cal. 527=44 C.W.N 500.**

——**Ss. 26-F and 3 (3)**—*Right to apply for pre-emption—Proprietor of resumed mahal with whom no settlement has been made—If landlord entitled to pre-empt.*

Where a mahal had been resumed under Regulation II of 1819 (on the ground that it was held under an invalid lakeraj grant), the proprietor of the resumed mahal with whom no settlement has been made by the Government, is not a landlord within the meaning of S. 3 (3) of the Bengal Tenancy Act, and he has, therefore, no right to apply for pre-emption under S. 26-F of that Act. (*Sen, J.*) Birendra Kumar Roy *v.* Jagat Kishore Acharjya. **43 C.W.N. 274.**

——**S. 26-F**—*Sale of property in two lots—Landlord's right to pre-empt one of them.*

Where property was sold in two lots in execution of a money decree, the landlord seeking to pre-empt under S. 26-F of the Bengal Tenancy Act cannot be allowed to pre-empt only one lot. He must pre-empt both the plots or his application must be refused. (*S. K. Ghose, J.*) Surabala Basu *v.* Rukmini Kanta Barman Roy. **42 C.W.N. 288.**

——**S. 26-F**—*Two separate holdings sold by one deed—Pre-emption of one—Permissibility.*

Under S. 26-F, Bengal Tenancy Act, it is permissible for the landlord to pre-empt one of two separate holdings which have been sold by one transfer deed. (*Sen, J.*) Monoranjan Chatterjee *v* Pyare Mohan De. **43 C.W.N. 220**

——**S. 26-F (1)**—*Application by co-sharer landlord—Applicant added as co-applicant in another application by other co-sharer landlords—Latter dismissed as defective—Applicant—If debarred from continuing his own application.*

Where a co-sharer landlord making an application for pre-emption under S. 26-F is added as a co-applicant, on his request, in another application by his co-sharer landlords and the latter application is dismissed by reason of certain defects, he is not debarred from continuing his own application. Each of the co-sharer landlords has an independent right to make an independent application under S. 26-F (1) and he is not entitled to exercise his right of pre-emption only by becoming a co-applicant in other co-sharer's pending application for pre-emption. Two applications for pre-emption can go on simultaneously. (*R. C. Mitter, J.*) MUKTI DEVI *v.* MONORAMA MITRA. **I.L.R. (1937) 1 Cal. 194 =169 I.C 852=10 R.C. 45=40 C.W.N. 1211= 63 C.L.J. 565=A.I.R. 1936 Cal. 490.**

——**S. 26-F (1)**—Application by co-sharer landlord for pre-emption under S. 26 F (1)—Notice on other co-sharer landlords not served in time owing to laches of Court officers or mistake of Court—Their application under S. 26-F (4) dismissed as time-barred—Application under S. 26-F (1)—Maintainability. *See* BENGAL TENANCY ACT, S. 183 (1), PROVISO. **41 C.W.N. 444.**

——**S. 26-F (1) and 26-F (4) (a)**—*Application for pre-emption by co-sharer landlord served with notice of transfer—Application for being made co-applicant by another co-sharer not served with notice—If one for pre-emption—Application by other co-sharers to be made co-applicants within one month of latter application but beyond one month of former and two months of service of notice—Maintainability.*

The application of a co-sharer landlord who has not been served with the notice of transfer to become a co-applicant in the application for pre-emption by another co-sharer landlord who has been served with notice, must be considered as an application for pre-emption under S. 26-F (1) of the Bengal Tenancy Act. As soon as such an application is made the remaining co-sharer landlords are entitled to become co-applicants, if they apply for being so made within one month of the application by the co-sharer not served with notice, even though they ask for pre-emption beyond one month of the application of the other co-sharer served with notice and beyond two months of the service of notice of transfer on them. It is not incumbent on a co-sharer landlord to exercise his right to pre-empt by becoming a co-applicant at the earliest opportunity, as soon as the first application for pre-emption is made by one of the co-sharers. (*R. C. Mitter, J.*) GADADHAR SARKHEL *v* GOPAL CHANDRA DAS. **63 Cal 1079=40 C.W.N 630=166 I.C 641=9 R.C. 570=A I.R. 1936 Cal 343**

——**S. 26-F (1), (5) and (6)**—*Sale of share in occupancy holding—Pre-emption application by landlord—Pre-emption suit by another co-sharer by inheritance—Decree in—Effect on landlord's application.*

Certain co-sharers sold their share in an occupancy holding, and getting notice of it, the landlord filed an application for pre-emption under S. 26-F. Pending this application, another co-sharer of the transferors who had become a co-sharer by inheritance under Mahomedan Law, filed a suit for pre-emption to enforce the right under Mahomedan Law. Both the application and the suit were heard together. The suit was decreed.

Held, that the landlord's application should be dismissed as there was no right, title or interest left in the vendees and as there could be no order for pre-emption against the co-sharer who had obtained the decree by reason of S. 26-F (1). (*R. C. Mitter, J.*) NALINAKSHA DUTTA *v.* ABDUL JALIL **166 I.C. 742=9 R.C. 579=A.I.R. 1936 Cal. 398.**

——**S. 26-F (1) and 188**—*Scope and construction—Application by some co-sharers for pre-emption—Applicants, if bound to invite other co-sharers to join—Failure to express consent to their joining as co-applicants—If fatal.*

Where some of the co-sharer landlords apply for pre-emption under S. 26-F (1) of B. T. Act, the remaining co-sharers must be made opposite parties either in the application originally filed or by an application for amendment made within one of the two periods of time mentioned in sub-S. 4 (*a*) of S. 26-F. That is the effect of the words "giving opportunity of joining in the proceedings" occurring in S. 188. It is not necessary that the co-sharer landlords applicants must invite the remaining co-sharer landlords to join in their application or should expressly consent to their so joining. All that is necessary is that the applicants must place their co-sharer landlords in a position to join in the pre-emption if they like. The absence of an express statement in the application to the effect that the applicants have no objection to their co-sharer landlords joining in the application or that they would be willing to treat them as co-applicants would not make their application for pre-emption a bad one on that account. (*R. C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. **167 I.C 432=9 R C. 693=40 C.W.N. 1023=A. I.R. 1935 Cal. 576.**

——**S. 26-F (1) and (4)**—*Deposit by co-sharer landlord—Time limit.*

The whole scheme in the matter of deposits to be made by co-sharer landlords applying for pre-emption under the Bengal Tenancy Act, whether the application be under S. 26-F (1) or under S. 26-F (4) of the Act, seems to be that the deposit to be made by applicants or co-applicants must be made within the time limit imposed by the statute for making such application, though failure to deposit the amount along with the application would not be fatal. The deposit must however be made within the period of limitation prescribed by S. 26-F (4) (*a*). If the service of notice be delayed, *i.e.*, of the application under S 26-F (1), beyond one month by reason of the act or defaults of the applicant for pre-emption, his application for pre-emption would be thrown out on the ground of non-compliance with S. 188. But if the notice be not served within that period by any act of omission or mistake of the Court or of its officers, the application of the co-sharer applicant under S 26-F (1) would be a good one; and the Court would be under a duty to relieve the co-sharer landlords opposite parties from the injury done to them by its acts or defaults or those of its officers. (*R. C Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. **157 I.C. 432=9 R.C. 693=40 C. W.N. 1023=A.I.R. 1936 Cal. 576.**

———S. 26-F (2)—*Application for pre-emption—Necessary deposit made only on following day—Application and deposit both within two months of service of notice—Application brought to notice of Court only on following day after deposit—Application, if in order.*

The expression "time of making" in sub-S. (2), S 26-F, Bengal Tenancy Act, is to be given a liberal construction and the expression 'making' does not mean filing but refers to some time when application is brought to the notice of the presiding officer, who has power to dismiss, and not the point of time when the application is presented to some officer of the Court. Hence where an application for pre-emption is made on a certain day, and the deposit of necessary amount is made only on the following day, and the application is brought to the notice of the Court after the deposit, both the application and the deposit being within two months of the service of notice, the application is quite in order. (*S. K. Ghose and Patterson, JJ.*) JOTIS CHANDRA BISWAS *v.* JADU NATH SIKDAR. **173 I.C. 398=10 R C. 509 =A.I R. 1937 Cal. 377.**

———S. 26-F (2)—*Compliance with—Sufficiency —Deposit made two days after application.*

Where the application and the payment of the money were both within two months of the receipt of the notice, and on the day on which the application was made the landlord's officer came ready with the *challan* to deposit the money but it being a Saturday, the money could not be accepted after 1 P.M. and the officer had to wait till the next Monday when the money was taken by the office.

Held, that there was sufficient compliance with sub-S (2) of S. 26-F of the Bengal Tenancy Act. (*M. C. Ghose, J.*) ABU BAKKAR *v.* NRIPENDRA NATH SEN. **41 C W.N 1212.**

———S. 26-F (2) and (3)—Kobala *showing price of land and of trees separately—Price of trees not included in notice to landlord—Landlord, if bound to deposit price of trees also—Right of purchaser to remove trees.*

The value of a holding would include the value of the trees standing on it, and the landlord would ordinarily be bound to deposit under S. 26 (F) of the B T. Act not only the price of the land as stated in the *Kobala*, but the price of the trees also, if that is separately shown. But under S 26 (F) (2), the landlord has only to deposit the price of the property as specified in the notice issued under S. 26 (C), and if the purchaser omits to include the price of the trees in the notice, the landlord cannot be compelled to deposit the price of trees also. Nor can the landlord be directed to deposit the price of the trees under S. 26 (F) (3) as the trees cannot be regarded as incumbrances within the meaning of that clause The purchaser is, however, entitled in such circumstances to remove the trees. (*M. C Ghose and Mukerjea, JJ.*) RAJ BALLAV MONDAL *v.* RAJENDRA NARAIN MONDAL **I.L.R. (1937) 2 Cal. 73= 170 I.C. 641=10 R C 167=41 C.W.N. 317=64 C.L J. 582.**

———S 26-F (3)—*Transferee of occupancy holding—If entitled to be paid mortgage debt due to himself.*

A transferee of an occupancy holding who is also a mortgagee of that holding is not entitled under S. 26-F (3) of the B. T. Act to be paid his unpaid mortgage debt. If he wishes to enforce his mortgage, he must do so by a proper suit in the ordinary Courts. (*Henderson, J.*) BENOY KUMAR *v.* SK. EAKUB. **42 C.W.N. 1110.**

———S. 26-F (4)—*Co-sharer landlord not availing opportunity to apply for pre-emption—Subsequent death—Substitution of his heirs—If necessary.*

The object of S. 26-F (4) is merely to afford co-sharer landlords an adequate opportunity themselves to apply for pre-emption in respect of transferred holding. If, therefore, a co-sharer landlord who was made a party to an application for pre-emption dies without availing himself of the opportunity given to him, it is not necessary to substitute his heirs as parties to the application. (*Edgley, J.*) RAKHAL CHANDRA DE *v.* LALIT MOHAN SAHA **43 C.W.N. 554.**

———S. 26-F (4) (a)—*Application by co-sharer to join as co-applicant in pre-emption application—Time for—Period of one month—Starting point.*

The period of one month within which the co-sharer landlord has to apply to be joined as co-applicant under the second alternative in S. 26-F (4) (*a*) of the B. T. Act must be counted from the date of the filing of the application under S. 26-F (1) and not from the date of service thereof on the co-applicant. (*R.C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. **167 I.C. 482=9 R.C. 698 =40 C W N 1023=A.I.R. 1936 Cal 576.**

———Ss. 26-F (4) (a) and 148-A (2)—*Application by some co-sharers for pre-emption impleading others as parties defendants—Notice on latter not served within one month due to act of Court—Latter coming in within reasonable time after notice—Their right to pre-emption—Knowledge of application apart from notice—If sufficient to deprive them of right.*

Where in an application for pre-emption by some of the co-sharer landlords impleading the others as parties defendants, the notice under S. 148-A (2) of the B. T. Act was not, due to the act of the Court, served upon the latter within one month from the date of the application, but the latter came in within reasonable time of the service of the notice, they should be allowed to exercise the right of pre-emption. The mere fact that they had, apart from the service of notice, vague information of the application made by the other co-sharer landlords for pre-emption, is not sufficient to deprive them of their right of pre-emption, when there is no evidence that they had definite knowledge of that application and, in particular, of the date when such application was made. (*D. N. Mitter, J.*) SATISH CHANDRA BANERJEE *v.* JOGENDRA KRISHNA BANERJEE. **41 C. W.N 674.**

———S. 26-F (4) (a)—*Co sharer landlord acquiring interest after transfer and application by some co-sharers under S 26-F (1)—Right to join as co-applicant—Limitation.*

A co-sharer landlord (although he acquires his interest after the date of transfer of the occupancy holding or after the date of an application for purchase by some of the co-sharer landlords under S. 26-F (1) of the Bengal Tenancy Act) is competent to apply under sub-S. (4) (*a*) to join as a co-applicant in the application under S. 26-F (1). In such cases the applicant will not be bound by the special rule of limitation prescribed in

S. 26-F (4) (*a*), but may make his application within a reasonable time of his knowledge of the sale of the occupancy holding. (*Biswas, J.*) Beni Madhab *v.* Taherannessa. **43 C.W.N 110.**

———S. 26-F (4) (a)—*Purchase of raiyati holding by co sharer landlord—Other co-sharer landlords applying to pre-empt entire holding—Transferee not joining in application—Effect.*

Where on the purchase of a raiyati holding by a co-sharer landlord, the other co-sharer landlords make an application for pre-emption under S.26-F of the B. T. Act, the transferee co-sharer landlord must within the time allowed by sub-S. (4) (*a*) of S. 26-F also apply for pre emption according to his share. Otherwise he will not save his proportionate share of the holding from pre-emption, and the other co-sharer landlords would be entitled to pre-empt the entire holding. (*M C. Ghose, J*) Sonamaddi *v* Pramada Sundari Sarkar. **173 I.C. 481=10 R.C. 529=41 C.W.N. 1251=A I R. 1937 Cal 746.**

———S. 26-F (4) (a)—*Scope—Application for pre-emption under—Co-sharers not joining in nor claiming share—Effect—Purchaser co-sharer landlord not claiming alternative right of pre-emption—If loses rights.*

Petitioner had two annas share, respondent No. 1 four annas share and respondents 2 to 22, the remaining ten annas share in a Patni Taluk. In June, 19 9, the said Patni was sold for arrears of rent and purchased by the petitioner. He also purchased the occupancy holding in that Patni on 12-1-1933. Respondent No. 1, a lady, brought a title suit in 1933 for a declaration of her title to four annas share in the Patni and for reconveyance of her share and got a decree declaring that she had four annas share in it and that the purchase by the petitioner of the Patni at the rent sale enured for the benefit of all the co-sharers in the Patni at the time of the sale. She was also ordered to deposit a certain amount in Court within two months and the petitioner was thereupon to reconvey to her four annas share by a registered *kobala* at the cost of respondent No. 1. The latter duly deposited the amounts in terms of the decree but the petitioner defaulted to execute the reconveyance. On 8-5-1934, respondent No. 1 applied for pre-emption. But neither the petitioner nor respondents 2 to 22 joined her in the application.

Held, that the decree in the title suit operated to vest the beneficial interest in four annas share in the respondent No. 1, though no reconveyance had been executed by the petitioner, and she having done what she was directed to do by the decree, the petitioner could not merit by or take advantage of his own default and resist her application for pre-emption.

Held, further, that since the petitioner neither joined in her application for pre-emption nor put forward any alternative claim to pre-empt as a co-sharer in case he was not adjudged sole landlord, and since respondents 2 to 22 never cared to exercise their right of pre-emption. The respondent No. 1, in view of the provisions of S 26-F (4) (*a*) of the B. T. Act, became entitled to get a decree for pre-emption of the entire sixteen annas share in the Patni. (*R. C. Mitter, J.*) Surendra Nath Nandi *v.* Sushilabala Dasi. **167 I C. 259=9 R.C. 671=63 C.L.J. 49=A.I.R 1937 Cal. 47.**

———S. 26-F (4) (a)—*Time fixed for deposit—Extension—Power of Court.*

A Court cannot extent the period for making a deposit by a co-applicant for pre-emption beyond the periods of time mentioned in Cl. (*a*) of sub-S. (4) of S. 26 F. (*R. C Mitter, J*) Sachindra Nath Chakravarty *v* Trailakya Nath Chakravarty. **167 I.C 482=9 R.C. 698=40 C.W.N. 1023=A.I.R 1936 Cal. 576**

———S 26 F (4) (a)—*Time limit under—Power of Court to extend under inherent powers—Mistake of Court—Duty to set right.*

Where owing to the mistake of the Court, notice of a co-sharer landlord's application for pre-emption is not issued to the other co-sharer landlords within one month of the filing of the application, the Court has inherent power to set right the injuries caused to the rights of the co-sharer landlords and extend the time for joining as co-applicants as provided for in S. 26-F (4)(*a*). (*R. C. Mitter, J.*) Gadadhar Sarkhel *v.* Gopal Chandra Das. **63 Cal. 1079=166 I.C. 641=9 R.C. 570=40 C.W.N. 680=A.I.R. 1936 Cal 343.**

———**S. 26-G (as amended)**—*"Any other law for the time being in force"—If includes Evidence Act*

In a proceeding under S. 26-G of the Bengal Tenancy Act, the principle of estoppel can be invoked to preclude the mortgagor from showing that he is an occupancy raiyat. The Evidence Act which contains the law of estoppel is not included within the words "any other law for the time being in force" occurring in that section. (*Nasim Ali and Rau JJ.*) Prafulla Kumar Maity *v* Uday Chandra Prodhan. **43 C W N. 1192=185 I.C. 587=12 R C. 391=A.I.R. 1939 Cal. 736.**

——— S. 26-G—*Applicability—Mortgage giving mortgagee all rights of usufructuary mortgagee and also right of sale.*

Under S. 26-G of the Bengal Tenancy Act the Legislature has interfered to a great extent with the rights of a usufructuary mortgagee under the existing law. The section should be construed strictly and the privilege should not be extended to a case where the mortgage does not come within the plain language of the section. If a mortgage document gives the mortgagee not only the rights of the usufructuary mortgagee but also allows him to demand the mortgage money after the stipulated period and to have a decree for sale in respect of the mortgaged property in default of payment, the transaction is an anomalous mortgage to which S. 26-G has no application. (*Mukherjea and Akram, JJ.*) Khoaj Jamadar *v.* Abdul Sobhan. **44 C.W.N. 756=71 C.L.J. 484=A.I R. 1940 Cal 426.**

———S. 26-G—*Applicability — Mortgage with possession—Usufruct to be enjoyed in lieu of interest—Mortgagor undertaking to pay principal at stipulated period—Mortgagee given right to realise principal and interest if dispossessed.*

Under a mortgage-bond, the mortgagee was given possession of the mortgaged property and the stipulation was that he should remain in possession till the sum advanced was paid and enjoy the usufruct in lieu of interest. The bond mentioned a period after which the mortgagor undertook to redeem the property on payment of the principal money. There was a provision that in case of dispossession the mortgagee would be able to realise the principal and interest.

Held, that the mortgage was a usufructuary mortgage, to which S. 26 G of the Bengal Tenancy Act applied, that the fixing of a period for redemption did not import any personal liability and that the provision giving the mortgagee right to realise principal and interest if dispossessed was in the nature of an indemnity clause and did not alter the nature of the mortgage. (*Mukherjea and Akram, JJ.*) BHUTNATH JANA *v.* GOPAL PROSAD. **44 C W.N. 761=A I.R 1940 Cal. 436.**

——S 26-G—*Applicability—Mortgagee with possession—Usufruct to be enjoyed in lieu of interest—Mortgagor undertaking to pay principal at stipulated time—Mortgagee given right of sale in case of disclosure of encumbrance.*

Under a mortgage deed, the mortgagor gave up possession of the properties to the mortgagee who was to enjoy the usufruct in lieu of interest. The mortgagor undertook to take back the properties on payment of the principal sum at a stipulated period, in default of which the mortgagee would go on enjoying the properties till the money was paid. There was a further stipulation that if it was subsequently disclosed that the mortgagor had already mortgaged the properties to other persons or before payment of the mortgage money it was again mortgaged to some other person or the mortgagor surrendered the lands in favour of the landlords, the mortgagee would be entitled to recover the mortgage-money by sale of the mortgaged properties.

Held, that the deed created a usufructuary mortgage to which S. 26-G of the Bengal Tenancy Act applied, that the term fixed in the deed did not import any personal liability but laid down the minimum time within which the mortgagor could redeem, and that the stipulation which gave the mortgagee a right to sell the mortgaged property was in the nature of an indemnity clause. (*Mukherjea and Akram, JJ.*) ABHOY CHARAN *v.* HARENDRA. **44 C.W.N. 760=A.I.R. 1940 Cal 437.**

——S. 26-G—*Applicability—Niskar holding.*

The provisions of S 26-G of the Bengal Tenancy Act do not apply to a *niskar* holding although the raiyat has a right of occupancy in the holding. (*Edgley, J.*) DEBENDRA NATH MAJHI *v.* SARAT CHANDRA NAYAK. **I.L.R. (1940) 1 Cal. 342=44 C.W N. 232.**

——S. 26 G—*Mortgage—Usufructuary or anomalous—Construction.*

A mortgage deed provided that on receipt of certain amount the possession of the property was made over to the mortgagee. It was then stipulated that after a period of 28 years the debt would be extinguished both as regards the principal and interest. There was a stipulation by which the mortgagor agreed that in the event of the mortgagee being dispossessed of the property in any way, the mortgagor would on account of the period of dispossession, be liable to pay interest at certain rate per month. There was in addition to this, a personal covenant to pay:

Held, that the mortgage in question was an anomalous mortgage (*Henderson, J.*) SURESH CHANDRA *v.* JADAV CHANDRA. **A.I.R. 1940 Cal 372.**

——S. 26-G—*Applicability—Possession of part only of mortgaged property delivered to mortgagee.*

A usufructuary mortgage can only come into existence if the whole of the mortgaged property is made over to the possession of the mortgagee. If the mortgagor delivers possession to the mortgagee part only of the mortgaged property, the mortgage must be regarded as an anomalous mortgage, and as such S. 26-G of the Bengal Tenancy Act can have no application to it. (*Edgley, J.*) SITAL PRASAD LALA *v.* UMESH CHANDRA CHAKRAVARTY. **44 C.W.N 728.**

——S. 26-G—*Order of Revenue Officer—Revision—C. P. Code, S. 115.*

The High Court cannot exercise its revisional jurisdiction in respect of an order made by a Revenue Officer in a proceeding under S. 26-G of the B. T Act. Even if a Revenue Officer in discharge of his judicial duties is a Court within the meaning of S 115, C. P. Code, it cannot be said that he is a Court subordinate to the High Court. (*Mukherjea, J.*) GOSTHA BEHARI GORAIN *v.* CHANDRA BHUSAN SARKAR. **44 C.W.N. 426=71 C L.J. 255**

——S. 26-G—*Order in—Proceeding under—Appeal.*

No appeal is competent from an order in a proceeding under S 26-G of the Bengal Tenancy Act. (*Derbyshire, C. J. and Nasim Ali, J.*) DIGAMBAR PONDA *v* SATISH CHANDRA DAS. **43 C.W N. 1108=185 I.C. 368=12 R.C. 357=A.I.R. 1939 Cal. 717.**

——S. 26-G—*Order in proceeding under—When* res judicata—*Revision.*

Although an order under S. 26-G of the Bengal Tenancy Act restoring possession to the mortgagor will operate as *res judicata,* no question of *res judicata* can arise if the application by the mortgagor to have possession restored to him is rejected. On this view there would be no justification for interference by the High Court in revision with an order rejecting an application. Different considerations, however, must arise when an order restoring possession is made. This has the effect of a decree of a Civil Court. An order can only be legally made in the case of a usufructuary mortgage. If in fact there is no such mortgage the order is without jurisdiction and the High Court can interfere under S. 115, C.P. Code. (*Henderson, J.*) KISHORI MOHAN *v.* MAIJANNESSA. **43 C.W.N. 1114=A.I. R. 1939 Cal 719**

——S. 26-G (1-a)—*'Usufructuary mortgage'—Meaning of—Additional covenants—If can change character of mortgage*

The term 'usufructuary mortgage' in S. 26-G (1-*a*) of the Bengal Tenancy Act is to be understood in the sense defined in S. 58 (*d*) of the Transfer of Property Act. If a mortgage satisfies that definition, its character is not changed by the following additional covenants, *viz.,* (1) that the mortgagor would pay the rent of the mortgaged land and that if the mortgagee pays it he might recover it from the mortgagor; (2) that if the mortgagor had already made any transfer or created a charge upon the mortgaged property, the mortgagee would be entitled to realise his dues by sale of other properties of mortgagor; (3) that if the mortgagee was dispossessed from the mortgaged land, the mortgagee would be entitled to recover the principal money with interest. (*Nasim Ali and Rau, JJ.*) PANCHANAN *v.* SHASHI BHUSAN. **44 C W.N. 465=71 C.L.J. 477=A.I. R. 1940 Cal. 281.**

——S. 26-G (5)—*Mortgage including both occupancy holdings and tenures—Mortgagor's right to recover possession of occupancy holdings.*

If a mortgage bond includes both occupancy holdings and permanent tenures the mortgagor, though not entitled to get back the tenures, is entitled to recover possession of the occupancy holdings under S. 26-G (5) of the Bengal Tenancy Act. (*Mukherjea and Akram, JJ.*) PRAFULLA CHANDRA GOPE *v.* SOARU MAHAMMAD. **44 C.W.N. 726=71 C L J 489.**

——S. 26-G (5)—*Mortgage of occupancy holding describing it as* mokarari *tenancy—Mortgagee cognisant of actual facts—Estoppel against mortgagor.*

Where the mortgagor mortgaged an occupancy holding describing it as a *mokarari* tenancy but the mortgagee was fully cognisant of the actual facts no question of estoppel can possibly arise and the mortgagor would be entitled to apply for restoration of possession of the mortgaged property under S. 26-G (5) of the Bengal Tenancy Act. (*Mukherjea and Akram, JJ.*) BHUTNATH JANA *v.* GOPAL PROSAD. **44 C.W.N. 761=A I.R. 1940 Cal 436.**

——S. 26-G (5)—*Mortgagors in possession as* adihars *under mortgagee—If competent to apply for restoration of possession.*

Although the mortgagors are in possession of the mortgaged property as *Adihars* under the mortgagee, they are competent to apply for restoration of possession under S. 26-G (5) of the Bengal Tenancy Act. They are either labourers or tenants and in either case their possession is in law the possession of the mortgagee. They can certainly claim to be restored to possession of the property in their own right. (*Mukherjea and Akram, JJ.*) PRAFULLA CHANDRA GOPE *v.* SOARU MAHAMMAD. **44 C.W.N. 726=71 C.L.J. 489.**

——Ss. 26-G (5) and 3 (3)—*Complete usufructuary mortgage—Mortgage with possession for certain period—Period considered sufficient to extinguish loan—Personal covenant to indemnify mortgagee if loan is not so extinguished—Nature of mortgage.*

A mortgage-bond provided that the mortgagee was to remain in possession of the property and enjoy the rents and profits for a certain period The contemplation of the parties was that under normal conditions that period would be sufficient to extinguish the loan. There was a further clause in the bond which was a personal covenant on the part of the mortgagor to compensate the mortgagee in case, owing to loss of fertility of the land or similar other reasons, the profits fell short of the expected amounts. In the event of that contingency the mortgagor undertook personally to make good the deficiency from his own pocket.

Held, that the personal covenant was in the nature of a contract to indemnify the mortgagee in the event of his not being able to realise the entire profits and was quite outside the mortgage transaction, and that the transaction was a complete usufructuary mortgage in spite of that covenant and hence attracted the provisions of S. 26-G (5) of the Bengal Tenancy Act. (*Mukherjea and Akram, JJ.*) PRAFULLA CHANDRA GOPE *v.* SOARU MAHAMMAD. **44 C.W.N. 726=71 C.L.J. 489**

——S. 26-G (5) and (6)—*If* ultra vires *of Provincial Legislature.*

The second part of S. 26-G (5) of the Bengal Tenancy Act merely gives the mortgagor certain rights in land at the end of a certain period. Rights in land fall wholly in entry 21 of the Provincial Legislative List; therefore this part of the sub-section, as distinct from the first part, can be subject to no limitations flowing from any "existing Indian law" in the concurrent field, the two fields being different. For the same reason, the proviso at the end of the sub-section must also continue to have full effect according to its tenor. The result is that the mortgagor's right to apply for restoration of possession under S. 26-G (5) and the power of the Court under S. 26-G (6) to make appropriate orders upon such an application are in no way affected. (*Nasim Ali and Rau, JJ.*) PANCHANAN *v.* SHASHI BHUSAN. **44 C.W.N. 465=71 C.L.J. 477=A.I.R. 1940 Cal. 281.**

——S 26 G (6)—*Order refusing application under sub-S. (5)—Appeal.*

The language used in the concluding portion of sub-S. (6) of S 26-G of the Bengal Tenancy Act is sufficiently wide to provide that any order passed by the Court or the Revenue Officer with reference to the matters mentioned in that subsection shall have the effect of a Civil Court decree whether such order rejects or grants an application which has been filed under sub-S. (5). Hence the remedy against the order is by way of an appeal. (*Edgley, J.*) GADADHAR MANDAL *v.* GOVINDA PRASAD MANNA. **182 I.C. 745=12 R.C 100=A I.R 1939 Cal 458.**

——S. 26-G (6)—*Order restoring possession to mortgagor—Appeal.*

No appeal is competent from an order restoring possession of the mortgaged property to the mortgagor passed under S. 26-G of the B. T. Act, although the nature of the mortgage is in dispute. (*Henderson and Latifur Rahman, JJ.*) ACHINTA NATH SASMAL *v.* GOBINDA PRASAD. **I.L R. (1939) 2 Cal 366=187 I.C 530=12 R.C. 588=70 C.L J 1=43 C.W.N. 1036=A.I R. 1939 Cal 705.**

——S 26-G (6)—*Order of Revenue Officer—Revision—C. P. Code, S. 115.*

An order made by a Revenue Officer under S. 26 G (6) of the Bengal Tenancy Act cannot be revised by the High Court under S. 115, C.P. Code. A Revenue Officer is not subject to the appellate jurisdiction of the High Court. The mere fact that his order might have the effect of a decree of Civil Court does not make him a Court, far less a Court subordinate to the High Court within the meaning of S. 115, C.P. Code. (*Nasim Ali and Rau, JJ.*) KASHINATH HALDAR *v.* KARNADHAR BAIDYA. **I.L R. (1940) 1 Cal. 329=187 I.C. 14=12 R.C 542=70 C.L.J. 570=44 C.W.N. 191=A.I.R. 1940 Cal. 111.**

——S. 26-J—*Applicability—Transfer fee—Evasion of payment by false statement as to relationship of transferee to transferor—Remedy of landlord—Application or suit—Court entertaining application instead of suit—Revision.*

S. 26-J of the B. T. Act in terms only provides remedies to the landlord in the event of the raiyat making a false statement of his right to the land transferred. Whether or not the landlord can proceed by way of an application under S. 188 (1) of the Act in cases where the payment of transfer fee is avoided by a false statement to the effect that the transferee is a relation by a consanguinity within three degrees of the transferor or whether he has to institute a regular suit for the purpose, is a matter of same doubt. But assuming that a regular suit is necessary and that a Court entertains an application instead of demanding *ad valorem* court-fee as in a suit, if commits only a technical error which does not justify interference in revision, as no injustice can be said to be caused by such procedure. (*M. C. Ghose and McNair, JJ.*) PADMA LOCHAN MAHATO *v.* BARADA KANTA MAHATO. **63 C.L.J. 103.**

——**Ss. 26-J and 111**—*Application for recovery of money and not for determination of status of tenant—Power to stay application under S. 111.*

A suit or proceeding can be stayed under S. 111, Bengal Tenancy Act, only if the suit or application is filed for the determination of the status of any tenant. Where therefore the prayer in an application under S 26-J is not for the determination of the status of a tenant but is for recovery of a sum of money and it is a money claim which the landlord wants to enforce the mere fact that the question of status may have to be gone into because the defendant has raised it, will not authorise the Court to stay the application under S. 111. (*R. C. Mitter, J.*) MAHARAJ BAHADUR SINGH *v.* BINODE BEHARY CHOUDHUAY. **162 I.C. 814=8 R C. 662 (1)=63 C.L.J. 152=A.I.R. 1936 Cal. 263.**

——**Ss. 26-J and 158 (c)**—*Application for transfer fee—Prayer for determination of tenancy—Order for payment of fee—No declaration of status of tenant—Revision—Maintainability.*

In an application under S. 26-J of the Bengal Tenancy Act for recovery of transfer fee, the landlord also prayed for the determination of the nature of the tenancy under S. 158 (*c*). Though the Court went into the question of the status of the tenant, the order passed by it only awarded the landlord a sum of money as transfer fee, but did not give any declaration of the status of the tenant. The tenant filed a revision application to the High Court against the order, and it was objected that as an appeal lay, the revision was not maintainable.

Held, though in regard to the order under S. 158 (*c*), the finding of the Court below could not be challenged in revision, the order for payment of the transfer fee under S. 26-J could be challenged in revision and hence the application was maintainable. (*Mitter, J.*) SHARFUDDIN AHMED *v.* JAGADISH NATH ROY BAHADUR. **63 Cal 900=165 I.C. 426=9 R.C. 397=63 C.L.J. 255=40 C.W.N. 502=A.I.R. 1936 Cal. 304.**

——**S. 26-J**—*Application under after its repeal—Maintainability—Bengal General Clauses Act, S. 8* (c).

A landlord can recover the balance of landlord's transfer fees by an application under S. 26-J of the Bengal Tenancy Act even after the repeal of that section by the Amending Act of 1938, where the occupancy holding was sold prior to such repeal. As the right to recover the fees was saved under S. 8 (*c*) of the Bengal General Clauses Act, it could be enforced in the same manner as it could be done under the old Act. 44 C.W.N. 729, Foll. (*Mukherjea and Akram, JJ*) SUMMERMAL *v.* GOVINDA BANDHU. **44 C.W.N. 791.**

——**S. 26-J**—*Application under—Decision, if* res judicata.

Under S. 11, C. P. Code, no question of *res judicata* arises unless there has been a suit. There can be no question of *res judicata* in connexion with summary proceedings unless Legislature has made express provision on the point. The Legislature by directing that an application should be made under S. 26-J, Bengal Tenancy Act, for landlord's fee intended that decision on that application would not operate as *res judicata* even in respect of fee payable. (*Remfry, J.*) KRISHNA CHANDRA MUKHERJEE *v.* MANIK LAL MUKHERJEE. **I.L.R (1938) 2 Cal. 418=178 I C. 892=11 R.C 435=67 C.L.J. 363=42 C.W.N. 793 =A.I.R. 1938 Cal 246.**

——**S. 26-J**—*Application under—Limitation—Starting point—Limitation Act, Art.* 181.

The provisions of Art. 181 of the Limitation Act apply to an application under S. 26-J of the B. T. Act and limitation will run from the date on which the right to apply accrues. It is only when the steps contemplated by S. 26-C (3) of the Act have been duly taken or at any rate when it is clear that the landlord has been informed that the transfer has taken place that it can be said that his right to file an application under S. 26-J has accrued. Where, therefore, no notices were ever served upon the landlord, an application filed by him within three years from the date of his knowledge of the transfer would be within time. (*Edgley, J.*) PROMODE KUMAR BANERJEE *v.* SM. KUMAR KAMINI DASSYA. **43 C.W.N. 217.**

——**S. 26-J**—*Deed of transfer of occupancy holding registered before Amendment Act of 1938—Application for transfer fee filed by landlord after Amendment Act—Maintainability.*

Reading Cls. (*c*) and (*e*) of S. 8 of the Bengal General Clauses Act, it will be seen that the Bengal Tenancy (Amendment) Act of 1938 cannot in the absence of a different intention appearing therein affect the liability which has already accrued and a legal proceeding in respect of such liability may be instituted and continued as if the Amendment Act has not been passed. Where, therefore, a deed of transfer of an occupancy holding was registered before the Amendment Act came into force, an application filed by the landlord after that Act came into force for balance of transfer fee under S. 26-J of the Bengal Tenancy Act is maintainable. (*Ghose, J.*) RAJENDRA NATH *v.* ASHALATA DEBI. **I.L.R. (1939) 2 Cal. 346=186 I.C. 349=12 R.C. 471=43 C.W.N. 948=A.I.R. 1940 Cal. 86.**

——**S 26-J**—*Landlord's compensation under—Fixing of—Considerations—Powers of Court.*

S. 26-J of the Bengal Tenancy Act no doubt permits the Court to grant compensation to the extent of the landlord's fee. The Court has got the power, but the amount of compensation in any special case must depend on the circumstances of that case and must be considered by the Court. Where there are conflicting decisions as to the nature of the land, *i.e*, as to whether the holding is an ordinary holding or a holding at a fixed rent, and the contention of the purchaser is supported by decisions of Courts, the ends of justice would well be met by granting only nominal compensation. (*R. C. Mitter, J.*) ARJEDALI *v.* SORBASONA DASSI. **I.L.R. (1937) 1 Cal. 278=40 C.W.N. 1279=64 C.L.J. 51.**

——S. 26-J—*Order to pay balance of landlord's fees—Mode of execution.*

An order of the High Court for the payment of the balance due in respect of the landlord's transfer fees under S. 26-J of the Bengal Tenancy Act, can be carried into effect only by executing the order under the ordinary provisions of Civil Procedure Code. (*Edgley, J.*) Jogesh Chandra Ganguly *v.* Prodyot K. Tagore. **44 C.W.N. 790.**

——S. 26-J—*Order under—Extent of finality—Question of status of tenant—If* res judicata *in subsequent suit.*

An order for payment of transfer fees passed in a proceeding under S. 26-J of the B. T. Act is final and conclusive and cannot be challenged in a subsequent suit. But the order is not final on the question of the status of the tenant, and the tenant is not precluded from raising the question in a subsequent suit that the tenancy which he holds is a permanent tenure or raiyati at fixed rate of rent. Such suit is not barred either under S. 11, C. P. Code, or the general principles of *res judicata.* (*Mukerjea and Roxburgh, JJ.*) Maha Luxmi Bank *v.* A. Khaleque. **43 C.W. N. 1046.**

——S. 26-J—*Proceeding under—Decision as to nature of tenancy—Whether* res judicata.

If in a proceeding by the landlord under S. 26-J of the B. T. Act for the recovery of the landlord's fee from the transferee, the nature and character of the tenancy is in dispute, the determination of the status of the tenancy is part and parcel of the question whether are not, the money is due from the transferee. The question of the status of the tenancy is not merely incidental, ancillary, or subsidiary. It is a matter which is directly in question between the parties. Consequently the decision of that question by the Court in a proceeding before it, operates as *res judicata,* in a subsequent suit between the same parties instituted in a Court of concurrent jurisdiction. The fact that in the prior proceeding the High Court in revision has expressed an opinion as to the right of the unsuccessful party to institute a suit cannot in law prevent the application of the doctrine of *res judicata.* (*Costello and Panckridge, JJ.*) Krishna Chandra *v.* Maniklal. **I.L.R. (1938) 2 Cal. 418=178 I.C. 892=11 R.C. 435=67 C.L. J. 363=42 C.W.N. 793=A.I.R. 1938 Cal. 246.**

——S. 26-J—*Proceeding under—Decision holding tenant liable to pay transfer fee to landlord in respect of particular transfer*—Res judicata—*Subsequent suit by tenant to declare holding to be mukrari and non-liability for transfer-fee—If barred.*

A decision in a proceeding under S. 26 (J) of the Bengal Tenancy Act, in favour of a landlord, to the effect that his tenant is liable to pay a premium of 20 per cent. as transfer fee on the footing that the holding is an occupancy holding is final and cannot be set aside in a subsequent suit by the tenant for a declaration that he holding is a *mukrari* one. The decision though made in a summary proceeding, is *res judicata.* But a finding that the holding in question is always liable on transfer to pay a premium cannot operate as *res judicata* in the subsequent suit; and the suit by the tenant is maintainable. (*M. C. Ghose, J.*) Joy Chandra Bhowmik *v.* Kali Kinkar Nath. **64 C.L.J. 545=41 C.W.N. 149.**

——S. 26-J—*Recovery of transfer fees—Proper remedy—Application or suit.*

The proper remedy of the landlord for the recovery of the balance of transfer fees under S. 26-J of the Bengal Tenancy Act is by an application and not by suit. (*Mukherjea and Roxburgh, JJ.*) Maha Luxmi Bank *v.* A. Khaleque. **43 C.W.N. 1046.**

See also (*M. C. Ghose, J.*) Sunity Bala Das Gupta *v.* Prodyot Kumar Tagore. **I.L.R. (1938) 2 Cal. 569=183 I.C. 239=12 R.C. 151=43 C.W. N. 248=A.I.R. 1939 Cal. 305.**

——S. 26-J.

There is no reason why the proceeding adopted by the landlord under S. 26-J of the Bengal Tenancy Act to recover the balance of the transfer fee should not be by means of a suit. The section itself does not indicate whether recovery is to be by means of an application or by means of a suit or by some other means (*Costello and Panckridge, JJ.*) Krishna Chandra *v.* Maniklal. **I.L.R. (1938) 2 Cal. 418=67 C.L.J. 363=178 I.C. 892=11 R.C. 435=42 C.W.N. 793=A.I. R. 1938 Cal. 246.**

——**Ss. 26-J and 188, proviso (1).**

S. 26-J of the Bengal Tenancy Act only deals with three classes of cases, namely, where an occupancy holding is sold on the footing (*a*) that it is a permanent tenure, (*b*) that it is a raiyati at a fixed rate, or (*c*) that it is a Lakheraj. It does not cover the case where the landlord is paid only a portion of the transfer fee due to him under S. 26-E and he claims to recover the balance of fee due to him. There is no indication in the Act anywhere whether the remedy is to be sought by means of a suit or by means of an application. In such a case the power of the Court to entertain a suit by the landlord for recovery of the balance of the transfer fee under the provisions of S. 9, C. P. Code; remains unaffected and has not been taken away by S. 26-J or by S. 188, proviso (1) of the Act. (*R. C. Mitter, J.*) Sashi Kanta Acharya Bahadur *v.* Nasirabad Loan Office Co. **168 I.C. 849=9 R. C. 819=63 C.L.J. 105=A.I.R. 1936 Cal. 786.**

——**Ss. 26-J and 188**—*Sale of occupancy holding under erroneous description as* mokarari *before repeal of sections—Landlord's right to recover balance of landlord's fees by application—If subsists after their repeal—Bengal General Clauses Act, S.* 8 (c) *and* (e).

Under S. 26-J of the Bengal Tenancy Act, the landlord acquired a right to recover the balance of landlord's fee as soon as an occupancy holding was sold with an erroneous description that it was a *mokarari* tenancy. A right which had so accrued under that section subsists even after its repeal by the Amending Act VI of 1938, as there is nothing in the repealing Act which would show that the legislature intended to take away or impair any vested right that had already accrued under the repealed section The right which the landlord had of recovering the landlord's fees by an application under S. 188 (1) also subsists after the repeal of that section, and the landlord is not bound to enforce his right by means of a regular suit. The right is saved in respect of antecedent transactions under Cl. (*c*) of S. 8 of the Bengal General Clauses Act and the remedy is also saved under Cl (*e*). (*Mukherjea and Akram, JJ.*) DHIRENDRA NATH ROY *v.* IJJITMALI MIAH. **44 C.W.N. 729=A.I.R. 1940 Cal 423.**

——**S. 26-J.**

The provisions of S. 26-J do not bar a suit by a landlord for recovery of "landlord's fees." Where such a suit is filed, the proper procedure is for the Court to treat the matter as an application under S. 26-J. (*Jack, J.*) ANANDA PROSAD GHOSE *v.* RONENDRA LAL. **165 I.C 715=9 R.C. 453=40 C.W.N 856=A.I.R. 1936 Cal. 342.**

——**S. 29**—*Applicability—Compromise beyond scope of suit—Term as to enhancement of rent—Decree in terms of compromise—Enforceability of term as to enhancement.*

A term in a compromise petition which goes beyond the scope of the suit has no force beyond that of an agreement, even though such term is made part of the consent decree which is passed on the compromise. Such a term ought not to be made part of the decree of Court. A contract for enhancement of rent in contravention of S. 29 of the Bengal Tenancy Act, contained in such a compromise does not become enforceable merely because it is made part of the decree passed on the compromise though ordinarily, the consent decree is not void, but has to be avoided, and is valid until set aside. (*R. C. Mitter, J.*) MAKHAN LAL SAMADDAR *v.* KHAGENDRA NATH CHAKRABARTY **63 Cal. 750=165 I.C. 650=9 R. C. 438=40 C.W.N. 689=A I.R. 1936 Cal. 446.**

——**S. 29**—*Claim of excess rent—Burden of proof.*

Proviso (1) to S. 29 only dispenses with the necessity of a contract being in writing and registered but does not affect Cls. (*b*) and (*c*) of S. 29. Although S 29 has no application where there are excess lands which are added to the original holding and a consolidated rent is assessed upon the whole, still it is incumbent on the Court to find in all cases, that this addition of excess land is not resorted to as a mere device to get round the provisions of S. 29 and that the lands which are said to have been added were real and not a fictitious addition. Where there is no proof that there has been an increase in area, the mere fact that the tenant agreed to pay enhanced rent beyond the limits prescribed by S. 29 and actually paid rent at that enhanced rate for a considerable period of time, is by itself not sufficient to take the case out of S. 29. If the original rent is known and the excess that is claimed is, *prima facie*, in excess of that which is allowed by S. 29, the initial burden to justify the increase must always be upon the landlord. The landlord can discharge the burden by showing that, in fact there has been an increase for which additional rent was assessed and it would also be open to him to rely upon any admission made by the tenant-defendant admitting the existence of additional lands, in which case the burden will be upon the tenant to explain away the admission or to prove by positive evidence that, as a matter of fact, there was no increase. (*Mukerjea, J*) GOBINDA KISHORE *v.* JITENDRA CHANDRA. **177 I.C. 106=11 R.C. 202=A.I.R 1938 Cal. 459.**

——**S. 29**—*Illegal enhancement of rent—Enhanced rate realised amicably for some years—Excess realisations—If can be deducted from claim for rent for subsequent years.*

In a suit for rent at an enhanced rate, the defendant denied his liability to pay at that rate. The Court found that the enhancement was in contravention of S. 29 (*b*) of the Bengal Tenancy Act, but that the plaintiff was realising rent at the enhanced rate amicably from the defendant for some years. No issue regarding liability to render account was framed in the suit

Held, that the Court should not deduct the excess sum raised by the plaintiff from his claim for rent in the suit. (*Akram, J*) MOHAN BASHI PODDER *v.* BILAT ALI. **44 C.W.N. 579.**

——**S. 29**—*Plea under—If can be raised for first time in second appeal.*

The question whether a stipulation as to payment of rent at a certain rate mentioned in a contract between the landlord and the tenant is enforceable or not enforceable as being in contravention of S 29, B. T Act, is dependent on various circumstances, and involves a decision on facts; it cannot therefore be raised for the first time in second appeal. (*Guha and Bartley, JJ.*) SANNAYASI BASAR *v.* RATNESWAR GHATAK. **167 I.C. 170=9 R.C 650=41 C.W.N. 169=A.I.R. 1937 Cal. 8.**

——**Ss. 29, 33 and 80**—*Raiyat contracting to pay enhanced rent in consideration of improvement—Improvement not registered—Landlord's right to enhanced rent*

Where a raiyat binds himself by a contract to pay an enhanced rent in consideration of an improvement made by the landlord, the landlord is entitled to the enhanced rent although the improvement in respect of which the enhancement is claimed has not been registered under the provisions of the Bengal Tenancy Act. (*Macnair, J.*) MADAN MOHAN *v.* KALI CHARAN. **42 C.W.N. 126.**

——**S. 29**—*Scope—Contract for enhancement of rent—Settlement of* bona fide *dispute—Absence of dispute as to amount of rent—Contract—If falls under S. 29.*

Where there is no dispute as to what is the rent payable, an agreement between the parties for enhancement of rent is still controlled by S. 29 of the B. T. Act; and it cannot be taken out of the scope of S. 29, merely on the ground that the agreement has been arrived at as the result of a settlement of a *bona fide* dispute. (*R.C. Mitter, J.*) MAKHAN LAL SAMADDAR *v.* KHAGENDRA NATH CHAKRABARTY. **63 Cal. 750=165 I.C. 650=9 R.C. 438=40 C.W.N. 689=A.I.R. 1936 Cal. 446.**

——**Ss. 29 and 51 (1) (a)**—*Scope—Suit for rent at increased rate—Jamabandi showing increase of area and increase of rent signed by tenant—Tenant actually paying increased rate for some years—Plea that increase illegal under S. 29—Burden of proof—Increase of area in holding—Onus.*

Where in a suit for rent at an increased rate on the ground of increase in area which is recorded in a *jamabandi* prepared on the basis of a survey made after the creation of the jama, it is found from the *jamabandi* and the record-of-rights that the rent fixed as payable at the time of the original settlement of the land on the tenant was calculated with reference to the basis rates for the various classes of land mentioned in the *jamabandi* and that the area of the holding was carefully ascertained and measured in terms of *bighas, cottas* and *chittaks*, and that the tenant who has signed the *jamabandi* has actually paid the increased rate for some years; if the tenant pleads that the enhancement is illegal by relying on S. 29 of the Bengal Tenancy Act, the onus is on him to prove that his *jama* has been actually held at a consolidated rent with reference to certain defined boundaries. It is not for the landlord to prove the contrary. If the tenant, however, fails to prove by satisfactory evidence that the settlement of the holding was a consolidated *jama* within specified boundaries, the landlord cannot as a matter of course get a decree for the increased rate. He must still prove that the area of the holding has actually increased since the settlement before he can get an increase under S. 52 (1) (*a*) of the Bengal Tenancy Act. (*Edgley, J.*) Radharaman Choudhury *v.* Purna Chandra Maitra. **I.L.R. (1937) 1 Cal. 313=40 C.W.N. 1330.**

——**(as amended in 1928), S. 30**—*If retrospective—Tenancy created before amendment—Landlord's right to sue for enhancement of rent.*

In the case of tenancy consisting entirely of undivided shares in parcels of lands or partly of entire parcels of lands and partly of undivided share in parcels of lands, S. 30 cannot be combined with the definition of holding as amended so as to give the landlord the right to sue for enhancement of rent in respect of the tenancy created before Act IV of 1928 came into force. The Amending Act cannot be given retrospective effect. (*Guha and Bartley, JJ.*) Sripati Chandra *v.* Kailash Chandra. **40 C.W.N. 984=166 I.C. 464=9 R.C. 534=66 C.L.J. 93=A.I.R. 1936 Cal. 386.**

On appeal from A.I.R. 1936 Cal. 331.

——**S. 30 (a)**—*Claim to enhancement under—Absence of prevailing rate in village—Effect of—"Prevailing rate"—Meaning of.*

The "prevailing rate" must be understood to mean the actual prevailing rate of rent at which all the villagers or the great majority of them hold their land, and the term does not mean the average rate or even the rate at which more than half the land of the village is held. If in a village for example, ninety per cent. of the raiyats hold their land at a certain definite rate that would properly be regarded and taken as the prevailing rate unless some special circumstances such as, a recent commutation of rent on a large scale, makes it impossible to so treat that rate. If there is no prevailing rate found in the village, the claim of the landlord for enhancement under S. 30 (*a*) of the B. T. Act, must fail. But S. 30 (*a*) cannot be applied to assess the land at the lowest rate paid for lands of similar description in the village, when there is no prevailing rate. (*Courtney-Terrell, C. J. and James, J.*) Jagdeo Narain Singh *v.* Tula Singh. **170 I.C. 593=3 B.R. 744=10 R.P. 137=18 Pat.L.T. 197=1937 P.W.N. 238=A.I.R. 1937 Pat. 430.**

——**S. 30 (a)**—*"Prevailing rate"—Meaning of.*

The "prevailing rate" referred to in S. 30 (*a*) of the B. T. Act is to be determined as a question of fact, and not to be deduced inferentially from the actual rates which may be found to be in force in the locality concerned. In many instances, the prevailing rate will no doubt be one single rate but not necessarily so. The expression "prevailing rate" means no more and no less than a rate actually prevailing, not a rate which ought to prevail. Such a rate, that is, a rate generally prevalent in the locality, may not, however, be ascertainable in every case as an exact mathematical figure: but only the limits within which it varies may be ascertained. As to what the limits of variation should be, will depend not merely on the extent of the actual variations, but also on the number of cases which show such variations or the extent of the areas which may be involved. In areas to which S. 31-A of the Act is not extended, it is a fair rule to adopt, in order to ascertain the prevailing rate to consider whether or not it is the rate, or substantially the rate, paid by the majority of the raiyats in the locality. (*Biswas, J.*) Dhirendra Nath *v* Golejannessa. **43 C.W.N. 93.**

——**S. 30 (a)**—*'Prevailing rate'—Meaning.*

340 tenants occupying almost about the same number of bighas of land of the same quality and enjoying the same privileges paid rent at varying rates.

Held, that it could not be said that there was a prevailing rate of rent within the meaning of 30 (*a*). (*Wort, J.*) Jagdeo Narain Singh *v.* Tula Singh. **160 I.C. 1102=8 R.P. 423=A.I.R. 1936 Pat. 54.**

——**Ss 30 (b) and 52**—*Decree against recorded tenant—Unrecognised transferee of occupancy holding—If can sue to set aside decree.*

The unrecognized transferee of a portion of an occupancy holding has undoubtedly a right to get a decree obtained against the recorded tenant set aside on the ground that it was vitiated by fraud or collusion; but it is not open to him to attack the decree simply on the ground that the decree is wrong in law and should not have been passed having regard to the evidence that was adduced in the case of the provisions of law which were applicable to the facts. (*B.K. Mukherjea, J.*) Barkatulla Sheikh *v.* Jnanendra Chandra Ghosh. **175 I.C. 731=11 R.C. 4=A.I.R. 1938 Cal. 281.**

——**S. 30 (b)**—*Enhancement of rent—Landlord's right to—Rent fixed in perpetuity in* patta *and* kabuliyat*—Effect—Permanent tenure and raiyati tenure—Distinction.*

It is a settled principle of law that the landlord has *prima facie* a right to claim enhancement of rent unless he has precluded himself by contract from claiming the same. If the Court can gather from the *patta* and *kabuliyat* an intention on the part of the landlord giving up his *prima facie* right to get enhancement, and finds that the rent is intended to be fixed in perpetuity, it will not grant an enhancement. In this respect no distinction can be drawn between cases where the tenancy is a permanent tenure and cases where it is only a raiyati one. (*R. C. Mitter, J.*) Nagendra Mohan Nath *v.* Jogendra Nath Sen. **63 C.L.J. 579.**

——**S. 30 (b)**—*Enhancement—Rent already low—Principle of economic depression—If applies.*

In a suit for enhancement of rent the landlord was entitled to an enhancement of Rupees 0-3-9 per bigha but enhancement of only 1 anna was allowed by the Court on the principle of economic depression. The rent of the land was already low.

Held, that the principle relating to economic depression did not apply by reason of the rent being low—(*Obiter*). (*Wort, J.*) Jagdeo Narain Singh *v.* Tula Singh. **160 I.C. 1103=8 R.P. 423=2 B.R. 289=A.I.R. 1936 Pat. 54.**

——**(as amended in 1928), Ss. 30 (b) and 3 (9)**—*If retrospective—Immunity from enhancement of rent—If affected or taken away by amendment of* 1928.

Where a tenancy created before 1928 consisted of undivided shares in parcels of land, the tenant enjoyed immunity from action for enhancement of rent. This immunity has been taken away by the amendment of 1928. But the amendment cannot be given retrospective operation and the landlord has no right to sue for enhancement of rent in respect of such a tenancy created before Act IV of 1928. In re *Joseph Suche & Co., Ltd.*, 1 Ch. D. 48, Appl. (*R. C Mitter, J.*) Sripati Charan De *v.* Kailash Chandra Jana. **166 I. C. 448=9 R.C. 523=A.I.R. 1936 Cal. 331**

——**S. 30 (b)**—*Suit for enhancement—Plea of* maurashi mokarrari—*Pattas at fixed rent granted by* shebait *of idol—Entry in record-of-rights that tenancy is held at fixed rent—*Pattas *not challenged for long time—Legal necessity—Inference of—Defendants—If bound to prove necessity.*

Plaintiff as *shebait* of a deity sued, in 1932 for enhancement of rent under S. 30 (*b*) of B. T. Act. The defendants contended that their tenures were *maurashi mokarrari*. The record-of-rights which was finally published in 19 2 recorded the tenancies as tenancies held at fixed rent and also contained a reference to the parties who created the tenancies in suit. The *pattas* which had been granted in 1847, 1878 and 1879, by the then shebait fixed the rent in perpetuity; and the succeeding shebaits accepted the *pattas* and recognised the tenancies as *maurashi mokarrari*. Plaintiff, though aware of the entries on the record-of-rights as well as the *pattas* alleged that the tenancies were occupancy tenancies and claimed enhancement on the ground that the prices of staple food crops had gone up, but did not challenge the *pattas* as not binding on him or on the deity.

Held, that plaintiff not having challenged the *pattas* in the plaint, as he was bound to do, there was no obligation on the defendants to plead legal necessity or to adduce evidence to that effect, and that in any case legal necessity could be inferred from the fact that the *pattas* had not been challenged for a long number of years by the successors of the grantors of the *pattas* even in the absence of a recital in the *pattas* themselves of legal necessity. No enhancement could therefore be granted to the plaintiff. (*R. C. Mitter, J.*) Ram Kishore Das *v.* Kedar Panda. **63 C.L.J. 22.**

——**S. 31-A**—*Applicability—Conditions—Area outside Monghyr.*

S. 31-A must not be applied except in the small area in the Monghyr District to which the section has been extended. The principles laid down in that section are not to be applied if the lowest rates paid for land of similar description can be ascertained. (*Courtney-Terrell, C J. and James, J.*) Jagdeo Narain Singh *v.* Tula Singh. **170 I.C. 593=3 B.R. 744=10 R.P. 137=18 Pat.L.T. 197=1937 P.W.N. 238=A.I.R. 1937 Pat. 430.**

——**Ss. 32 and 35**—*Scope—Claim to enhancement—Rents paid found to be low—Full enhancement under S. 32. if to be allowed—Duty to apply S. 35 and find out what would be fair and equitable.*

From the mere fact that the rents paid by the tenants are low, it does not necessarily follow that the full enhancement on a strict reading of S. 32 of the B. T. Act ought to be allowed. S. 35 of the Act should be read as saving an officer who is applying the provisions of S. 32 from the anomalous position in which he might find himself otherwise, of being obliged to take as a basis for further payments comparatively recent conditions which he might know have already ceased to exist. S. 35 has also to be applied to see what rate of enhancement would be fair and equitable. (*Courtney-Terrell, C.J. and James, J.*) Jagdeo Narain Singh *v.* Tula Singh. **170 I.C. 593=3 B R 714=10 R P. 137=18 Pat.L.T. 197=1937 P.W.N. 238=A.I.R. 1937 Pat 430.**

——**S. 38**—*Construction—"Permanent"—Meaning of.*

The word "permanent" must be read with reference to the circumstances of the case. The deterioration must be such deterioration as would continue to have effect from year to year unless and until something is done to remedy it. The fact that it can be remedied by expenditure of capital and labour will not prevent its being regarded for the purposes of S. 38 and similar provisions of law as a permanent deterioration. (*Rowland, J.*) Lal Behari Singh *v.* Mahabir Mahton. **163 I.C. 522=9 R.P. 33=1936 P.W. N. 314=A.I.R. 1936 Pat. 414.**

——**S. 38**—Falkar *rent—Tenant claiming reduction—Onus of proof.*

Where a tenant claims reduction of the *falkar* rent by reason of the fact that any of the trees on which the assessment had originally been made had ceased to exist or that any of the trees in respect of which it was sought to recover *falkar* had been planted by the tenant himself, the onus of proving that lies on him. (*Edgley, J.*) K. C. De *v.* Hira Bewa. **I.L.R. (1937) 1 Cal. 491=167 I C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

——**S. 38**—*Right to abatement — "Deterioration"—Nature of—Omission of landlord to keep irrigation system in order — Effect—Right of tenant to abatement in suit for rent Pleadings.*

The deterioration contemplated by S. 38 of the Bengal Tenancy Act is a deterioration of the soil which must be more or less of a permanent character, namely, by a deposit of sand or other specific causes, sudden or gradual. Where the productive capacity of the land depends on irrigation, the mere fact that for want of irrigation the land does not yield as much produce as it did before cannot amount to a permanent deterioration of the soil so as to entitle the tenant to an abatement of rent. If, however, it is shown that as a result of some local custom or contract the landlord is not entitled to receive the full rent unless he maintained the irrigation system in good order, suitable relief can be given to the tenant even in a suit for rent by the landlord. But for this to be done, the case, whether based on custom or contract, must be clearly made out in the pleadings and supported by proper evidence. A tenant may also counterclaim for damages when he has sustained any loss owing to the omission on the part of the landlord to carry out his obligation to him or to the tenants in general. (*Courtney-Terrell, C J. and Fazl Ali, J*) SOMESHWAR NATH SINGH *v* RAGHUBANSH LAL. **178 I C 495=11 R.P. 264=5 B R. 106=1938 P. W.N 411=A.I R. 1938 Pat 514.**

——S. 38—*Suit for rent—Plea of reduction of rent—Reduction allowable—Extent of.*

Where in a suit for rent by a landlord the tenant takes a plea of reduction of rent, the Court should not give effect to the plea to a greater extent than is warranted by the written statement submitted by the defendant. The Court is not entitled to make its own calculations. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I.C. 522=9 R.P. 33=1936 P.W.N. 314=A.I. R 1936 Pat 414.**

——**S. 38**—*Suit for rent by landlord—Plea for abatement of rent by tenant—If open.*

The principle of S. 38 applies not only to suits instituted by a tenant for abatement of rent but also to a plea for abatement of rent taken by a tenant in a suit for rent by the landlord, in which he is a defendant The tenant is entitled to raise such a plea and what he has to show is permanent deterioration leading to failure of outturn. (*Rowland, J.*) LAL BEHARI SINGH *v.* MAHABIR MAHTON. **163 I C 522=9 R.P. 33=1936 P.W. N· 314=A.I R. 1936 Pat. 414.**

——**S. 38**—*Tenant holding under*—Istimrari mukarrari *lease—Right to abatement of rent—Natural justice—Applicability.*

There is no warrant for holding that a tenant who holds under an *istimrari mukarrari* lease is entitled to claim reduction of rent on the ground that his land has permanently deteriorated or has become useless for cultivation. Nor can the principle of natural justice and equity be invoked for the purpose. Where the rent has been permanently fixed by contract, the rights and liabilities of the parties are regulated by contract, and when the terms of such a contract cannot be said to have been unfair at the date when the contract was entered into, the principle of natural justice cannot be invoked to relieve one of the parties of some hardship which might have been provided against in the contract but which the parties have omitted to provide for. There is therefore no justification for extending the principles underlying S. 38 to a tenant holding under an *istimrari mukarari* lease. (*Courtney-Terrell, C. J., Macpherson and Fazl Ali, JJ.*) DUKHA LAL CHAUDHURY *v.* MST. MANABATI. **15 Pat. 594=163 I C. 1003=9 R P. 69=17 Pat.L.T 339=1936 P.W.N. 373=A.I.R. 1936 Pat. 341 (S.B.).**

——**Ss. 38 and 52**—Tenant holding under *mukarari* lease—Right to abatement of rent. *See* BENGAL RENT ACT, S. 18. **17 Pat.L.T. 339=A.I. R. 1936 Pat. 341 (S.B.).**

——**S. 38**—*Tenure holder—Right to benefit of section.*

S. 38 of the B. T. Act applies only to an occupancy raiyat, and a tenant cannot invoke it to his aid unless it is clearly established by him that he is an occupancy tenant. A tenant who is only a tenure-holder cannot get the benefit of the section. (*Courtney-Terrel, C. J. and Fazl Ali, J.*) SOMESHWAR NATH SINGH *v.* RAGHUBANSH LAL.

178 I C 495=11 R P. 264=5 B.R. 106=1938 P. W N. 411=A I.R. 1938 Pat. 514.

——**Ss. 44 (c) and 116**—*Applicability—Verbal lease for one year—If one for "term of years"—Status of tenant—Ejectment—Liability of tenant.*

The words 'term of years' in S. 116 in the context in which they occur cannot be read as applying to a verbal lease for one year or less. And unless a proprietor when letting out zirat takes the precaution of letting "under a lease for a term of years or under a lease from year to year", the tenant inducted on the land, if he is a raiyat within the definition of S 5 (2), will get the benefit of the provisions of Ch. 6 thereof. Therefore a tenant who has been inducted on the zirat land as a *raiyat* by a verbal lease for one year only, becomes a non-occupancy *raiyat* as S. 116 does not apply so as to bar the operation of Ch 6 Nor is he liable to be ejected under S. 44 (*c*) at the expiry of his lease as he has not been admitted to occupation of the land under a registered lease. (*Rowland, J*) KUNJ BIHARI THAKUR *v* UMASHANKAR PRASAD. **173 I.C. 237 =10 R.P. 388=4 B.R. 228=A.I.R. 1938 Pat. 38.**

——**S. 48 (as amended in 1928)**—*Applicability—Rent claimed for period after new Act came into force.*

Where the period for which the rent is claimed in a suit is after the new Act came into force, the rights of the parties must be governed by S. 48 of the new Act, as the bar which was imposed by the old section has now been removed. (*Nasim Ali and Mukherjea, JJ.*) JODHAN PRASAD *v.* HAJI MAHAMMAD YUNUS. **42 C W.N. 992 =176 I.C 1006 (1)=11 R.C. 190 (1)=A.I R. 1938 Cal. 160.**

——**(as amended in 1928), S. 48**—*Scope—If retrospective—Under-raiyati created prior to Amending Act—Rent claimable by landlord.*

In the case of an under-raiyati created prior to the passing of the Bengal Tenancy Amending Act of 1928, the landlord is not entitled to recover rent from this under raiyati at a rate exceeding the rent allowed by the old S. 48, for the period before the coming into force of the new S. 48, although there is no such bar for the period subsequent to the coming into force of the new section The fact that the suit is instituted after 1928 makes no difference. (*Nasim Ali and Henderson, JJ.*) AHMAD AKANDA *v.* BAHAR UDDIN SHAH. **40 C.W.N. 569=64 C.L J. 1.**

——S. 48—Scope—Non-compliance with—Effect—Decree without preliminary order—Executing Court—Power to refuse execution. *See* EXECUTION—EXECUTING COURT. **40 C.W N. 1293.**

——**S. 48 C, Cl. (d) and proviso (i) (2)**—*Continuous possession by under-raiyat for 12 years—Computation of period—Period covered by ejectment notice—If should be excluded.*

If an under-raiyat has been in continuous possession of his holding for more than 12 years on the date on which the ejectment notice expires, he is protected by proviso (*i*) (2) to S. 48-C of the Bengal Tenancy Act and is not liable to ejectment. In computing the period of his continuous possession, the period covered by the ejectment notice should be included. Neither S. 15 (2) of the Limitation Act nor anything contained in S. 185 of the Bengal Tenancy Act would appear to operate so as to exclude from the benefit of the proviso to S. 48-C, any period covered by the ejectment notice. (*Edgley, J.*) Krishna Kanta Ghosh *v.* Rajeshwar Ghosh. **I.L.R. (1937) 1 Cal 499=174 I C. 31=10 R C. 605=A.I R. 1937 Cal. 656.**

——**S. 48-C proviso (i) (2)**—*Continuous possession for* 12 *years as under-raiyat—Necessity for.*

The language of proviso (*i*) (2) of S. 48-C of the Bengal Tenancy Act clearly implies that, if an under-raiyat claims protection from eviction under this proviso, he must show that he has been in continuous possession of the demised land *as an under-raiyat* for a period of 12 years or more. This proviso cannot, therefore, be brought into operation, if a person was in possession of a holding as an under-raiyat for 9 years, thereafter as a *bargadar* for one year, and again as an under-raiyat for four years. (*Edgley, J.*) Ali Ahammad *v.* Abdul Gania Mia. **I L.R. (1940) 1 Cal. 367=44 C.W N. 330=A.I.R. 1940 Cal. 441.**

——**S. 48-C (c) and (d)**—*Under-raiyat holding under lease specifying no term—Liability to ejectment.*

The words "written lease" in Cls. (*c*) and (*d*) of S. 48-C of the Bengal Tenancy Act, mean a written lease which is for a term. It follows that an under-raiyat holding under a lease in which no term is stated would be liable to ejectment under the provisions of Cl. (*d*), and there can be no ground for suggesting that he would be virtually holding under a perpetual lease. (*Biswas, J.*) Abinash Chandra Gargary *v.* Raj Kumar Sardar. **183 I.C. 141=12 R.C 144=69 C.L.J. 225=43 C.W.N. 356=A.I.R 1939 Cal. 281.**

——**S. 48-C (1), Proviso 2 (f) (as amended in 1928) and S. 178**—*Scope—Under-raiyat holding under lease executed prior to and expiring after* 1928—*Continuous holding for over* 12 *years—Liability to ejectment*

An under-raiyat who has been holding the land continuously for over 12 years, whether partly before or partly after the amendment of the Bengal Tenancy Act in 1928, is protected from ejectment on the expiry of his lease. It is not necessary for claiming immunity from ejectment that he should have been in possession as under-raiyat for the whole period of 12 years. Where he has held the land as a service tenure for several years and subsequently becomes an under-raiyat of the same land under a lease executed before, and expiring after the amended Act of 1928, Proviso 2, Cl. (1) of S. 48-C of the amended Act will apply, if he has been in possession of the land for over 12 years. The landlord cannot claim that he has got a vested right of ejectment on the execution of the lease prior to the enactment of S. 48-C by the amended Act of 1928. S. 178 (*f*) of the new Act makes S. 48-C (1), Proviso (2) applicable to the case so as to take away any such vested right of the landlord under the contract of lease. (*Jack, J.*) Biswambar Chakravarty *v.* Kalidas Dhupi. **40 C.W.N. 1275.**

——**S. 48-D**—*Decree not drawn up in proper form after preliminary order—Irregularity.*

The fact that the decree was not drawn up in proper form after a preliminary order, amounts at the most to this that the final decree for ejectment was made in an irregular manner. (*R. C. Mitter, J.*) Subal Chandra Jana *v.* Surendra Nath Bera. **66 C L.J. 33.**

——**S. 48 F**—*Scope and effect of—Under raiyat—Permanent lease amounting to full transfer without landlord's consent—Under-raiyat vacating possession and leaving the place—Effect—Abandonment—Presumption—Absence of proof of relinquishment without arrangement for payment of rent—If material—S.* 87.

A transfer by an under-raiyat of his holding is not valid unless it is made with the previous consent of the landlord, as under S. 48 of the B. T. Act, the holding of an under-raiyat is heritable but not transferable except with the consent of the landlord. Where an under-raiyat grants a permanent lease of the land, which is in effect a full transfer, without notice and without the permission of the landlord, vacates the land in favour of the lessee and then leaves the place, the permanent lease operates as an actual abandonment or relinquishment of the land by the under-raiyat. The fact that there is no proof that the transferring tenant has relinquished the land without arranging for the payment of the rent as it falls due does not prevent the Court from presuming that the abandonment is complete; this circumstance cannot decide the question of abandonment. S. 87 of the B. T. Act is not exhaustive and the method described by it is not the only one by which a landlord can claim that the tenant has abandoned the land. (*Ghose, J.*) Iajuddin Sheikh *v.* Umedali Meah. **64 C. L.J. 58.**

——**S. 48-G (3)**—*Operation of—Occupancy right acquired by under-raiyat before enactment of section.*

The provisions of S. 48-G are sufficiently clear to deprive an under-raiyat of protection under S 160 (*d*) of the Act to which he may have been entitled by virtue of his status before that section became law. (*Edgley, J.*) Narendra Nath *v.* Alanga Sundari. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——**Ss. 48-H and 174 (3)**—Bemeadi *lease to under-raiyat registered without payment of landlord's fee—Effect of—Rent sale of holding—*Locus standi *of under-raiyat to set aside sale.*

A *bemeadi* lease to an under-raiyat, that is to say, a lease without any definite term specified in it and in which there is nothing to show that it is meant to be a lease in perpetuity, does not come within the mischief of S 48-H of the B. T. Act. Such a lease, therefore, creates a valid interest in the holding, although registered without payment of landlord's fee, and the under-raiyat has *locus standi* to make an application under S. 174 (3) to set aside a rent execution sale of the holding. (*Biswas, J.*) Abinash Chandra Gargary *v.* Raj Kumar Sirdar. **183 I.C 141=12 R.C 144=69 C L.J. 225=43 C.W. N. 356=A.I.R. 1939 Cal. 281.**

——**S. 48-H**—*Registration of under-raiyati lease without payment of landlord's fee—Validity—Subsequent payment—Effect of.*

The registration of an under-raiyati lease without payment of the landlord's fee has no effect, and the defect cannot be cured by a subsequent payment. (*Henderson, J.*) Debendra Chandra De *v.* Jamini Kumar Dey. **I.L.R.**

(1940) 1 Cal. 156=185 I.C. 704=12 R.C. 402=43 C.W.N. 1209=A.I.R. 1939 Cal. 744.

——S. 48-H—*Under-raiyati lease infringing terms of section—Claim of landlord pre-emptor to* khas *possession—Under-raiyat, if can resist—Right to refund of premium.*

A person claiming under an under-raiyati lease created by the original occupancy tenant, which infringes the terms of S. 48-H of the B. T. Act, is not entitled, to resist the claim for *khas* possession of the landlord who has obtained an order for pre-emption. As, however, the landlord pre-emptor succeeds only to the interest of the original tenant, he cannot repudiate the lease without refunding the premium paid by the under-raiyat. (*Henderson, J.*) DEBENDRA CHANDRA DE *v.* JAMINI KUMAR DEY. **I.L.R. (1940) 1 Cal. 156=185 I.C. 704=12 R.C. 402=43 C.W.N. 1209=A.I.R. 1939 Cal. 744.**

——S. 48-H—*Under-raiyati lease registered without payment of landlord's fee—Landlord's right to sue for such fee.*

If an under-raiyati lease by an occupancy raiyat is registered without payment of the landlord's fee in contravention of S. 48-H of the B. T. Act, the lease itself would be void as against the superior landlord. But the section does not entitle that superior landlord to sue for the unpaid landlord's fee. (*Bartley and Nasim Ali, JJ.*) HARENDRA NATH MITTER *v.* HOSSAINALI SANA. **174 I.C. 972=10 R.C. 740=42 C.W.N. 215=A.I.R. 1938 Cal. 254.**

——S. 49-K—*Applicability—Member of aboriginal tribe changing religion and embracing Christianity—If loses benefit of section.*

S. 49 (*k*) of the B. T. Act does not become inapplicable to a member of an aboriginal tribe merely because he or she changes his or her religion and embraces Christianity. Notwithstanding change of a religion a member of an aboriginal tribe can invoke the provisions of S. 49 (*k*); and there is nothing in the B. T. Act justifying the importation of any fact with regard to the change of religion as affecting the status of a member of an aboriginal tribe. (*Mitter, J.*) KARMOO HANSADA *v.* FANINDRA NATH SAREN. **41 C.W.N. 32.**

——**S. 49-K, proviso (b) (ii)**—*Garos*—Bona fide *mortgage registered more than one year before 1923—If protected.*

A *bona fide* mortgage executed by a member of the primitive community called the Garos and registered more than one year before 1923, in which year the provisions of Chap VII-A of the B. T. Act were extended to the Garos, comes within the saving provisions of S. 49-K, proviso (*b*) (*ii*) of the Act, and the mortgagee is entitled to sell the property in execution of his final mortgage decree. (*Derbyshire, C.J. and Syed Nasim Ali, J.*) ARDHA CHANDRA SAHA *v.* NAMANI GARONI. **182 I.C. 666=12 R.C. 94=69 C.L.J. 120=A.I.R. 1939 Cal. 323.**

——S. 49-L—*If mandatory.*

The provision of S. 49-L of the B. T. Act by which the Court executing the decree should allow the tenant a reasonable time within which to pay the amount due is mandatory. It is for the Court to give the reasonable time whether it is asked for by the tenant or not. (*Derbyshire, C.J. and Syed Nasim Ali, J.*) ARDHA CHANDRA SAHA *v.* NAMANI GARONI. **182 I.C. 666=12 R.C. 94=69 C.L.J. 120=A.I.R. 1939 Cal. 323.**

——S. 50—*Applicability—Variation in rent due to abatement consequent on compulsory acquisition—If deprives tenant of benefit of presumption.*

Where the tenant has not been paying uniform rent to the landlord but the difference in the rents paid is due only to abatement of rent on account of acquisition under Land Acquisition Act and not due to any variation in the rent, the tenant is entitled to the presumption under S. 50. (*Nasim Ali, J.*) RAJ NANDINI DEBI *v.* BHUSAN CHANDRA SEN. **162 I.C. 694 (1)=8 R.C. 647 (1)=A.I.R. 1936 Cal. 234.**

——S. 50—*Fixed rate tenancy—Inclusion of small area of land on rent which is subject to enhancement—If affects status of tenant as fixed rate tenant.*

It is not a contradiction in terms that a fixed rate tenure or holding should comprise, besides an area held at a fixed rent or at a fixed rate of rent, an area carrying a rent which is liable to enhancement in accordance with the law. When a tenancy is predominantly of the character of fixed rate, the addition of a small area which the tenant is not entitled to hold at fixed rate cannot affect his status as a fixed rate tenant. There is no reason for holding that a tenant may not have a fixed rate tenancy combined with an area the rent of which may be enhanced from time to time in accordance with law. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B.R. 313=17 Pat.L.T. 747=A.I.R. 1937 Pat. 127.**

——S. 50—*Fixed rate tenant—Interest in excess land—Nature of—If same as in original lands—Right to fixed rate or same rate in excess lands.*

The nature of the interest acquired by a tenant in land adjoining the land settled with him by his landlord is not necessarily of the same kind as his interest in the land originally settled, but depends on the circumstances. The holder of a rent-free holding, for example, though he is entitled to all land forming an accretion thereto, is not entitled to hold the same rent-free; similarly a fixed rate tenant cannot be held to be entitled to a fixed rate interest in the excess lands or an interest therein at the same rate as in the lands originally constituting the tenancy. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B.R. 313=17 Pat.L.T. 747=A.I.R. 1937 Pat. 127.**

——**S. 50**—*Presumption under—Applicability—Amalgamation of holdings.*

The presumption arising under S. 50 of the B. T. Act is not affected by the fact of amalgamation of separate holdings into one. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I.C. 587=11 R.C. 572=42 C.W.N. 637=A.I.R. 1938 Cal. 481.**

——S. 50—*Presumption under—Applicability to proceedings under S.* 104-*H.*

In proceedings under S. 104-H, B. T. Act, a party can claim the benefit of the presumption under S. 50, although final publication has taken place, because it cannot be held that the particulars mentioned in S. 115 have been completely recorded so long as any dispute remains pending which would immediately affect the record which is being prepared. (*Courtney-Terrell, C.J. and James, J.*) PRATAP MANDAL *v* SURPAT SINHA. **16 Pat. 377=170 I.C. 760=1937 P.W.N. 588=3 B.R. 765=10 R.P. 146=18 Pat.L.T. 554=A.I.R. 1937 Pat. 417.**

——**S. 50**—*Presumption under—Rebuttal—Absence of entry of jamas in books of accounts.*

The absence of entry of the jamas in the books of account is evidence of their non-existence under Ss. 9 and 11, Evidence Act, but it is difficult to say that the Courts are bound to regard the absence of these entries as sufficient to rebut the presumption arising out of uniform payment of rent under S. 50, B. T. Act. (*Jack, J.*) LILABATI DASI *v.* CHITPORE GOLABAI CO., LTD. **174 I.C. 163=10 R.C. 650=A.I.R. 1937 Cal. 542.**

——**S. 50**—*Presumption under—Rebuttal—Small variation in rent—Effect of.*

When the variation in rent is a small one or slight one, although unexplained, there is no rebuttal of the presumption which arises under S. 50 of the B. T. Act or under the general law (*D. N, Mitter and B. N. Rau, JJ.*) PRODYOT KUMAR TAGORE *v.* HIRENDRA NATH DUTT. **62 C L.J. 551.**

——**S. 50**—*Presumption under—Right to—Plaintiff entering possession of holding by virtue of purchase—Landlord not recognising purchase and not taking rent from plaintiff—Right of latter to tack on his period of possession to that of his vendor.*

The plaintiff came into possession of the disputed holding by virtue of purchase which was not recognised by the landlord who instituted proceedings under S. 145, Cr. P. Code, against him. The plaintiff was however allowed to retain possession of the holding as a result of the decision of the Magistrate in that proceeding, and the landlord thereafter took no steps to evict the plaintiff. The plaintiff during the period of his possession did not pay rent to the landlord on account of the latter's unwillingness to receive rent from him. It was proved that during the period of possession of the plaintiff's vendor within the 20 years immediately before the institution of the suit by the plaintiff under S. 10 of the B. T. Act, the rate of rent in respect of the holding remained unchanged.

Held, that the plaintiff must be recorded as having stepped into the shoes of his vendor who must be recorded as his predecessor in interest within the meaning of S. 50 (2) of the B. T. Act and that the plaintiff was entitled to tack on his period of possession to that of his vendor in order to obtain the benefit of the presumption under that section.

Held further, that the plaintiff had succeeded in establishing that the rate of rent had not been changed during the 20 years before suit and that the mere fact that the landlord did not accept rent from the plaintiff during the period of his possession could not be of any advantage to the landlord. (*Edgley J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD **179 I C 587=11 R.C 572 =42 C.W.N. 637=A.I.R 1938 Cal 481.**

——**S. 50**—*Principle of—Applicability—Suits not under Act.*

Even in suits which are not under the B. T, Act, the principle of S. 50 of the Act is a useful guide to the Courts in determining the nature of a tenancy, and a presumption similar to the one arising under the section may be accepted along with the other facts and circumstances of a case. (*Guha and Mitter, JJ.*) PRODYOT KUMAR *v.* RADHAKISHEN **42 C W.N. 304.**

——**Ss. 50 and 115**—*Relative scope—Record of rights—Entry as to status of tenants—Bulk of land recorded as* sharah muaiyan *and excess land as otherwise—Effect of—Presumption under S. 50—If excluded.*

S 115 of the B. T. Act, when it provides that the presumption under S. 50 shall not apply to a tenancy after the particulars mentioned in S. 102 (*b*) have been recorded, does not mean that if the entry in the record-of-rights regarding the tenant's *sharah muaiyan* status is challenged they will not be at liberty to support that entry by falling back on S. 50. Entries showing the bulk of the land as *sharah-muaiyan* and the excess land as otherwise will not defeat themselves. The record-of rights will carry a statutory presumption of correctness, and if assailed, the tenants can always fall back on S. 50 in support of the entries in the record. (*Dhavle, J*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA **167 I. C. 736=9 R P. 420=3 B R. 313=17 Pat.L.T. 747=A.I.R 1937 Pat. 127.**

——**Ss. 50 (1) and 52**—*Construction—Fixed rate tenancies—Excess area—Assessment of rent —Increase in rate of rent—If permissible—Fair and equitable rent—S. 112.*

Under S. 50 (1) of the B. T. Act, although it is true that a holding or tenure will remain at what the Act compendiously calls "fixed rates", the concluding words "except on the ground of an alteration in the area of the tenure or holding", only show when the rent or rate of rent may be increased and cannot be taken to mean that the increase in the rent must be proportionate to the area; they clearly include an increase in the rate of rent as well. S 52 is no doubt general in terms and does not deal specifically with tenancies coming under S. 50. But the general rule for assessment of excess area found in sub-S. (3) of that section is not inapplicable to "fixed rate" tenancies in assessing rent under S. 112; the sub-section prohibits rent which is unfair and inequitable, and S. 112, especially when read with S. 104, does much the same by providing positively for the settlement of fair and equitable rates (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v* HEM NATH JHA. **167 I C. 736=9 R.P. 420=3 B.R. 313=17 Pat. L.T. 747=A I.R 1937 Pat. 127.**

——**S. 50 (2)**—*Presumption under—Applicability and scope—Fixed rate tenant—Part of land recorded as* sharah muaiyan *and excess land otherwise—Enhanceability of rent in respect of excess land—If detracts from status of fixed rate as regards* sharah muaiyan *land.*

The presumption in S. 50 (2) of the B. T. Act cannot prevail in a case where the area of the holding admittedly includes a portion which has been commuted to *nakdi* at some time previous to the last twenty years but since the Permanent Settlement, and the tenant cannot identify the plots for which the *sharah muaiyan* status is claimed on the basis of payment of a fixed rate of rent for the entire holding for 20 years. But that is no ground for holding that a tenant may not have a fixed rate tenancy combined with an area the rent of which may be enhanced from time to time according to the law. As regards the status of such a tenant, it would undoubtedly be unjust to him to leave out the fixed rate of the *sharahmuaiyan* element from the description (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B R. 313=17 Pat.L.T. 747=A I.R. 1937 Pat. 127.**

——**S. 50 (2)**—*Presumption under—Rebuttal—Suit under S. 106, by occupancy raiyat claiming certain jamas to be Maurashi Mokarari for correction of record of rights—Collection papers—Admissibility to rebut presumption.*

Where in a suit under S. 106 by a person recorded as an occupancy raiyat, in respect of certain jamas, claiming them to be Maurashi Mokarari and praying correction of the record-of-rights accordingly, the plaintiff is entitled to the benefit of the presumption, under S. 50 (2) by reason of his having been paying a uniform rent for a period over twenty years before the institution of the suit, and the defendant landlords in rebutting the presumption rely upon their collection papers, the absence of entries relating to the jamas in the collection papers is evidence in the case, although its evidentiary value depends upon other facts disclosed in the case. The collection papers are admissible in evidence and are relevant to the question whether the jamas came into existence after the permanent settlement If the Court excludes from consideration the collection papers and finds that the landlords have failed to rebut the presumption under S. 50 (2) its finding is vitiated by an error of law. (*Nasim Ali and Edgley, JJ.*) ANANDA LAL CHAKRAVARTY *v.* NARAYAN CHANDRA **166 I.C. 764=9 R.C. 583=A I.R. 1936 Cal. 481.**

——**S. 50 (2)**—*Presumption under—Rebuttal—Variation in rent if to be substantial—Small variation—If sufficient.*

In order that the statutory presumption of fixity of rent arising under S 50 (2) of the Bengal Tenancy Act, may be rebutted, all that is necessary to be proved is that there has been a real change or variation in the rent or rate of rent. It is not necessary that it should be a substantial one. The amount of the variation is only one of the elements to be considered in determining whether there has been a real change If there is a variation even of a small amount, and if the excess amount had been actually realised and is being realised by the landlord, that fact will put an end to the presumption arising under S 50 (2). (*R C. Mitter, J*) ARJEDALI *v.* SORBASONA DASSI **I.L.R. (1937) 1 Cal 278=40 C.W.N. 1279=64 C.L.J 51,**

——**Ss 50 (2), 103-B (3), 104-H and 115**—*Suit under S. 104-H—Entry in favour of tenant in record of-rights challenged—Tenant—If can rely on presumption under Ss. 50 (2) and 103-B (3).*

In a suit under S. 104 H, when the entry in the record of-rights in favour of the tenants is challenged, it is open to them to support its correctness by proof including the presumption laid down in Ss. 50 (2) and 103-B (3), and there is nothing to preclude this being done in S 115. (*Dhavle, J*) KAMESHWAR SINGH BAHADUR *v.* BACHA KOIRI **164 I.C 98=9 R.P. 88=1936 P.W.N. 436=A.I R. 1936 Pat. 446.**

——**S 52**—Abatement of rent—Grantee of Sunderbans land under S. 13 of Regulation III of 1828—If can claim. *See* BENGAL LAND REVENUE ASSESSMENT (RESUMED) REGULATION (III OF 1828) S 13. **42 C.W.N. 239.**

——**S. 52**—*Abatement of rent—Right of tenant—Unlawful eviction.*

A landlord is bound to put his tenant in possession If he fails to put his tenant in possession of the whole of the demised premises, he can only get rent for so much of the demised premises of which he had put his tenant in possession. If he has discharged that duty and the tenant is actually put in possession, his duty is to maintain the possession of the tenant against all lawful evictions. The landlord's duty does not extend to protect the tenant from unlawful evictions, that is to say, the evictions by persons who have not got any title or who have not derived any title from the landlord. If the tenant is unlawfully evicted from any land of his tenancy, it is for him to recover the same from his dispossessor. If he does not choose to do so, he cannot on any principle of law whatsoever claim abatement of rent. (*R. C. Mitter, J.*) SURENDRA NATH MONDAL *v.* BHUDAR CHANDRA SAFUIX. **177 I.C. 996=11 R.C. 307=67 C L.J. 136=A.I.R. 19 8 Cal. 690.**

——**S 52**—*Applicability—Conditions of—Tenant holding under* mukarrari *lease—Right to abatement of rent on ground of diluvion of land.*

S. 52 of the Bengal Tenancy Act is applicable even to a tenant holding under a *mukarrari* lease. But it is applicable only when there is found to be any deficiency in the area of the holding or tenure from whatever cause. A tenant would be thus entitled to claim abatement of rent under the section if it can be ascertained that he has lost the whole or portion of the land by diluvion or some similar cause. (*Courtney Terrell, C.J. Macpherson and Fazl Ali, JJ*) DUKHALAL CHAUDHURY *v.* MST. MANABATI. **15 Pat. 594=163 I.C 1003=9 R.P. 69=17 Pat.L.T 339=1936 P.W.N. 373=A.I.R. 1936 Pat 341 (S.B).**

——**S. 52**—Applicability to fixed rate tenancies. *See* B.T. ACT, SS. 50 (1) AND 52. **17 Pat L.T. 747.**

——**S. 52**—*Claim for additional rent for additional area based both on kabuliyat and section—Landlord omitting to make measurement as provided for in kabuliyat—Claim, if barred.*

A claim for additional rent in respect of additional area based not only on the terms of the kabuliyat but upon the express provision of S 52 of the B.T. Act, is not time barred simply because the landlord omitted to make the measurement which was provided for in the kabuliyat, as the claim under S. 52 of the Act is a recurring right. (*Mukherjea, J.*) KEDAR NATH BOSE *v.* EMANDI MONDAL **42 C.W N. 994.**

——**S 52**—*Claim for rent for additional area—Standard of measurement—Presumption*

In a suit for additional rent in respect of additional area, the presumption is that the staandard of measurement has not varied since the first letting out of the lands, if there is no evidence to the contrary adduced by the tenant. (*Mukherjea, J.*) KEDAR NATH BOSE *v.* EMANDI MONDAL. **42 C.W.N 994**

——**S 52**—*Construction—Liability of tenant to pay additional rent—When arises.*

The words "area for which rent has been previously paid" mean the area with reference to which rent was assessed or adjusted. In order therefore to prove the area for which rent was being previously paid it is not necessary for the plaintiff to prove the area of the tenancy at its inception, and in order to determine whether the landlord is entitled to additional rent the question which has to be solved is whether the tenant is in occupation of the land for which no rent has been assessed and for which he is bound to pay rent. If since the time of the last assessment he has encroached on adjoining waste of the landlord he is liable for rent for the land encroached. If he has not encroached upon the adjoining waste and is in occupation of the same area which he possessed when the rent was last assessed he may be liable to pay the additional rent if it is proved that rent was not assessed at a consolidated sum upon the entire area found in his possession but upon an assumed area or upon an area determined by measurement as the area in his possession. 55 C. 680 and 25 C.W.N. 704, Rel on. (*Nasim Ali and Edgley, JJ.*) Gopal Chandra Chauda *v.* C.K. Nag & Co., Ltd. **167 I C. 474=9 R.C. 690 =A.I.R. 1936 Cal. 375.**

——**S. 52**—*Enhancement of rent for excess area —Deduction of 10 per cent. on settlement area.*

When a suit is instituted for enhancement of rent on the ground of excess area under S. 52 of the B. T Act. the Court would be acting rightly in reducing the settlement area by ten per cent. before comparing it with the previous area as found on private measurement. (*M C. Ghose, J.*) Jaynuddin Sheik *v.* Ramesh Chandra Roy. **40 C.W N. 1022.**

——**S. 52**—*Excess area within boundaries discribed in kabuliyat—Landlord's right to additional rent.*

A tenant executed a kabuliat nnd agreed therein to pay certain rent for certain area assumed to be comprised within boundaries described in the kabuliat He also agreed that if at the time of the survey there was an excess, the landlord would have a right to make a separate settlement for the excess land At the time of the kabuliat there had been no khas land of the landlord on any of the sides of any plots demised by the kabuliat so that there was no room for encroachment.

Held, that while entering into stipulation about payment of additional rent for excess area, the parties were not thinking of any land outside the boundaries mentioned in the kabuliat. The rent mentioned in kabuliat was not intended to be a consolidated rent for the entire land within the original boundaries for all time to come. It was taken to be the rent of the holding till after fresh measurement the actual area was ascertained The landlord was therefore entitled to get additional rent for excess area if there be any, within the original boundaries (*S.K Ghose and Nasim Ali, JJ.*) Nanda Kishore Lal *v* Khetabuddin Ahmed **177 I.C. 670=11 R.C 265=A.I.R. 1938 Cal. 449.**

——**S 52**—*Precedents under—Value.*

Each case under S. 52, B. T. Act, ought to be studied with reference to its facts and with reference to the particular point or points which arose therein, and an attempt to spell out of a

decision of any other case or cases a proposition of law which it did not intend to lay down can only lead to confusion. (*Biswas, J.*) Nanda Kishore Lala *v.* Khetabuddin Ahmed. **176 I C. 336=11 R.C. 88=42 C.W.N. 276=A I.R. 1937 Cal. 632.**

——**S 52**—Principle underlying—Abatement of rent—Diluvion—Right of tenant. *See* Landlord and Tentant—Abatement of Rent. **17 Pat.L. T. 339=A.I R. 1936 Pat. 341. (S.B)**

——**Ss. 52 and 183**—*Scope—Occupancy holding —Usage depriving tenant of right to reduction of rent on diluvion—Legality*

A usage whereby a tenant of an occupancy holding loses his right to reduction of rent on diluvion under S. 52 of the Bengal Tenancy Act and to re-occupy the land on its reformation is a serious derogation of the rights of an occupancy raiyat. Although a usage relieving a tenant from payment of rent for the diluviated portion of his holding may be of benefit to him and not inconsistent with the Act, serious hardship would arise if, for instance, a tenant having paid eleven years' full rent for his holding were then to lose a substantial portion of his holding by temporary diluvion, and were debarred from retaining his right to that portion on payment of rent. A usage to that effect, even if proved, is not in accordance with law and is barred by the provisions of S. 183 of the Bengal Tenancy Act. (*Agarwala aud Madan, JJ*) Rudra Narain Singh *v.* Kedar Nath Singh **18 Pat.L.T. 477=3 B R 762=170 I.C. 754=10 R.P. 148=1937 P. W N. 526=A.I.R. 1937 Pat 458.**

——**S. 52**—*Scope and applicability of.*

S. 52 would apply even where the tenant is found to be holding land without any variation in the boundaries, the excess being merely due to the later measurement showing the area to be greater than the supposed previous area. The test is not what was the actual area before but what was the area, actual or assumed, for or with reference to which the rent previously paid had been assessed. What S 52 requires to be shown is land held in excess and such excess may be established even within the limits of the original boundaries, provided of course it is shown that the previous settlement was on the basis of the supposed area. On the other hand, in some cases, S. 52 would not apply even when there is a real increase in area of the holding. It may so happen that at the time of the assessment of the previous rent the area might have been actually ascertained and specified, but the settlement of rent might not have been on the basis of the area so ascertained, the rent being fixed as a consolidated sum. (*Biswas, J.*) Nanda Kishore Lala *v.* Khetabuddin Ahmed. **176 I.C. 336=11 R.C. 88=42 C.W.N. 276=A.I R 1937 Cal 632.**

——**S. 52**—*Suit for enhancement—Excess area —Facts to be proved—'Proved by measurement' 'area for which rent was previously paid'—Meaning of.*

In order to establish a tenant's liability for additional rent, the first thing to be proved is that the tenant is in possession of land in excess of the area for which rent has been previously paid by him. The excess area must be proved by measurement. The collocation of the words "proved by measurement" in the context in which they occur in S. 52, T. P. Act, does not require evidence to be given of two measurements, one to show what is the land for which the previous rent was fixed and another to show what land the tenant is in possession now. What the section requires to be proved by measurement is the quantity of land held in excess and not the old area as well as the new area. Similarly the words "the area for which rent was previously paid by tenant" mean not the actual area of the holding at the time previous rent was assessed, but the determinate area with reference to which such assessment was made. For this purpose it is first necessary to determine whether the previous rent was at all assessed with reference to area. The mere fact that the old area was arrived at by measurement will not be enough It will have to be further shown that the settlement of rent was made after measurement on the basis of the area so measured. (*Biswas, J.*) NANDA KISHORE LALA *v.* KHETABUDDIN AHMED. **176 I.C. 336=11 R.C. 88=42 C.W N. 276=A.I R. 1937 Cal. 632.**

——— S. 52—*Suit for enhancement — Second appeal—New case—Permissibility.*

The burden which the landlord takes on himself under S. 52, B. T. Act, is to show the area for or with reference to which the rent was assessed or adjusted at the inception of the tenancy or at any intermediate assessment which followed. Where the landlord's case both in second appeal and in the Courts below was that the area mentioned in the kabuliyat was such area and this he attempted to establish in the Courts below by showing that this was the actual area of the holding at the time, but the findings being against him, he sought to argue in second appeal that this must in any case be assumed to be the area for which the previous rent was being paid.

Held, that this was not such a new case as the appellant was not entitled to raise in second appeal, it arises on the record as it stands, and is urged substantially as a question of law. (*Biswas, J*) NANDA KISHORE LALA *v.* KHETABUDDIN AHMED **176 I C 336=11 R.C. 88=42 C.W.N, 276=A I.R. 1937 Cal. 632.**

——— S. 52 (1) (a)—Burden of proof—Jamabandi signed by tenant showing increase in area and enhancement of rent—Effect—Plea of illegality of enhancement under S. 29—Onus. *See* BENGAL TENANCY ACT, Ss. 29 AND 52 (1) (*a*). **40 C.W.N. 1330.**

——— S. 52 (1) (a)—*Retrospective effect—Suit pending in appeal.*

Sub-S (1-a) inserted in S. 52 of the Tenancy Act by the Amendment Act of 1939 was made applicable by S 3 of that Act to suits which were pending on the date of commencement of that Act. A suit must be deemed to be pending during the pendency of an appeal filed in that suit. (*Rau, J.*) NUR AHAMED *v.* RASIK CHANDRA. **44 C.W.N. 780=71 C L J. 493.**

——— S. 52 (2)—Grant of waste lands in Sunderbans to lotdar under Waste Land Rules—Part of grant diluviated—Claim for abatement—If sustainable. *See* BENGAL LAND REVENUE ASSESSMENT REGULATION, S. 13. **A.I.R. 1938 Cal. 229.**

——— S. 52 (2)—*Right conferred by—Availability.*

Even assuming a grant of Sunderbans land to be a case, its terms which provide for a measurement and revised assessment only once during the whole term of 99 years, militate against the right conferred by S. 52 (2) of the Bengal Tenancy Act. (*Mitter and Biswas, JJ.*) AMBUJ BASHINI CHOWDHURAIN *v.* SECRETARY OF STATE. **I.L.R. (1938) 2 Cal. 1=42 C.W.N. 239=182 I.C. 121=12 R.C. 5=A.I.R. 1938 Cal. 229.**

——— S. 60—Dakhilas *granted by landlord's agent—If conclusive against landlord.*

Dakhilas showing payments of rent, granted by an authorised agent of the landlord are not conclusive against the landlord. S. 60 of the Bengal Tenancy Act does not prevent the landlord from proving that in fact no payments had been made, and the the *dakhilas* were collusive documents. The only effect of a *dakhila* is this, that the onus is shifted on the landlord. (*Mitter, J.*) JOGENDRA MOHAN DAS *v.* RAMANATH KARMAKAR. **43 C.W. N 581.**

——— S. 65—*Landlord purchasing tenure in execution of money decree—Right to recover arrears of rent for anterior period.*

Per *S. K. Ghose, J.*—If a landlord purchases a tenure in execution of a money decree against the tenure-holder the liability of the tenure for arrears of rent in respect of a period anterior to the auction purchase passes with the sale and attaches to the landlord-purchaser and the latter is not entitled even to a money decree against the judgment-debtor tenant. The fact that the proclamation of sale which resulted in the landlord's purchase did not contain any notice that there were rents in arrears for the anterior period is immaterial.

Per *Patterson, J.*—The arrears of rent due to the landlord are extinguished by his purchase of the tenure. (*S. K. Ghose and Patterson, JJ.*) MIDNAPUR ZEMINDARY CO., LTD. *v.* MRINAL KANTI ROY. **182 I.C 110=11 R.C. 901=42 C W N. 967=A.I.R. 1938 Cal. 681.**

——— S. 65—*Sale of holding—Right of co-sharer landlord who has parted with his interest.*

The right to bring the tenure or holding to sale under S. 65 appertains exclusively to the landlord; and a person to whom certain rents are due and who obtains a decree therefor after he has parted with the property in which the tenancy is situate, has no such right. (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——— S. 67—*Interest on arrears of patni rent—If can be claimed.*

Interest on arrears of rent due in respect of a patni taluk cannot be claimed under S. 67 of the Bengal Tenancy Act, if according to the terms of the engagement between the parties no interest on arrears is payable. In view of the provisions of S. 195 (*c*) of the Bengal Tenancy Act, as it stood in 1933, those terms cannot be affected by any provision contained in the Bengal Tenancy Act. (*Mitter and Roxburgh, JJ.*) KIRAN CHANDRA ROY *v.* BROJESCHARAN SEN. **I.L.R. (1940) 1 Cal. 442=71 C L.J. 110=44 C.W.N. 415=A.I.R. 1940 Cal. 306.**

———S. 68 (2)—*False suit by landlord—Damages to tenant—Award of, at twenty-five per cent.—Propriety.*

Where a landlord is found to have instituted a suit for *bhaoli* rent against his tenant without resonable and probable cause the defendant is, under the provisions of S. 68 (2) of the Bengal Tenancy Act, entitled to be awarded damages of twenty-five per cent. of the whole amount claimed. (*Macpherson and James, JJ.*) Brindaban Prasad *v.* Banku Bihari Mitra. **15 Pat. 295=166 I.C. 317=9 R.P. 282=17 Pat.L.T. 575=1936 P.W.N. 598=3 B.R. 153=A.I.R. 1936 Pat. 595.**

———S. 70—*Order under—If a decree.*

An order of a Collector passed under S. 70 of the Bengal Tenancy Act is not a decree. It is an order in a proceeding which does not start with a plaint but with an application on which court-fees are not payable as for a plaint. (*Agarwala and Varma, JJ.*) Rameshwar Prasad Narain Singh *v.* Kunj Behari Mahto. **160 I.C. 27 (1)=8 R.P. 329=1936 P.W.N. 23=17 Pat.L.T. 36=A.I R. 1936 Pat. 125.**

———(as amended in 1928), S. 73, Proviso—*Applicability — Transfer by one co-tenant—Transferee undertaking to pay part of arrears only—Liability of transferor.*

The proviso to S. 73 of the Bengal Tenancy Act, as amended in 1928, deals with a case where the liability to pay the entire rent has been taken over by the transferee. Such arrears must obviously refer to the whole of the arrears due. Where there has been a transfer by one of the tenants only, and the transferee has not taken upon himself to pay the whole of the arrears due the proviso can have no application, and under the first part of S. 73, the transferor and the transferee, whether the transfer be of the whole of the holding or of a part, would be jointly and severally liable for the whole of the arrears due. (*R. C. Mitter, J.*) Amirul Islam *v.* Sarada Kumar Sen. **165 I.C. 249=9 R.C. 366=40 C.W.N. 149.**

———(as amended in 1928), S. 73, Proviso—*If retrospective.*

S. 73, B. T. Act, as amended came into force in February, 1929, and has no retrospective operation. The transferors of a holding are therefore liable for the arrears of rent of the holding for the years prior to the date of the coming into operation of the amended section. (*R. C. Mitter, J.*) Amirul Islam *v.* Sarada Kumar Sen. **165 I.C. 249=9 R.C. 366=40 C.W.N. 149.**

———S. 74—Falkar—*If part of rent.*

Where *falkar* is claimed as a part of consideration for the use and occupation of land and arises from the inception of the tenancy it forms part of the rent for the demised premises. (*Edgley, J.*) K. C. De *v.* Hira Bewa. **I.L.R. (1937) 1 Cal. 491=167 I.C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

———S. 74—*Old kistibandi patta—Small sum of* moltana *shown as payable—Recoverability—If* abwab.

Where in a kistibandi patta the instalments put down include a small expense of *moltana* to be paid along with every instalment, and the document is of old times and record-of-rights shows the amount of instalment inclusive of *moltana* as the rent, the small sum cannot be deemed to be an *abwab.* (*M. C. Ghose, J.*) Sachindra Kumar Roy *v.* Purna Chandra Pal. **166 I.C. 1008 (1)=9 R.C. 643=A.I.R. 1936 Cal. 541.**

———S. 74—*Scope—Rent payable—What is—Customary rent and actual rent—Claim to sum in excess of actual rent—Maintainability.*

The rent of a holding is that which is paid by a tenant for the use and occupation of the land. Actual rent is the rent actually agreed upon between the parties. A tenant may be inducted on land on an agreement to pay the customary rent; that is perfectly a good contract, and on proof of what has been customary, such rent is leviable. What must not be levied is something in excess of the actual rent agreed upon. It is not the concern of the tenant how the landlord actually devotes the money which the tenant pays him by way of agreement for the use of the land. If the amount has been definitely agreed upon that is the actual rent payable. (*Courtney-Terrell, C. J. and Fazl Ali, J.*) Surjo Mohan *v.* Chhote Singh. **174 I.C. 447=10 R.P. 521=4 B. R. 448=19 Pat.L.T. 365=1938 P.W.N. 286=A. I.R. 1938 Pat. 319.**

———S. 76 (2) (f) (as amended)—*Effect—Right of tenant to erect building.*

The only effect of the amendment of S. 76 (2) (*f*) is that the description of dwelling-house is made more specific in the present Act. But it is certainly not correct to say that the tenant is entitled to build without reference to area even though the effect might be to render the land unfit for the purposes of the tenancy. (*S. K. Ghose, J.*) Bhupendra Nath *v.* Elokeshi Dassi. **177 I.C. 294=11 R.C. 223=A.I.R. 1938 Cal. 318**

———Ss. 76 (2) (f) and 77—*"Tenant"—Unrecognized transferee of non-transferable holding—Right to erect permanent structure.*

Under S. 76 (2), sub-S. (*f*) and S. 77, a landlord is not entitled to prevent his tenant from erecting a permanent dwelling-house whether of masonry bricks, stone or any other material whatsoever, for the tenant and his family, together with all necessary out-offices. The right to erect a dwelling house is a right belonging to the tenant and to no other and even the tenant is entitled to do so only for the benefit of himself and his family. It belongs to the tenant by virtue of his relationship to the landlord and not by virtue of his rights of occupying the land. An unrecognised transferee of a portion of a non-transferable holding does not stand to the landlord in the relationship of tenant. (*Lodge, J.*) Jogesh Chandra Das *v.* Hem Chandra Ghosh. **162 I.C. 617=8 R.C. 616=A.I.R. 1936 Cal. 243.**

———S. 85—*Sub-lease created by raiyat void under—Superior landlord purchasing raiyati holding at rent sale after repeal of section—If can treat sub-lease as nullity.*

A superior landlord who purchases a raiyati holding at a rent sale after the repeal of S. 85 by the Bengal Tenancy (Amendment) Act (IV of 1928) cannot treat a sub-lease created by the raiyat before the repeal of that section as void and inoperative, even though such sub-lease was void under that section. (*Mukherjea and Roxburgh, JJ.*) Promotha Nath *v.* Jitendra Nath. **43 C.W.N. 1102.**

———S. 86 (6)—*Applicabillity to non-transferable holding.*

S. 86, Cl. (6) does not apply to a non-transferable holding. Though the section speaks in general terms of a holding it has to be read with the other provisions of the Act. Occupancy holdings in the absence of proof of any custom to the contrary are presumed to be non-transferable. The mortgagee of a raiyat cannot claim that the surrender of the mortgaged property to the landlord could not be valid unless it was made with his consent. (*James and Chatterjee, JJ.*) RAM CHANDERJI *v.* HEM CHANDRA **18 Pat. 184=182 I.C. 557=5 B.R. 779=12 R.P. 21=20 Pat.L.T. 469=A.I.R. 1939 Pat. 200.**

——S. 87—*Abandonment of holding—Transfer by original tenant of portion of his holding to* R *before amendment of Act in* 1928—*He after amendment transferring remaining portion to* K—*No arrangement made regarding payment of rent in respect of former treated as having abandoned his holding and landlord could evict* R *from portion transferred to him.*

It cannot be said that the transferee of a portion of a holding steps into the position of the former tenant except as regards that portion of the holding which has been transferred to him. As long as the original tenant retains the holding or a portion thereof the landlord has some security for the payment of his rent. If, on the other hand, the original tenant severs his connexion with the holding the only method by which the landlord can safeguard his interest is by pre-empting the portion transferred or by attempting to recover rent from the transferee in respect of the entire holding. Such a course will afford the landlord no guarantee that he will be able to recover rent for any portion of the holding that may have been transferred previously by the original tenant unless that tenant has made proper arrangements for the payment of the rent as it falls due. An original tenant transferred, before the passing of the Bengal Tenancy Amendment Act of 1928, a portion of his holding to *R*. Subsequently, after the passing of the Act of 1928, he transferred the remainder of the holding to *K*. He had made no arrangement regarding payment of rent with regard to that portion of the tenancy which had been transferred to *R* before the passing of the Bengal Tenancy Amendment Act.

Held, that the original tenant must be treated as having abandoned his holding within the meaning of S. 87, B. T. Act. The landlord was therefore entitled to re-enter and might evict *R* from that portion of the holding which was transferred to him. (*Edgley, J.*) ANNADA PROSAD *v.* RAMJAN SARKAR. **I.L.R. (1939) 2 Cal. 471=70 C.L.J. 501=186 I.C. 555=12 R.C. 478=44 C.W.N. 118=A.I.R. 1940 Cal. 6.**

——S. 87—Scope—If exhaustive—Under-raiyat granting permanent lease without landlord's consent and vacating land and leaving place—Abandonment—Presumption. *See* B. T. ACT, S. 48-F. **64 C.L.J. 58.**

——S. 87 (4)—*Applicability—Permanent lease by under-raiyat.*

S. 87 (4) of the B. T. Act is not applicable to a permanent sub-lease by the under-raiyat, but only to a sub-lease for a term. (*Ghose, J.*) IAJUDDIN SHEIKH *v.* UMEDALI MEAH. **64 C.L.J. 58.**

——**S. 87 (5) (c)**—*Applicability.*

S. 87 (5) (*c*) of the B. T. Act can only apply to an under-raiyat of the first degree and not to an under-raiyat of the second degree. A permanent sub-lease by the under-raiyat without the consent of the landlord being invalid, the sub-lessee under such a lease cannot get the protection of S. 87 (5) (*c*). (*Ghose, J.*) IAJUDDIN SHEIKH *v.* UMEDALI MEAH. **64 C.L.J. 58.**

——S. 88, (ii)—*Applicability—Putni tenures.*

S. 88, Cl (ii) of the B. T. Act is not applicable to putni tenures, and the Civil Court has, therefore, no power under that provision to order distribution or apportionment of the rent of a putni tenure. (*Nasim Ali and Rau, JJ.*) JAGADISH CHANDRA *v.* ISHAN KUMARI. **I.L.R. (1940) 1 Cal. 318=188 I.C. 304=12 R.C. 667=44 C.W.N. 192=A.I.R. 1940 Cal. 212.**

——S. 88, Proviso 2—*Kabuliyat involving division of original holding without consent of all co-sharer tenants—Validity—Inclusion of new land in kabuliyat—Effect of.*

New kabuliyat which involves a division of the original holding without the consent of all the co-sharer tenants of that holding is invalid under Proviso 2 to S. 88. The fact that new land had been included in the kabuliyat does not make any difference to the validity of the kabuliyat itself. (*Edgley, J.*) MAHENDRA CHANDRA *v.* RAJANI KANTA. **A.I.R. 1939 Cal. 609.**

——**Ss. 94 and 99**—*Common manager appointed by proprietors—Removal—Jurisdiction of District Judge.*

Where in pursuance of a notice under S. 94 of the B. T. Act, all the co-owners appoint a common manager of their estate, the District Judge has no jurisdiction thereafter to remove him under S. 99 of the Act and to restore the management to the co-owners. (*Nasim Ali and Edgley, JJ.*) JOGENDRA NATH MUKHERJEE *v.* KSHITESH CHANDRA ROY CHOUDHURY. **40 C.W.N. 1312.**

——S. 95—*Common manager—Position of—If agent of proprietors.*

A common manager of an estate appointed by the District Judge under S. 95 of the B. T. Act is not an agent of the proprietors of the estate placed in his charge. (*R. C. Mitter, J.*) BRINDABAN CHANDRA MITRA *v.* ATUL KRISHNA BASU. **164 I.C. 728=9 R.C. 267=40 C.W.N. 92.**

——S. 102—*Record-of-rights—Statement of particulars.*

It is not wrong for the settlement authorities to state in the record of-rights the amount of rent payable for the land or whether it is assessable to rent. (*M. C. Ghose and Mukherjea, JJ.*) THE NUDDIA MILLS CO., LTD. *v.* RAJ LAKSHMI DEBI. **64 C.L.J. 530.**

——S. 102 (dd)—*Dispute between neighbouring proprietors—Settlement Officer's jurisdiction to decide.*

A Settlement Officer has authority to decide a dispute between two neighbouring proprietors under the provisions of S. 102 (*dd*), 19 Cal. 641, Diss. (*M. C. Ghose, J.*) HUMAYUN RAJA CHAUDHURY *v.* JYODIRMOYEE DEBI. **168 I.C. 270=9 R.C. 789=A.I.R. 1936 Cal. 452.**

——**Ss 102 (11) (gg) and 103-B**—*Scope*—Fard-ab-pashi—*Entry in stating that raiyat will be liable to pay existing rent if landlord fully maintains existing irrigation arrangement—If authorised—Presumption of correctness.*

An entry in the *fard-ab-pashi* to the effect that the raiyat will be under an obligation to pay the existing rent to the landlord if the arrangements for irrigation are fully maintained, is one which the Settlement Officer is authorised to make under S. 102 (11) (*gg*) of the Bengal Tenancy Act in the *fard-ab-pashi*, which is part of the record-of-rights. Such an entry must be presumed to be correct under S 103-B of the Bengal Tenancy Act. (*Harries. C.J. and Fazl Ali, J.*) Kapildeo Bhagwan *v.* Ali Raza. **19 Pat. 104=1940 P.W.N. 280=A I.R. 1940 Pat. 322.**

——**Ss. 102 (j) and 103-B**—*Scope and effect—Entry in record-of-rights that land is rent-free—Presumptive force of—Rebuttal—Mode of—Suit to declare entry erroneous and for assessment of fair rent—Burden of proof—Proof that land lies within zamindari—If sufficient.*

In a suit for a declaration by a landlord that the entry in the record-of-rights to the effect that the land held by the defendant tenant is rent-free and for assessment of a fair rent, it is not enough for the landlord to merely show that the land in question fell within the ambit of his zemindari. The effect of Ss. 102 (*j*) and 103-B of the B. T. Act is that the entries in the record-of-rights are given presumptive force, and those entries must prevail unless the presumption is rebutted by positive evidence that the land in question was in fact assessed to rent, unless the landlord proves that his suit must fail. (*Courtney-Terrell, C.J. and James, J.*) Rashik Lal Sahu *v.* Surput Singh. **16 Pat 281=18 Pat.L.T. 187=1937 P.W.N. 210=169 I.C. 964=3 B.R. 646=10 R.P. 59=A.I.R 1937 Pat. 408.**

——**Ss 103-B and 191**—*Fresh settlement of revenue made in respect of taluk—Entry in record-of-rights showing increase in rent of holding situate therein—Presumption of correctness—Rebuttal by lease granted after Act.*

A fresh settlement of land revenue was made in respect of a taluk not subject to a permanent settlement, and an entry was made in the record-of-rights showing an increase in rent in respect of a holding situate in that taluk. In a suit for rent at the higher rate mentioned in the record-of-rights, the defendant relied on a lease granted after the passing of the Bengal Tenancy Act showing that the rent of the tenancy was permanently fixed at a certain rate. It was not shown that the right of the defendant to hold the tenancy at the rate mentioned in the lease beyond the term of the previous revenue-settlement of the taluk was expressly recognised by the revenue authorities.

Held, that by the provisions of S. 191 of the B. T. Act nothing in the lease entitled the defendant to hold at the rent mentioned therein and it could not, therefore be said that the lease proved the incorrectness of the entries in the record-of-rights. (*Rau. J.*) Boksa Bunjari *v.* Amana Khatun. **44 C.W.N. 778.**

——**S. 103-B**—*Presumption under—Extent of.*

The record-of-rights raises a strong presumption in favour of the recorded holder, but it is only presumptive evidence of the state of things at the date the record-of-rights was prepared, and cannot ordinarily raise a presumption in favour of the recorded holder of his possession at some earlier date. A.I.R. 1934 Cal. 707, Foll. (*McNair, J.*) Berojullah Sarkar *v.* Ayatullah Akand. **176 I.C. 706=11 R.C. 159=66 C.L.J. 455=A.I R. 1938 Cal. 117.**

——**S. 103 B**—*Suit for assessment of fair rent—Plea of rent-free grant—Burden of proof—Lands within plaintiff's regularly assessed estate—Entry in record-of-rights in defendant's favour—Effect.*

In a suit for a declaration by a landlord that certain lands, which were recorded in the record-of-rights as in possession of the defendants as *belagan*, were liable to assessment for rent and claiming that a fair and equitable rent should be assessed on the Court, if the defendants set up a rent-free title to the lands in dispute, if the landlord proves that the lands in suit lie within his regularly assessed estate or mahal, the onus is shifted on to the defendants. If the plaintiff establishes that the disputed lands are within his zamindari and within the area assessed to revenue, the defendants must establish their right to a rent-free grant, notwithstanding that the record-of-rights is in favour of the defendants. It is not for the plaintiff landlord to rebut the entry in the record. Even if there be no evidence adduced by the plaintiff to the effect that the lands are within his zamindari, if the allegations in the plaint and the admission of the defendants in their written statement lead to that conclusion, the defendants have the burden on them to establish by satisfactory evidence that they have been relieved of the obligation to pay rent either by contract or by some old grant. (*Wort and Agarwala, JJ.*) Kameshwar Singh Bahadur *v.* Sakhawat Ali. **167 I.C. 238=9 R.P. 396=3 B.R. 283=17 Pat.L.T. 819=A.I.R. 1937 Pat 96.**

——**Ss. 103-B and 50**—*Tenant not entitled to presumption under S. 50—Payment of same rent for long period—If rebuts presumption under S. 103-B.*

It cannot be held in a case brought under the Bengal Tenancy Act that any presumption arises as to the fixity of rent from mere payment of the same rate of rent for a number of years apart from the presumption arising under S. 50 of the Act. Where a tenant is not legally entitled to the presumption under S. 50, having regard to the provisions of S. 115 the presumption relied upon by the landlord arising under S. 103-B regarding the entries in the record-of-rights cannot be said to have been rebutted by the fact that the holding was held at the same rate of rent for a long period. (*Edgley, J.*) Dwarika Nath Saha *v.* Rasik Lal Saha. **179 I.C. 992=11 R.C. 643=A.I.R. 1939 Cal. 19.**

——**S. 104**—*Assessment of land added to an estate paying revenue—Complaint of wrong inclusion of land in Diara estate—Omission to file suit—Effect of—Bengal Act IX of 1847.*

Where on assessment of land which has been added to an estate paying revenue to Government, the complaint of the tenant is that his lands have been wrongly included in the Diara estate, he ought to institute a suit within six months of the final publication of the record-of-rights under the provisions of S. 104-H (iii) (*d*) of the B. T. Act, and if he does not do so, he must abide by the rent settled under the provision of the section, provided the Settlement Officer had jurisdiction to settle rent under S. 104. The Settlement Officer has jurisdiction to settle rent for any land which shall appear to the local Revenue Officer to be added to any estate paying revenue to the Government Collector, on inspection of a map prepared under S. 3 of Act IX of 1817. (*Jack, J.*) BHUPATI CHARAN DEY *v.* LALIT MOHAN BANERJEE. **42 C.W.N. 403**.

———**S. 104**—*Permanent tenure at fixed rent created by grantee of permanent lease under Government—Grantee subsequently surrendering permanent lease and taking lease for term—Settlement of rent of tenure after expiry of term—Jurisdiction of Settlement Officer.*

In 1827, Government granted a permanent lease to certain persons. Thereafter in 1840 the grantees created certain permanent tenures at fixed rent under the above permanent lease. These tenures were held by themselves. Thereafter in 1853 the grantees surrendered the permanent lease and in its place took from Government a lease for 99 years of the same estate. In 1926, when the term of 99 years was over, the Settlement Officer settled the rent of the tenure under S. 104 of the B. T. Act at rates much more than the rates which had been fixed in 1840.

Held, that the assessment was in accordance with law and not *ultra vires*. (*M. C. Ghose and Bartley, JJ.*) SATINDRA NATH CHOUDHURY *v.* HARENDRA NATH CHOUDHURY. **178 I.C 335=42 C.W.N. 866=11 R C. 341=A.I.R. 1938 Cal 529.**

———**Ss. 104 and 104-J**—*Record-of-rights—Entries in—Conclusive nature.*

Where proceedings under Part II of Chapter X of the B. T. Act have been taken, *only* the entry regarding rent and not other entries in the record-of-rights is conclusive. (*R.C. Mitter and Biswas, JJ.*) SRISH CHANDRA NANDI *v.* MIDNAPORE ZEMINDARY CO., LTD. **I.L.R. (1938) 2 Cal. 41=67 C. L.J. 202=181 I.C. 370=11 R.C. 802=A.I.R. 1938 Cal. 853.**

———**Ss. 104, 104-J and 112**—*Settlement of rent under—Principles—Rent prevailing at rates settled at Permanent Settlement—If fair and equitable for excess area.*

Rents which have not been changed from the time of the Permanent Settlement would generally be found to be very low for the present, and if the rents for excess areas are to be proportionate they would, again speaking generally, be very low, while the rent settlement under Ss. 112, 104 and 104-J, is to be a settlement of fair and equitable rents for tenants of every class. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R.P. 420=3 B.R. 313=17 Pat. L.T. 747=A.I.R. 1937 Pat. 127.**

———**Ss. 104-A to F and 104-J**—*Settlement of rent ignoring contractual rights—Validity.*

S. 104 (2) read with S. 192 of the B. T. Act, does not empower the Revenue Officer to disregard the terms of contract entered into before the Act in settling rents for tenures under Ss. 104-A to 104-F. He has, therefore, no power to touch contractual rights acquired before the Act. By S. 104-J, the amount of rent is to be deemed to have been correctly settled within the meaning of the Act. Any rent settled by a Revenue Officer ignoring such contractual rights cannot be deemed to have been correctly settled under the Act if in settling such rent he abrogates such contractual rights and thereby exceeds

his powers under the Act. It cannot be presumed that the Revenue Officer in settling rent of a tenancy touched or intended to touch the contractual right of the tenants. If the entry is taken to have such effect, it would be void and not binding on the tenants. (*Syed Nasim Ali and Henderson, JJ.*) MIDNAPORE ZEMINDARY COMPANY, LTD. *v.* CHANDRA SINGH DUDHORIA. **181 I.C. 674 =11 R.C. 828=68 C.L.J. 305=A.I.R. 1939 Cal. 1.**

———**S. 104-H**—*Parties — Suit for declaration that status of defendant should be altered—Under-tenants recorded as occupancy raiyats—If necessary and proper parties.*

In a suit framed under S. 104-H the relief claimed must determine the question whether the under-tenants are or are not necessary parties. Where the plaintiff asks for a declaration that the status of the defendants should be altered, the under-tenants or the persons who have been recorded as occupancy raiyats of a portion of the same holding are necessary and proper parties, as the decision would not only affect the status of the defendant but would also affect the status of the under-tenants. (*Wort and Manohar Lall, JJ.*) KAMESHWAR SINGH BAHADUR *v.* BIBI FATMA. **17 Pat. 150=173 I.C. 6=10 R.P. 383=4 B.R. 222= A.I.R. 1938 Pat. 43.**

———**S. 104-H**—*Scope—Suit under sub-S. 3 (e)—Landlord plaintiff failing to prove claim to increase of rent in respect of excess area in holding recorded as* sharah muaiyan—*Power of Court to reduce rent settled—Proper course.*

S. 104-H of the B. T. Act, which is a special provision of law entitling the Civil Court to interfere with the fair rents that the Revenue Courts are to settle under Ss. 104 to 104-J, empowers any person aggrieved by an entry of a rent settled in the Settlement Roll, etc., to institute a suit in the Civil Court within six months from the final publication of the record-of-right, etc., on any of the grounds stated in sub-S. (3) of that section and on no others. Where in a suit instituted by the landlord against the tenant under S 104-H (3) (*e*) on the ground that the tenant belonged to a class different from that to which he is shown in the record-of-rights as belonging, the landlord fails to prove his case, the suit has only to be dismissed. Merely because the plaintiff fails to make out his case for an increase, it is not open to the Court to reduce the rents settled by the settlement authorities in respect of excess areas, which the tenant is found to hold. When the tenant is primarily *istimrari-mukarrari* or *sharah-muaiyan* tenant, and does not claim to hold the excess area on the same terms as his old holding, the Court cannot reduce the existing rent of the excess area merely because it erroneously finds the entries to be incorrect. (*Dhavle, J.*) KAMESHWAR SINGH BAHADUR *v.* HEM NATH JHA. **167 I.C. 736=9 R P. 420=3 B.R. 313=17 Pat.L.T. 747=A.I.R. 1937 Pat. 127.**

———**S. 104-H (4)**—*Applicability—Suit under S. 104-H (3) (e)—Plaintiff landlord failing to prove claim for increase—Power of Court to reduce rent settled.*

Cl. (4) of S. 104-H of the B. T. Act can only apply to suits brought properly under it. It does not empower the Court to settle fair rents or to reduce rents already settled, when the landlord suing under sub-S. 3 (*e*) fails to prove his case for an increase. (*Dhavle, J.*) Kameshwar Singh Bahadur *v.* Hem Nath Jha. **167 I.C. 736=9 R. P. 420=3 B.R. 313=17 Pat. L.T. 747=A.I.R. 1937 Pat. 127.**

——**Ss. 104-J and 111-A**—*Applicability—Re-opening of area and rent settled by Revenue Officers—Procedure.*

Where the main reliefs prayed for, relate to the question of area of the tenancy and to the question whether the rent payable by the tenant is liable to enhancement or not, it is incumbent upon the plaintiff to proceed under S. 104-J if he wants to have the question of area decided and to have the question of rent settled by Revenue Officers re-opened; this cannot be allowed to be done by an indirect method of having a declaration under S. 111-A. The Civil Court would not be justified in granting a discretionary relief by way of declarations, if the remedy by way of consequential relief is unquestionably barred, which consequential relief is the ultimate object of the relief prayed by way of simple declarations. (*Guha and Khnndkar, JJ.*) Mahim Chandra Guha *v.* Secretary of State. **166 I.C. 734=9 R.C. 575=A I.R. 1936 Cal. 300.**

——**S. 104-J and H**—*Effect of—Entries in record-of-rights—Conclusive nature of.*

The effect of S. 104-J of the B. T. Act is that neither the landlord nor the tenant can challenge the amount of rent settled under Ss. 104-A to 104-F except by a suit under S. 104-H. From this, it necessarily follows that other entries in the record-of-rights so far as they bear upon the amount of rent settled cannot be also challenged except by a suit under S. 104-H. The effect of S. 104-H is that the failure to get the entry cancelled by a suit under that section on the grounds specified therein precludes the civil Court from entertaining and giving effect to any plea which would have the effect of declaring that the amount of rent was not correctly settled under Ss. 104-A to 104-F. (*Syed Nasim Ali and Henderson, JJ.*) Midnapore Zamindary Company. Ltd. *v.* Chandra Singh Dudhoria. **181 I.C. 674=11 R.C. 828=68 C.L J. 305=A.I.R. 1939 Cal. 1.**

——**S. 104-J**—*Lease created before Act—Estate subsequently resettled with original temporary settlement holder—Enhanced rent entered in Settlement Record—Rent recoverable by landlord.*

In the case of a lease which was created before the Bengal Tenancy Act the stipulation as to rent remains unaffected as between the contracting parties, although the estate is subsequently resettled by Government with the original temporary settlement holder and the annual rent is increased under Chap. X, Part II of the Bengal Tenancy Act. The fact that the tenant did not move the Revenue Officer under S. 104-E or 104-G or the Civil Court under S. 104-H does not make the entry of rent in the Settlement Records conclusive against the tenant under S. 104-J so far as the original landlord is concerned, and the rent recoverable by the latter is the rent provided under the terms of his lease and not the enhanced rent recorded by reason of the settlement. (*S. K. Ghose and McNair, JJ.*) Sarada Prasad Ghose *v.* Prafulla Chandra Ghosh. **176 I.C. 671=11 R.C. 145=65 C.L.J. 583=A.I.R. 1938 Cal. 188.**

——**S. 104-J**—*Presumption under—Record-of-rights—Entry recording rent—Conclusive nature of.*

Though the presumption of correctness attaching generally to entries in the record-of-rights can be rebutted by evidence, the entry with regard to rent is on a different footing. It is conclusive, even if the other entries have been rebutted and proved incorrect (*Rowland, J.*) Mahabir Singh *v.* Ramsumran Anantnidhi. **179 I.C. 753=5 B. R. 283=11 R.P. 398=A.I.R. 1939 Pat. 44.**

——**S. 104-J**—*Record of Rights mentioning progressive rent for number of years—Maximum rent to be in force for fixed period—No rent fixed after existing settlement—Right to enhance rent.*

There was progressive rent for a certain number of years, and a maximum rent was mentioned which was to be in force for the last five years of the period of the existing settlement, there was no mention about the rent to be paid after the period of that settlement.

Held, that when there was the occasion for a revision of settlement, there could be no bar to the rent being enhanced and the rent was not fixed in perpetuity. 54 I.A. 48; 54 C. 166 (P.C.), Rel. (*Guha and Khundkar, JJ.*) Mahim Chandra Guha *v.* Secretary of State. **166 I.C. 734=9 R. C. 575=A I.R. 1936 Cal. 300.**

——**S. 105**—*Application under — Court-fee—Appeal from decision of Revenue Officer to Special Judge—Court-fee—Court-Fees Act, S. 7 (ii) and Sch. I, Art.* 1.

The amount of Court-fee payable on application under S 105 of the Bengal Tenancy Act before a Revenue Officer raising issues under S. 105-A of the Act, as well as in appeals to the special Judge against the decision of the Revenue Officer thereon is governed by the notification issued by the Government under S. 105 (3) of the Act. The proper Court-fee payable is: (*i*) a stamp of 12 annas for each tenancy which is the subject matter of an application under S. 105, and (*ii*) an additional *ad valorem* fee chargeable under Sch. I, Art. 1 of the Court-Fees Act, on the value of the subject-matter of the dispute in appeal, subject to a maximum of Rs. 20. The value of the subject-matter in appeal must be determined under S. 7 (*ii*) of the Court-Fees Act, that is to say, in addition to the court-fee of 12 annas a fee on ten times the difference between the fair rent claimed and the rent recorded in the record-of-rights subject to a maximum of Rs. 20 for each of the *Khatians* must be paid. (*Nazim Ali and Henderson, JJ.*) Charusila Dasi *v.* Abhilas Bauri. **I.L.R. (1937) 1 Cal. 103=168 I. C 203=9 R.C. 770=40 C.W.N. 1149=A.I.R. 1936 Cal. 804.**

——**S. 105**—*Decree for enhancement of rent—Suit to set aside—Heirs of one of decree-holders not impleaded—Effect.*

Where in a suit to set aside a decree for enhancement of rent the heirs of one of the decree-holders who is dead are not impleaded, the decree cannot be set aside in their absence. (*Jack, J.*) Harshamukhi Dasi *v.* Nabakrishna Roy. **178 I C. 941=11 R.C 437=A.I R. 1938 Cal. 609.**

——**S. 105**—*Enhancement of rent—Right of landlord.*

A zamindar holding under the perpetual settlement is entitled to enhance the rents of all rent paying lands, unless he is precluded from doing so by a contract binding on him. Where the taluk was not described as putni taluk but the potta mentioned Putni Regulation and also provided for assessment of khilla lands at the rate of the present settlement.

Held, that the mere mention of these was not conclusive to show that the rent was fixed for all time and hence the landlord was entitled to enhance rent. (*M. C. Ghose and B. K. Mukherji, JJ.*) AMAR KRISHNA CHOWDHURY *v.* SURENDRA BIJOY DEWANJI **171 I C. 632=10 R.C. 291=A. I.R. 1937 Cal. 148.**

——**Ss. 105 and 109**—*Proceedings under S. 105—Claim for additional rent for unassessed lands of tenancies not pressed—Suit for enhancement of rent is not barred.*

Under S. 109, the failure to press the claim for additional rent for unassessed lands of the tenancies in proceedings under S. 105 bars the landlord from suing the tenant in Civil Court for increasing the rent of tenancies. (*Nasim Ali and Edgley, JJ.*) GOPAL CHANDRA CHAUDA *v.* C. K. NAG & CO., LTD **167 I.C. 474=9 R C. 690=A.I. R. 1936 Cal. 375.**

——**S. 105**—Proceedings under—Decision of Special Judge—Appeal to High Court—Maintainability—Conditions *See* BENGAL TENANCY ACT, S. 115-C (3). **40 C.W.N. 1149.**

——**S. 105**—*Rent—Liability to enhancement or reduction—Presumption.*

The proposition is too well established that "*prima facie* the rent is liable to enhancement on the application of the landlord or to reduction on the application of the tenant unless either of them has precluded himself by contract from claiming such enhancement or reduction respectively." 54 I.A. 48, relied on. (*M C. Ghose and Mukherjea, JJ.*) PANCHU GOPAL MUKHERJEE *v.* KUMAR GOCOOL CHANDRA LAW. **66 C.L.J. 24.**

——**Ss. 105 and 107**—*Scope—Settlement proceedings—Rent fixed at definite lump sum—Effect of—Rent suit by landlord—Claim to sum in excess of and over and above the settlement rent—Maintainability.*

When the rent has definitely been fixed in settlement proceedings under S. 105 of the Bengal Tenancy Act, it cannot, by reason of S. 107 of the Act, be made the subject of further litigation. A suit by the landlord against the tenant claiming a certain amount as *patwari* rent over and above the jama entered in the record-of-rights in respect of the holding is not maintainable. When the Settlement Officer has decided upon a definite sum and fixed the rent at a lump sum in respect of the holding, it is not open to the landlord in a suit to attempt to establish that the rent even in a limited class of suits is other than the rent which the Settlement Officer has in fact found to be payab'e, (*Courtney-Terrell, C. J. and Fazl Ali, J.*) SURJO MOHAN *v.* CHHOTE SINGH. **174 I.C 447=4 B.R. 448=10 R.P 521=19 Pat. L.T. 365=1938 P.W. N. 286=A.I.R 1938 Pat. 319.**

——**S. 105**—*Suit for assessment of rent—Land recorded as liable to rent—Assertion of claim of Niskar—When bars claim.*

Before the landlord's right to assess rent in respect of land which has been recorded as liable to rent, can be barred, it is necessary that the assertion of a claim of Niskar must be made to the knowledge of the landlord twelve years before the proceedings for assessment of rent. (*M. C. Ghose and R. C. Mitter, JJ.*) ANANDA LAL CHAKRAVARTY *v* GIRINDRA NATH. **168 I.C. 806=9 R.C. 876=A I.R. 1936 Cal 483.**

——**S. 106**—*Suit under—Transfer of interest of plaintiff pending suit—Continuance of suit.*

The trial of a suit under S. 106 of the B. T. Act cannot be arrested merely by reason of the transfer of the interest of the plaintiff pending suit. The transferee may, if he chooses, obtain leave of the Court under O. 22, R. 10, C. P. Code, to continue the suit, but if he does not do so, the original plaintiff may continue the suit, and the transferee will be bound by the result of the litigation. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I C. 587=11 R.C. 572=42 C.W.N. 637=A.I.R. 1938 Cal, 481.**

——**S. 106**—*Suit under—Parties—Transferee of interest of tenant who was made* pro forma *defendant, not made party—Suit, if maintainable.*

The fact that in a suit under S. 106 of the B. T. Act the transferee of the interest of a tenant who was impleaded as a *pro forma* defendant was not made a party, does not render the suit non-maintainable on account of the defect of parties. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD **179 I.C. 587=11 R.C. 572=42 C.W. N. 637=A.I.R. 1938 Cal. 481.**

——**S. 106**—*Suit under—Questions of title—Power of Court to consider.*

A suit for the determination of a bare question of title divorced from possession is not one which falls within the purview of S. 106 of the Bengal Tenancy Act. But this does not mean that the Court is not under any circumstances to consider questions involving the title of the rival parties. In order to determine the nature of the possession of a party with respect to a particular piece of land, the Court can in a suit under that section enter incidentally into questions of title. (*Sen, J.*) SECRETARY OF STATE *v.* DISTRICT BOARD OF RANGPUR. **185 I.C 454=12 R C. 373=70 C.L.J. 126 =A.I.R. 1939 Cal. 758.**

——**S. 106**—*Suit under—Transportation of cosherer defendant as plaintiff after limitation—Jurisdiction of Court—C. P. Code. O. 1, R. 10—Limitation Act, S. 22 (2).*

In a suit under 'S. 106 of the B. T. Act, a co-sharer *pro forma* defendant can be transferred to the category of the plaintiff, although a period of four months has elapsed since the final publication of the record of rights, and a decree can be passed in his favour. The Court clearly has jurisdiction to order the transfer under O, 1, R. 10, C. P. Code, and having regard to the provisions of S. 22 (2) of the Limitation Act no question of limitation can arise. (*Edgley, J.*) LILABATI DASI *v.* GHITPUR GOLABARI CO., LTD. **179 I. C. 587=11 R.C. 572=42 C.W.N. 637=A.I.R. 1938 Cal. 481.**

——**(as amended), S. 109**—*Applicability—Suit instituted after amendment—Proceeding under S. 105 withdrawn prior to amendment.*

S. 109 of the B. T. Act, as amended in 1928, applies to all cases instituted after February, 1929, even though the proceeding under S. 105 was withdrawn prior to the amendment. 61 C.L.J. 127, Rel. on. (*M. C. Ghose, J.*) UDAY CHANDRA CHAKRAVARTY *v.* AMBIKA CHAKRAVARTY. **170 I. C. 259=10 R.C. 125=64 C.L.J. 547=A.I.R. 1937 Cal. 455.**

——**S. 109**—*Applicability—Suit under S. 106—Dismissal as barred by limitation—Fresh suit by plaintiff more than 12 years later on the ground of title by adverse possession—If barred.*

Plaintiff's father who had purchased the suit property in execution of a decree against the father of the defendants, brought a suit under S. 106 of the Bengal Tenancy Act to correct the entry in the *Khatian* where the defendants were recorded as being in possession: but it was dismissed on the ground of limitation on 25-6-1911. In the next settlement in 1927, the defendants were again shown as being in possession, though the plaintiff's father and afterwards plaintiff remained in possession of the property in spite of the dismissal of the suit under S. 106. Plaintiff's objection to the settlement under S. 116 of the Orissa Tenancy Act having been dismissed he brought a suit in 1928 for a declaration of his title and confirmation of possession, asserting that by being in possession for more than twelve years previous to the suit, he had acquired a right to the disputed property by adverse possession.

Held, that S. 109 of the Bengal Tenancy Act did not bar the suit by reason of the earlier suit under S. 106, as the two suits were not in respect of the same matter, and that plaintiff was entitled to succeed in the suit on the ground of title by adverse possession acquired after the date of the previous decision. S. 109 of the Bengal Tenancy Act would bar only a suit based on the same subject-matter as the previous suit which might have been dismissed or withdrawn and would not bar a suit on a different cause of action. (*Courtney-Terrel. C.J. and Dhavle, J.*) Nimaicharan Das *v.* Surendra Nath Ghosh. **3 B.R. 91=1936 P.W.N. 583=165 I.C. 854=9 R.P. 225 =17 Pat.L.T. 549=A.I.R. 1936 Pat. 606.**

——**(as amended in 1929), S. 109, Proviso**—*Applicability—Proceedings on application under Ss. 105 and 106 withdrawn before amendment—Suit instituted after amendment.*

The amendment is operative from the time when it comes into force. The amendment to S. 109 of the Act came into force in February, 1929. Proceedings on application under Ss. 105 and 106 of the Act were withdrawn before February, 1929, but the suit respecting the same matter was brought after February, 1929.

Held, that the suit being instituted after the amendment came into force, it was maintainable, no matter whether the proceedings on the application under Ss. 105 and 106 were withdrawn before it came into force. (*M. C. Ghose and Mukherji, JJ.*) Administrator-General, Bengal *v.* Sachindra Kumar Roy. **171 I.C 834=10 R. C. 315=65 C.L.J. 90=A.I.R. 1937 Cal. 237.**

——**(as amended in 1928), S. 109, proviso**—*Applicability—Suit instituted after amendment came into force—Proceeding under S. 105 withdrawn before amendment—Suit in Civil Court—If maintainable.*

The proviso to S. 109 of the Bengal Tenancy Act introduced by the Amending Act of 1928 applies to a suit for assessment of rent instituted after the amendment came into force in 1929. Such a suit is, therefore, maintainable in a Civil Court, in spite of withdrawal of an application under S. 105 made before the amendment came into force. (*Guha and Bartley, JJ.*) Hingal Kumari Dassi *v.* Satis Chandra Pal. **175 I.C. 73=10 R.C. 745=41 C.W.N. 737=A.I R. 1937 Cal. 361.**

——**S 109, Proviso**—*Proceeding under S. 105 withdrawn before amendment—Suit instituted after amendment—If barred.*

S. 109 of the Bengal Tenancy Act as amended in 1928 does not bar a suit for the assessment of a fair and equitable rent instituted after the amendment, although the withdrawal of the proceeding under S. 105 took place before the amendment. (*Patterson, J.*) Kameshwar Singh *v.* Hridoy Nath Sahoo. **182 I C. 413=12 R.C. 62=67 C.L J. 111=A.I.R 1938 Cal 763.**

——**(as amended in 1928), S. 109, Proviso**—*Scope—If retrospective—Application under S.105 made before Amendment but withdrawn after—Suit in Civil Court—If barred.*

S. 109, Bengal Tenancy Act, as it stood before the amendment in 1928, was doing injustice both to the landlords and the tenants, by depriving them of their right to have the question of rent settled by the Civil Court, once an application under S. 105 was made before the Revenue Court, even though the matter was not decided by the Revenue Court. The proviso to S. 109 was enacted by the Amending Act of 1928 to remedy this evil. The Court must therefore give the proviso the widest operation which its language will permit. Where therefore an application for enhancement of rent is made by the landlord under S. 105 before the amendment, and is withdrawn after the coming into force of the Amending Act, and a suit for enhancement is subsequently instituted in the Civil Court, the proviso applies to the cases and the suit is maintainable and not barred by S. 109. The proviso added in 1928 merely affects the procedure and does not alter the rights of the parties by destroying or creating a new right of action. (*Nasim Ali and Edgley, JJ.*) Suprabhat Chandra *v.* Bhupati Bhusan Mandal. **165 I.C. 294=9 R.C. 370 (2) =63 C.L.J. 585=40 C.W.N. 773=A.I.R. 1936 Cal. 307.**

——**Ss. 109 and 105**—Ex parte *decision under S. 105—Subsequent suit by tenant for declaration of his niskar right—Maintainability.*

An *ex parte* decision under S. 105 of the Bengal Tenancy Act does not operate as a bar under S. 109 of that Act to the institution of a suit by the tenant for a declaration of his niskar right in the land. But the tenant is not entitled to a declaration that the order passed under S. 105 is not binding upon him, as that is a matter which was the subject of the application before the Revenue Officer. (*Roxburgh, J.*) Mahomed Rahul Amin *v.* Dinandhu Barni. **188 I.C. 247=12 R.C. 663 =71 C L.J. 104=A.I R 1940 Cal. 235.**

——**S. 111**—Applicability—Application under S. 26-J for recovery of money incidentally involving question of title—Stay of—Power of Court. *See* Bengal Tenancy Act, Ss. 26-J and 111. **63 C.L.J. 152=A.I.R. 1936 Cal. 263.**

——**S. 111-A**—Applicability—Suit for declaration of extent or area and for declaring record-of-rights incorrect—Maintainability—Proper remedy. *See* Bengal Tenancy Act, S. 104-J. **A.I.R. 1936 Cal. 300.**

——**S. 111-A**—*Suit to declare title of plaintiff and to declare that entry in record is incorrect—*

Limitation—Starting point—Cause of action—Limitation Act, Art. 120.

There are two courses open to person whose status and rights are entered wrongly in the record-of-rights. In the case of an entry adverse to the plaintiff, he is not bound to institute a suit for a declaration that the entry is wrong. He can wait, and when an invasion of his rights is made on the basis of the entry, he can come in and sue for a declaration of his title on the ground that the record is wrong; and the suit would be in time if brought within 6 years of the threatened invasion. He can also make the entry in the record-of-rights as the basis of his cause of action on the ground that the entry has cast a cloud upon his title; one of the purposes of the suit being the removal of the cloud. If he makes the said entry as his cause of action, he must institute the suit within 6 years from the date of the final publication of the record-of-rights, under Art. 120 of the Limitation Act. The very fact that the entry records the plaintiff as possessing rights lower than what he claims, gives him a cause of action for the suit. S. 111-A is no bar to such a suit for a declaration of the plaintiff's title, his claim being to a status higher than that recorded in the settlement record. (*R. C. Mitter J.*) Kiran Chandra Roy Bahadur *v.* Tarak Nath Gangopadhyay. **166 I.C. 460=9 R.C. 528=40 C.W.N. 566=A.I.R. 1936 Cal. 456.**

——**S 111-A, Proviso**—*Suit by ijardar for declaration of title—Sub-tenants, if necessary parties.*

An ijardar purchased occupancy holding. By operation of S. 22 the occupancy rights in those holdings ceased but these holdings were not recorded even as non-occupancy holdings in the record-of-rights. The ijardar brought a suit for declaration that the record-of-rights was incorrect and that he was entitled to possession of the holdings as non-occupancy holdings. The sub-tenants did not deny ijardar's title.

Held, that as the sub-tenants did not deny ijardar's title and as the suit was under Proviso to S. 111-A, the sub-tenants were not necessary parties to the declaratory suit brought by the ijardar. (*R. C. Mitter and Sen, JJ.*) Midnapore Zamindary Co. *v.* Secretary of State. **I.L.R. (1939) 1 Cal. 349=180 I C. 278=11 R.C. 659=69 C.L.J. 51=43 C.W.N. 57=A.I.R. 1938 Cal. 804.**

——**S. 111-B and Limitation Act, Art. 120**—*Suit for correction of record-of-rights—Limitation—Computation—Deduction of four months—If permissible.*

A suit for a declaration and correction of the record-of-rights falls under Art. 120 of the Limitation Act and in computing the period of limitation, the period of four months mentioned in S. 111-B (4) of the Bengal Tenancy Act, shall be excluded from the time allowed. (*M.C. Ghose, J.*) Bhabadas Mukherjee *v.* Karpur Kamini Debi. **173 I.C. 945=10 R.C. 602=42 C.W.N. 96 =A.I.R. 1937 Cal. 745.**

——**S.** 112—Fair and equitable rent—Rates fixed at Permanent Settlement. *See* B. T. Act, Ss. 104, 104-J and 112. **17 Pat.L.T. 747.**

——**S.** 112—Scope and effect of—Assessment of rent—Fixed rate tenancy—Excess area—Principle of assessment—Increase in rate. *See* B. T. Act, Ss. 50 (1) and 52. **17 Pat.L.T. 747.**

——**S.** 113—*Tenure-holder—If entitled to reduction of rent under S*, 52 (*1*) (*b*).

The meaning of the word "holding" in latter part of S. 113 of the B. T. Act is the same as in the beginning of the section and it cannot include a tenure. Accordingly the last part of S. 113 deprives a tenure-holder of his right to get reduction of rent under S. 52 (1) (*b*) of Act on account of deficiency in the area of his tenancy by diluvion. (*Nasim Ali and R.C. Mitter, JJ.*) Prafulla Natha Tagore *v.* Syed Mahammad Maliha. **170 I.C 910=10 R.C. 206=41 C.W.N. 637 =A.I R. 1937 Cal. 276.**

——**S.** 114—*Zamindari estate sold under Bengal Land Revenue Sales Act—Purchaser annulling under-tenures—Liability for unpaid balance of costs of preparation of record-of-rights.*

A purchaser of a zamindari estate sold under the provisions of the Bengal Land Revenue Sales Act for the recovery of arrears of land revenue, is not liable, after he has annulled, as he is entitled to do under S. 27 of that Act, the under-tenures, for the unpaid balance of the costs of the preparation of a record-of-rights of the estate, which has been duly apportioned on the patnidars of the estate prior to his purchase of the estate and the annulment of the under-tenures. When the purchaser, under S. 37, of the entire estate elects to avoid and annul under-tenures they cease to exist and when they have ceased to exist the charge imposed on them in respect of the costs also ceases to exist. And R. 414 of the Bengal Survey and Settlement Manual does not apply as it does not purport to deal with a case of the annulment of under-tenures but deals only with death, transfer or abandonment. An abandonment cannot be construed as including an annulment. 64 C.L.J. 126 =9 R C. 757=A.I.R. 1937 Cal. 94=167 I.C. 741, Reversed. (*Lord Wright.*) Kamalaranjan Roy *v.* Secretary of State. **66 I.A 1=11 R P.C. 108=178 I C. 472=43 C W N. 113=5 B.R. 165 =1939 M.W.N. 148=1938 O.L.R. 505=1938 P.W.N. 908=1938 A.L.R. 905=68 C L J. 505 =I.L.R. (1939) 1 Cal. 222=I.L R. (1939) Kar. 1=19 Pat L.T. 861=A.I.R. 1938 P.C. 281=(1939) 1 M.L.J. 1 (P.C.).**

——**S.** 115—Scope and effect of—Presumption under S. 50—If affected. *See* B. T. Act, Ss. 50 and 115. **17 Pat L.T 747.**

——**S.** 115—*"Thereafter" meaning.*

Word "thereafter" in S. 115, clearly signifies "after the particulars have been finally recorded after recourse to all the provisions contained in Chap. 10 for the attainment of finality in this respect." (*Dhavle, J.*) Kameshwar Singh Bahadur *v.* Bacha Koiri. **164 I C. 98=9 R.P. 88=1936 P.W.N. 436=A.I R. 1936 Pat. 446.**

——**S. 115-B**—*Correction of entries in record-of-rights—Power of Revenue Officer.*

Per *Mukherjea, J.*--S. 115-B of the B. T. Act authorises the correction of entries in a record-of-rights which has been made owing to a *bona fide* mistake. *Bona fide* mistake means a genuine mistake which is possible even after due care and caution. If the Settlement Officer, on a consideration of the evidence before him, deliberately comes to a particular conclusion regarding the rights of the parties and makes an entry to that effect in the records, however much his judgment might be wrong or the decision erroneous it cannot be said that there was a *bona fide* mistake vitiating the records. On the other hand, if the conclusion drawn by the Settlement Officer does not follow from his own premises, or one part of the record contradicts the other, there may be in such and similar cases *bona fide* mistakes and there may be scope for reconsideration of the matter on the merits. (*Nasim Ali and Mukherjea, JJ.*) Ayeshakhanun *v.* Commissioners for the Port of Chittagong. **I.L.R. (1938) 1 Cal. 413=174 I.C. 113=10 R.C. 645=41 C.W.N. 1332=A.I.R. 1938 Cal. 31.**

———**S. 115-C**—*Proceeding under S. 105—Second appeal.*

In a proceeding under S. 105 of the B. T. Act for settlement of fair and equitable rent of certain holding on the ground of rise in the price of staple food crops and of increase in area on the basis of certain stipulations in the lease by which the tenancy is created, a second appeal is not barred under S. 115-C of the B. T. Act. (*Guha and Nazim Ali, JJ.*) The Chandra Sekhar Zemindary Co. *v.* Radha Gobinda Koer. **67 C. L.J. 2.**

———**S. 115 (c) (3)**—*Special Judge—Appeal from order on application under S. 105—Non-payment of additional Court-fee—Rejection—Power of Special Judge—Appeal from order rejecting—Competency—Decision on issues under S. 105-A—Appeal to High Court.*

A Special Judge to whom an appeal is preferred against decision of a Revenue Officer in proceedings under S. 105 of the Bengal Tenancy Act, has power to reject the memorandum of appeal for failure of the appellant to supply the requisite additional Court-fee which he demands. An order of the Special Judge so rejecting a memorandum of appeal is not appealable to the High Court, though the High Court, can, in special circumstances, treat the appeal as memorandum of revision under S. 115, C. P. Code. But an appeal arising out of a proceeding under S. 105 of the B. T. Act lies to the High Court against the decision of the Special Judge when there has been an investigation and determination by him of any of the questions under S. 105-A of the B. T. Act. (*Nasim Ali and Henderson, JJ.*) Charusila Dasi *v.* Abhilas Bauri. **I.L.R. (1937) 1 Cal. 103=168 I C. 203=9 R.C. 770=40 C.W.N. 1149=A.I.R. 1936 Cal. 804.**

———**S. 116**—Applicability—"Term of years"—Verbal lease for one year. *See* B. T. Act, Ss. 44 (*c*) and 116. **A.I R. 1938 Pat. 38.**

———**S. 120**—*Claim to lands by proprietor as* khamar *lands—Proof—Standard of—Nature of evidence requisite.*

Under S. 120 of the B. T. Act, which lays down the standard of proof necessary when a proprietor claims certain lands as his *khamar* lands, if *khas* cultivation by the proprietor for twelve continuous years before the passing of the Act is proved, that is sufficient. If village usage recognises a parcel of land to the *malik's kamar*, that too would be enough. If it has been let out as *khamar* before 2nd March, 1883, that would be enough. Even admissions and assertions made after 2nd March, 1883, or after the passing of the Act and in fact any piece of evidence relevant under the Evidence Act would be admissible to prove that it is *khamar*, and will have to be weighed by the Court. (*R.C. Mitter, J.*) Uma Charan Biswas *v.* Debendra Nath Poddar. **164 I.C 1001=9 R.C. 329=40 C.W.N. 119.**

———**Ss. 144 and 26 J**—*Application for landlord's fee under S. 26-J—Jurisdiction of Court.*

The whole of S. 144 of the B. T. Act seems to refer to the territorial jurisdiction of the Court; as to the pecuniary jurisdiction of the Court, this section must be read together with the relevant sections of the Code of Civil Procedure. Under that Code, a suit is to be instituted in the Court of the lowest grade competent to try it. Hence a Court having territorial jurisdiction under S. 144 of the B. T. Act, can try an application under S. 26-J of that Act to recover the balance of the landlord's transferfee if the sum claimed is within its pecuniary jurisdiction, although the market-value of the holding would take the case out of its jurisdiction. (*M.C. Ghose, J.*) Sunity Bala Das Gupta *v.* Prodyot Kumar Tagore. **I.L.R. (1938) 2 Cal. 569=183 I C 239=12 R C. 151=43 C.W.N 248=A.I R. 1939 Cal. 305.**

———**S. 144**—Ex parte *rent decree—Separate suit to set aside—If lies.*

Where a rent suit is decided *ex parte* in the absence of the defendant, a separate suit always lies to have such a decree set aside or declared a nullity on the ground that the Court passing the decree had no territorial jurisdiction as regards the subject-matter of the suit. (*Mukherjea, J.*) Sarat Kumar *v.* Dharamdas. **42 C.W.N. 375=174 I.C. 522=10 R.C. 685=A.I.R. 1937 Cal. 738.**

———**S. 144**—*One suit for rent in respect of two plots—One of them alone within jurisdiction of Court—Decree in respect of both plots—Validity.*

Where one suit for rent claiming two decrees in respect of two plots is instituted as contemplated by S. 144 of the B. T. Act and one of the plots alone is within the jurisdiction of the Court but a decree is passed in respect of both the plots, the decree in so far as it relates to the plot within the jurisdiction of the Court is valid but the decree relating to the other plots is liable to be set aside. (*Mukerjea, J*) Kumar Sarat Kumar Roy *v.* Dharmadas Bhattacharjee. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

———**Ss. 145 and 187**—*Recognised agent of landlord—Right to conduct and plead in rent suits.*

There is nothing in the Bengal Tenancy Act empowering a recognised agent of a landlord to conduct and plead in rent suits filed by the landlord. (*Henderson, J.*) Sarat Chandra *v.* Arjun Mondal. **185 I.C. 416=12 R.C. 360=43 C.W.N. 1191=A.I.R. 1939 Cal. 742.**

———**S. 146-A**—*Applicability—Certificate sales—Bengal Public Demands Recovery Act, S. 20.*

S. 146-A of the Bengal Tenancy Act does not apply in terms to certificate sales. But apart from that section, if a co-sharer tenant who is not a party to the proceedings is represented therein by others, his interest is bound by the sale. (*Mukherjea and Roxburgh, JJ.*) Bajroga Khatun *v.* Province of Bengal. **I.L.R. (1939) 2 Cal. 358=187 I.C. 301=12 R.C. 564=43 C.W. N. 1096=A.I.R. 1940 Cal. 113.**

———**S. 146-A**—*Decree for rent obtained against tenants—Landlord omitting to implead purchasers of portion of holding, being unaware of the purchase—Decree, if ceases to be rent decree.*

After the enactment of S. 146-A of the B. T. Act, a decree for arrears of rent obtained against the tenants does not cease to be a rent decree merely by reason of the landlord decree-holder omitting to implead in the suit certain persons who had purchased an interest in the holding, when he was not aware of the purchase at the time of the suit or of the decree and when there was no notice of the purchase served on him till after the decree was passed. (*M. C. Ghose, J.*) NAGENDRA NATH SINHA *v.* NIRANJAN PATSA. **I.L.R. (1938) 1 Cal 164=176 I C. 183=11 R.C. 46=41 C.W N. 1173=A I.R. 1937 Cal. 665.**

———(as amended in 1929), S. 146-A (3)—*Construction—Rent suit—Representative character of defendants—All conditions laid down by Cls.(1) to (4)—If must co-exist.*

In order to give the defendants in a rent suit a representative character, all the four conditions mentioned in Cls. (1) to (4) of sub-S. (3) of S. 146-A, B.T. Act, need not concur. The word "and" occurring in between Cls. (3) and (4) of S. 146-A (3) must be read in a disjunctive way; if the defendants fulfil any of the conditions enumerated in Cls. (1), (2), (3) and (4) of sub-S. (3), they need not fulfill all the conditions and they would be deemed to represent the entire tenure. (*R.C. Mitter, J.*) AYESHA KHATUN *v.* MAHOMED HOSSAIN MOLLA. **41 C.W.N. 85.**

——S. 146-A (3)—*Interpretation.*

The four sub-clauses of S. 146-A of the B. T. Act cannot be read disjunctively. (*Jack, J.*) CHANDRAKANTA BAL MUNSHI *v.* SAHARALI SHEIKH. **178 I.C. 923=11 R.C. 438=67 C.L.J. 467=A I.R. 1938 Cal. 758.**

———S. 146-A (3)—*"Homestead"—Meaning of—Bare piece of lands used as dwelling place long ago—If "homestead"*

The word ' homestead" in S. 146-A (3) means the actual habitation of the tenure-holders. It does not mean or include a bare piece of land with no structures thereon which had been used as a dwelling-house years before by the tenure-holder or some of the tenure-holders. (*R. C. Mitter, J.*) AYESHA KHATUN *v.* MAHOMED HOSSAIN MOLLA. **41 C.W.N. 85.**

———(as amended in 1929), S. 146-A (3)—*Scope—If exhaustive--Co-sharer tenants—Agreement that some of them should represent all in dealings with landlord—Latter made aware of agreement—Suit by landlord for rent against some only—Decree—Sale in execution—Whole tenure—If passes.*

The conditions enumerated in sub-S. (3) of S. 146-A of the B.T. Act are not exhaustive, and those conditions are not the only conditions which would give to the defendants in a rent suit a representative character. There may be other circumstances from which a Court would be entitled to come to decide as a question of fact that the defendants in a rent suit did in fact represent their co-sharers not made parties to such rent suit. If all the co-sharer tenure-holders agree that some of them should be their representatives in their dealings with their landlord and if that fact is communicated to the landlord, the latter would be entitled to institute a suit against those persons who have been held out to him as representing the tenure, and if he gets a decree in a rent suit against such persons, the consequences mentioned in sub-S. (2) of S. 146-A would attach to that decree; and a sale of the defaulting tenure in execution of that decree would pass not only the right, title and interest of the persons actually sued by him in the tenure, but the entire tenure. (*R. C. Mitter, J.*) AYESHA KHATUN *v.* MAHOMED HOSSAIN MOLLA. **41 C.W. N. 85.**

———S. 146-A (3)—*Rent suit—Co-sharer tenant coming under any of four classes—If should be impleaded.*

Under S. 146-A (3), B. T. Act, the entire body of co-sharer tenants is to include the names of every one of the four classes enumerated therein and the landlord in order to get a proper rent decree must implead as defendants every co-sharer tenant who comes under the description of any of the four classes. In other words, if any co-sharer tenant comes under any of the four classes and he is not sued in the rent suit then the decree will not be a proper rent decree. (*M. C. Ghose and Bartley, JJ.*) AMULYA CHARAN MISRA *v.* PRAN KRISHNA ADHIKARY. **179 I C. 334 =11 R.C. 532=42 C.W.N. 755=A.I.R. 1938 Cal. 531.**

———S. 146-A (3)—*Representation of co-sharer tenants.*

Under S. 146-A of the Bengal Tenancy Act, in order that the whole body of tenants may be deemed to be represented by the defendants, such defendants must include all the four classes therein set out. Otherwise the decree passed in the suit will be a mere money decree. (*Henderson, J.*) BHARANI KANTA RAY *v.* RAJAGOPAL LAL. **70 C.L.J. 199.**

———S. 146-A (3), Cls. (iii) and (iv)—*Portion of holding purchased by plaintiff Recognition of purchase by all co-sharer landlords except one—Rent suit by latter against original tenants without impleading plaintiff—Decree and sale—What passes—Plaintiff's right to declaration that sale not binding on him.*

The plaintiff acquired the greater portion of an occupancy holding partly by private purchase before the amendment of the B T. Act, and partly by auction-purchase after the amendment. All the co-sharer landlords except defendant No. 1 recognised the plaintiff, and defendant No. 2, one of the co-sharer landlords even accepted the transfer fees paid in respect of the auction-purchase. Defendant No. 1 brought a suit for rent against all the original tenants, impleading his co-sharer landlords as defendants. The plaintiff was not made a party to this suit. Defendant No. 2, however, subsequently joined as co-plaintiff. The rent suit was decreed and defendants Nos. 1 and 2 purchased the holding in execution. The plaintiff sued for a declaration that the decree in the rent suit and the resultant sale of the holding in execution were not binding upon him.

Held, (*i*) that the plaintiff was entitled to come in under Cls. (*iii*) and (*iv*) of sub-S. (3) of S. 146-A of the B.T. Act, that being so, the omission to implead him in the rent suit must operate against the landlords, and it must be held that the defendants in that suit did not represent the entire body of tenants and that, therefore, the decree obtained in the course of the rent suit must be held to be a money decree and the auction-sale in execution thereof only passed the right, title and interest of the original tenants;

(*ii*) that the plaintiff was entitled to the declaration prayed for, although he did not take the other course of getting the auction sale set aside by making the deposit. (*S. K. Ghose and Patterson, JJ.*) Tayaja Molla *v.* Birendra Nath. **43 C.W.N. 80.**

——**S. 148**—*Decree for rent obtained against widow after adoption—Effect of—Right acquired by purchaser in execution.*

If a widow of a deceased tenant makes an adoption, the landlord is bound to recognise the adopted son, who becomes the heir of the deceased tenant, as the tenant in respect of the holding. If he institutes a suit for rent against the widow without impleading the adopted son as a party and obtains a decree, the decree will not have the effect of a rent decree. The purchaser at a sale in execution of that decree cannot, therefore, acquire any interest in the holding. ((*Mukherjea, J.*) Hamed Gazi *v.* Sadat Ali Sikdar. **188 I.C. 479=44 C.W.N. 443=71 C.L.J. 243=A.I.R. 1940 Cal. 241.**

——**S. 148**—*Succession to tenancy not notified—Landlord getting credible information as to who are all heirs—Decree for rent obtained against other persons—If rent decree.*

It is, no doubt, the duty of the persons succeeding by inheritance to a permanent tenure to notify the succession and it is not the duty of the superior landlord to find out who all the heirs of a deceased tenure-holder are. But where the landlord prior to the institution of the suit for rent or during its pendency gets credible information with regard to succession, it is not open to him to ignore that information and proceed with the suit for rent as against some other person and thereafter to say that the decree which he has obtained as against that person is a decree which should be treated as a decree for rent. (*Mukherji, J.*) Ali Baksha Bepari *v.* Chitta Ranjan Guha. **42 C.W.N. 334.**

——**S. 148-A**—*Rent suit—Co-sharer originally defendant made co-plaintiff on his application—Bar of limitation.*

Where, in a rent suit, a co-sharer landlord is originally made a defendant, but later on he is joined as a co-plaintiff on his application under S. 148-A, Bengal Tenancy Act, there could be no bar of limitation operating against the party so made a co-plaintiff. It is not necessary for him to call into his aid the provisions of S. 22 of the Limitation Act, and the special limitation for a suit for rent as provided by the B. T. Act cannot have also any application to the case. (*Guha and Bartley, JJ.*) Bhujanga Bhusan Mukherjee *v.* Kalidas Das. **173 I.C. 896=10 R.C. 593=A.I.R. 1937 Cal 333.**

——**S. 148-A**—*Rent suit—Sole landlord's right to institute—Arrears of rent due to former co-sharers.*

If there is only one landlord of the holding at the date of the institution of the suit there is nothing in the provisions of the Bengal Tenancy Act to prevent such landlord from instituting a rent suit the decree of which will be executable against the holding, provided he sues for the entire amount of rent actually due to him, even although certain former co-sharers may have arrears of rent due to them in respect of some of the years for which the suit is brought. (*Edgley, J.*) Narendra Nath *v.* Alanga Sundari. **I.L.R (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659 =A.I.R. 1939 Cal. 754.**

——**S. 148-A**—*Scope—Non-compliance with—Objection based on—When to be raised—Maintainability in proceedings for setting aside sale in execution of decree—Decree in contravention of S. 148-A (9)—Suit to declare nullity—Maintainability*

Once a decree for rent under S. 148-A (1) of the Bengal Tenancy Act is passed and executed by sale of the tenancy, the tenant cannot, in proceedings on an application to set aside the sale, challenge the decree or sale in execution on the ground that the provisions of S. 148-A (9) have not been complied with. The question of compliance or non-compliance with S. 148-A (9) cannot be raised at that stage.

Obiter.—Even a suit to have the decree declared a nullity would not lie. (*R. C. Mitter, J.*) Kali Pada Bhaneari *v.* Panch Kari Mandal. **162 I.C. 623=8 R.C. 621=40 C.W.N. 531=A.I.R. 1936 Cal. 197.**

——**S. 148 A**—*Scope—Suit for rent—Tenant admitting liability for rent as to rate claimed but pleading that holding was larger in extent than alleged in plaint—Finding that rent sued for was of part of holding—Proper decree.*

In a suit under S. 148-A of the B. T. Act, the tenants defendants admitted that rent was due at the rate claimed, but pleaded that the holding included a further area than that comprised in the plaint. The Court found the contention of the tenants as regards the extent of the holding was true and found that the suit was for rent of a portion of a holding.

Held, that the suit should not be dismissed altogether but that the landlord should be given a money-decree and not a rent-decree, there being an obligation to pay rent apart from the Tenancy Act. (*Madan, J.*) Janki Singh *v.* Jevanandan Singh. **171 I.C. 689=10 R.P. 235=1938 P.W.N. 47=4 B.R. 64=18 Pat.L.T. 715=A.I.R. 1937 Pat. 558.**

——**S. 148-A**—*Suit by co-sharer landlord for portion of rent due to him—Decree passed in such suit—If a rent decree.*

A decree passed in a suit by a co-sharer landlord framed in the manner contemplated by S. 148-A, Cl. (1) of the B. T. Act, is a rent decree and could be executed as such, even though the suit is only to recover not the entire rent due to the landlord but a portion of the rent due to him in respect of his share. (*D. N. Mitter and S. K. Ghose, JJ.*) Biraj Krishna Mukherjee *v.* Purna Chandra Trivedy. **41 C.W.N. 361.**

——**S. 148-A (1)**—*Object of—Co-sharer landlord who has parted with his interest—If entitled to be joined as party.*

The object of S. 148-A (1) is apparently (1) to ensure that a suitable opportunity is afforded to all co-sharer landlords to recover against the holding any arrears of rent which may be due to them in respect of their shares and (2) to secure the tenant against multiplicity of rent suits by his landlords in respect of the same period. This section can have no application in the case of a former co-sharer of the landlord who institutes a rent suit and such a person has no right to be joined as a party to the suit if he has parted with his interest at the time when the suit is brought. If arrears of rent are due to him from the tenant his only remedy would be to recover the same by instituting an ordinary money suit but he has no remedy against the holding. (*Edgley, J.*) NARENDRA NATH *v.* ALANGA SUNDARI. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

——**S. 148-A (1)**—*Rent suit by some of the usufructuary mortgagees—Others disclaiming interest in mortgage and stating that they are benamidars of plaintiffs—Suit, if bad for defect of parties.*

If in a suit for rent by some of the usufructuary mortgagees the plaintiffs state that they alone are the mortgagees and the other usufructuary mortgagees appear as witnesses and disclaim all interest in the mortgage and state that they are *benamidars* of the plaintiffs, the provisions of S. 148-A (1) of the B. T. Act are not violated and the suit is not bad for defect of parties. (*Sen, J.*) KIRTIBASH MODAK *v.* RAKHAL MAJHI. **182 I.C. 567=12 R.C. 86 (1)=69 C.L.J. 95=A.I.R. 1939 Cal. 368.**

——**S 148-A (8)**—*Rent suit decreed in favour of two co sharer landlords—Sale of holding at instance of one of them—Sale proceeds allowed to be withdrawn by him—Application by the other for rateable distribution—Limitation.*

A rent suit was decreed in favour of two co-sharer-landlords specifying separately the amount payable to each. Thereafter, one of them applied for execution of his share of the decree by sale of the holding, and notice of this application was served upon the other in accordance with S. 148-A (7) of the B. T. Act, but he did not appear. The sale was held and the applicant decree-holder was permitted to withdraw the sale proceeds. A year and a half after the sale, the other decree-holder made an application demanding that the applicant decree-holder should bring into Court the amount which he had withdrawn for rateable distribution between them.

Held, that though Cl. (8) of S. 148-A of the B. T. Act does not lay down a period of limitation, it is the duty of the Court to impose a reasonable period for the remedy sought, and that the application must be rejected having been made beyond a reasonable time. (*M. C. Ghose, J.*) JAGADAMBA LOAN CO., LTD. *v.* SATYENDRA CHANDRA GHOSE. **I.L.R (1938) 1 Cal. 175=173 I C. 516=10 R C. 532=41 C.W.N. 1248=A.I.R. 1937 Cal. 730.**

——**S. 148-A (9)**—*Scope—Suit for rent by co-sharer landlord impleading others as defendants—If prevents latter from further prosecuting certificate proceedings previously started—Latter withdrawing from certificate proceedings and joining as co-plaintiffs in suit—Right to exclude time taken by such proceedings—Limitation Act, S. 14.*

Sub-S. (9) of S. 148-A of the Bengal Tenancy Act bars the recovery by *suit* only of the co-sharer landlord's dues, when he had not joined as co-plaintiff in his co-sharer's suit for rent. It does not bar recovery of such dues by certificate proceedings. A suit by a co-sharer landlord under S. 148-A of the Act for recovery of rent due to his share impleading the other co-sharer landlords as defendants does not prevent the latter from proceeding further with the certificate proceedings previously started by them for recovery of their share of rent for the same period. If, therefore, the latter withdraw from the certificate proceedings and join as co-plaintiffs in the suit, they cannot invoke S. 14 of the Limitation Act to extend the period of limitation for their claim by excluding the period during which they prosecuted those proceedings. (*M. C. Ghose and R.C. Mitter, JJ.*) HRISHI KESH MITRA *v.* BARADA PRASAD RAY CHAUDHURI. **I.L.R. (1938) 1 Cal. 262=177 I.C. 948=11 R.C. 303=A.I.R. 1938 Cal. 517.**

——**S. 148-B**—*Suit for rent—Identity of land—Need for proof.*

It is not sufficient for a plaintiff to establish merely that the defendant is liable to pay a certain amount of rent. He must establish also the identity of the lands of the tenancy. No decree for rent should be passed until the Court is satisfied regarding the identity of the land with respect to which the rent is payable. The Court cannot leave the question of identity open because there can be no tenancy except with reference to a definite piece of land. (*Sen, J.*) RADHASHYAM *v.* GOURINATH. **187 I.C. 154=12 R. C. 547=A.I.R. 1940 Cal. 9.**

——**S. 148 (g)**—*Separate suit to set aside rent-decree—When lies.*

Where there were defects in service required by S . 148 (*g*), B. T. Act, they may be grounds for setting aside the *ex parte* decree under O. 9, R. 13, C. P. Code; but unless there was fraud with regard to service which kept the defendant in ignorance of the suit or unless by putting in a false return the plaintiff kept the Court in ignorance of the real state of affairs and thus enabled it to pass a decree which otherwise it could not have passed, no suit for setting aside the decree would lie. (*Mukerjea, J.*) SARAT KUMAR *v.* DHARAMDAS. **174 I.C. 522=10 R.C. 685=42 C. W.N. 375=A.I.R. 1937 Cal. 738.**

——**S. 148 (h)**—*Natural guardian—Who is.*

The mere fact that an infant is in the care of a person does not make that person the natural guardian of the person of the infant. S. 148 (*h*) contemplates guardians who are entitled to the custody of the infant under the personal law by which the infant is governed, in the absence of a testamentary guardian or a guardian appointed. An elder brother was entitled to the custody of the minor under the Muslim law. He did not appear and object to be appointed guardian of the minor when served with a notice under S. 148 (*h*).

Held, that he must be deemed to be duly appointed guardian of the minor for the suit. (*Nasim Ali, J.*) JAGAT KESHORE ACHARYA *v.* BADAN MANDAL. **166 I.C. 82=9 R.C. 470=41 C.W.N. 895=A.I.R. 1936 Cal 702.**

——**S. 148 (h)**—*Person other than natural guardian appointed as guardian of minor without his consent—Decree, if binds minor—C. P. Code, O. 32, R. 4 (3).*

Under S 148 (*h*) of the B. T. Act, only a natural guardian may be appointed without his consent to act as a guardian of a minor. If a person who is not the natural guardian is so appointed without his consent being taken, the minor concerned cannot be regarded as being properly represented in that suit. A decree passed in that suit is, therefore, not binding upon the minor. (*Edgley, J.*) RAGHUNATH BARAL *v.* BHOLA NATH ROY. **44 C.W.N. 391.**

———S. 148 (o)—*Applicability—Assignee—If includes assignee by operation of law—*Patni *lease by life-estate holder—Decree obtained by for arrears of rent—Execution by legatee-executors —If barred.*

S. 148 (*o*) is a complete bar to an application for execution of a decree for rent by an assignee in whom the interest of the landlord has not vested. An assignee includes not only an assignee by deed but also an assignee by operation of law. Consequently, the executors to the estate of a female life-estate holder, who are also her legatees under the will executed by her appointing them executors, and bequeathing to them the outstanding profits of her properties and the amount of a decree for arrears of rent obtained by her in respect of a *patni* lease granted by her, are not competent to execute the decree for arrears of the *putni* rent. S. 148 (*o*) operates as a bar to such an application for execution. Nor is the bar removed by reason of the fact that the *patni* lease has altogether ceased to exist with the demise of the testator life-estate holder who granted the *patni* tenure. (*Guha and Bartley, JJ.*) Akhil Kanta Lahiri *v.* Aswini Kanta Bhattacharji. **165 I.C. 631=9 R.C. 435=40 C.W.N. 589=A.I.R. 1936 Cal. 464.**

———S. 148 (o)—*Usufructuary mortgagee getting assignment of rent decrees obtained by landlord—Right to execute the decrees.*

A usufructuary mortgagee who has under the mortgage deed got from the landlord an assignment of certain rent decrees obtained by him, is entitled to execute those decrees. S. 148 (*o*) of the B. T. Act is no bar to their execution. (*S. K. Ghose, J.*) Radharani Basu *v.* Dwarkanath Mandal. **41 C.W.N 608.**

———S. 153—*Appeal—Rent suit—Claim for less than Rs.* 50—*Lower Court deciding question of title or interest in land.*

Although the claim in a rent suit is less than Rs. 50 yet the decree of the lower Court (which has decided a question relating to title of the land or to some interest in the land as between parties having conflicting claims thereto, the question being with regard to the liability to pay rent between other co-sharer landlords and the principal tenants) is appealable notwithstanding the fact that the tenants have not appeared in the suit. (*S. K. Ghose and Patterson, JJ.*) Atul Chandra *v.* Mohini Mohan. **182 I.C. 751=12 R.C. 102=A.I.R. 1939 Cal. 28.**

———S. 153—*Appeal not competent under—No objection taken by respondent—Jurisdiction of appellate Court.*

When no appeal lies under S. 153 of the Bengal Tenancy Act and there is no decision by the appellate Court on the question of the competency of the appeal, mere inaction or want of objection on the part of the respondent cannot invest the appellate Court with the jurisdiction it does not possess. (*Mukherjea, J.*) Piru Pramanik *v.* Pabna Dhanabhandar Co., Ltd. **172 I.C. 663=10 R.C. 404=41 C.W.N. 958=A.I.R. 1937 Cal. 427.**

———S. 153—*Decree in rent suit—Defence that all persons entitled to receive rent not brought on record overruled—Appeal, if competent.*

If in a rent suit the trial Court passes a decree overruling the defence that all the persons who are entitled to receive rent have not been brought

on record, and holding that the plaintiffs alone are entitled to the 16 annas of the rent, S. 153 of the Bengal Tenancy Act applies and an appeal is incompetent. There is no decision in the suit as to the amount of rent annually payable. (*S. K. Ghose and B. K Mukherjea, JJ.*) Rasidunnessa Khatun *v.* Nabin Chandra Nath. **69 C.L.J. 383.**

———S. 153—*District Judge deciding appeal when no appeal lies—Non-appealability—Revision.*

Where the trial Court had to consider and decide a question relating to the title to the land in suit, but that question did not fall for decision between parties having conflicting claims to the land in suit, no appeal lies to the District Judge from the decision of the trial Court. But if the District Judge decides an appeal, his decree will be without jurisdiction and yet under S. 153 no appeal will lie against such decree. But the Court can under such circumstances vary the decree in revision. (*Patterson, J.*) Hrishikesh Chakravarty *v.* Nilmadhab Chattopadhya. **177 I.C. 833=11 R.C. 279=67 C.L.J. 484=A.I.R. 1938 Cal. 543.**

———S. 153—*Order under S. 174 setting aside sale on application by private purchaser from tenant—Appeal by auction purchaser—Maintainability.*

After an auction sale of the tenant's lands in execution of a rent decree, a private purchaser from the tenant applied under S. 174, B. T. Act, to have the sale set aside on the ground of his purchase. The Court allowed the application, disallowing the objection raised by the auction-purchaser. The auction-purchaser preferred an appeal.

Held that, that as there was a conflict of title between the private purchaser and the auction-purchaser, an appeal lay. (*M. C. Ghose, J.*) Biswambar Nama *v.* Abdul Majid Mea. **164 I.C. 785 (1)=9 R.C. 278=40 C.W.N. 95.**

———S. 153—*Rent suit—*Muafi *claimed by tenant —Court, if can pass decree after deducting* muafi.

If *muafi* is claimed as an incident of the tenancy the decision which arises with regard to it in a rent suit is a matter which affects the amount of rent within the meaning of S. 153 of the Bengal Tenancy Act. The Court can, therefore, pass a decree for rent after deducting the *muafi* to which the tenant is found entitled. (*Agarwala, J.*) Diwakarnath Pandey *v.* Kamla Prasad Sing. **165 I.C 962=9 R.P. 242=1937 P.W.N. 375=3 B.R. 119=A.I.R. 1937 Pat. 199.**

———S 153—*Scope—Composite suit—Claim for rent and alternatively for money—Second appeal barred if claims considered separately—Bar if can be avoided by joinder of both claims—C. P. Code, S.* 102.

Where in a suit for arrears of rent with an alternative prayer for decree for money, a second appeal would be barred under S. 153 of the Bengal Tenancy Act so far as the claim for rent is concerned, and the claim for money would be cognizable by a Court of Small Causes and the amount claimed is below Rs. 500, not allowing of a second appeal by reason of S. 102, C. P Code, the bar of second appeal cannot be evaded by the joinder of the two claims, and amalgamating the two claims in one suit. (*R. C. Mitter, J.*) Bankim Chandra Deb Sarkar *v.* Madan Mohan Deb. **40 C.W.N. 698.**

——S. 153—Scope—Rent suit valued below Rs. 50—*Ex parte* decree—Order refusing to set aside—Appeal. *See* C. P. CODE, O. 43, R. 1 (*d*). **63 C.L.J. 277=40 C.W.N. 992.**

——S. 153—*Scope—Question whether certain rent is payable or nothing at all—Second appeal.*

It is difficult to distinguish on principle a case of total suspension of the rent from a case of abatement of rent or a decree for rent at a rate lower than that claimed by the plaintiff. Where the Court will have to decide whether rent payable is a certain amount, or in the alternative nothing at all, the question is of the amount of rent payable annually by the tenant, and as such a second appeal is competent. 34 I.C. 851, Rel. on; S. A. No. 1520 of 1924, not foll. (*Nasim Ali and Henderson, JJ.*) SABARATULLA SHEIKH *v.* MANIKJAN BIBI. **166 I.C. 750 (2)=9 R.C. 580 =A.I.R. 1936 Cal. 323.**

——S. 153—*Second appeal—Rent suit—Claim to particular amount of rent—Denial by defendant of claim on ground of rent-free tenancy.*

Where in a suit for *bhaoli* rent the plaintiff asserts that a certain amount of rent is due, and the defendant pleads that no rent is due because the holding is rent free, the question between the parties is as to the amount of rent annually payable for the holding, and the case falls under S. 153, B. T. Act; a second appeal is not barred in such a case, though the amount falls below Rs. 100. Even if the question be regarded as one as to liability to pay rent, it makes no difference, because in such a case the question would be about title to hold the land free from liability to pay rent. (*Manohar Lall, J.*) RUP NARAIN MANDEY *v.* SHEO SAGAR TEWARI. **180 I.C. 105=11 R.P. 454=5 B.R. 342=A.I.R. 1939 Pat. 258.**

——S. 153 (b)—*Applicability—Rent suit below Rs. 50 in value—* Ex parte *decree by Munsif having final jurisdiction—Application to set aside—Order rejecting by Munsif without final jurisdiction—Appealability.*

In a rent suit in respect of an agricultural holding valued at less than Rs. 50 an *ex parte* decree was passed as none of the defendants appeared. The Munsif who passed the decree was vested with final jurisdiction under S. 153(*b*) of the Bengal Tenancy Act. No question was decided which would come under the proviso to that section. Subsequently some of the defendants applied to have the *ex parte* decree set aside, and the application was heard by another Munsif who had no final jurisdiction under S. 153 (*b*) and was dismissed by him. An appeal was preferred from the order of dismissal and was allowed.

Held, in revision from the appellate order, that the appeal to the lower appellate Court was competent and was not barred by S. 153. (*R. C. Mitter, J.*) MAHENDRA CHANDRA DUTTA ROY *v.* BASIRUDDIN. **I.L.R. (1937) 1 Cal. 135=166 I.C. 103=9 R.C. 471=63 C.L.J. 277=40 C.W.N. 992 =A.I.R. 1936 Cal. 485.**

——S. 153, Proviso—*Scope—Question as to liability for arrears of rent as between transferor and transferee—Decision on—Appeal and second appeal.*

Where the question decided relate to disputes between the transferor and transferee of a holding as to the liability for the arrears of rent of the holding prior to the transfer, the questions so raised and decided do not come within the proviso to S. 153 of the B. T. Act, because there is no question relating to title to land or to some interest in land as between parties having conflicting claims thereto. Where in such a case a Munsif having final powers under the section passes a decree for arrears of rent for a sum below Rs. 50, no appeal or second appeal lies. But where an appeal is preferred and decided by the lower appellate Court without deciding any question falling under S. 153, proviso, a second appeal to the High Court is competent. (*R. C. Mitter, J.*) AMIRUL ISLAM *v.* SARADA KUMAR SEN. **165 I.C. 249=9 R.C. 366=40 C.W.N. 149.**

——S. 155—*Applicability—Lessee bound by covenant not to alienate—Transferee of—Right to benefit of section.*

A transferee from a lessee, who is bound by a covenant in the lease not to alienate, is not a tenant, and is not therefore entitled to the benefit of S. 155, B. T. Act. S. 155 does not apply so as to enable the Court to relieve him against forfeiture. (*Dhavle and Agarwala, JJ.*) THAKUR DAYAL SINGH *v.* PROMETHA NATH MITRA. **15 Pat. 673=9 R.P. 136=164 I.C. 811 (2)=17 Pat. L.T. 502=1936 P.W.N. 534=A.I.R. 1936 Pat. 493.**

——S. 155—*Person sued under—Status of—Proceedings under section—If imply tenancy—Absence of proof as to how defendant acquired holding—Effect.*

The fact that the landlord has taken proceedings against the defendant under S. 155 of the Bengal Tenancy Act shows that the plaintiff has recorded the defendant as tenant, and it is immaterial in what way the defendant acquired the holding. (*Jack, J.*) SHIB CHANDRA SARKAR *v.* PANCHANAN KOLAY. **64 C.L.J. 71.**

——S. 157—*Claim for assessment of fair rent not claimed in trial Court—If can be allowed in appeal.*

A person is not entitled in an ejectment suit to get an assessment of rent under S. 157 there was no prayer whatsoever made in the plaint for an assessment of a fair and equitable rent, and it was only when the appeal was being heard that a petition was filed claiming this relief. This is too late a stage at which this relief could be claimed. The granting of this prayer would necessitate an amendment of the plaint, and the taking of fresh evidence. The amendment of the plaint would really amount to a changing of the nature of the suit and such an amendment should not be allowed at such a late stage. (*Sen, J.*) MEAH KHA *v.* SERAJ-UDDIN SARDAR. **A.I.R. 1940 Cal. 65.**

——S. 158—*Refusal to revise by District Judge—High Court's power.*

Where a District Judge has failed to revise an order under S. 153, the High Court has power in a proper case to act under its powers of revision. (*Macpherson, J.*) KAMESHWAR SINGH *v.* MAHABIR PASI. **15 Pat. 605=166 I.C. 488=9 R.P. 303 =1936 P.W.N. 385=17 Pat.L.T. 363=3 B.R. 173=A.I.R. 1936 Pat. 402.**

——S. 158—*Right of appeal—Defendant denying relationship of landlord and tenant, and setting up tenancy at lower rate under third person—Issue framed as to amount of rent payable and decided in plaintiff's favour—Effect.*

Where in a suit for rent the defendant's case is that there is no relationship of landlord and tenant between him and the plaintiff and that he holds the *jama* at a lower rate of rent as tenant under a third party, the defendant is not entitled to appeal against the decree passed against him although the Court frames an issue with regard to the *jama* payable for the jote in suit and decides that issue in favour of the plaintiff, as that issue is unnecessary for the decision of the suit. (*Edgley, J.*) Gour Chandra *v.* Ghawa Singha. **44 C.W.N. 539.**

———**S. 158 (b)**—Construction—"Subject to the provisions of S. 22 (2)"—Meaning and effect of—Co-sharer purchasing *raiyati* land—Right to hold same after partition. *See* Bengal Tenancy Act, Ss. 22 (2) and 158-B. **17 Pat.L.T. 97.**

———**S. 158 (c)**—Scope—Prayer for determination of status of tenant in application for transfer fee—Order for payment of fees without declaring status — Appealability — Revision — Competency. *See* B. T. Act, Ss. 26-J and 158 (c). **40 C.W.N. 502.**

———**Ss. 159 and 22**—Landlord auction-purchaser—Right to annul incumbrance. *See* Bengal Tenancy Act, Ss. 22 and 159. **43 C.W.N. 1102.**

——— **Ss 159 and 167**—*Suit for possession by purchaser at rent sale—Claim resisted by mortgagee-purchasers under mortgage decree—Mortgage subsisting at date of rent sale—Rights of mortgagee—Purchaser at rent sale—Liability to redeem mortgage.*

Where a claim, in a suit for possession of property by a purchaser at rent sale, is resisted by certain persons claiming to be mortgagee-purchasers of the property at a sale in execution of their mortgage decree and it is found that the mortgage was subsisting at the date of rent sale that the property was purchased by the mortgagees within a year of the rent sale in execution of their decree, and that the rights of the mortgagee under the mortgage were not annulled, the sale under the mortgage does not for all purposes extinguish the mortgage, and the mortgagee who purchases at the mortgage sale can fall back upon the mortgage and use it as a shield against the purchaser at the rent sale and the purchaser is not entitled to possession of the property unless he redeems the mortgage. (*Guha and Bartley, JJ.*) Annada Prosad Chatterji *v.* Phanindra Bhushan Ghatak. **166 I.C. 740=9 R.C. 577=41 C.W.N. 277=A.I.R. 1936 Cal. 381.**

———**S. 160 (c)**—*Temporary straw huts—If entitled to protection.*

The dwelling-houses which the Legislature intended to protect under S. 160 (*c*) should be of a permanent character. A dwelling-house merely consisting of temporary straw huts is not entitled to protection under S. 160 (*c*). (*Edgley, J.*) Narendra Nath *v.* Alanga Sundari. **I.L.R. (1939) 2 Cal. 497=188 I.C. 196=12 R.C. 659=A.I.R. 1939 Cal. 754.**

———**S. 160 (c)**—*Under-raiyat—Right to protection.*

An under-raiyat is entitled to protection under S. 160 (*c*) of the B. T. Act, if there is any garden or plantation on the land. (*Mukherjea and Roxburgh, JJ.*) Promotha Nath *v.* Jitendra Nath. **43 C.W.N. 1102.**

———**S. 160 (d)**—*Occupancy right acquired by under-raiyat under custom—If protected interest.*

The occupancy right which the under-raiyat acquires under custom is not a protected interest under S 160 (*d*) of the B. T. Act. (*Mukherjea and Roxburgh, JJ.*) Promotha Nath *v.* Jitendra Nath **43 C.W.N. 1102.**

———**S. 161**—*"Incumbrance" —Meaning of—Lands included in* sepatni *but never put in possession of* sepatnidar—*Lands held throughout by landlord—If "incumbrance" on* sepatni—*Purchaser of* sepatni *in rent sale—Right to annul incumbrance and to sue for khas possession—Bengal Tenancy Act, S. 167.*

The term "incumbrance", as defined in S. 161 of the B. T. Act, has no doubt been held to include not merely such interests as have been directly created by the tenant but also interest of the nature described in the definition which have been allowed to grow up by his sufferance or negligence. But this meaning, assuming that it is correct, can by no stretch of imagination be taken to include the case of lands of which the tenant had never been put in possession and in respect of which the landlords themselves by means of adverse possession on the strength of their own title, either real or supposed, have acquired an indefeasible title against the whole world Where certain lands, though included in a *sepatni patta* and *kabuliyat*, were never put in possession of the *sepatnidar*, but remained in the possession of the landlord himself ever since the commencement of the *sepatni*, a purchaser of the *sepatni* at a rent execution sale with power to annul incumbrances is not entitled to treat those lands as forming an incumbrance upon the *sepatni* and proceed to annul the incumbrance by service of notice under S. 167 of the B. T. Act, or to sue for *khas* possession of the lands. The provisions relating to annulment of incumbrances in Chapter XIV of the B. T. Act, are intended primarily for the benefit of the landlord, and can never be utilised by a purchaser at a rent execution sale in order to defeat the title of the landlord himself. (*Mukherji and Jack, JJ.*) Midnapore Zemindary Co., Ltd. *v* Radhikanath Biswas. **64 C.L.J. 476=41 C.W.N. 81.**

———**S. 161**—*'Incumbrance'—Under-raiyati created by raiyat invalid against landlord under S.* 85.

An under-raiyati created by a raiyat, although invalid against the landlord of the raiyat under S. 85 (now repealed) of the B. T. Act, is perfectly valid as against the raiyat and also against a third party who purchases the raiyati interest at a certificate sale. The interest of the under-raiyat, therefore, amounts to an incumbrance within the meaning of S. 161 of the B. T. Act which can only be annulled by a notice served in accordance with S. 167 of the Act. (*Sen, J.*) Nibaran Chandra Ghose *v.* Pratap Chandra. **44 C.W.N. 141.**

———**S. 163 (2) (a)**—*Application for attachment under—Proceedings actually taken under S.* 163 (2) (*b*) *owing to use of wrong form—Effect—Sale if ceases to be rent sale.*

A landlord who had obtained a rent decree asked for attachment and sale according to S. 163 (2) (*a*) of the B. T. Act, but through some mistake, a wrong form was used and proceedings were taken obviously under S. 163 (2) (*b*) of the

Act, instead of under S. 163 (2) (*a*). It was stated that the sale would be by public auction and with power to annul all incumbrances of the occupancy holding. But the sale proclamation described the holding as a *mokurari mourashi* interest of the judgment-debtor.

Held, that this was only a misdescription and it did not render the sale as one not coming under Ch. XIV of the Act, and that notwithstanding the defect, the sale was a rent sale under Ch. XIV of the Act. (*D.N. Mitter and Patterson, JJ.*) MOHENDRA NATH BANERJI *v.* HARSHAMUKHI DASSI. **164 I C. 490=9 R.C. 229=40 C.W.N. 108.**

———S. 167—*Annulment of incumbrance—Service of notice—Limitation—When begins to run.*

Under S. 167 of the B. T. Act, the time for the application for service of the notice of annulment of an incumbrance will begin to run from the date of the confirmation of the sale held under the certificate or from the date of knowledge of the purchaser at the certificate sale of the existence of the incumbrance. The date of purchase from the certificate purchaser is not relevant. (*Sen, J.*) NIBARAN CHANDRA GHOSE *v.* PRATAP CHANDRA. **44 C.W.N. 141.**

———S. 167—*Fresh notice—Power of Court to issue—Question of service of previous notice pending in appeal.*

The Court cannot issue a fresh notice of annulment of encumbrance under S. 167 of the B. T. Act, when the question whether the notice previously issued was served or not is pending determination in appeal. (*Sen, J.*) KIRAN CHANDRA *v.* MATILAL. **44 C.W.N. 864=71 C.L.J. 544.**

———S. 167 — *"Incumbrance"—Meaning of—"Under-tenure"—If incumbrance—Revenue Sale Law.*

The word "incumbrance" as used in the Bengal Tenancy Act is of wider import than the same word as used in S. 37, Revenue Sales Act. An under-tenure created by the defaulting tenure-holder would be an incumbrance within the meaning of S. 167, B. T. Act, according to the definition given in S. 161, but is not incumbrance within the meaning of S. 37, Revenue Sales Act. (*R. C. Mitter, J.*) SERAJGANJ LOAN OFFICE CO., LTD. *v.* SASIMUKHI DEBI. **I.L.R. (1937) 1 Cal. 595=168 I.C 538=9 R.C. 835=41 C.W.N. 110=A.I.R. 1937 Cal. 36.**

———S. 167—*Non-transferable holding sold under rent decree—Purchase by landlord—Effect—Rights of landlord purchaser.*

Where a holding is non-transferable and a purchaser under a rent decree happens to be the landlord, he in his capacity as landlord is entitled to disregard the encumbrance, if not made with his consent, and may take possession of the purchased holding and may successfully maintain it in opposition to the claims of encumbrancer. (*James and Chatterjee, JJ.*) RAM CHANDERJI *v.* HEM CHANDRA. **18 Pat. 184=182 I.C. 557=5 B.R. 779=12 R.P. 21=20 Pat.L.T. 469=A.I.R. 1939 Pat. 200.**

———S. 167—*Order refusing to issue notice—Revision—C.P.C., S. 115.*

An order of a Munsif refusing to issue a notice of annulment of encumbrance under S. 167 of the B. T. Act, is open to revision by the High Court under S. 115, C. P. Code. The Munsif in passing the order acts as a Court and not merely in a ministerial capacity. (*Sen, J.*) KIRAN CHANDRA *v.* MATILAL. **44 C.W.N. 864=71 C.L.J. 544.**

———S. 167—*Property subject to maintenance charge—Rent sale—Zamindar purchasing himself—Subsequent grant of putni or permanent tenure—Right to annul charge.*

Where a certain property subject to maintenance charge is sold in rent sale and is purchased by zamindar himself and subsequently the zamindar grants a putni or permanent tenure, the charge does not shift from the zamindar to the putni-holder. In spite of the putni, the zamindar still remains a person affected by the charge as being the owner of the charged property; the zamindar therefore is entitled to make an application to annul the charge under S. 167, B. T. Act. (*R. C. Mitter, J.*) SERAJGANJ LOAN OFFICE CO., LTD. *v.* SASIMUKHI DEBI. **I.L.R. (1937) 1 Cal. 595=168 I.C. 538=9 R.C. 835=41 C.W.N. 110=A I.R. 1937 Cal. 36.**

———S. 167—*Rent decree—Sale in execution—Annulment of under-tenure—Prior purchaser of tenant's interest not impleaded in suit—Right to set up purchase in defence.*

A landlord sued his recorded tenants for rent, and having obtained a decree, put up the holding for sale. Plaintiff purchased the holding, obtained possession and annulled the interest of an under-tenant by a notice under S. 167, B. T. Act, and sued for recovery of possession. The under-tenant had purchased the interest of one of the recorded tenants at a sale in execution of a money decree prior to the rent suit, but was not impleaded as a party to the latter suit, as the landlord did not know of the purchase. The sale in execution of the money decree was not confirmed until after the purchase by the plaintiff. The under-tenant pleaded that as he was not impleaded in the rent suit, the decree was not a rent decree and that the sale therefore did not pass the entire tenure.

Held, that the entire tenure itself passed to the plaintiff, and that the purchaser at the sale in execution of the money decree could not set up his purchase as a shield to defeat the plaintiff's claim. (*Cunliffe and Henderson, JJ.*) RAMESH CHANDRA GUHA *v.* DINANATH MESTARI. **63 Cal. 846=162 I.C. 348=8 R.C. 600=62 C.L.J. 483=A I.R. 1936 Cal. 178.**

———S. 167—*Rent sale—Purchase by incumbrancer—Omission to serve notice of annulment of incumbrance—Effect of—Sale if subject to encumbrance.*

Where at a rent sale the encumbrancer himself purchases the property hypothecated to him, it is not necessary that any notice should be given, under S. 167 of the Bengal Tenancy Act, to annul the incumbrance, and the omission to give a notice under S. 167, will not render the sale subject to the mortgage in question. (*D. N. Mitter and Patterson, JJ.*) MOHENDRA NATH BANERJI *v.* HARSHAMUKHI DASSI. **164 I.C. 490=9 R.C. 229=40 C.W.N. 108.**

———S. 167—Scope—*Sepatni patta* and *kabuliyat*—Lands included in *sepatni* but not put in possession of *sepatnidar*—Lands throughout held by landlord—Purchaser of *sepatni* in rent sale—Right to annul landlord's possession as incumbrance and to sue for *khas* possession. *See* **B. T. ACT, S. 161. 41 C.W.N. 81.**

——**S 170**—*Decree for arrears of rent against recorded tenants of putni tenure—Tenure attached and advertised for sale in execution—Claim filed by tenure-holders under O. 21, R. 58, C. P. Code—Maintainability.*

A putni tenure had been sub-divided amongst a number of tenure-holders. The proprietors brought a suit for rent in respect of the entire tenure against the recorded tenants and obtained a decree *ex parte*. The decree was in due course put into execution and the putni tenure was attached and advertised for sale. Thereupon, some of the tenure-holders filed a claim under O. 21, R 58, C. P. Code, stating that they had a four anna share in the attached putni mehal, that they had been paying rent to their landlord, and as they had not been made parties to the original suit, the decree passed in that suit was not a rent decree. These tenure-holders had not however applied in the suit for rent for being made parties.

Held, that the decree as it stood was valid against all the co-tenants including the tenure-holders, and as they had their remedy by way of suit, their claim under O. 21, R. 58 was barred under S. 170, B. T. Act. (*S. K. Ghose and B. K. Mukherjea, JJ.*) DEBENDRA NATH *v.* SASI BHUSAN. **182 I.C. 489=12 R.C. 72=A.I.R. 1939 Cal. 272.**

——**S. 170**—*Deposit of decretal amount by third party—Landlord challenging depositor's right to make deposit and failing—Withdrawal of deposit by landlord—If operates as recognition of depositor as tenant.*

Where a third party has deposited the decretal amount and the landlord has challenged the depositor's right to make deposit, but that objection has been overruled by the executing Court on the footing that the depositor had an interest voidable on the sale as he was the real purchaser of the land sought to be sold, the decision of the executing Court is a summary order and is not appealable. If, in such circumstances, the landlord chooses to withdraw the deposit, the withdrawal does not amount to recognition of the depositor as tenant. (*Dhavle, J.*) INDERJIT PRATAB BAHADUR SAHI *v.* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

——**S. 170**—*Execution of rent decree against benamidar—Landlord withdrawing same—Right of landlord to proceed against benamidar—If lost.*

The benami character of the interest of a tenant in whose name the sale certificate stands cannot, merely because the executing Court allowed the beneficial owner to deposit the decretal amounts and the landlord proceeded to withdraw them, disentitle the landlord to proceed against the certified auction-purchaser or entitle the beneficial owner to claim that he should have been sued instead of his benamidar and that the decrees obtained against the latter do not bind him. (*Dhavle, J.*) INDERJIT PRATAB BAHADUR SAHI *v.* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

——**Ss. 170 and 171**—*Mortgagee of portion of occupancy holding, also a co-tenant with judgment-debtor—Right to order for possession in his favour.*

A mortgagee of a portion of the occupancy holding is entitled to deposit the money under S. 170 of the Bengal Tenancy Act and to have an order for possession in his favour under S. 171 of that Act, although he is also an unrecognised transferee of another portion of the occupancy holding and is, therefore, a co-tenant with the judgment-debtor. (*Mukherjea, J.*) MANINDRA CHANDRA GHOSE *v.* RAM NATH SAMANTA. **41 C. W.N. 983.**

——**S. 170**—*Scope—Decree for arrears of rent against all tenants recorded in the Sherishta of landlord—Execution—Claim by person claiming to be purchaser from tenant—Maintainability—O. 21, R. 58, C. P. Code.*

S. 170 of the B. T. Act bars a claim under O. 21, R. 58, C. P. Code, by a person not a party to the decree who claims to be in possession under purchase from a tenant of the holding, in all cases where it is shown that the decree is one for arrears of rent, and where all the tenants recorded in the landlord's *Sherishta* are the judgment-debtors. The landlord is not bound to go beyond his own record, and the mere fact that there may be other tenants than the judgment-debtors does not allow of a claim being preferred in the execution of a decree for arrears of rent.

Rowland, J.—If the decree is only a money decree, the sale in execution passes only the right, title and interest of the judgment-debtor, and S. 170 is no bar in such a case to a claim by a person interested under O. 21, R. 100, C. P. Code. The remedy of claim under O. 21, R. 58, C. P. Code, is barred in all cases where the holding is put to sale for its own arrears. The only way of preventing the sale is to pay the decretal amount. (*Agarwala and Rowland, JJ.*) SURPAT SINGH *v.* SHITAL SINGH. **15 Pat. 614=162 I C. 805=8 R. P. 575=17 Pat.L.T. 385=1936 P.W.N. 388=A.I R. 1936 Pat 480.**

——**S. 170 (1)**—*Scope—Execution of rent decree—Third party claiming title to tenure—Right to sue for declaration of title to holding.*

It is true that in execution of a rent decree a third party claiming title to the tenure is not competent to apply under O. 21, R. 53, C. P. Code. But S. 170 (1) does not bar a substantive suit by him for declaration of title to the holdings and for declaring that the landlord had no right to have them sold in execution of the decree. (*Dhavle, J.*) INDERJIT PRATAB BAHADUR SAHI *v* SURAJ NARAIN. **A.I.R. 1940 Pat. 21.**

——**S. 171**—Scope—Payment to save holding from sale—Mortgage in respect of—Incidents—Applicability of Transfer of Property Act. *See* T. P. ACT. S. 60. **15 Pat. 481.**

——**S. 171**—*Suit for arrears of rent—One of co-tenants paying entire decretal amount—Contribution suit against other co-tenants Right to charge.*

Where in a suit for arrears of rent by the proprietors one of the co-tenants pays the entire decretal amount and then sues other co-tenants for contribution it is doubtful whether such person is entitled to claim a charge under S. 171. (*Mahomed Noor, J.*) BHAGWAN DAS *v.* AKBAR HUSSAIN KHAN. **3 B.R. 50=165 I.C. 567=9 R. P. 182=A.I.R. 1936 Pat. 571.**

——**Ss. 173 and 174**—Locus standi *to apply—Purchaser of interest of under-raiyat—Purchase invalid*

A purchaser of a portion of the interest of an under-raiyat cannot make an application under Ss. 173 and 174 of the Bengal Tenancy Act to have the sale of an occupancy holding set aside, when his purchase is not valid in law and he has not got possession of the land. (*S. K. Ghose and Edgley, JJ.*) Skish Chandra Mandal *v.* Bishnupada Mandal. **178 I.C. 204=11 R.C. 330=42 C.W.N. 1011=A.I.R. 1938 Cal. 550.**

———**Ss. 173 (3) and 174**—*Order setting aside sale under both provisions—Appealability.*

Where an application by a judgment-debtor in a rent decree to set aside a sale held in execution of that decree under S. 174 of the Bengal Tenancy Act and also on the ground that the purchase was barred under S. 173 (3), is allowed under the provisions of both, the order allowing the application is open to an appeal by one who was a party to the rent suit and to the application. (*Edgley, J.*) Adam Aly Khan *v.* Jagadish Chandra. **43 C.W.N. 108.**

———**S. 174**—*Appeal—Order of Munsif refusing to set aside sale—Appealability—Revision.*

No appeal lies against an order of a Munsif refusing to set aside a sale under S. 174, B. T. Act. The remedy is by way of revision. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) Sukhoo Sao *v.* Sita Ram Hajjam. **17 Pat. 53=172 I.C. 785=4 B.R. 174=10 R.P. 345=18 Pat. L.T. 938=1937 P.W.N. 934=A.I.R. 1938 Pat. 21 (S.B.).**

———**S. 174**—*Application to set aside sale—Limitation—Sale processes fraudulently suppressed by decree-holder purchaser—Applicant's knowledge of fraud—Burden of proof.*

Where in an application to set aside a rent sale under S. 174 of the B.T. Act the Court finds that the decree-holder purchaser fraudulently suppressed the sale processes, the burden is upon him to show that the person injured by this fraud and suing to recover the property had clear and definite knowledge of the fact which constituted fraud at a time which is too remote to allow him to bring his application. (*Mukherjea, J.*) Mahammad Ghunguria Sarkar *v.* Ramgopal Das Kundu. **43 C.W.N. 467.**

———**S. 174**—*Application to set aside sale by usufructuary mortgagee of holding—Limitation—Applicant's knowledge of sale—If material.*

In an application to set aside sale under S. 174 of the Bengal Tenancy Act by a usufructuary mortgagee with regard to a portion of the holding in arrears, his knowledge or ignorance of the sale is not at all material for purposes of limitation. (*Mukherjea, J.*) Bishop of Mylapur *v.* Meher Ali. **41 C.W.N. 993.**

———**S. 174**—*Compliance with—Decree-holder and judgment-debtor certifying satisfaction of decree—Deposit by judgment-debtor of five per cent. for payment to auction-purchaser—Sufficiency—Sale—If. to be set aside—Deposit of decretal amount in Court—Necessity.*

After a sale of a holding in execution of a rent decree and within thirty days of the sale the decree-holder and the judgment-debtor certified to the Court that the decree had been satisfied and fully paid, and the judgment-debtor deposited five per cent. of the purchase-money for payment to the auction-purchaser and prayed that the sale be set aside.

Held, that the provisions of S. 174, B. T. Act, had been substantially complied with and the sale should be set aside; it was not necessary for the judgment-debtor to deposit the amount of the decretal debt in Court for the benefit of the decree-holder when the decree-holder himself had certified satisfaction of the decree. (*Courtney-Terrell, C.J., James and Manohar Lall, JJ.*) Sukhoo Sao *v.* Sita Ram Hajjam. **17 Pat. 53=172 I.C. 785=4 B.R. 174=10 R.P. 345=18 Pat. L.T. 938=1937 P.W.N. 934=A.I.R. 1938 Pat. 21 (S.B.).**

———**S. 174**—*Compliance—Payment to decree-holder out of Court of amount due to him within 30 days—Application to set aside sale and deposit of compensation to auction-purchaser within time—If sufficient compliance—Duty of Court to set aside sale.*

Where it is established, either by an admission of the decree-holder or by an application made by him to the Court, that the amount due to the decree-holder has been received by him out of Court within thirty days, and the judgment-debtor applies to set aside the sale within the thirty days and deposits the compensation money due to the auction-purchaser also within the same time, the Court is bound to set aside the sale, because there is a substantial compliance with the provisions of S. 174 of the Bengal Tenancy Act. (*Manohar Lall, J.*) Mahomed Zakiruddin *v.* Mahomad Naeem. **18 Pat.L.T. 776=1937 P.W.N. 764=172 I.C. 13=10 R.P. 294=A.I.R. 1937 Pat. 635.**

———**S. 174**—Locus standi *to deposit—Person claiming under interest created before rent sale but devolving on him subsequently.*

A person who claims under an interest which had been created before the rent sale, has *locus standi* to make the deposit under S. 174 (1) of the B. T. Act, though such interest devolved on him subsequently to such sale. (*R. C. Mitter, J.*) Dayaluddin Sirkar *v.* Azimuddin Mondal. **41 C.W.N. 255**

———**S. 174**—Locus standi *to deposit—Purchaser of portion of non-transferable occupancy holding—Purchase effected before amendment.*

A purchaser of a portion of a non-transferable occupancy holding has *locus standi* to make the deposit under S. 174 (1) of the B. T. Act, though the purchase was effected before the amendment of the Act came into force. (*R. C. Mitter, J.*) Dayaluddin Sirkar *v.* Azimuddin Mondal. **41 C.W.N. 255.**

———**S. 174**—Order under— Dispute between auction purchaser and private purchaser from tenant—Appeal—Competency. *See* B. T. Act, S. 153. **40 C.W.N. 95.**

———**S. 174**—*Order under—Second appeal, if competent.*

No second appeal is competent against an order setting aside or refusing to set a sale under S. 174 of the Bengal Tenancy Act. (*Mukherjea, J.*) Bishop of Mylapur *v.* Meher Ali. **41 C.W.N. 993.**

———**S. 174 (1)**—*Right to apply—Purchaser at private sale after auction sale—"Interest"—Meaning of.*

There is nothing in S. 174 (1) of the Bengal Tenancy Act to indicate that the interest of the person, who makes the application for setting aside the sale, must be in existence at the date of the sale. The sole criterion for determining whether a person's interest is affected by the sale is to find out whether his interest will be affected if the sale be ultimately onfirmed. Under S. 159 of the Bengal Tenancy Act, a purchaser at a rent sale gets his title from the date of the confirmation of the sale, and not from the date of the sale, as in a sale under C. P. Code. The judgment-debtor has, therefore, a subsisting interest between the date of the sale and the date of the confirmation of the sale. The purchaser from the judgment-debtor after the date of the sale and before the confirmation of the sale, therefore, acquires the subsisting interest of the judgment-debtor, and has *locus standi* to get the sale set aside under S 174 (1) of the Act. (*Nasim Ali and Rau, JJ.*) SUSHIL KUMAR GHATAK *v.* SATYA GOPAL CHATTERJI. **I.L.R. (1940) 1 Cal. 153=189 I.C. 203=A.I.R. 1940 Cal. 329.**

——S. 174—*Sale set aside on condition of deposit of decretal amount within certain time—Further extension of time for deposit—Power of Court to grant—C P. Code, S.* 148.

An order allowing an application to set aside a sale under S. 174 of the Bengal Tenancy Act on condition that the applicant deposited in Court the decretal amount within a certain time, is a final order which cannot be modified except in the manner provided by O. 20, R. 3, C. P. Code. In a case such as this S. 148, C. P. Code, has no application and the Court has, therefore, no jurisdiction to allow a further extension of time for making the requisite deposit. (*Edgley, J.*) GIRISH CHANDRA DAS *v.* ANNADAMONI DASI. **182 I.C. 760=12 R.C. 104 (1)=43 C.W.N. 553=A.I.R. 1939 Cal. 309.**

——S. 174—*Scope—Setting aside of sale—Conditions of—Application by transferee from judgment-debtor—Deposit of five per cent. alone for auction-purchaser—Decree amount and costs not deposited—Allegation of payment to decree-holder out of Court—Decree-holder consenting—Objection by auction purchaser—Proper course—Duty of Court—Order setting aside sale—Legality.*

Under S. 174, B. T. Act, before a sale in execution of a decree for rent can be set aside, the deposit must be made within 30 days as laid down by S. 174 (2), and on a plain reading of the words of the section, the sale has to be confirmed unless the money is paid into Court. The section does not provide for any settlement between the decree-holder and the judgment-debtor out of Court or for an application being made by the decree-holder-landlord. A sale cannot be set aside otherwise than under S. 174 or R. 89 of O. 21, C. P. Code, by consent of some but not of all of the parties concerned in the decree, the execution and the sale. Though the Court may give effect to a compromise and to allow adjustment outside the scope of S. 174 provided all the parties entitled to be heard in the matter concur, and if that is done one of those parties will not be heard at a later stage to resile from his agreement and impeach the act of the Court on the ground of its irregularity. The correct procedure is to abide by what the statute has laid down But in any case, when there is no such general agreement among all the parties, the proper course for the Court to follow is to adhere strictly to what is laid down by the statute itself for its guidance. Where a transferee from the judgment-debtor applies to the Court on the last but one day of limitation to have the sale set aside on depositing the five per cent. of the purchase-money alone for payment to the auction-purchaser, alleging, in lieu of depositing the amount of the decree with costs, that he has paid the same to the decree-holder out of Court, and the application is assented to by the decree-holder but objected to by the auction-purchaser, the Court is bound to reject the application and confirm the sale. An order setting aside the sale under such circumstances is illegal and without jurisdiction. (*Rowland, J.*) HANUMAN SINGH *v.* BAIJNATH PRASAD SINGH. **172 I.C 8=10 R.P. 298=1937 P.W.N. 497=18 Pat.L.T. 409=A.I.R. 1937 Pat. 537.**

——S. 174 (1)—*Application under—Applicant obtaining attachment before judgment*—Locus standi.

The words of S. 174 (1) are *pari materia* with the provisions of O. 21, R. 90. The words "whose interests are affected by the sale" are no doubt not limited to persons whose proprietary or possessory interests are affected. They also include persons whose pecuniary interests are affected by the sale. But a person who has obtained an attachment before judgment of property subsequently put to sale at a rent sale, but has not obtained a decree in his suit before his application under S. 174, Cl. (1), for setting aside the rent sale, is not a person whose pecuniary interests are affected by the sale and he has therefore no *locus standi* to make and maintain the application under S. 174 (1). 15 I.C. 668 and A.I R. 1925 Cal. 1103, applied. (*R. C. Mitter, J.*) BAIDYA NATH PANDEY *v.* HEMLATA DASI. **160 I. C. 1080=8 R.C. 468=40 C.W.N. 759=A.I.R. 1936 Cal. 26.**

——S. 174 (1)—*Right to apply under—Holder of money decree obtaining order for attachment of holding in execution*—Locus standi *to apply.*

A person who has obtained a decree for money and has obtained an order for attachment of the holding in question is a person "whose interests are affected by sale" within the meaning of those words in S. 174 (1), and such person has a right to apply to have the sale set aside, although the attachment is actually effected after the sale only. (*R. C. Mitter, J.*) BULANDA BASHINI DASI *v.* PRAN GOVINDA DHAR. **I.L.R. (1937) 1 Cal. 230=166 I.C. 388=9 R.C. 509=40 C W.N. 1334=63 C.L.J. 554=A.I.R. 1936 Cal. 547.**

——S. 174 (1)—*Scope—Application by decree-holder to set aside sale—Competency—Purchase by decree holder—Payment of decree amount and compensation out of Court—Agreement that sale should be set aside—Power of Court to set aside sale on application of decree-holder.*

S. 174 (1), B. T. Act, no doubt lays down the normal procedure to get a sale set aside by making payment of the decree-amount and compensation. But it is an undoubted principle of law that where a Court has general jurisdiction, the parties to a proceeding can, by agreement, adopt a different procedure—procedure quite contrary to the ordinary *cursus curiae*, and the Court is bound to give effect to such an agreement. Where the decree-holder is himself the auction-purchaser, and if he and the judgment-debtor agree between themselves on a payment of the decretal amount and compensation out of Court after the sale that the decree-holder should apply and get the sale set aside the Court has to set aside the sale. There is no principle on which the Court can refuse to set aside the sale. (*R. C. Mitter, J.*) BANGA CHANDRA MOZUMDAR *v.* NANDA KUMAR MOZUM-

DAR. I.L.R. (1937) 1 Cal. 142=40 **C. W. N. 1402.**

——S. 174 (3)—Locus standi *to apply—Transferee of holding from judgment-debtor before decree.*

A person who alleges that the holding had been transferred to him by the judgment-debtor before the date of the rent decree, and who was not a party to the rent suit or to the subsequent proceedings taken in execution of the decree, has no *locus standi* to apply to have the execution sale set aside under S. 174 (3) of the Bengal Tenancy Act. (*Edgley, J.*) Charubala Dei *v.* Baikuntha Nath Jana. **182 I.C. 930=12 R.C. 124=43 C.W.N. 743=A.I.R. 1939 Cal. 419.**

——S. 174 (3)—*Scope—Objection under—Right to raise—*Locus standi *of third party when landlords admit receipt.*

An objection under S. 174 (3) of the B. T. Act to a deposit made by a transferee of the judgment-debtor tenant on the ground that the transferee has not paid the transfer fee and therefore is not competent to make the deposit, is one for the landlord to raise. If the landlord, however, admits receipt of it, a third party cannot compel the Court to investigate such a question of fact. (*Rowland, J.*) Hanuman Singh *v.* Baijnath Prasad Singh **172 I.C. 8=10 R.P. 293=13 Pat.L.T. 409=1937 P.W.N. 497=A.I.R. 1937 Pat 537.**

——S. 174 (3) (*b*)—*Time for deposit of decretal amount fixed in order—Extension of—Jurisdiction of Court—C. P. Code, S* 148.

The Court which passes an order under S. 174 (3) (*b*) of the B. T. Act that the application of the judgment-debtor to have the sale set aside will be allowed on deposit of the decretal amount by him within a certain time and that on his failure to do so the application will stand dismissed, has no power to extend the time for making the deposit, even though the application for extending the time is made within the period mentioned in the order. Owing to the final character of that order, the Court has no jurisdiction to vary it unless proper steps are taken to review it under O. 47, R. 1, C P. Code S. 148, C P. Code, has no application to the above case That section only authorises an enlargement of time in respect of acts prescribed or allowed by the Code. Further it does not apply in the case of a decree or order of a final character made by a Court, but it applies only to acts preliminary to or during the course of the trial of a case before the final order has actually been made. (*Edgley, J.*) Haji Eakur Sheik *v.* Samian Bibi. **183 I. C. 661=44 C.W.N. 449=A.I.R. 1940 Cal. 275.**

——S 174 (3), proviso (b)—*Deposit under—If condition precedent to application—"Shall be allowed"—Construction.*

The preliminary deposit under S. 174 (3), proviso (*b*) of the Bengal Tenancy Act is not a condition precedent to the entertainability of the application to set aside. It is enough if the deposit is made after the filing of the application, but before the application is heard and allowed. The expression "shall be allowed" cannot be construed to mean "shall be admitted" or "shall be entertained." To admit the application is not the same thing as to allow it. (*Cunliffe and Henderson, JJ.*) Ajit Kumar Basu *v.* Surendra Nath Mandal. **165 I.C. 385=9 R.C. 387=40 C W.N. 525=53 C.L.J. 19=A.I.R. 1936 Cal. 430.**

——S. 174 (3), proviso (b)—*Deposit under—When to be made.*

The deposit required under proviso (*b*) to sub-S. (3) of S. 174, B. T Act. has to be made not along with the application under S. 174 (3), but has to be made before that application is allowed, that is to say, the proper time for the Court to call for the deposit under S. 174 (3), proviso (*b*), is after the Court comes to the conclusion that the sale ought to be set aside. (*R. C. Mitter, J.*) Kali Pade Bhandari *v.* Panch Kari Mandal. **162 I.C. 623=8 R C. 621 =40 C W.N. 531=A.I.R. 1935 Cal. 197.**

——S 174 (3), proviso (b)—*Deposit under—When to be made—"Allowed"—Meaning of.*

The word "allowed" in proviso (*b*) to sub-S. 3 of S. 174 of the B. T. Act means "granted" and should not be read as "admitted" or "entertained". It is not therefore necessary for an applicant to make the deposit at the time he makes the application for setting aside the sale as a condition precedent to his application being entertained. (*S. K. Ghose and Edgley, JJ.*) Bholanath Roy Choudhury *v.* Haji Syed Mahamad Mashud. **171 I.C. 479=10 R.C. 270 =40 C.W.N. 528.**

——S. 174 (5)—*Appeal filed within limitation but deposit made only after limitation—Appeal, if competent.*

Under S. 174 (5) of the B. T. Act, the deposit must be made before the appeal could be entertained at all. Consequently an appeal, though filed on the last date of limitation, is not competent, if the deposit is made only subsequently after the period of limitation. (*S. K. Ghose, J.*) Dakhaja Mohan Roy Choudhury *v.* Matiar Rahman. **42 C.W.N 646.**

——S 174 (5)—*Appeal presented before but deposit made after limitation—Competency.*

Where an appeal is preferred against an order dismissing an application to set aside a sale, the deposit must be made as required by S. 174 (5) of the B T. Act before the appeal can be entertained at all. If, therefore, the deposit is made after the prescribed period of limitation, the appeal is incompetent although it is presented within time. A subsequent order accepting the deposit cannot save limitation. (*Edgley, J.*) Bhagaban Chandra Bhakat *v.* Satia Bewa. **I.L.R. (1939) 2 Cal. 49.**

——S. 174 (5)—*Deposit under—When to be made—Power of Court to extend time.*

S. 174 (5) of the Bengal Tenancy Act contemplates that the amount recoverable in execution of the decree must be deposited with the appellate Court immediately after the presentation of the appeal to the Court in question and before its registration. The deposit is a condition precedent or at any rate a contemporaneous act in connection with the admission of the appeal. The Court has no authority to extend the time within which the deposit might be made. (*Edgley, J.*) Sudhir Chandra *v.* Nazir Mamud. **182 I.C. 118=12 R. C. 11=43 C.W.N. 105=68 C.L.J. 402=A.I.R. 1939 Cal. 30.**

——S. 174 (5)—*Deposit, when to be made.*

Where an appeal is preferred against an order dismissing an application to set aside a sale, the deposit must be made as required by S. 174 (5) of the B. T. Act before the appeal can be entertained at all. The deposit is a condition precedent to or, at any rate, a contemporaneous act in connection with the "admission of the appeal". After the appeal is presented and registered, the Court has no power to give the appellant an opportunity of making the required deposit (*Costello, Ag. C.J. and Edgley, J.*) BITHUPALA DASI *v.* KUMUDNATH DAS. **67 C.L J. 211=41 C W.N. 1299.**

——**S. 174 (5)**—*Order dismissing for default application for setting aside sale—Appeal.*

An order dismissing for default an application for setting aside a sale is appealable under S. 174 (5) of the Bengal Tenancy Act. (*S. K. Ghose, J.*) DEBENDRA NATH *v.* GOPAL CHANDRA. **42 C.W.N. 128.**

——**S. 174 (5)**—*Order dismissing for default application to set aside sale—Appeal.*

An appeal lies against an order of Court dismissing for default an application under S. 174 of the B. T. Act to set aside a sale. (*Edgley, J.*) MOHAMMAD KAZIBULLA *v.* HUMAYUN REZA CHOUDHURY. **I.L.R. (1938) 2 Cal. 345=42 C W. N. 612=179 I.C. 816=11 R.C. 619=A.I.R. 1938 Cal. 454.**

——**S. 174 (5)**—*Order setting aside sale—Second appeal—If competent.*

No second appeal is competent against an order setting aside a sale under S. 174 of the B. T. Act. The word 'appeal' in S. 174 (5) cannot be interpreted to include, by implication, a second appeal also. (*Mukherjea, J.*) CHARLES DE SA FRAGOSA *v.* MEHER ALI. **I.L.R. (1937) 2 Cal. 496.**

——**S. 174 (5)**—*Order under S. 173 (3)—Right of appeal.*

S. 174 (5) of the B. T. Act applies to applications falling under S. 174 and does not apply to applications coming under S. 173 (3). Consequently, there is no right of appeal against an order under S. 173 (3). (*S.K. Ghose and Nasim Ali, JJ.*) ASHUTOSH MANDAL *v* GATIKRISHNA **176 I C 761=11 R.C. 171=42 C.W.N. 585=A.I. R. 1938 Cal. 446.**

——**S. 174 (5)**—*Scope—Order refusing to set aside sale but finding that sale is only one in execution of money decree on account of non-service of notice under S. 148-A (7)—Appeal by decree-holder landlord—Maintainability—Revision.*

Two co-sharer landlords obtained rent decrees against the tenant on an occupancy holding under them. The petitioner, one of the co-sharer landlords, purchased the holding at a sale in execution of his decree. The other then applied to have the sale set aside on the ground that the processes and the proclamation of sale had been suppressed. The Court found against the allegation, but found that the notice required by S. 148-A (7) of the B. T. Act had not been served. It therefore refused to set aside the sale but observed that the sale was to be considered only as one in execution of a money decree, as passing the right, title and interest only of the tenant in the holding but not the holding itself. Petitioner applied in revision against this observation contending that the same was outside the scope of the proceedings.

Held, on a preliminary objection. that under S. 174 (5) of the B. T. Act, an appeal would lie against the finding or observation that the sale was only a sale in execution of a money decree, and therefore the petitioner could not maintain an application in revision and agitate the question therein.

Held, further, that the observation complained of was not outside the scope of the proceedings. (*Khundkar, J.*) KHAGENDRA NATH PARUI *v.* SARAT KUMAR DAS. **40 C.W.N. 182 (2).**

——**Ss. 178, 179 proviso and 195 (e)**—*Interest on arrears of patni rent—How regulated—Patni Regulation, Ss. 2 and 3.*

In view of Ss. 2 and 3 of the Patni Regulation and S. 195 (*e*) of the B. T. Act, the matter of payment of interest on the arrears of *patni* rent is to be regulated by the terms of the engagement between the parties, and not by S. 178 or the proviso to S. 179 of the B. T. Act. 39 C.W.N. 1003, Foll. (*Guha and Bartley, JJ.*) SHAMSER ALI CHOUDHURY *v.* HAJI ARAF MUHAMMAD TALUKDAR. **167 I.C. 404=9 R.C. 685=41 C.W.N. 605.**

——**S. 178**—*Monthly tenancy* — Kabuliyat—*Clause that tenant not to claim compensation in case of acquisition—Effect of—Tenant making improvements—Right of.*

A clause that the tenant is not to receive any compensation in case the acquisition of land is made by Government or Municipality is not inconsistent with the nature of the tenancy, namely, the tenancy being one from month to month. The clause regarding the non-taking of compensation cannot be said to be a clause which is collateral to the ordinary incident of the holding. But the clause does not preclude the tenant from claiming such part of the compensation as has been the result of the improvements on the land made by the tenant; in other words such part of the compensation as had been the result of improvements which have enhanced the market value of the land: *Bradbury* v *Grimble & Co.*. (1920) 2 Ch. D. 548 and *Sherwood* v. *Tucker*, (1924) 2 Ch. D. 440, Ref. (*D. N. Mitter and Patterson, JJ.*) RADHA NATH MAITY *v.* KRISHNA CHANDRA MUKERJI **165 I.C. 682=9 R.C. 445=40 C.W.N. 722=63 C.L. J. 72=A.I.R. 1936 Cal. 249.**

——**S. 178**—*Scope—Acquisition of land—Occupancy raiyat agreeing to abandon claim for—If bound by agreement.*

Even in the case of an occupancy raiyat a clause in a kabuliat with regard to the tenant abandoning any claim to compensation money is effective and does not hit in any way the provisions of S. 178, Bengal Tenancy Act. (*D. N. Mitter and Patterson, JJ.*) RADHA NATH MAITY *v* KRISHNA CHANDRA MUKERJI. **165 I.C. 682=9 R C. 445=40 C.W.N. 722=63 C.L.J. 72=A.I.R. 1936 Cal. 249.**

——**S. 178 (f)**—Scope and effect of—Under-raiyat in possession as service tenure—Subsequent lease before 1928 expiring after 1928—If protected from ejectment by holding for over 12 years—Right to claim benefit of S. 48-C (1), proviso (2). *See* BENGAL TENANCY ACT, S. 48-C (1), PROVISO (2). **40 C.W.N. 1275.**

——**S. 178, proviso (1)**—*Applicability*—Kabuliat *of forest land for purposes of reclamation—Stipulation for interest at one anna per rupee per month—Enforceability.*

Where the terms of a *kabuliat* of the year 1876 evidence a demise in favour of tenants by way of a *Howladari potta* of certain land covered by forest consisting of timber and nals, for the purpose of reclamation, and all the terms usually present in a reclamation lease are also present in the *kabuliat*, the *kabuliat* must be held to be a *bona fide* lease for reclamation purposes, so as to attract the operation of proviso (1) to S. 173, B. T. Act. A stipulation in such a lease for payment of interest in respect of arrears of rent at the rate of one anna per rupee per mensem is legal and enforceable. (*Guha and Khundkar, JJ.*) Upendra Nath Das *v.* Surendra Nath Roy Sircar. **63 C.L.J. 283.**

——**S. 179**—*Scope*—Kabuliyat—*Stipulation in providing for* $6\frac{1}{4}$ *per cent. per month interest in case of default in instalment even in respect insignificant or petty default—Power of Court to relieve against—Contract Act, S. 74, etc.*

Under S. 179 of the B. T. Act, the parties are competent to make their own contract. But if a provision in a *kabuliyat* is found to be a penalty, the Court has ample jurisdiction to grant proper relief to the tenant. Where a tenant in his *kabuliyat* undertook that he would not deposit any amount of rent, road cess, etc., that fell short of the amount of any kist, and that if any instalment of rent, road cess, etc., paid by him fell short by even a rupee the landlord in that case should be competent to realise interest for default at the rate of $6\frac{1}{4}$ per cent. per mensem on the entire amount of instalment or rent, etc., from the date of default to the date of realization without any objection on his part.

Held, that the stipulation was one by way of penalty coming within the mischief of S. 74, Contract Act, and could be relieved against, and that the landlord was entitled only to reasonable damages or compensation. Interest at 12 per cent. per annum was considered reasonable under the circumstances and damages and compensation were allowed at that rate. (*Harries, C.J. and Manohar Lall, J.*) Jangdhari Singh *v.* Badri Narayan Singh. **1939 P.W.N. 220.**

——**S. 179**—*Scope*—Mokrari mourashi pottas—*Payment of selami and fixing of annual rent—Simultaneous* ekrarnama *undertaking to surrender land on payment of Selami, etc., within fixed time—Enforceability—Plea of occupancy right—Maintainability.*

Plaintiffs let out certain lands to the defendants by *mokrari mourashi pottas*, taking *selamis* and fixing annual rents. On the same date and simultaneously with them, defendants executed *ekrarnamas* to the plaintiffs, stipulating that if within fifteen years from the date of the *ekrarnamas*, the amount of selami paid for the *mokrari mourashi pottas* together with the costs of the *ekrarnamas* were paid, they would execute deeds of surrender in respect of the *mokrari mourashi pottas* and return the lands.

Held, that the contract evidenced by the *ekrarnamas* was valid and enforceable and did not contravene the provisions of S. 178, B. T. Act, and that the defendants could not avoid the agreement lawfully entered into by them by asserting that they had acquired occupancy rights in the lands, in view of S. 179 of the B. T. Act. (*Guha and Bartley, JJ.*) Shib Narayan Ghose *v.* Gopalchandra Ghose. **40 C.W.N. 1366**

——**S. 182**—*Applicability—Holding acquired subsequent to homestead—Benefit of S. 182—If available.*

When a raiyat holds his homestead otherwise than as part of his holding, he is entitled to the benefit of S. 182, although he may have become a raiyat subsequently to the taking of his residential tenancy. (*Edgley, J.*) Kalikumar Deb *v.* Secretary of State. **167 I.C. 310=9 R.C. 684 =41 C.W.N. 405=A.I.R. 1936 Cal. 528.**

——**S. 182**—*Applicability—Homestead*—Kabuliyat *creating tenancy at will—Subsequent acquisition of occupancy right by tenant—Effect—Tenant—If protected from ejectment from homestead.*

If a raiyat's homestead is not part of his agricultural holding, *i.e.*, if he holds the homestead otherwise than as a part of his holding, the incidents of his tenancy of the homestead are regulated by the Bengal Tenancy Act, and he can claim the benefit of S. 182, B. T. Act, notwithstanding that the status of an occupancy raiyat is acquired by the tenant subsequent to his taking the homestead for residential purposes and notwithstanding that the *kabuliyat* in respect of the homestead creates only a tenancy at will terminable by notice to quit. The tenant acquires occupancy rights in the homestead as well and cannot be ejected from it on the basis of the *kabuliyat*. (*Nasim Ali and Henderson, JJ.*) Pulin Chandra Daw *v.* Ab-u-Bakhar Naskar. **163 I.C. 406=9 R.C. 22=40 C.W.N. 599=A.I.R. 1936 Cal. 565.**

——**S. 182**—*Applicability—Homestead situated in municipal area.*

S. 182 of the B. T. Act applies to a homestead which is situated within a municipal area which has not been notified as provided for in S. 1 (3) (iii) of the said Act. The tenant is entitled to the benefit of that section in spite of the fact that the homestead does not constitute an agricultural tenancy. (*S. K. Ghose, J.*) Panchanon Chaudhury *v.* Samatul Chandra. **173 I.C. 602=10 R.C. 542=41 C.W.N. 1327=A.I.R. 1937 Cal. 695.**

——**S. 182 (as amended in 1928)**—*If retrospective.*

S. 182 of the Amending Act of 1928 became applicable to tenancies which were in existence at the time of the passing of the Amending Act. Both raiyats and under-raiyats on that date would get the benefit of the new section and would therefore be entitled to hold their homestead subject to the provisions of the Act as amended and the incidents of their homestead will be governed by provisions of new Act applicable to raiyats and under-raiyats. (*Edgley, J.*) Kalikumar Deb *v.* Secretary of State. **167 I.C. 310=9 R.C. 684=41 C.W.N. 405=A.I.R. 1936 Cal. 528.**

——**S. 182**—*Settled raiyat—Acquisition of occupancy in homestead—Subsequent sale of agricultural holding—Effect—Occupancy in homestead—If lost—T. P. Act—Applicability.*

Where the settled raiyats of a village in respect of agricultural lands acquire occupancy rights in homestead lands, under S. 182 of the B. T. Act, the mere fact that they subsequently sell away the agricultural lands, in respect of which they have occupancy rights, cannot divest them of their right of occupancy in their homestead. The incidents of the tenancy would still be governed by the B. T. Act and not by the T. P. Act. (*Nasim Ali, J.*) Haru Charan Manna *v.* Sourendra Nath Ghosh. **40 C.W.N. 182 (1).**

———S. 183—Scope—Diluvion of lands in holding—Tenants ceasing to pay rent—Abandonment of holding—Usage as to—Validity. *See* LANDLORD AND TENANT—ABANDONMENT. **18 Pat.L.T. 477=A.I.R. 1937 Pat. 458.**

———S. 183—Scope—Occupancy holding—Right to deduction of rent under S. 52—Usage depriving tenant of such right—Validity. *See* B. T. ACT, Ss. 52 AND 183. **18 Pat.L.T. 477=A.I.R. 1937 Pat. 458.**

———S. 184 (1)—*Question of limitation not raised by pleadings—When may not be raised in appeal.*

S. 184 (1) of the B. T. Act does not overrule the provisions of O. 8, R. 2, C. P. Code, and a question of limitation should not be allowed to be raised before the Appellate Court, if the necessary facts had not been pleaded and so attention had not been drawn to them at the time of the trial. S. 184 (1) requires a suit to be dismissed even in an *ex parte* case although limitation has not been pleaded, only if it is clear from undisputed facts that the suit was filed after the period of limitation. (*Mukherjea and Roxburgh, JJ.*) BAJROGA KHATUN *v.* PROVINCE OF BENGAL. **I.L.R. (1939) 2 Cal. 358=187 I.C. 301=12 R.C. 564=43 C.W.N. 1096=A.I.R. 1940 Cal. 113.**

———S. 188—Construction—'Giving opportunity of joining in the proceedings'—Meaning of—Duty of co-sharer landlord applying for preemption under S. 26-F (1). *See* B. T. ACT, Ss. 26-F (1) AND 188. **40 C.W.N. 1023=A.I.R. 1936 Cal. 576.**

———S. 188—*Scope—Non-compliance with—Effect—Application under S. 26-F (1) beyond time—Procedure.*

If an application for pre-emption under S. 26-F (1) does not comply with the provisions of S. 188 of the B. T. Act or is defective and not made good within time, the application will have to be dismissed on that ground; but the so-called defect cannot nullify the provisions of S. 26-F (4) (*b*) by authorizing the Court to receive as a good deposit an amount of money put into Court beyond the periods mentioned in S. 26-F (4) (*a*). In such a case mistakes and omissions of the Court itself or of its officers are out of the question. (*R. C. Mitter, J.*) SACHINDRA NATH CHAKRAVARTY *v.* TRAILAKYA NATH CHAKRAVARTY. **I.L.R. (1937) 1 Cal. 112=167 I.C. 482=9 R.C. 698=40 C.W.N. 1023=A.I.R. 1936 Cal. 576.**

———S. 188 (1)—Scope—Transfer of holding—Evasion of payment of transferee by false statement as to relationship of transferor to transferee—Remedy of landlord—Application or suit—Court entertaining application without Court-fee as required for suit—Revision—If open. *See* B. T. ACT, S. 26-J. **63 C.L.J. 103.**

———S. 188 (1) proviso—*Application by co-sharer landlord for pre-emption under S. 26-F (1)—Notice on other co-sharer landlords not served in time owing to laches of Court officers—Their application under S. 26-F (4) dismissed as time barred—Application under S. 26-F (1)—Maintainability.*

In order to entitle a co-sharer landlord who applies for pre-emption under S. 26-F (1) of B.T. Act to get the benefit of the proviso to S. 188 (1) of that Act, the other co-sharer landlords must not only be made parties defendants to the proceeding but they must be given an opportunity of joining in the proceeding as co-applicants. In order that the other co-sharer landlords may get an opportunity of joining in the proceeding, the notice to join must be given to them before the period of limitation expires (*i.e.*) within the time prescribed by S. 26-F (4). Where the applicant for pre-emption under S. 26-F (1) does all that is required of him but on account of mistake of the Court or the laches of Court officers, the notice is not served upon the co-sharer landlords in time and their application under S. 26-F (4) (*a*) to join in the proceeding as co-applicants is rejected as barred by limitation, the application under S. 26 F (1) is not hit by S. 188 and is maintainable. (*Nasim Ali, J.*) FAZLE RAHAMAN PRODHAN *v.* BAHARULLA PRODHAN. **41 C.W.N. 444.**

———S. 188, proviso (1)—Scope—Transfer fee due to landlord—Payment only in part—Recovery of balance—Procedure—Suit—If barred. *See* B. T. ACT, Ss. 26-J AND 188, PROVISO (1). **63 C.L.J. 105.**

——— S. 191—*Scope—Zamindar granting mokarari lease of* asli *and* diara *lands at consolidated rental—Revenue officers settling rent payable by tenant of* diara *portion — Government settling* diara *lands as temporarily settled estate with Zamindar—Contract of lease—If affected.*

When a Zamindar grants a mokarrari lease in respect of lands comprising his *asli* lands and *diara* lands accreted to his estate at a consolidated rental, his contract is not affected when the revenue officers settle the rent payable by the said tenant of the *diara* portion under S. 104 of the B. T. Act and Government settles the *diara* lands as temporarily settled estate with the said Zamindar. The contract is not hit by S. 191 of the Act. When the contract is for *one* tenancy bearing a consolidated rent covering *both* lands of the permanently settled estate and *diara* lands, the contract cannot be split up, whether at the instance of the Revenue officer or of the landlord alone or of the tenant alone, and made into two. That would be creating a new contract between the parties, *i.e*, substituting two tenancies in the place of one. This can only be done by the mutual consent of the landlord and tenant, S. 191 contemplates that a lease or contract (provided it is made after the passing of the B. T. Act) may be seperseded as therein stated, only where the area comprised in the tenure or holding to which the contract relates is situate wholly in an estate not subject to a subsisting permanent settlement. (*R.C. Mitter and Biswas, JJ.*) SRISH CHANDRA NANDI *v.* MIDNAPORE ZAMINDARY CO., LTD. **I.L.R. (1938) 2 Cal. 41=181 I.C. 370=11 R.C. 802=67 C.L.J. 202=A.I.R. 1938 Cal. 853.**

———S. 193 and Sch. III, Art. 2 (b)—*Applicability—Settlement of toddy trees for taking juice—Suit for settlement money—If one for rent under Tenancy Act—Limitation Act, Art.* 110—*Jurisdiction—Small Cause Court.*

A person taking a settlement of date and toddy palm trees, who gets the right to take the juice of the trees for the season is not a tenant, nor is the person settling the trees a landlord within the meaning of the B. T. Act. A suit by the settlor against the settlement holder for recovery of money due under the settlement is not a suit between a landlord and a tenant and does not fall under S. 193 of the B. T. Act. No part of the provisions of the Act applies to such a suit. The suit is governed for purposes of limitation not by Art. 2 (*b*) of Sch. III of the B. T. Act, but by Art. 110 of the Limitation Act. The suit not being a suit for immovable property is a suit cognizable by the Small Cause Court and must therefore be brought in that Court and not in the Court of the Munsif as an ordinary suit under the B. T. Act. (*Agarwala and Rowland, JJ.*) Kameshwar Singh *v.* Mahabir Pasi. **15 Pat. 626=166 I.C. 484=9 R.P. 301 (1)=3 B.R. 171=17 Pat L.T. 363=A.I R. 1936 Pat. 403.**

——**S. 195 (e) (as amended in 1929)**—*Retrospective operation.*

The amended Cl. (*e*) of S. 195 of the B. T. Act is not retrospective in its operation. Where, therefore, the putni sale took place before the amended section came into force in 1929, an occupancy *raiyat* cannot claim the benefit of S. 11, Cl. (3) of the Putni Regulation by reason of the extended definition of the expression "khudkhast raiyat" given in amended S. 195 (*e*), B. T. Act. (*Mukherjea, J.*) Annada Prasanna *v.* Ram Saran Kower. **41 C.W.N 1234=176 I.C. 602=11 R C. 133=A.I.R. 1937 Cal. 686.**

——**Sch. III, Art. 1**—*Applicability — Suit in ejectment on breach of covenant against alienation —Lessee not appealing against decree in ejectment—Right of transferee to plead Sch. III, Art. 1, in bar.*

In a suit for ejectment for breach of a covenant against alienation, when the lessee-transferor does not appeal against the decree in ejectment, the transferee from the lessee cannot plead limitation by calling to his aid Art. 1 of Sch. III to the B. T. Act, and the landlord is entitled to eject the transferee. (*Dhavle and Agarwala, JJ.*) Thakur Dayal Singh *v.* Rai Promotha Nath Mitra. **15 Pat. 673=9 R.P. 136=164 I.C. 811 (2)=17 Pat.L.T. 502=1936 P.W.N. 534=A.I.R. 1936 Pat. 493.**

——**Sch. III, Art. 2**—*Applicability—Lease for collection of rent—Limitation Act, Art 116.*

The B. T. Act applies only to a lease for an agricultural purpose and not to a lease which is a lease of agricultural lands, but not for an agricultural purpose. The true test to determine whether a lease for collection of rents does or does not come within the Act is, therefore, not whether the lands comprised in it are or are not agricultural lands, but whether or not the letting was for agricultural purposes. Where the letting is merely for collection of rents, and there is no question of the lessee being required or expected to bring any land under cultivation either himself or by members of his family or by servants or labourers, or by establishing tenants on the land, the mere fact that the land is agricultural or that there are cultivating tenants on it, would not make the lease one for an agricultural purpose. Such a lease is, therefore, not subject to the operation of the B. T Act, and the special rule of limitation prescribed by that Act will accordingly not apply. If the lease is in writing and registered, a suit for rent based on such a lease will be governed by Art. 116 of the Limitation Act. (*Henderson and Biswas, JJ.*) Alauddin Ahammad *v.* Tomizuddin Ahammad. **I.L.R. (1937) 2 Cal. 631=173 I.C. 540=10 R.C. 535=41 C.W. N. 1001=A I.R. 1937 Cal. 587.**

——**Sch. III, Art. 3**—*Applicability—Dispossession by landlord as auction-purchaser.*

Dispossession by the landlords as auction purchasers does come under the provisions of the special law of limitation under Art. 3 of Sch. III. A.I.R. 1927 Cal. 488, Rel. on. (*Jack, J*) Amiruddin Sarkar *v.* Nisaruddin Sarkar. **175 I.C. 697=10 R.C. 815=A.I.R. 1938 Cal. 276.**

——**Sch III, Art. 3**—*Applicability—Landlord dispossessing tenant from possession obtained in execution of mortgage decree against co-sharer tenants.*

Where a tenant in execution of a mortgage decree against his co-sharer tenants obtains their rights in the land, he represents the tenancy and when he is dispossessed by the landlord the rule of special limitation would apply. A.I.R. 1936 Cal. 299, Rel. on. (*Jack, J.*) Amiruddin Sarkar *v.* Nisaruddin Sarkar. **175 I.C. 697=10 R.C. 815=A.I R 1938 Cal. 276.**

——**Sch. III, Art. 3**—*Applicability—Landlord setting up servant as tenant and dispossessing raiyat through him—Suit by raiyat to recover possession—Limitation.*

Mere allegations or suggestions in the pleadings are insufficient material on which to base a conclusion that dispossession was dispossession by the landlord. Where the landlord does not directly dispossess the raiyat, but sets up his servant as a tenant who dispossesses the raiyat, the dispossession is by landlord and a suit by the raiyat to recover possession is governed by Art. 3. (*Agarwala, J.*) Bindeshwari Rai *v* Ram Palak Singh. **175 I.C 91=4 B.R. 521=10 R.P. 580=1938 P.W.N. 741=A.I.R. 1938 Pat. 181.**

——**Sch. III, Art. 3**—*Applicability and construction—Strict construction— Transferable occupancy holding—Purchase by mortgagee in execution of decree on mortgage—Suit for possession against prior landlord purchaser in execution of money decree against mortgagor-tenant—Limitation—Starting point.*

The provision as to the special period of limitation contained in Sch. III, Art. 3, B. T. Act, must be construed as other statutes prescribing limitation of suits and actions are construed, strictly against the party seeking to apply the same. The well-settled general rule, that the statute of limitation will not run against a mortgagee purchaser, at a sale in execution of a decree on his mortgage against his mortgagor, until the ownership in, and beneficial title to, the land vested in him for the first time under the decree and sale on his mortgage, cannot be completely ignored in applying the provisions of Art. 3. Sch III, B. T. Act. Nor can a landlord purchasing his tenant's holding at a sale in execution of a money decree against his tenant altogether ignore the rights accruing by a transfer by way of mortgage of a tenancy that is transferable, and defeat the rights of such a mortgagee in view of a special provision as to limitation of suits of a particular nature. such as is contained in Sch. III, Art. 3. (*Guha and Lodge JJ.*) Gosta Behari Pramanik *v.* Amiya Kumar Das **63 Cal. 503=165 I.C. 135=9 R.C. 346=40 C.W.N. 135.**

——**Sch. III, Art. 3**—*Applicability—Dispossession by landlord as auction-purchaser in execution sale under money decree—Suit within two years—If necessary.*

The fact that a landlord dispossesses his occupancy tenant as auction-purchaser of the holding,

at a sale in execution of a money decree against the tenant cannot take the case out of the operation of Art. 3, Sch. III of the B. T. Act. Again the mere fact that the dispossession is brought about by the process of the Court cannot take away the case from the operation of Art. 3, because the responsibility for the dispossession is on the landlord who resorts to the process of the Court as a mode of effecting ouster. The dispossessed raiyat must in such a case bring his suit within two years of the dispossession. (*Nasim Ali and Henderson JJ.*) Sheikh Alam *v.* Atul Chandra Roy **163 I.C 84=8 R.C. 686=40 C.W.N. 173=A I R. 1936 Cal. 299**

———**Sch. III, Art. 3**—*Applicability—Mortgage of transferable occupancy holding—Purchase of holding by co-sharer of land in execution of money decree and actual possession for over two years—Subsequent purchase by mortgagee in execution of his mortgage decree—Suit for actual possession after delivery of symbolical possession—Limitation.*

Plaintiffs were mortgagees of a holding of a *raiyat* who had transferable occupancy right in the holding mortgaged. They obtained decrees on the mortgage and purchased the holding in execution of the decrees and took symbolical delivery of possession through Court on 20-8-1927. When they attempted to take actual possession, they were resisted by the defendant who set up title as a co-sharer landlord who had purchased the holding at a sale in execution of a money-decree against the *raiyat* which he had obtained. The defendant, as such purchaser had taken actual delivery of possession on 25-6-1924 and remained in possession thereafter keeping the *raiyat* out of possession. Plaintiffs thereupon instituted suits for possession on 17-8-1929.

Held, that the special provision as to limitation contained in Art. 3 of Sch. III of the B. T. Act was not applicable to the suits, and that the fact that the defendant (co-sharer landlord) had been in possession since 25-6-1924 did not and could not amount to dispossession of the plaintiffs within the meaning of Art. 3, Sch. III, B. T. Act, as plaintiffs had never been in, and had no right to possession before 20-8-1927. (*Guha and Lodge, JJ.*) Gosta Behari Pramanik *v.* Amiya Kumar Das. **63 Cal. 503=165 I.C. 135=9 R.C. 346=40 C.W.N 135.**

———**Sch. III, Art. 3**—*Applicability—Occupancy holding—Tenant losing land by diluvion—Subsequent reformation — Proceedings by landlord under S. 145, Cr. P. Code—Finding of taking of possession by landlord on re-appearance—Suit by tenant for declaration of occupancy right and possession—Limitation.*

Where a tenant loses his land by diluvion, and it is found in proceedings under S. 145, Cr. P. Code, that the landlord took possession of the land on its re-appearance, there is no dispossession of the tenant by the landlord; and a suit by the tenant for a declaration of his occupancy rights in the land and for possession does not fall under Art. 3, Sch. III of the Bengal Tenancy Act. (*Agarwala and Madan, JJ.*) Rudra Narain Singh *v.* Kedar Nath Singh. **170 I.C. 754=3 B.R. 762=10 R P. 148=18 Pat.L.T. 477=1937 P.W.N. 526=A.I.R. 1937 Pat. 458.**

———**Sch. III, Art. 3**—*Applicability—Suit for possession—No allegation that landlord instigated dispossession—No evidence to prove landlord responsible for his dispossession — Landlord denying any dispute with plaintiff—Limitation.*

Where in a suit for possession of a holding the plaintiff stated in the plaint that he was dispossessed by the defendants third persons claiming land, and he did not allege that the defendant landlord instigated or assisted such third persons in his dispossession, and no evidence was adduced by him to show that the landlord was responsible for his dispossession, but, on the contrary, the landlord denied that there was any dispute with the plaintiff.

Held, that the suit was governed by the general law of limitation and not by the special period of limitation prescribed by Art. 3, B. T. Act. (*Agarwala and Madan, JJ.*) Shive Saran Rai *v.* Sukhdeo Rai. **4 B.R. 20=171 I.C. 317=10 R. P. 192=A.I.R. 1937 Pat. 418.**

———**Sch. III, Art. 3**—*Applicability—Usufructuary mortgage by raiyat—Mortgagee in possession—Dispossession by landlord—Suit by mortgagee for possession—Limitation.*

The provisions of Art. 3 of Sch. III of the Bengal Tenancy Act are attracted if a raiyat wants to recover possession by a suit from his landlord who has wrongfully dispossessed him from his holding, whether such dispossession be by the landlord as such or as auction-purchaser of the holding at a sale in execution of a money-decree against the tenant and taking possession through Court. A usufructuary mortgagee who is in possession of the holding at the time of such dispossession is also hit by Art. 3, Sch. III, and must bring a suit for ejectment against the landlord within the time prescribed by Art. 3, in as much as he has a right to put an end to the trespass by the landlord. (*Nasim Ali and Henderson, JJ.*) Sheikh Alam *v.* Atul Chandra Roy **163 I.C. 84=8 R.C. 686=40 C.W.N. 173=A.I.R. 1936 Cal. 299.**

———**Sch. III, Art. 3**—*Construction—"Dispossession"—Meaning of—Money decree against tenant in favour of co-sharer landlord—Sale of holding in execution—Purchase by co-sharer landlord and delivery of possession—If "dispossession."*

A dispossession effected by the act of delivery of possession by the Court to a co sharer landlord as auction-purchaser of the lands appertaining to the tenancy of his tenant at a sale in execution of a money-decree is not dispossession by the landlord within the meaning of Art. 3, Sch. III of the Bengal Tenancy Act. (*Guha and Lodge, JJ.*) Gosta Behari Pramanik *v* Amiya Kumar Das. **63 Cal. 503=165 I.C. 135=9 R.C. 346=40 C.W.N. 135.**

———**Sch. III, Art. 6, Proviso**—*Interpretation.*

The two arms of the proviso to Art. 6, Sch. III of the B. T. Act. should be read together, and it comes to this that normally the period of limitation for pursuing execution is three years from the date of the decree. But if in the course of that period a sale has taken place, and subsequently that sale has been set aside, the intervening period is not to be counted, if he then desires to go on with the execution, provided there is no further break in the continuity of the execution proceedings due to his own inaction. Otherwise, the total period of time within which the decree-holder must set in motion proceedings for enforcing his decree is a period of three years. (*Costello and Biswas, JJ.*) SIDDESWAR GHOSE *v.* PANCHANAN. I.L.R. (1938) **2 Cal. 125** =177 I.C. 110=11 R.C. 204=42 **C.W.N. 485**= **A.I.R. 1938 Cal. 390.**

[Reversing A.I R. 1937 Cal. 490.]

——**Chap. XIV**—*Applicability—Suit for rent by landlord—Transfer of holding by tenant pending suit—Transferee not impleaded—Decree—If rent decree—Execution—Claim by transferee under O. 21, R. 58, C. P. Code—Maintainability.*

Where after the institution by the landlord of a suit for recovery of the rent of an occupancy holding from the tenant, the latter transfers the holding to another, and the landlord, though aware of the transfer, does not make the transferee a party to the suit, the decree passed against the defendant on record is not a rent decree which can be executed under the procedure of Ch. XIV of the Bengal Tenancy Act. When, therefore, the landlord attempts to execute the decree under the special procedure provided for in Ch. XIV, the transferee of the holding is entitled to object to the same and prefer a claim under O. 21, R. 58, C.P. Code.

Obiter.—The landlord can possibly preserve his security of the holding by adding the transferee in the execution proceedings. (*R. C. Mitter, J.*) MAHARAJ BAHADUR SINGH *v.* NARI MOLLANI. **63 Cal. 1117**=165 I.C. 17=9 R.C. 363=**40 C.W.N. 683**=**A.I.R. 1936 Cal. 279.**

——**Chap. XIV**—*Rent decree—Transferee of putni tenure not recognised by landlord—Suit for rent against putnidar—On objection by latter, transferee impleaded as party defendant—Decree obtained against putnidar alone—If rent decree.*

So long as a Transferee of a putni tenure is not recognised by the landlord and his name is not registered in the landlord's *sherista* in conformity with the provisions of Ss. 5 and 6 of the Putni Regulation, the latter may sue the original putnidar for rent and put the tenure up to sale in execution of the decree without any notice to the assignee. The mere fact that in the rent suit, on objection by the putnidar, the landlord impleads the transferee as a party defendant cannot be construed as an act of recognition on the part of the landlord. If, therefare, in such a suit the landlord obtains a decree against the original putnidar alone, the decree can be executed as a rent decree by sale of the tenure under the provisions of Chap. XIV of the B. T. Act. (*Mukherjea, J.*) RADHARANI DEBI *v.* BIJOY CHAND MAHATAP. **I.L.R. (1938) 2 Cal. 527**=**180 I.C 716**=**11 R.C. 725**=**42 C.W.N. 890**=**A.I.R. 1939 Cal. 257.**

BENGAL VILLAGE CHOWKIDARI ACT (VI OF 1870)—*Mokarari grant of Chowkidari Chakran lands—Resumption by Government and Settlement with zamindar—Latter settling with new persons—Pesh Khash included in jama—Mokarari—If bars claim of zamindar to fair and equitable rent.*

The plaintiff was the proprietor of estate to which the Chowkidari Chakran lands appertain. The defendant was a Mokararidar in respect of these lands by virtue of some grants made by the predecessor in interest of the plaintiff. The lands were resumed and were settled by the Collector under Chowkidari Act VI of 1870 with the plaintiff. The plaintiff after taking settlement from the Collector made new settlement of these lands with certain persons and instituted suits for settlement of fair and equitable rent in respect of these lands.

Held, that the mere fact that Pesh Khash which was being paid by the Chowkidars to the Zamindars, was included in the jama and the Mokararidar was given the right to realise it from the Chowkidars, would not go to indicate that the Zamindar at the time of the grants gave up his right to get fair rent for these lands arising out of events which were not contemplated then. The grants do not take away the right of Zamindar to get fair and equitable rent for the disputed lands after they have been resumed. 45 I.A. 162 and 52 I.A. 355, Ref. (*Nasim Ali and Henderson, JJ.*) HRISHIKESH LAW *v.* SATISH CHANDRA PAUL. **170 I.C. 634**=**10 R.C. 160**= **A.I R. 1936 Cal. 203.**

——Chowkidari jagir—Liability to resumption. *See* GRANT—CHOWKIDARI JAGIR. **17 Pat. 315.**

——**S. 50**—*Chowkidari chakran lands lying in plaintiff's estate wrongly transferred to defendant —No contribution paid to chowkidari fund of the union in which they were originally included—Lands subsequently transferred by Collector to plaintiff—Suit by latter for possession—Limitation—Starting point—Limitation Act, Art. 144.*

In 1907, certain Chowkidari Chakran lands lying within the plaintiff's estate were by a mistake transferred by the Collector to the defendant under S. 50 of the Village Chowkidari Act and without any order under S. 61. These lands contributed nothing to the Chowkidari fund of the union within which they were originally included. They were subsequently resumed by Government and were transferred to the plaintiff by an order of Collector, dated 23rd January, 1920, under S. 50 of the Village Chowkidari Act. The said order was communicated to him on March 8, 1920. On March 7, 1932, the plaintiff filed a suit for possession of these lands on the basis of that order. The defendant pleaded that the plaintiff's claim was barred by limitation as he was in adverse possession of the disputed lands from 1907.

Held, that as the disputed lands contributed nothing to the chowkidari fund of the union in which they were originally included, the right of the chowkidars of that union to possess them in lieu of their services to that union was not affected by the order of transfer in 1907, and that the plaintiff's right to possess could not, therefore, accrue so long as the chowkidar's right to possess continued, and that as the right of the chowkidars to possess the lands continued till 1920 when the order of transfer in favour of the plaintiff was passed, the plaintiff's right to take possession did not arise before 1920.

Held, further, that time began to run not from the date of the order of transfer in favour of the plaintiff but from the issue of that order and the plaintiff's suit, therefore, was not barred under Art. 144 of the Limitation Act. (*Nasim Ali and R. C. Mitter, JJ.*) NARATTAM DEY *v.* DEBENDRA LAL KHAN. **173 I.C. 439**=**10 R.C. 518**=**41 C.W. N. 763**=**A.I.R. 1937 Cal. 343.**

——**S. 55**—*Purchase at sale under—When takes effect.*

A purchase at a sale held under S. 55 of Act VI of 1870 for arrears of Chaukidari assessment takes effect on the day after that fixed by the Collector in the sale notification for payment of the arrears. (*Edgley, J.*) KANTI CHANDRA *v.* SUCHITRA SUNDARI. **I.L R. (1939) 2 Cal. 285=185 I.C. 560=12 R. C. 385=43 C.W.N. 855=A.I. R. 1939 Cal. 606.**

BENGAL VILLAGE SELF-GOVERNMENT ACT (V OF 1919), Ss. 6, 7 and 101 and Rr. 6, 7 and 9—*Person appointed member of Union Board under S. 6 (3)—Such person's name appearing on list of candidates duly qualified under S. 7 (2) to be member of Board—Suit challenging his appointment—Jurisdiction of Civil Court.*

Under R. 6 the Circle Officer who is appointed to decide the claims and objections and to prepare the list of voters is the only person who is to determine as to who is entitled to vote at an election of members of the Union Board. Under R. 6 his decision is final. So also under R. 9 he is the only person who can decide the question of residence of any person within the Union and his decision as to residence of any person is also final. Where therefore the name of a person appointed to the Union Board as a member appears on the list of candidates duly qualified under S. 7 (2), on a decision arrived at by the Circle Officer or tribunal appointed for the purpose under the Act and after proper proceedings taken in accordance with the Act, such person is a duly qualified person to be appointed a member of the Board under the provisions of S. 6 (3) of the Act. The appointment to the Union Board of such person is proper and a suit in ordinary Civil Court to challenge his appointment cannot lie on account of the exclusive jurisdiction bestowed by the Act on the Circle Officer to decide as to who is entitled to vote at the election of the Union Board. 31 Bom. 604, Appl. (*Derbyshire, C. J. and D. N. Mitter, J.*) SAJANI KANTA GHOSAL *v.* BISTOOPADA MEYUR. **41 C.W.N. 706=169 I.C. 486=10 R.C. 5=A.I.R. 1937 Cal. 277.**

———**S. 6 (3)**—*Appointment of member to Union Board by Dt. Magistrate—Suit challenging validity—Maintainability.*

It cannot be said that the District Magistrate is the final authority in the matter of the eligibility of a person appointed by him as a member of the Union Board under S. 6 (3) of the Bengal Village Self-Government Act and that the appointment by him of a particular person is a decision by him that the latter is qualified to be appointed, for that view would nullify the proviso to S. 6 (3) of the Act. Accordingly, a suit challenging the validity of such appointment is maintainable in a Civil Court. (*R. C. Mitter, J.*) SURENDRA NATH ROY *v.* PROSAD CHANDRA CHAKRABUTTY. **41 C. W.N. 356.**

———**S. 7**—*Construction—Joint undivided family—Father and son having joint interest in property—Cess paid by father—Right of son to vote.*

Where a father and son having joint interests in certain inherited property live together in one house, the son being supported by the father, it cannot be said that they are technically members of a joint family. Even if they are to be regarded as such, when the cess payable as the union rate is paid not by the family but by the father, the son is not qualified to be a voter, even if the father nominates the son to take his place and allows him to vote in his place on behalf of the joint family. (*Jack, J.*) KASIRUDDIN *v.* MAFFISUDDIN AHMAD. **63 Cal. 1163=165 I.C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

———**S. 7 (3)**—*Union Board election—Right of resident to vote—Title to place of residence—If essential—Son living in father's house—Right to vote.*

Under S. 7 (3) of the Bengal Village Self-Government Act, a person claiming to be a voter on the ground of residence within a Union Board area must not only live within the union, but must also have title to the place of residence in which he lives. Otherwise he will not be eligible as having a place of residence within the union. Consequently a son who lives with his father in a house which belongs to the father cannot claim to be a voter by reason of such residence. (*Jack, J.*) KASIRUDDIN *v.* MAFFIZUDDIN AHMAD. **63 Cal. 1163=165 I C. 354=9 R.C. 383=40 C.W.N. 753=A.I.R. 1936 Cal. 295.**

———**S. 16**—*Removal of Chairman of Union Board—Jurisdiction of Civil Court—Bengal Local Self-Government Act, S.* 120.

Where the action taken by the District Board under S. 16 of the Bengal Village Self-Government Act in removing the plaintiff from the office of the Chairman of a Union Board to which he was elected was without jurisdiction, the Civil Court has jurisdiction to grant the plaintiff a declaration in his favour. There is nothing in S. 120 of the Bengal Local Self-Government Act to suggest that the ordinary jurisdiction of the Courts to give the plaintiff a declaration to which he is entitled has been taken away. (*Henderson, J.*) DISTRICT BOARD, CHITTAGONG *v.* EMDADAL HOQUE. **44 C.W.N. 362=A.I.R. 1940 Cal. 305.**

———**S. 27 (1) (b)**—*Construction of public drains—Issue of notice upon owner or occupier—If mandatory.*

It is not mandatory for the Union Board to issue any written notice upon the owner or occupier of the land under S. 27 (1) (*b*) of the Bengal Village Self-Government Act before undertaking any work in connection with the construction of public drains. (*Edgley, J.*) IMAMUDDIN *v.* MOQBUL AHAMMED. **43 C.W.N. 555.**

———**S. 31**—*Applicability*—Halot *used as public pathway during dry season and as public boatway during rainy season—If "waterway"—Power of Union Board to raise level of and obstruct boat passage.*

A *halot* which is private property and which is used as a public pathway in dry season and as a public boat passage during the rainy season does not come under the operation of S. 31 of the Bengal Village Self-Government Act as a waterway. A Union Board has therefore no authority to exercise control over the *halot* purporting to act under S. 31. Even assuming that S. 31 applies, and that the Union Board has the control and power to make improvements in regard to the *halot*, such control and power to make improvement can only be exercised in a manner consistent with the rights of user of the members of the public. When the public have acquired a right to use the *halot* as a boat passage during the rainy season, such right cannot be interfered with, and the Board cannot, under its powers under S. 31, raise the level of the passage so as to totally obstruct the passage of boats. (*Guha and Bartley, JJ.*) LALIT MOHAN SAHA *v.* DEBENDRA-

NATH THAKUR. **63 Cal. 1221=165 I.C.281=9 R. C. 367=40 C. W. N. 838=A. I. R. 1936 Cal. 444.**

——S. 38—*"Assessment on circumstances within the union"—Meaning of.*

The words "assesssment on circumstances within the union" in S. 38 of the Village Self-Government Act must not be construed to mean that assessment should be made only on the income derived from properties within the union. *(Jack, J.)* TARINI CHARAN KUNDU *v.* SAGARKANDI UNION BOARD. **172 I.C 548=10 R.C. 393=41 C. W.N. 802=65 C.L.J. 337=A.I.R. 1937 Cal. 405.**

——S. 63—*Member of Union Board acting in pursuance of resolution of that Board—Prosecution for such action—Maintainability.*

If an officer or member of a Union Board acts in pursuance of a resolution of that Board duly and properly passed, his prosecution in respect of such action is barred under the provisions of S. 63 of the Bengal Village Self-Government Act, unless the prosecution shows that he secured the passage of the resolution by improper means or that otherwise he was acting *mala fide* or merely in his own interest. *(Edgley, J.)* IMAMUDDIN *v.* MOQBUL AHAMMAD. **43 C.W.N. 555.**

——S. 63—*Protection under—Union Board, when can avail—Encroachment by Union Board on private property—Suit for its removal If lies.*

Before the Union Board can avail themselves of the advantage of S. 63 of the Village Self-Government Act, it is necessary for them to show that the act complained of was done both lawfully as well as in good faith with due care and attention under the provisions of the Act. If the land is not a public road but the private property of an owner, an act of encroachment upon it by the union Board, cannot be said to be a lawful act done under the provisions of the Act, even though they may have an honest belief that it was really vested in them. S. 63, therefore, does not protect the Union Board from a suit for removal of an encroachment by them upon private property. *(Mukherjea, J.)* KEDARUDDIN AHAMAD *v.* SAMSUR MATA. **41 C.W.N. 769=169 I.C. 771=10 R.C. 54=A.I.R. 1937 Cal. 355.**

——S. 64—*Applicability—Suit to establish easement right.*

A suit against the Union Board for the establishment of easement rights does not come within the purview of S. 64 of the Village Self-Government Act. The suits contemplated by that section are those where the plaintiff claims damages or compensation for some wrongful act committed by the Union Board or their officers in the exercise or honestly supposed exercise of their statutory powers. *(Mukherjea, J.)* KEDARUDDIN AHMED *v.* SAMSUR MATA. **169 I.C. 771=10 R.C. 54=41 C.W.N. 769=A.I.R. 1937 Cal. 355.**

——S 64—*Benefit of protection under—If limited to acts done* bona fide.

The protection afforded by S. 64 of the Bengal Village Self-Government Act is not confined to acts done by the Board or a member thereof *bona fide* in the due discharge of duty. The Board or member is entitled to protection of S. 64 even when the acts complained are alleged to be done maliciously. *(M.C. Ghose, J.)* HEM CHANDRA ROY CHOUDHURY *v.* TARAPADA SANYAL. **40 C. W N. 500.**

——S. 64—*Limitation of three months—Applicability—Union Board not properly constituted—Right to claim benefit of section.*

The three months' limitation provided by S. 64 of the Bengal Village Self-Government Act is applicable, if the Board concerned is actually functioning as such on the date of the Act complained of, even if the Board happens to be not duly constituted. Even if there be a legal flaw in the appointment of the Board or of its members, benefit of the section can be claimed by the Board and the members. *(M.C. Ghose, J.)* HEM CHANDRA ROY CHOUDHURY *v.* TARAPADA SANYAL. **40 C.W.N 500.**

——Ss. 71 and 93—*Conviction by Union Bench—Revision—Jurisdiction of High Court—Transfer of case pending before such Bench—Power of High Court.*

The High Court has no jurisdiction to interfere in revision under S. 439, Cr. P. Code, with an order of conviction by a Union Bench. Nor has it power to transfer a criminal case pending before such Bench. *(Bartley and Khundkar, JJ.)* SITALPADA SARKAR *v.* PULIN BEHARI GURE. **42 C. W.N. 1068.**

——S. 79—*Order of dismissal under—Bar of fresh suit.*

The order of dismissal in the presence of the defendant under S. 79 does not bar a fresh suit on the same cause of action, the fresh suit can be instituted either in the Union Court or in a Civil Court as the plaintiff chooses. *(Ghose, and Mukerjee, JJ.)* MUHAMMAD ABDUL KERAM *v.* DABIRUDDIN MUHAMMAD. **166 I.C. 1004=9 R.C. 648=64 C.L.J. 520=41 C W.N. 180=A.I.R. 1937 Cal. 59.**

——Ss. 93 and 71—Conviction by Union Bench—Revision—Jurisdiction of High Court—Transfer of case pending before such Bench—Power of High Court. *See* BENGAL VILLAGE SELF-GOVERNMENT ACT, Ss. 71 AND 93. **42 C.W.N. 1068.**

——S. 101, Rr. 6, 8, 9 and 38—*Eligibility of candidate for election—Jurisdiction of Civil Court.*

Rr. 6, 8, 9 and 38 framed under S. 101 of Bengal Village Self-Government Act, bar the jurisdiction of a Civil Court to try a question whether a particular person was a qualified voter or not and consequently whether his election was void on the ground of his not being a qualified voter. The Circle Officer is the authority or special tribunal constituted to decide the question of a person's eligibility to vote The authorities constituted by the Bengal Self-Government Act are the final uthorities in the matter of conducting elections after deciding the eligibility of voters, on objections raised before them or without objection, and the provisions contained in the Act bar the jurisdiction of a Civil Court to try the question of eligibility or otherwise of a candidate for election. A.I.R. 1935 Cal. 10, Rel. on. *(Guha and Bartley, JJ.)* PURNA CHANDRA CHOWDHURY *v.* ALEP BISWAS. **161 I.C. 183=8 R.C. 488=62 C.L.J. 538=40 C.W.N. 543=A.I.R. 1936 Cal. 64.**

——S. 101 (2)—*Rule 9 of Rules framed under—Qualification of candidates under S. 7 (2)—Deci-*

sion of circle officer—Jurisdiction of Civil Court to interfere.

Under R. 9 of the Rules framed by the Local Government under S. 101 (2) of the Village Self-Government Act, the decision of the circle officer as to whether the candidates are duly qualified under S. 7 (2) of the Act is final and the Civil Court has, therefore, no jurisdiction to interfere with his decision. (*Jack, J.*) PRIYANATH GHOSAL *v.* TARAK NATH DUTTA. **173 I C. 275=10 R.C. 495=65 C L.J. 353=A I.R. 1937 Cal 727.**

——**S 101 (2) (a) and Rr. 6, 7, 8 and 9**—*If* ultra vires.

Rules 6, 7, 8 and 9 of the Rules framed by the Local Government are not *ultra vires.* (*R. C. Mitter, J.*) SURENDRA NATH ROY *v.* PRASAD CHANDRA CHAKRABUTTY. **41 C.W.N. 356.**

——**S. 101 (2) (a) and Rr. 6, 8 and 9**—*Election of member to Union Board—Suit challenging its validity—Jurisdiction of Civil Court.*

Rules 6, 8 and 9 of the Rules framed by the Local Government have made the circle officer the exclusive tribunal for deciding questions bearing upon qualifications of voters and of candidates who offer themselves for election to the Union Board and no suit would lie in a Civil Court for setting aside an election or declaring an election invalid on the ground that persons appearing on the voters' list and who had voted for the candidate returned had not the qualification of voters as defined in S. 7 (1) of the Bengal Village Self-Government Act or that the returned candidate whose nomination had been accepted by the circle officer, had not the qualification prescribed in S. 7 (2) of that Act. In a case not governed by Act VIII of 1935, a suit for declaring an election invalid on other grounds (*e.g.*) for corrupt practice, would lie in a Civil Court. (*R.C. Mitter, J.*) SURENDRA NATH ROY *v.* PROSAD CHANDRA CHAKRABUTTY. **41 C.W.N 356.**

BENGAL WAKF ACT (XIII OF 1934), S 40—*Power to appoint temporary* mutwalli—*Exercise of.*

The power of the Commissioner to appoint an *ad interim mutwalli* under S. 40 of the Wakf Act can be invoked only if there is no *mutwalli* already. The power of appointing a temporary *mutwalli* can be exercised subject to any order of a competent Court. (*M C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* UMME SALIMA. **I.L.R. (1937) 1 Cal 673=171 I C. 59=10 R.C. 224=65 C.L.J. 340=41 C.W.N. 382=A.I.R 1937 Cal. 150.**

——**S. 70**—*Applicability—Proceedings outside Bengal.*

S. 70 of the Bengal Wakf Act has no application to proceedings outside the province of Bengal. (*S. K. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* MESSRS. NARSING CHANDRA DAW & CO. **I.L.R. (1939) 1 Cal 462=43 C.W.N. 415=185 I.C. 438=12 R.C. 366=A.I.R. 1939 Cal. 643.**

——**Ss. 70 and 71**—*If retrospective.*

Ss. 70 and 71 have no retrospective operation and do not apply to suits pending at the time when the Act became law. (*M. C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* UMME SALIMA. **I L.R (1937) 1 Cal. 673=41 C.W.N 332=171 I.C. 59=10 R.C. 224=65 C.L.J. 340=A.I.R. 1937 Cal. 150.**

——**Ss. 70 and 72**—*Petitions by* mutwallis *under O 21, R. 58, C. P. Code. dismissed for default—Right of Commissioner to present similar petition on notice from Court.*

Although petitions under O. 21, R. 58, C. P. Code, previously filed by successive *mutwalli* were dismissed for default, the Commissioner of wakf is entitled to file a similar petition of claim on receipt of notice under S. 70 of the Bengal Wakf Act, and he is entitled to have his petition heard on the merits. (*S.K. Ghose and Nazim Ali, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* GAGAN CHANDRA DAS **I.L R (1938) 2 Cal. 187=180 I. C. 782=11 R. C 749=42 C. W. N. 616=A.I R. 1939 Cal. 20.**

——**S 70 (1)**—*"Suit or proceeding"—Meaning of—If includes appeal also.*

The words "suit or proceeding" in S. 70 (1) of the Bengal Wakf Act must be regarded in their ordinary sense and cannot be held to include an appeal. (*D N. Mitter and Patterson, JJ.*) THE COMMISSIONER OF WAKFS, BENGAL *v.* MAHMUDA BIBI. **166 I.C. 212=9 R C. 488=40 C.W.N. 816=A.I.R. 1936 Cal. 480.**

——**Ss. 70 (4) and 83 (a) and (b)**—*Scope and effect of—Appeal pending when Act came into force—Order appointing receiver by consent of parties—Right of Commissioner of wakfs to apply to vacate.*

Two appeals were pending in the High Court against the decree of a Subordinate Judge, the question in controversy being whether certain properties were wakf. In those appeals an application was made for appointment of a receiver on 2—3—1936, *i.e.*, a day after the Bengal Wakf Act came into force; and by consent a receiver was appointed during the pendency of the appeals. Subsequently the Commissioner of Wakfs appointed under the Act applied to the High Court under S. 70 (4) of the Act for vacating the order appointing the receiver.

Held, that the suit having been instituted long before the promulgation of the Act, any right or rights acquired by the parties before the promulgation of the Act could not be affected by the provisions of the Act, and that the application by the Commissioner for wakfs under S. 70 (4) was therefore incompetent in view of S. 83 (*a*) and (*b*). (*D. N. Mitter and Patterson, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* MAHMUDA BIBI. **166 I.C 212=9 R.C. 488=40 C.W.N. 816=A.I. R. 1936 Cal. 480.**

——**S. 71**—*Construction—'Any other person.'*

Quaere.—The words 'any other person' are wide enough to include a mutawalli. (*M. C. Ghose and Mukherjea, JJ.*) COMMISSIONER OF WAKFS, BENGAL *v.* UMME SALIMA. **I.L.R. (1937) 1 Cal. 673=41 C.W.N. 382=171 I.C. 59=10 R. C. 224=65 C.L J. 340=A.I.R. 1937 Cal 150.**

——**S. 71**—*Property not admitted to be wakf—Right of Commissioner to intervene.*

Per *Nasim Ali, J.*—S. 71 of the Bengal Wakfs Act enables the commissioner of Wakfs to intervene and to defend a suit or a proceeding although it is in respect of property which is not admitted by all the parties to the suit or proceeding to be wakf. If, therefore, a person attaches certain wakf property in execution of a decree for money obtained against the mutwalli personally on the allegation that it is not wakf, the commissioner can intervene and oppose the attachment and sale of the property on behalf of and in the interests of the wakf. *(S. K. Ghose and Nazim Ali, JJ.)* Commissioner of Wakfs, Bengal *v.* Gagan Chandra Das. **I.L.R. (1938) 2 Cal. 187=42 C.W.N.616=180 I.C. 782=11 R.C. 749=A.I.R. 1939 Cal. 20.**

——**Ss. 71 and 83**—*Suit under S. 92, C. P. Code pending when Act came into force—Right of Commissioner to intervene.*

S 83 of the Bengal Wakf Act exempts all suits in respect of rights which accrued before the Act, from the operation of the Act. The Commissioner has, therefore, no right to intervene under S. 71 of the Act in a suit relating to a wakf estate under S. 92, C. P. Code, whether such suit is commenced before or after the Act, if it is in respect of a right or for enforcement of an obligation which is antecedent to the passing of the Act. The right to have a scheme framed or accounts examined in a suit under S 92, C. P. Code does not flow from the preliminary decree but accrues before it and originates from facts which constitute the very foundation of the suit itself, and the preliminary decree simply records the finding of the Court. *(M. C. Ghose and Mukherjea, JJ.)* Commissioner of Wakfs, Bengal *v.* Umme Salima. **I.L.R. (1937) 1 Cal. 673=171 I.C. 59=10 R.C. 224=65 C.L.J. 340=41 C.W.N. 382=A I.R. 1937 Cal. 150.**

——**S. 73 (2)**—*Suit under—Receiver—Power of Court to appoint.*

It is well within the power of a Judge in dealing with a suit under S. 73 (2), Bengal Wakf Act, 1934, to appoint a receiver pending the hearing of the suit. *(Costello, Ag. C.J. and Edgley, J.)* Syed Fateh Ali Mirza *v.* Sajjad Hussain. **173 I.C. 921=10 R.C. 590=A.I.R. 1937 Cal 740.**

BERAR ALIENATED VILLAGES TENANCY LAW, S. 22—*Right of hypothecation—Limits.*

The right of hypothecation contemplated by S. 22 of the Berar Alienated Villages Tenancy Law, could only be exercised against those crops which had been reaped or gathered and were deposited or stored, and only on account of an arrear which has not been due for more than one year. *(Pollock, J.)* Ramchandra Govind *v.* Mishrimal Chandanmal. **173 I.C. 800=10 R.N. 325=A.I.R. 1938 Nag 202.**

——**S. 76 (3)**—*Suit for arrears of rent due by ante alienation tenant—Limitation.*

According to S. 76 (3) of the Berar Alienated Villages Tenancy Law, the period of limitation for a suit by a landlord for an arrear of rent due by an ante-alienation tenant is three years and this is so notwithstanding anything contained in Arts. 120 and 132 of the Limitation Act. *(Pollock, J.)* Ramchandra Govind *v.* Mishrimal Chandanmal. **173 I.C. 800=10 R.N. 325=A.I.R. 1938 Nag. 202.**

BERAR COTTON MARKET RULES, R. 56 (3)—*Who are all affected by.*

Sub-R. (3) to R. 56 of the Berar Cotton Market Rules, prohibits any person from buying or selling cotton within the market proper unless he is a registered cotton trader. The word 'person' must comprise both the ostensible and the real buyer or seller. The rule therefore affects both the cotton trader and the Adatya or broker. A firm or a registered company would also seem to be included in the word 'person'. *(Niyogi, J.)* Chiranji Motilal *v.* Cotton Market Committee. **188 I.C. 77=12 R.N. 315=1940 N.L.J. 174=A.I.R. 1940 Nag. 226.**

BERAR INAM RULES (1859)—*Assignment of share in inam certificate—Failure of heirs—Devolution.*

If the share assigned to a grantee in the inam certificate amounts to a distinct and independent grant it will on failure of heirs of the grantee, escheat to Government. But, if it is merely one carved out of a major grant it would revert back to the major grant and merge in it. *(Stone, C.J. and Niyogi, J.)* Shriram Deorao *v.* Banya Bai. **I.L.R (1940) Nag. 244=1940 N.L.J. 78=A.I.R. 1940 Nag. 129**

——*Nature of Inam estates in Berar—Alienability—Onus,*

As Inams in Berar are *prima facie* held in restricted tenure, the onus is on those who allege that a particular inam was to be treated as freehold and alienable to prove that Cl. (1) in the classification given in R. II relates to personal Jagirs and cl. (3) to personal or subsistence grants. If the grant is one of Cl. (3) to which R. V applies and the inam has not been enfranchised, it is inalienable. *(Grille and Niyogi, JJ.)* Mahadeo Bhagwan *v.* Harihar. **I.L.R. (1940) Nag. 89=186 I.C. 375=12 R.N. 199=1939 N.L.J. 548=A.I.R. 1940 Nag. 108.**

——*Scope of—Enfranchisement following from grant—Rules, if to be applied.*

The Inam rules lay down the general principles of succession and enfranchisement, and if the act of enfranchisement follows from the terms of the Inam grant itself, it is not necessary that it should be brought about by the exact operation of the rules. *(Roughton, F.C.)* Mir Ahsanalli *v.* Mst. Hussainbi. **1938 N.L.J. 248.**

——**R. IV**—*Inam—Service grant—Succession to—Sister and Father's brother's son—Preferential right—Watan belonging to family—Succession to.*

A person who is disqualified by reason of sex from performing a particular service cannot be considered a successor to an Inam within the meaning of R. IV of the Berar Inam Rules. In the case of an Inam grant for the purpose of performance of Abhishek to a Maruthi Samsthan, it is an essential feature of the service grant that it should be held by the person who performs the service. A sister of the deceased certified holder, though she is a nearer heir than the father's brother's son for purposes of Hindu Law, cannot be held to be the successor for the purposes of R. IV since she cannot perform the service herself. As the sister goes out of the family on her marriage she cannot inherit a watan which belongs to the family. A watan is not the same thing as an Inam. *(Roughton, F.C.)* Harnabai *v.* Gangadhar. **1938 N.L.J. 22.**

——**R. IV**—*Service grant to temple—Mahant's powers of alienation.*

Land given as a service grant to a temple under R. IV of the Berar Inam Rules can be alienated by the Mahant of the temple as under the general law, for the period of the tenure of his office, as the Rules place no limitation on alienation. If the Mahant makes a permanent alienation of the property, it binds him although it does not bind his successor. It is open to his successor when he succeeds to the office, either to ratify his predecessors action, or to set it aside. But any rights of resumption which Government may choose to exercise are unaffected. (*Bose, J.*) BHAGWANDAS GURU BADA RAMDAS *v.* PRAYAGDATTA. **171 I. C. 242=10 R N. 100=A.I.R. 1938 Nag. 127.**

——**Rr. V, XI & XV**—*Applicability and scope—Inam grant—Representative of inamdar not applying to Inam Commissioner or getting certificate or paying quit rent—Right to claim protection from attachment.*

An inamdar who claims under a grant from the Crown governed by Rr. V, XI & XV of the Inam Rules in the Berar Code, is entitled to get a certificate giving protection against attachment. But a representative of the grantee—the grant being conferred on the grantee and not upon the person entitled as his representative—who does not apply to the Inam Commissioner or get the certificate given to the inamdar is not entitled to such protection from attachment. Such a representative who is not called upon to pay a quit rent does not receive a free-hold estate as provided by R. V. (*Stone, C J. and Puranik, J.*) LAXMAN *v.* RAMCHANDRA. **I.L R. 1938 Nag. 151=1938 N L J. 48=182 I.C. 232=11 R N. 511=A.I.R. 1938 Nag. 145.**

[On appeal from 161 I. C. 784=8 R. N. 235=A.I.R. 1936 Nag. 29.]

——**Rr. V and VI**—*Scope—Alienation for life by holder of service inam—Effect of.*

An alienation for life by a holder of a service inam does not amount to a realization of the total benefit for himself. The inams covered by R. VI are alienable by the holders thereof for their lives like those covered by R. V, subject to the right of resumption reserved by Government to itself. (*Vivian Bose, J.*) YADEO NILKANTH DESHPANDE *v.* JANKIDAS NARSINGDAS. **170 I. C. 78=10 R.N. 37=A.I.R. 1937 Nag. 202.**

——**R. V. (2)**—*Applicability—Hereditary inams granted in lieu of lands or money stipends.*

The inams granted in lieu of lands or money stipends popularly called hugs and russums of offices, the services of which has either been dispensed with or otherwise discontinued are to be disposed of according to cl. (2) of R. (v) of the Inam Rules, if they are hereditary. (*Stone, C.J. and Niyogi, J.*) SHRIRAM DEORAG *v.* BANYA BAI. **I.L.R. (1940) Nag. 244=1940 N.L.J. 78=A.I.R. 1940 Nag. 129.**

——**Rr. V (3) and (5)**—*Use of ward 'Jahgir' in grant—If precludes its enfranchisement.*

The use of the words "as the Jahgir' in the inam grant does not preclude the inam from being enfranchised. (*Roughton, F. C.*) MIR AHSANALLI *v.* MST. HUSSAINBI. **1938 N.L.J. 248.**

——**Rr. VI (2) and V (2)**—*Applicability—Inam for the service of Deshmukh and maintenance.*

The words in a grant 'service of Deshmukh and maintenance' suggest that the inam is something more than a mere maintenance grant. It falls under R. VI of the Berar Inam Rules and by reason of Cl. (2) of R. VI it is governed by Cl. (2) of R. V, except in so far as that clause is inconsistent with R. VI. (*Roughton, F. C.*) MT. RENUKABAI *In re.* **1938 N.L.J. 258.**

——**R. VI, Cl. (4)**—*Interpretation—Grant in return for services—Services ceasing to be rendered — Continuing of service grant by Inam Commissioner—Nature of estate granted to inamdar.*

Where the original grant of lands was in return for certain services which had now ceased to be rendered and the service grant was continued in perpetuity on the recommendation of the Inam Commissioner on payment of 'one half rates of assessment,' it was held, on an interpretation of Cl. 4 of R. 6 of the Berar Inam Rules which governed the case that the grantee obtained a free hold estate. (*Pollock, J.*) DIGAMBAR *v.* KISHANDAS GOVERDHANDAS. **174 I.C. 84=10 R. N. 340=A.I.R. 1938 Nag. 220.**

BERAR LAND REVENUE CODE (1896)—*Revenue auction sale—Notice of arrears due or of sale to mortgagee—Failure to give—If fatal.*

There is no legal provision requiring notice of arrears due upon or sale of a survey number to be given to a mortgagee of the property proclaimed for sale, though this is desirable and should be done when the mortgage is on record. The mere failure to give such notice in itself in no way affects the legality or propriety of the proceedings. (*Burton, R. M.*) VYANKATRAO *v.* SHANKAR. **20 N.L.J. 177.**

——**S. 4 (12) and (13)**—*Inferior holder and tenant.*

The two terms tenant and inferior holder are not synonymous because the definition of a "tenant", expressly excludes an "inferior holder". (*Subhedar, A.J.C.*) RAMCHANDRA WASUDEO *v.* LAXMAN ANANDRAO. **161 I.C. 784=8 R.N. 235=A.I.R. 1936 Nag 29.**

[*See* on appeal I.L.R. 1938 Nag. 151=1938 N.L.J. 48=A.I.R. 1938 Nag. 145].

——**S. 39 (1), proviso (iv)**—*Scope—Collector's power to review* suo motu.

By reason of proviso (*iv*) to S. 39 (1) of the Berar Land Revenue Code, the Collector has no power to review an order affecting any question of right between private persons except on the application of a party to the proceedings. A Collector reviewing an order *suo motu* acts illegally in the exercise of his jurisdiction. (*Greenfield, F.C.*) SHRIRAM *v.* MAROTI. **20 N.L.J. 222.**

——**Ss. 49 and 83 (1)**—*Lands in Berar—Liability to assessment and enhancement of revenue—Right of Government to assess and enhance revenue—Non-enhancement for long time—Effect—Estoppel—If arises.*

Under S. 49 of the Berar Land Revenue Code, all lands are made liable to pay land revenue, for whatever purpose they are used and wherever they may be situate in Berar, unless exempted by any special contract or any law or rule or order of the Government. All lands are also liable to pay any enhanced assessment imposed in accordance with a survey under S. 83 (1) of the Code. The mere fact that the rent or revenue has not been enhanced for a number of years does not deprive the Government of the right to enhance it, nor does it raise an estoppel against the Government in that respect, as it cannot be said that there is any act or representation emanating from the Government or its agents upon which the holder of land acts. (*Bose, J.*) MAHADEO GANORKAR *v.* SECRETARY OF STATE. **20 N.L.J. 209.**

——S. 95—*Scope—Title entered in record-of-rights—Presumption of correctness—Extent of—Presumption as to entries having been made after due enquiry.*

There is a presumption under S. 95 of the Berar Land Revenue Code of 1898 that the entries in the record-of-rights and certified entries in the mutation register are true until the contrary is proved or a new entry is lawfully substituted for them. The presumption is of the correctness of the title so entered and not merely of the fact that it was asserted on the date of the application for mutation. In the absence of evidence to the contrary it must be presumed that these official acts were duly and properly performed and that, therefore, these entries were made and certified after due and proper enquiry. (*Bose, J.*) CHHOGLAL BULIDAN MAHESIR *v.* NAZIM SHABI. **I.L.R (1937) Nag. 395=172 I.C. 715=10 R.N. 242=A.I.R. 1938 Nag. 73.**

——**Ss. 149 (1) and 150 (3)**—*Scope—Sale—Validity—Want of due proclamation—Effect—If cured by improvised measures of sale officer.*

A sale should be held only after the prescribed requirements for giving publicity to it by proclamation have been satisfied. If the proclamation is wanting, its place cannot be taken by improvised and casual measures taken by the sale officer; and a sale held without due proclamation is invalid. (*Burton, R.M.*) DHANJI SHIOLAL *v.* MADANLAL. **20 N L.J. 50.**

——**S. 150 (3)**—*Scope—Non-compliance—Effect—Sale fixed for particular date—Sale officer absent on tour—Adjournment of sale to another date on next day—Sale on adjourned date without fresh proclamation—Validity.*

Where a sale is fixed for a particular date, but no proceedings take place at all on that day owing to the absence of the Naib Tahsildar on tour, and on the following date he fixes another date for the sale, the proclamation of sale lapses, and it cannot be revived by informal measures to give notice of the fresh date to essential parties. A sale held on the adjourned date without a fresh proclamation is illegal as being not in conformity with S. 150 (3) of the Berar Land Revenue Code, and cannot be upheld. (*Burton, R. M.*) DHANJI SHIOLAL *v.* MADANLAL. **20 N.L.J. 50**

——**S. 150 (3)**—*Scope—Postponed sale—Change of place—Fresh proclamation—If necessary.*

An auction-sale postponed under S. 150 (3) of the Berar Land Revenue Code may not be held in a place other than that notified; the section only empowers the officer holding a sale to postpone it, but not to change the venue of the sale. If the place of auction is to be changed a fresh proclamation is necessary. (*Burton, R.M.*) VYANKATRAO *v.* SHANKAR. **20 N.L.J. 177.**

——**S. 174**—*Right of pre-emption in Berar—Basis of—Doctrine of substitution.*

In Berar, the right of pre-emption given by the Code is to a large extent based on Mahomedan law. The right is not one of re-purchase but of substitution. The only limitation is that when the amount specified in the notice exceeds the market value or, in the case of a foreclosure, the alternative given in S. 183 (1) (*b*), then a fair consideration is to be fixed. (*Bose, J.*) NAMDEO *v.* KESHEO. **I L R. (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I.R. 1938 Nag. 59.**

——**S. 174 (1)**—*Scope of the Code—Rights of pre-emption to be determined by the Code—Reference to the Mahomedan Law of pre-emption when relevant.*

The Berar Land Revenue Code is exhaustive with regard to the rights of pre-emption. In so far as the rights are founded on the Code, they must be determined by the Code and not by any other law. So references to the Mahomedan Law of pre-emption or the rights prevailing in other Provinces may be misleading. It is legitimate to look to the Mahomedan Law for assistance upon any matter in regard to pre-emption on which the Code is silent (*Bose, J.*) NAMDEO *v.* KESHEO. **I L.R. (1937) Nag. 469=172 I.C. 701=10 R N. 237=A.I R 1938 Nag. 59**

——**S. 174 (4)**—*"Any transfer"—"Has been enforced"—Meaning of.*

The expression "any transfer" used in sub-S (4), S. 174, Berar Land Revenue Code, may comprise three kinds of transfers: (1) re-sale to the vendor, (2) sale to a co-occupant, or (3) sale to a stranger. To meet the last mentioned case it was necessary to enact a law such as sub-S. (4) of S. 174, because a transfer to stranger by a stranger purchaser could not obviously affect the pre-emptor's right. It was to prevent the pre-emptor's right being defeated by the first two kinds of transfers that sub-S. (4), S. 174 has been expressly enacted. This sub section counteracts the device to defeat the pre-emptor's right after it has accrued. The meaning of the expression "has been enforced' in sub-S. (4), S. 174 is that the subsequent transfer becomes voidable only when the pre-emptor enforces his right of pre-emption, either by depositing the money as contemplated in S. 180 or when the pre-emptor files a suit claiming pre-emption. (*Niyogi, J*) KISAN DEOLU MALI *v.* GANGABAI. **I L R. (1937) Nag. 108=167 I.C. 592=9 R.N. 194=A.I.R. 1936 Nag. 278.**

——**S. 177**—*Failure to give notice under—Position of pre-emptor.*

Where a mortgagee omits to give the notice mentioned in S. 177, the pre-emptor should not be placed at a disadvantage He can have pre-emption for the fair consideration. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I R 1938 Nag. 59.**

——**S. 177 (1)**—*Foreclosure decree—Amount distributed over a large number of fields—Pre-emption in regard to a less number of fields—Apportionment of the sum decreed.*

Where the foreclosure decree is distributed over a certain number of fields and pre-emption is sought in respect of a smaller number of fields, the price of pre-emption is fixed by apportioning the amount in proportion to the respective values of the various fields. The only guide for ascertaining the values is the land revenue payable in respect of the fields. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L.R (1937) Nag 459=172 I.C. 701=10 R N. 237=A I.R. 1938 Nag 59**

——**S. 177 (1)**—*Foreclosure decree—Interest—Inclusion in the price of pre-emption—No notice given by mortgagee in possession.*

No question of interest arises where no notice was given by the mortgagee and he has been in possession of the property. (*Bose J.*) NAMDEO *v.* KESHEO. **I.L.R. (1937) Nag. 469=172 I.C. 701=10 R.N. 237=A.I.R. 1938 Nag. 59.**

——S. 177 (1)—*Foreclosure decree price of pre-emption—Costs awarded in the decree if included in*

In the case of foreclosure decree the price of pre-emption includes everything that the mortgagee is entitled to receive at the date of the final decree before the property can be redeemed. So the pre-emptor must pay everything due to the mortgagee including the costs of the suit, unless he considers it exceeds the market value. (*Bose, J.*) NAMDEO *v.* KESHEO. **I L.R (1937) Nag. 469=172 I.C. 701=10 R N 237=A I R. 1938 Nag 59.**

——S 182 (4)—*Market value of the land—How far relevant for consideration by the Court.*

The Court is directed to fix, not the market value of the land, but a 'fair consideration'. The market value is to be taken into consideration for determining whether the price was fixed in good faith or not. It is not the criterion, however relevant it may be, for consideration in determining the fair consideration, for the various interests, *viz.*, the interests of the transferee in the case of mortgages and leases and of the proposed vendee in the case of an intended sale (*Bose J.*) NAMDEO *v.* KESHEO. **I L R. (1937) Nag. 469=172 I C. 701=10 R N. 237=A I.R. 1938 Nag. 59**

——S. 182 (4)—*Price fixed by vendor being less than the market value—Position not dealt with in the Code*

The Code does not make any provision for the position when the price fixed by the intending vendor is less than the market value because such a position does not arise when the notice contemplated by S. 176 (1) has been duly served on the co-occupants. They are then bound to pre-empt at that price or not at all. (*Bose, J*) NAMDEO *v.* KESHEO. **I L R. (1937) Nag 469=172 I C. 701=10 R.N. 237=A I R. 1938 Nag 59**

——Ss. 182 (4) and 183 (2)—*'Fair consideration'—Contruction of*

The 'fair consideration' contemplated by S. 182 (4) is not the same thing as the market value and it must be similary construed in S. 183 (2) (*Bose, J.*) NAMDEO *v* KESHEO. **I L R (1937) Nag. 469=172 I C. 701=10 R N. 237=A I.R. 1938 Nag. 59.**

——S. 183 (2)—*Construction—To examine the transaction and fix a fair consideration, for the interest to be pre-empted.*

The words 'examine the transaction' mean that the Court is to determine the nature of the interest sought to be pre-empted and apply the principles enumerated in S 182 (1) (*b*). The 'interest to be pre-empted' must be the interest of the transferee in the case of mortgages and leases, and of the proposed vendee in the case of an intended sale. (*Bose, J.*) NAMDEO *v.* KESHEO. **I.L R (1937) Nag. 469=172 I C. 701=10 R.N 237=A I.R 1938 Nag. 59**

——Ss 192 and 194 (2) (g)—*Appointment of village* mahar—*Dispute as to—Jurisdiction of Civil Court.*

The appointment of a *mahar* in a village is a matter which, under the rules framed under S. 194 (2) (*g*) of the Berar Land Revenue Code, is a matter which the Revenue authorities have been empowered to deal, and consequently the jurisdiction of the Civil Courts is ousted by S. 192, unless the Revenue Courts think fit to refer the matter to the Civil Court when there is a dispute between rival claimants. A reference by the Revenue Court is a condition precedent to the jurisdiction of the Civil Court. (*Bose, J.*) IRBHANYA *v.* SAKHOO. **I L R. (1937 Nag. 355=172 I.C. 394=10 R N. 203=A.I.R. 1937 Nag, 308.**

——(1928), Ss. 24 and 145—*Defaulter—If entitled to be served personally with prohibitory order.*

A copy of the prohibitory order is not required to be personally served on the defaulter either by S. 24 of the Berar Land Revenue Code read with R. 4-A under S. 194 (2) (*a*) or by S. 145 of the same Code read with O. 21. R. 54, C. P. Code. (*Greenfield, F C*) BHAURAO VITHOBA *v.* KAIKAJI KANHUJI. **1939 N L J. 57.**

——Ss 38 and 178—*Nature of rules contemplated by S. 38—If comes into operation by itself—Basis of their validity—Publication in gazette, if only directory.*

'General rules' contemplated in S. 38 of the Berar Land Revenue Code are not rules of procedure but rules to guide the Revenue Officers in the disposal of Government lands. Since the power to 'sanction' such rules is given by S. 38 itself, it is unnecessary to invoke the general power conferred by S. 178. As such the general rules contemplated by S. 38 take effect by virtue of their having been sanctioned by the Chief Commissioner and becomes operative *de hors* their publication in the gazette under S. 218 They are valid, not because they have the force of law, but because they were sanctioned by a competent authority in accordance with law. Publication is a condition subsequent to the making of the rules and hence directory. The non-observance of that condition would not prevent the rules from taking effect (*Gruer and Niyogi, JJ.*) MADHAO GOPAL *v* SECRETARY OF STATE. **I.L.R. (1939) Nag. 143=180 I C 532=11 R.N. 370=1938 N.L J 439=A I.R. 1939 Nag 44.**

——S 41 (3)—*Right of suit in Civil Court—Adverse decision by Revenue Officer on Government s right to enhance assessment.*

Where a person questions the right of Government to enhance the assessment on his land, but the Revenue Officer decides it adversely to him, he is clearly entitled to sue for establishing his right under sub-S (3) of S 41 of the Berar Land Revenue Code. (*Gruer and Niyogi JJ.*) MADHO GOPAL *v.* SECRETARY OF STATE. **I L R. (1939) Nag 143=180 I C 532=11 R.N 370=1938 N. L J 439=A I R. 1939 Nag 44.**

——S 72—*Ante-alienation tenant--Arrears of rent—Jagirdar, if entitled to interest on the arrears.*

In the case of an ante-alienation tenant in a Jagir Village, the jagidar is the receiver of the rent reserved on the holding of such tenant and if the rent is not paid on the due date in spite of demands, it is a case in which it would be equitable to order interest to be paid to the jagirdar on the rent due. (*Stone, C.J.*) RAJE SHRIDHAR RAO *v.* SHRAWAN VITHOBA. **183 I C. 176=12 R N. 52=1939 N L.J 198=A.I R. 1939 Nag. 149**

——S 72—*Scope of—Status of ante-alienation tenant—Proof of—Requisites.*

S 72 of the Berar Land Revenue Code requires that the land must have been held on a rent equal in amount with the fair assessment. 'Equal' cannot be interpreted to mean approximately equal. In order to establish a status as an ante-alienation tenant, a tenant must show that what he has to pay does not depend on the choice of the landlord but what the Government considered to be the fair assessment at each successive settlement. An approximation to the fair assessment due to the leniency of a Jagirdar who may rack-rent his tenants cannot give the tenant a right to claim a status to which he is not otherwise entitled. (*Grille, J.*) SYED HIDAYAT *v.* RAMCHANDRA DUMNAJI. **I.L.R. (1940) Nag. 388=1940 N.L.J. 229=A.I.R. 1940 Nag. 209.**

——**S. 102**—*Powers of Deputy Commissioner—Reduction of* nazul *ground rent.*

S. 102 of the Berar Land Revenue Code only gives the Deputy Commissioner, powers to interfere to correct an error due to a mistake in survey or arithmetical calculation. Reduction of *nazul* ground rent cannot come under the section. (*Roughton, F.C.*) UMAR HAJI, *In re.* **1938 N.L.J. 316.**

——**S. 112 (1)**—*Expression "first hearing"—Meaning of.*

The expression "first hearing" of a suit in S 112 (1) means the hearing at which the Court examines the pleadings of the parties with a view to understand their contention and to frame issues. (*Niyogi, J.*) BALIRAM *v.* UTTAM CHAND. **I. L. R. (1939) Nag. 452=182 I.C. 52=11 R. N. 495=1939 N.L.J. 157=A.I.R. 1939 Nag 110.**

——**S. 112 (2)**—*Dismissal of suit under—If a decree—Appeal, if lies.*

The dismissal of the suit under S. 112 (2), Berar Land Revenue Code, must be regarded as a decree within the meaning of that term as defined in S. 2 (2), C. P. Code, and under S. 96, C. P. Code, the plaintiff is entitled to file an appeal. (*Niyogi, J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I C 52=11 R.N. 495=1939 N L.J. 157=A.I.R. 1939 Nag. 110.**

——**S. 112 (2)**—*Granting of time—Computation.*

The granting of time by the Court contemplated in sub-S. (2) of S. 112 must be interpreted in the sense of granting time after the lapse of first hearing and not before it. (*Niyogi, J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I.C. 52=11 R.N. 495=1939 N.L.J. 157 =A.I.R 1939 Nag. 110.**

——**S. 129**—*Applicability—Right of way claimed running partly over boundaries and partly through fields of others.*

Where the right of way claimed by the plaintiff does not lie altogether over the boundaries but lies in part through the fields of others. S. 129 of the Berar Land Revenue Code would not apply to the entire right of way claimed, and the plaintiff can only rely on a right of easement acquired under the ordinary civil law. (*Pollock, J.*) BALIRAM SHIWAPPA *v.* NARAYAN. **173 I.C. 266=10 R.N. 291=A I.R. 1938 Nag. 144.**

——**S. 129**—*Persons acquiring right of easement under ordinary law—If need apply to Deputy Commissioner.*

S. 129 of the Berar Land Revenue Code can never have been intended to take away a right of easement or any other right acquired under the ordinary civil law. It merely gives the Deputy Commissioner power to give a right of way over the boundaries of other survey numbers, but it is open to persons who havea right of way acquired by easement to rely on their rights and not to apply to the Deputy Commissioner under S. 129. (*Pollock, J.*) BALIRAM SHIWAPPA *v.* NARAYAN. **173 I.C. 266=10 R.N. 291=A.I.R. 1938 Nag. 144.**

——**S. 129 (3)**—*Limitation—Starting point—Decision in dispute about a right of way—Order by Tahsildar and appeal to Deputy Commissioner.*

The terms of sub-S. (3) of S. 129 of the Berar Land Revenue Code go to show that it is the decision of the Deputy Commissioner which is the starting point of limitation for filing a suit in a Civil Court. Where in the case of a dispute about a right of way the Tahsildar enquired and passed orders, but an appeal was preferred to the Deputy Commissioner, which was heard by the Sub-Divisional Officer and decided and the matter was then taken up in due course to the Commissioner and local Government, it was held that the starting point of limitation for filing civil suit was the date on which the Sub-Divisional Officer passed his orders and not the date on which the Tahsildar passed his orders. (*Niyogi, J.*) SAMBHOO UKARDA MALI *v.* PARASHRAM. **187 I.C. 404=12 R.N. 287=1940 N.L.J. 76=A I.R. 1940 Nag 95.**

——**S. 154**—*Forfeiture—Legality—Intentional default—Clearance of arrears—If an excuse for avoiding forfeiture.*

Where a defaulter neglects to avail himself of the remedies open to him by Ss. 144 and 145 of the Berar Land Revenue Code, and resorts to a collusive arrangement with the purchaser and pays the deposit amount himself and later on intentionally defaults in the payment of the balance, but in the meanwhile pays off the arrears of land revenue is nevertheless liable to have his deposit forfeited. (*Burton, F. C.*) VITHOBA PANDURANG NEWA SALKAR, *In re.* **1939 N.L.J. 56.**

——**S. 155**—*Absence of jurisdiction to sell—Question, if can be raised after sale but before confirmation.*

An objection as to jurisdiction of a Court to sell can be raised between the sale and its confirmation for, if there is no jurisdiction, the sale would be void and there could be no confirmation. (*N. J. Roughton, F C.*) KILACHAND DEVCHAND & CO., LTD. *v.* DHUNDIRAJ GANESH SAHASRABUDHE. **1938 N.L.J. 128.**

——**S. 156**—*Attachment not effected as required by S. 145 (2) of the Revenue Code—Objection if open—Absence of prejudice—Sale if should be set aside.*

The objection that the attachment of the Survey numbers was not effected as required by S. 145 (2) of Revenue Code. does not lie under S. 156 of the Code inasmuch as it is an irregularity or mistake in publishing or conducting the sale. Hence it could not be raised by way of an application to set aside the sale. Further when there has been no prejudice, there is no substance in the plea. (*Burton, F.C.*) RAMGOPAL HARDE *v.* SYED KARIMUDDIN. **1940 N.L.J. 424.**

——**S. 156**—*Sale of all survey numbers in one lot—Legality.*

BERAR LAND REV. CODE (1928), S. 176.

Where there were arrears due in respect of several numbers for a series of years and all were liable to sale under S. 141 (*c*), of the Berar Land Revenue Code, a sale of all of them in one lot in order to obtain a better price is not illegal. (*Burton, F. C.*) Ramgopal Harde *v.* Syed Karimuddin. **1940 N.L.J. 424.**

——**S. 176**—*Sale—If confined to sales as defined in the T. P. Act.*

The word 'sale' in S. 176 of the Berar Land Revenue Code is not to be construed in the narrow sense in which it is used in the T. P. Act. As such it includes an oral sale. (*Bose, J.*) Jainarayan *v* Balwant. **180 I.C. 963=11 R. N. 414=1938 N.L.J. 379=A.I.R. 1939 Nag. 35.**

——**S 194**—*Rules framed under—R. 18—Interpretation of.*

The last sentence in R. 18 of the rules framed under S. 194 of the Berar Land Revenue Code can only refer grammatically and logically and in the ordinary meaning of the words to the former part of that rule and cannot refer to the preceding rule. The result is that R. 18 provides for an application to the Tahsildar for redress only in the particular case stated, namely, when the Civil Court has decided a dispute as to the right to office and the patel demands a substitute in place of the person who, the Civil Court has decided, has the right to office. (*Burton, F.C.*) Nago Mahar *v.* Bhawania Mahar. **1939 N L.J. 166.**

BERAR LAND REVENUE MANUAL (1906). Vol. I, App. VIII--*Nazul land held by Municipal Committee—Permanent lease by latter at fixed rent—Validity of.*

A Municipal Committee which holds Nazul land from Government cannot grant to others any right in such land which it does not itself possess. It cannot consequently grant a permanent lease of such land at a fixed rent which is not liable to enhancement. (*Bose, J.*) Mahadeo Ganorkar *v.* Secretary of State. **20 N.L.J. 209.**

BERAR PATELS AND PATWARIS LAW (1900)—*Review—Grounds for—Procedure—C P. Code, O. 47, R. 1.*

There are no rules under the Berar Patels and Patwaris Law of 1900, regulating the procedure about applications for review; therefore the rule in the C. P. Code contained in O. 47, R. 1 should be followed so far as they may be applicable; and a review can be allowed only on the grounds specified in O. 47, R. 1, C. P. Code. (*Burton, R. M. and Roughton, H. M*) Madhorao Kale *v.* Vyankatrao. **19 N.L J 276.**

——*Rules framed under—Scope of—Revenue officer—Powers, if any regarding collection of rent in a Jagir village.*

The duties of patels and patwaris prescribed in the rules under the Patels and Patwaris law relate to the collection of land revenue and cesses and not to the recovery of rent in alienated villages. There is no law or rule in force by which any revenue officer is competent to give directions regarding the recovery or disposal of rent in a Jagir village. (*Burton, F. C.*) Ramchandra Atmaram *v.* Yellue Vithal Ranu Kanandan. **1939 N.L.J. 224.**

——*Scope—Watan rights—Permanent forfeiture—Legality.*

BERAR PATELS AND PATWARIS LAW (1900), S. 6.

In the absence of specific orders *watan* rights cannot be legally forfeited for ever or permanently. (*Raghavendra Rao, H M.*) Sonaji *v.* Parwatrao (Krishnarao Deshmukh. **19 N.L.J. 239.**

——**Ss. 5, 6, 6-A and 6-B**—*Scope—Appointment under S. 6-A—If governed by S. 5.*

Though there is no specific exemption of appointment under S. 6-A of the Patels and Patwaris Law from the operation of S. 5 of the same Law, S. 5 cannot have been intended to apply to appointments made under S. 6-A, as the application of S. 5 would involve a breach of the conditions of the lease granted under the Waste Land Rules of 1865. Ss. 5 and 6 are mutually exclusive, and S. 6-A is part of the law dealing with a matter similar in nature to what is provided for in S 6. S. 5 provides for the appointment under the watandari system in khalsa villages, while Ss. 6, 6-A and 6-B provide for appointment under the proprietary systems prevailing in jagir, palampat and izara villages. (*Greenfield, F. C.*) Bhaurao *v.* Bapurao. **20 N.L.J. 224.**

——**S. 5 (3)**—*Construction—Adopted son—Right of—Son adopted by widow of prior incumbent—Claim of as against son of last incumbent—Rule—Disqualification of widow—If bar to claim of son adopted by her.*

The words "shall not appoint a woman if a male relative of the late incumbent of the office exists" in S. 5 (3) (*e*) of the Patels and Patwaris Law postpone the rights of a woman to those of a male relative; but they do not affect the rights of a son adopted by a widow, who claims not through the widow but through the widow's deceased husband into whose family he has been adopted. The rights of the adopted son have to be decided according to the law of inheritance applicable to the family into which he has been adopted. (*Burton, R M. and Roughton, H. M.*) Laxman *v* Tukaram. **19 N.L.J 279.**

——**S. 6 (3) (amendment of 1934)**—*Amendment, if retrospective.*

The amendment of S. 6 (3) of the Berar Patels and Patwaris Law was an alteration by way of limitation of the period within which application for assistance could be made to the Revenue Court. The right under S. 6 prior to amendment was a vested right and hence it could not be taken away by the amendment being given a retrospective operation. (*Roughton, F.C.*) Muradbeg *v.* Raje Gopalrao. **1938 N L.J 94.**

——**S. 6 (3)** –*Applicability—"Withholding of poyment"—Meaning of—Patwari agreeing to accept payment after next harvest—Effect of—"Emoluments of patwari"—Meaning of—Rate fixed by agreement—Power of Deputy Commissioner to fix emoluments.*

The words "emoluments of a patwari" in S. 6 (3) of the Patels and Patwaris Law cannot be interpreted as meaning the emoluments at the rate fixed by the Deputy Commissioner under the proviso (*b*) after the patwari has intimated that he no longer abides by the agreed rate. When the rate of emoluments has once been fixed by agreement between the Jagirdar and the Patwari, the Deputy Commissioner cannot fix emoluments under S. 6 (3). S. 6 (3) does not further come into operation unless there has been a withholding of payment by the proprietors; and when the withholding is condoned by the patwari by

BERAR PATELS AND PATWARIS LAW (1900), S. 6.

agreeing to accept payment later on after next harvest, there is no such withholding as would invoke the application of S. 6 (3). A contract should not be varied in one particular and maintained in another particular without the consent of the contracting parties; and although there is nothing illogical in this being done in the peculiar circumstances of a contract between a jagirdar and a patwari in a Jagir village, such a departure from the ordinary law should be clearly indicated in the section of the law. *(Roughton, F.C.)* Syed Chhaban *v.* Rajaram. **1938 N.L.J. 64.**

——**Ss. 6 (3) and 8**—*Applicability—Patwari nominated by jagirdar and appointed by Government—Status of—Loose description as substitute patwari—If makes him substitute.*

Where it is clear that a patwari is appointed under S. 6 (1) of the Berar Patels and Patwaris Law by the Government on the nomination of the Jagirdar S. 6 (3) applies to the case. The fact that he is loosely described as a substitute partwari, cannot make him a substitute, under S. 8 of the Patels and Patwaris Law, of a malik who is unable to work himself. *(Roughton, F.C.)* Syed Chhaban *v.* Rajaram **1938 N L.J. 64.**

——**S. 6-A**—*Scope—Izara village created under Waste Land Rules—Malik and patel—Non performance of services personally—If entails dismissal.*

The malik and patel of an izara village, created under the Berar Waste Land Rules, 1865 whether he be the sole proprietor or one of the proprietors appointed as such under S. 6-A of the Patels and Patwaris Law, is not bound to perform the duties of the office of patel personally. A deputy may be appointed to perform the duties. Merely because the patel fails to render personal service, does not entail his dismissal. *(Greenfield, F.C.)* Bhairao *v.* Bapurao **20 N. L J 224.**

——**S. 7**—*Reintroduction of practice of lapsed rotation—Principle.*

Where the practice of rotation has lapsed and an attempt to reintroduce it is made, its revival would be sanctioned only when the cessation is shown to have been wrongful or to have been due to the operation of the rules prohibiting or discouraging rotation. Where it is due entirely to the voluntary action or inaction or acquiescence on the part of the representatives of the different *munds*, the practice of rotation would not be permitted to be reintroduced *(Burton, F. C.)* Sheshrao *v.* Narayan. **1939 N L.J. 105.**

——**S. 7 (3)**—*Amalgamation of two villages with separate patels—Joint patels—Dismissal of one in 1874 and sole holding by other—Succession—Rotation between families—Rules of 1886—Effect of.*

Where two separate villages, having a separate patel each, were combined and the two patels continued to be patels working jointly till 1874, when one of them was dismissed for embezzling government money, and the other patel remained as sole patel till his death in 1876 and was succeeded by his son, and on the death of the latter in 1935, disputes arose between the two families about the succession to the office.

BERAR PATELS AND PATWARIS LAW 1900), S. 14.

Held, that the old rules having been superseded in 1886, the case was a fit one for the introduction of rotation between the two families under S. 7 (3) of the Berar Patels and Patwaris Law.

Held, further, that in the absence of a specific order, no watan right could be legally forfeited; and merely because a patel is dismissed, the watan rights of the family of the dismissed patel could not be held to be forfeited. *(Raghavendra Rao, H.M.)* Narayan *v.* Ganpat. **19 N.L.J. 201.**

——**S 7 (3) (b)**—*Appointment of patel—Two branches of family found jointly working as patels in the past—Proper order.*

Where it is found that two branches of a family have worked jointly as patels in the past, both have equal claims to share the Revenue Patelki Office under S. (3) (b) of the Patels and Patwaris Law. The proper order in such a case is to direct the representatives of the two branches to work as revenue patel in rotation for 10 years each. *(Raghavendra Rao, H M)* Sonaji *v.* Parwatrao Krishnarao Deshmukh. **19 N.L. J. 239**

——**S. 8 (4) and R. XII (iii)**—*Appointment under S. 8 (4), if falls within scope of R. XII (iii)—Son of a lunatic Malik—Proper remedy to remove substitute.*

Any appointment made under sub-S. (4) of S. 8 of the Berar Patels and Patwaris Law, whether on the nomination of the Malik or on his failure to do so, by selection of the Deputy Commissioner is an appointment made on behalf of the Malik and falls within the scope of R. XII (*iii*). Where a substitute is appointed for a lunatic Malik patel, his son who at that time was not a major, cannot apply to remove the substitute. His only remedy is to get his father resign and then himself to become patel, making the substitute go out automatically. *(Greenfield.)* Sheshrao *v.* Ramrao. **1940 N.L J. 198.**

——**S. 8 (4)**—*R (x) of Rules framed under the Act—Nomination of substitute—Procedure—Deputy Commissioner, when can select and appoint—Malik Patwari's power, if affected by the absence of members of the family.*

It is only when the Malik Patwari refuses or fails to nominate a substitute, or the Deputy Commissioner does not approve of such a nomination, that the Deputy Commissioner gets the power of selection and nomination. R. (*x*) of the rules framed under S. 21 of the Act requires the principal to nominate a member of his family or of the sub-division of his family. But it does not follow that in the absence of any such persons, the principal's right to nominate a substitute is lost. *(Burton, F.C.)* Govind Balkrishna *v.* Vithal Vinayak. **1940 N.L.J. 120.**

——**S. 8 (4**—*Scope—If permits alternative nominations till acceptance of one.*

There is no provision in S. 8 (4) of the Berar Patels and Patwaris Law, that the malik patwari is to be given the option and opportunity of making alternative nominations until one of them is approved by the Deputy Commissioner *(Burton, F.C.)* Yado Parashram *v.* Shaikh Aziz. **1939 N.L.J. 104.**

——**S 15**—*Enquiry—Procedure to be followed prior to dismissal.*

An enquiry under S. 15 of the Berar Patels and Patwaris Law should, apart from other things, at

least have a Judicial form. Definite charges should be framed and the patel's explanation and evidence taken and a Judicial finding recorded (*Greenfield, F.C.*). NAMDEO EKOBA, *In re* 1940 N.L J. 255.

BERAR REVENUE BOOK CIRCULAR—*Sale—Objections—Bid not in fact accepted, but case adjourned—Appellate Court, if can direct sale on other terms.*

Where after a sale objections are filed and the case comes before Collector to consider the objections and whether the final bid is to be accepted, he simply adjourns it without accepting the bid, the Deputy Commissioner in appeal has no power at that stage to raise the bid and direct a sale. It is for the Collector to accept the bid first. (*Burton, F.C.*) JAGANNATH *v.* SETH MISHRILAL. **1940 N.L.J. 61.**

——**Vols. II-III—8**—Adjournment of sale—Failure to specify hour of adjourned sale—Omission to inform all persons present of adjournment—Effect—Material irregularity. *See* C. P. CODE, O. 21, R. 90. **20 N.L.J. 283.**

——**III—8**—*Execution sale by Naib Tahsildar—Acceptance of bid and confirmation of sale by Sub-Divisional Officer — Considerations—Inadequacy of price and irregularity in proceedings—Effect of.*

Eleven fields comprising an area of about 250 acres with a rental of Rs. 195, only one of which was encumbered to the extent of Rs. 500 were sold in execution of two B class decrees by a Naib Tahsildar. The total amount of the decrees was about Rs. 9,100, but the price fetched was only Rs 1,365 or Rs. 5-8 0 per acre. The Naib Tahsildar fixed the reserve price only at Rs. 1,240, though on a prior auction, about one month previously, it was Rs. 1 07,000. The bidders were not informed of the cancellation of the prior sale. The Sub-Divisional Officer without any regard to the interests of the judgment-debtor and without considering the objections and protest of the judgment-debtor accepted the bids and confirmed the sale.

Held, that the bids should not have been accepted and the sale must be set aside. (*Raghavendra Rao, H.M.*) BHAN *v.* DIPCHAND. **19 N. L.J. 51.**

——**(1118), R. 11 (ii)**—*Sale by officer deputed by Collector—Acceptance of bid—Further procedure—Powers of Collector.*

Where a sale is held by an officer deputed by the Collector, R. 11 (*ii*) of Berar Revenue Book Circular (1118) requires that the sale shall be adjourned to the Deputy Commissioner (*i e.*, the Collector) before the final bid is accepted. The rule gives the Collector power to accept or reject the bid obtained in the original sale and does not give him the power to continue the sale without a fresh proclamation. (*Burton F C.*) VITHAL *v.* JAMNADAS. **1940 N.L.J. 323.**

BERAR WASTE LAND RULES (1865)—Izara village—Malik and patel—Liability to render personal service. *See* BERAR PATEL AND PATWARIS LAW, S. 6-A. **20 N.L.J. 224.**

BHOPAL CIVIL PROCEDURE CODE, Ss. 27, 58 and 2 (8)—*Suit on basis of foreign judgment to recover costs—Maintainability—Suit decided* ex parte *by foreign Court.*

In a suit instituted in a British Indian Court. the plaintiff's witness who was under examination absented himself whereupon the counsel for the plaintiff applied for adjournment. This being disallowed the counsel withdrew from the suit with the result that the plaintiff's claim was rejected and he was required to pay costs to the defendant. The defendant instituted a suit in the Bhopal State to recover costs from the plaintiff on the basis of the judgment of the British Indian Court.

Held, (1) that the suit was decided by the British Indian Court *ex parte* under O. 17, R. 2, C. P Code; (2) that the definition of judgment in S. 2 (8), Bhopal C. P. Code, covered both an order and a decree, and equally held good whether the decree was passed *ex parte* or on merits; (3) that the suit to recover costs on the basis of the *ex parte* judgment of the British Indian Court was not barred by S. 58, Bhopal C. P. Code. (*Mohammad Ahmad Khan, C.J. and Birdie, J.*) HARKUNWAR RAI *v.* KESRI SINGH. **187 I.C. 439.**

——**Ss. 58 and 27**—Suit on basis of foreign judgment to recover costs—Maintainability. *See* BHOPAL C P. CODE, Ss. 27 AND 58. **187 I.C. 439.**

——**O. 6, R. 17**—*Amendment of plaint—When not allowed—Suit on instalment-bond containing default clause—Amendment to plead waiver of right to sue for whole amount—Amendment of date of payment of instalment—Permissibility.*

It is generally accepted that no amendment of a plaint can be allowed which has the effect of depriving the defendant of any right already acquired by him or of altering the cause of action in any suit Amendment of every other kind is permitted. An amendment by which the defendants' plea of limitation against the suit might entirely fall to the ground must always be permitted. A right which the defendant has already acquired is one thing, and a mere right to raise the plea is quite another. The plaintiff shall not be allowed to add any new relief by way of an amendment which on account of the efflux of time he could not claim at that time. But in a suit on an instalment bond containing a default clause giving the creditor a right to recover the whole amount in the event of failure of any one instalment, the plaintiff's request to plead waiver of his right to sue for the whole amount is neither a new relief nor it has the effect of depriving the defendant of any right already acquired by him. The nature of the suit is not in the least altered thereby. In fact the plaintiff is trying by this amendment to explain that his suit is within time, and such an amendment is permissible at any stage. If the plaintiff has made a mistake in stating the date of payment of money and now requests to correct the same, he by doing so is not in any way depriving the defendant of any right whatsoever which he had so far acquired. A mistake of fact of this nature can always be corrected in pleadings by any party without injuring any right of his adversary. It would clearly be against the principle of amendment laid down in O. 6, R. 17, C P. Code, to refuse an amendment in respect of a *bona fide* mistake regarding the mere date of any transaction. (*Mohamad Ahmad Khan, C.J. and Birdi, J.*) MADAN MOHANLAL *v.* ZAHIRUDDIN. **187 I.C. 809.**

——**O. 23, R. 1**—*Withdrawal of suit in appeal —Failure to implead necessary defendant—If sufficient ground.*

Failure to implead even a necessary party as defendant is neither such a formal defect as can be cured in appeal nor does it afford sufficient ground to withdraw from the suit with permission to institute the same afresh after it has once been heard and decided. (*Mohammad Ahmad Khan, C.J. and Fazle Azim, J.*) KISHORILAL *v.* SUNDARBAI. **187 I.C. 581.**

——**O. 23, R 1 (2) (b)**—*"Other sufficient reasons"—Interpretation.*

The sphere of "other sufficient reasons" in O. 23, R. 1 (2) (*b*) is wider than the sphere of "some formal defect". (*Mohammad Ahmad Khan, C. J. and Fazle Azim, J.*) KISHORILAL *v.* SUNDARBAI. **187 I.C. 581.**

BHOPAL LIMITATION ACT, Arts 40 and 137

—Scope—Suit to recover property given for sale on commission basis—Article applicable. *See* BHOPAL LIMITATION ACT, ARTS. 137 AND 40. **188 I.C. 437.**

——**Arts. 137 and 40**—*Scope—Suit to recover property given for sale on commission basis—Article applicable.*

A suit for the recovery of a philatelic album given to he defendant for negotiating a sale on commission basis is governed not by Art. 40 but by Art. 137 of the Bhopal Limitation Act The defendant is a depositary within the meaning of the latter article. Art. 40 has no application to a case of property entrusted by one person to another. The fact that the defendant refused to give delivery of the property does not make his possession unlawful and simultaneously start limitation against a suit for recovery under that article. The depositary cannot be allowed to take advantage of his own wrongful act by claiming to be benefited by the shorter period under Art. 40, because by so doing, he would be clearly defeating the object of the Legislature. (*Mohammad Ahmad Khan, C. J. and P. C. Birdi, J.*) HASHMAT ALI *v.* M. GODREJ. **188 I.C. 437.**

BHOPAL SMALL CAUSE COURTS ACT

—*Jurisdiction of Small Cause Court—Suit for accounts—What is—Suit for against agent for value of tickets given for sale and not accounted for by him—If cognisable by Small Cause Court.*

The Small Cause Courts Act excludes from its purview all suits relating to settlement of accounts between the parties. The essential nature of such a suit is that therein the plaintiff does pray for a decree for a fixed sum of money, but only wants rendition of account by the defendant followed by a decree for the amount found due. It is possible that even in claims for a fixed amount the defendant's plea might some time give rise to the necessity of settlement of account, but this alone would not convert a suit for a fixed sum into a suit for account. It is a settled principle that a suit which is essentially of small cause nature does not change its character merely because the defendant has chosen to raise a plea of account. Even if the Court has to go into the parties' account to a certain extent the jurisdiction of Small Cause Court is not ousted. A suit against an agent for a fixed sum representing the value of certain number of tickets given to him for sale and not accounted for by him, is not a suit for account and is, therefore, cognisable by the Court of Small Causes. (*Mohammad Ahmad Khan, C.J.*) ISHAQUE ALI *v.* ABDUS SAMAD. **187 I.C. 480.**

BIHAR AND ORISSA CO-OPERATIVE SOCIETIES ACT (VI OF 1935), S. 24-A

—*Scheme of compromise pending suit by depositor —Plaintiff not party to compromise—If bar to passing of decree and execution.*

S. 24-A (2) of the Bihar and Orissa Co-operative Societies Act makes a scheme of compromise agreed to by the specified majority, if sanctioned by an order of registrar binding on all the creditors or the class of creditors, as the case may be and also on the Co-operative Society. It may be that a particular creditor was no party to the scheme of compromise, but S. 24-A (2) makes his individual participation absolutely immaterial. Where therefore pending a suit by a depositor against a Co-operative Bank for recovery of his deposit a scheme of compromise under S. 24-A of the Act is agreed to by the required majority of creditors and sanctioned by the Registrar of Co-operative Societies, and a decree is subsequently passed in favour of the depositor in his suit the decree cannot be executed, against the Bank. The depositor-plaintiff being a creditor, is bound by the compromise. though not a party to it. The compromise bars execution of the decree not by resson of any express provision in the Act but under the general law. The scheme of compromise has to be regarded as an arrangement under which creditors are to refrain from bringing execution in return for the restrictions, imposed upon the Bank as regards the disposal of its income and property. The decree passed is only a security for the debt and has the effect of establishing the debt as against the Bank. The compromise, while not operating as a bar to the passing of the decree, is a clear bar to execution. (*Harries, C. J. and Dhavle, J.*) BUXAR CENTRAL CO-OPERATIVE BANK, LTD. *v.* AKHOURI BINDHYACHAL PRASAD. **185 I.C. 606=6 B R 222=12 R. P 387=21 Pat L T. 173=A.I.R. 1940 Pat. 261.**

—— **S 48**—*Jurisdiction of Registrar—"Dispute" —Prior award under Act of 1912—Second award under new Act in respect of same debt—If a nullity and without jurisdiction—C. P. Code, S. 11.*

The expression "dispute" in Expl. I to S. 48 of the Co-operative Societies Act is used in a very special sense. There may be a dispute under the section even when the claim is admitted. There is nothing to prevent the Registrar from dealing under S.48 with a dispute between the parties as to a decretal debt. Therefore even when a previous award has been given, if there is still a dispute as to the judgment-debtor's ability to pay or the method of enforcement of payment, the Registrar is competent to deal with the matter. There is no section in the Act which makes S. 11 of the C. P. Code applicable to the Co-operative Societies Act. Therefore the fact that an award was made by the Registrar in respect of a debt under the Act of 1912 does not deprive the Registrar of jurisdiction to make a second or subsequent award in respect of the same debt under the provisions of the new Act of 1935. The second award cannot on that ground be held to be a nullity as being without jurisdiction. (*Fazl Ali and*

Meredith, JJ.) Dwarka Prasad *v.* Traders' Co-operative Bank, Ltd. **21 Pat.L.T 343.**

——**Ss. 48 and 57**—*Suit by member against Society to recover interest on deposit—Dispute as to rate of interest—Jurisdiction of Civil Court.*

Where the plaintiff sued a co-operative union, of which he was a member to recover arrears of interest on deposit made by him, and the dispute was about the rate of interest,

Held, that the suit did not lie in the Civil Court, as it was barred by S. 57 of the Bihar and Orissa Co operative Societies Act, 1935, read with S 48 of the same Act. (*Rowland, J.*) Hajipur Central Co operative Union, Ltd. *v.* Kamla Prasad. **166 I.C. 689=8 R.P. 335=3 B R. 208=18 Pat.L. T. 255=A.I.R. 1937 Pat. 531.**

——**S. 57 (2)**—*Applicability and scope—"Touching the affairs of the Society"—Decree for costs against Co-operative Society—Execution in Civil Court—Leave of Registrar—Necessity for—S.* 57 (1).

S. 57 (2) of the Bihar and Orissa Co-operative Societies Act imposes a bar to certain proceedings in the case of a Co-operative Society in liquidation, *i.e.*, on any matter touching the affairs of the Society. The affairs of a Society in liquidation are confined to the winding of the Society and the payment of its debts, the collection of amounts due to it and of contributions from members, etc. The payment of the debts of a Society whether decretal or otherwise, is clearly a matter touching the affairs of the Society within the meaning of S. 57 (2), and proceedings to realize such debts are barred except by leave of the Registrar. An application to execute a decree for costs against a Society can therefore lie only with the leave of the Registrar under S. 57 (2).

Rowland, J.—(*Quaere*).—Whether such an execution application is also barred by S. 57 (1) of the Act. (*Agarwala and Rowland, JJ.*) Gaya Prasad *v* Sadar Central Co operative Society, Gaya. **1940 P.W.N. 155=21 Pat.L.T. 217=6 B. R. 776=A.I.R. 1940 Pat. 253.**

——**S. 63**—*Applicability—Debtor not ceasing to be member of Society—Limitation.*

There can be no question of limitation at all under S. 63 of the Co-operative Societies Act so long as the person from whom a debt is due to a Society is still a member of the Society. (*Fazl Ali and Meredith, JJ.*) Dwarka Prasad *v.* Traders' Co-operative Bank, Ltd. **21 Pat.L.T. 343.**

BIHAR AND ORISSA EXCISE ACT (II OF 1915), S. 74—*Scope—Search—Omission to record reasons—Effect—Obstruction to search—If offence—Penal Code, S.* 353—*Penal Code, S.* 99—*Search at night—If illegal*

Under S. 74 of the Excise Act, if an officer, having reason to believe that an offence under the Act has been committed, wants to search, he has to record his reasons for doing so. The recording of reasons before search is provided for both under the Excise Act and the Code of Criminal Procedure, and is intended to protect the liberty of citizens and avoid useless and unjustified searches. If no reason is recorded before an attempt to search is made, the officer cannot be said to be acting in the exercise of his powers or in good faith; consequently a person pushing such officer or otherwise preventing the search cannot be convicted of an offence under S. 353 of the Penal Code. Nor can the officer be said to be acting with due care and attention, so as to render S. 99, I. P. Code, applicable. There is no restriction in S. 74 of the Bihar and Orissa Excise Act, to the effect that a search can be made only in day and not at night. A night search is not therefore illegal. (*Khaja Mahomed Noor, J.*) Chander Prasad *v.* Emperor **170 I C. 784=3 B.R. 786=10 R.P. 156 (1)=38 Cr L J. 982=1937 P.W.N. 377=18 Pat.L.T. 398=A I R 1937 Pat. 501.**

BIHAR AND ORISSA FOOD ADULTERATION ACT (II OF 1919), S 3—*Articles illegally seized under Municipal Act—Complaint in respect of—Legality.*

Articles which are not intended for sale within the Municipality cannot be legally seized by the Commissioners under S. 286 of the Bihar and Orissa Municipal Act. But when they are seized, and it is found that their condition warrants a complaint of an offence punishable under S. 3 of the Food Adulteration Act, committed within the Municipal area, there is nothing to prevent the Commissioners from making a complant in proper form before a Magistrate. There is nothing in the Food Adulteration Act which prohibits a Magistrate from taking cognisance on complaint of an offence punishable under the Act wherever that offence may have been discovered. (*James, J*) Ramjas Marwari *v* Purulia Municipality. **160 I.C 343=37 Cr.L.J. 289=8 R.P. 353=17 Pat.L.T. 258=1936 Cr.C. 231=1936 P.W.N. 45 =A I R. 1936 Pat. 145.**

BIHAR AND ORISSA LOCAL SELF-GOVERNMENT ACT (III OF 1885), S. 118-C (3) (d)—*Construction—Joint Hindu family owning several buildings—Assessment in respect of all exceeding limit prescribed by section—Legality—If* ultra vires.

An owner or occupier of buildings within a union is not taxable under S. 118 C of the Bihar and Orissa Local Self-Government Act in respect of each of the buildings which he owns or occupies; only one tax is assessable on each individual. Cl. (*d*) of sub-S. (3) of that section limits the amount to be assessed on any person to Rs. 5 per mensem. This clause does not refer to buildings, tanks, wells or water-courses, but to persons, and in unequivocal language it limits the assessment on any one person (including a joint Hindu family) to five rupees per mensem. An assessment on a joint Hindu family which owns several buildings within the union to any amount in excess of Rs. 5 per mensem is *ultra vires*, (*Agarwala, J.*) Members of the Union Committee *v.* Sahay Sah, **21 Pat L.T. 271=187 I. C. 300=6 B.R. 448=12 R P. 581=A.I.R. 1940 Pat. 474.**

——**S. 118 Cl. (3) (d)**—*"Person"—If includes joint Hindu family.*

A joint Hindu family is a 'person' within the meaning of Cl. (*d*) of sub-S. (3) of S. 118-C of the Bihar and Orissa Local Self-Government Act. (*Agarwala, J.*) Members of the Union Committee *v.* Sahay Sah. **21 Pat L T. 271=187 I. C. 300=6 B.R. 448=12 R .P. 581=A.I.R. 1940 Pat. 474**

BIHAR AND ORISSA MICA ACT (I OF 1930), S. 17 (2) (a)—Offence under—Nature of —Mica found in excess of amount entered in account— Conviction for — Order confiscating excess mica—Propriety—Cr P. Code, S 517 *See* CR. P. CODE, S. 517. **18 Pat L T. 146=A.I.R. 1937 Pat 257.**

BIHAR AND ORISSA MOTOR VEHICLE RULES, **R. 46, Permit H, Para.** 7—"*Ply*"—*Meaning.*

The word 'ply' in para. 7 of Permit H, under rule 46, means plying for hire, that is to say, it means that the person driving a vehicle stops to take up or put down the passengers for reward A person merely driving his vehicle cannot be said to be plying his vehicle. (*Courtney-Terrell, C J.*) BERRY MAHAPATRA *v.* EMPEROR. **163 I C 399=9 R P 6 (2)=37 Cr.L.J 850=17 Pat.L.T. 378=1936 Cr.C 497 (1)=A.I R. 1936 Pat. 321 (1).**

———**R 61**—*Construction and scope—"Attendant"—Meaning of—Cleaner—If attendant.*

Rule 61 of the Bihar and Orissa Motor Vehicle Rules requires only that there shall be one man besides the driver appointed for the purpose of dealing with and competent to deal with all matters unconnected with the actual driving of the bus. A man employed on the bus as a cleaner whose duties are to put on the bus the luggage, to unload it, put water in the radiator and to start the bus, the driver being left with other duties such as issuing tickets and giving information to passengers, cannot be regarded as an "attendant" within the meaning of R. 61. (*Saunders, J*) GANGULLY *v.* EMPEROR. **161 I.C 703 (1)=8 R P. 474=37 Cr.L J 469=17 Pat L T. 162=1936 Cr. C. 256=1936 P.W N. 147=A I R 1936 Pat 172.**

BIHAR AND ORISSA MUNICIPAL ACT (VII OF 1922)—*Limitation—Market dues—Contract granting right to collect market tolls—Suit by Municipality against grantee to recover—Limitation—Limitation Act, Arts.* 110, 115 *and* 120

The Bihar and Orissa Municipal Act does not prescribe any special period of limitation for the recovery of dues under the Act. A Municipality in exercise of its powers under the Act, maintained a market and settled the right to collect the tolls in the market with the defendant for a period of two years. The amount payable by the defendant was fixed at Rs. 560, out of which the defendant paid only a part. The Municipality brought a suit for recovery of the balance from the defendant.

Held, (1) that the dues payable by the defendant were not rent and so Art. 110 of the Limitation Act was not applicable; (2) that the amount sued for was due to the plaintiff-Municipality under a contract by which the defendant bound himself to pay a certain amount annually, and the suit having been due to the breach of that contract by the defendant, Art. 115 of the Limitation Act applied to the suit; (3) that since the suit fell under the specific Art. 115, it would not be governed by the residuary Art. 120. (*Fazl Ali and Madan, JJ.*) CHAIRMAN AND COMMISSIONER, CHAIBASA MUNICIPALITY *v.* GOBIND SAO **16 Pat. 302=169 I C 364=3 B R. 561=10 R.P. 7=18 Pat L T. 252=A I R. 1937 Pat. 360.**

———**S. 3 (13)**—Owner—Sharahmoaiyan holding —Tenant of—If "owner." *See* BIHAR AND ORISSA MUNICIPAL ACT, S. 109 (2). **20 Pat.L.T. 86.**

———**S. 3 (24)**—*"Road"—What it includes.*

By reason of the definition in S. 3 (24) of the Bihar and Orissa Municipal Act, a road includes on both sides of it the land between the metalled portion of the roadway and the defined boundary of the abutting property. (*Harries, C J. and Fazl Ali, J*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA, **18 Pat 735=184 I C. 52=6 B. R. 8=12 R. P. 214=20 Pat. L. T. 810=A. I. R. 1939 Pat. 683.**

———**Ss. 6 and 16**—*Sabarkars—Status of—If tenure-holders—Liability to pay transfer fee to landlord—Amount of fee.*

Under S. 6 of the Orissa Tenancy Act, sabarkars are, for purposes of S. 16, tenure-holders and are payers of rent and must pay the transfer fee accordingly. The fee payable by them is six times the rent. (*Mohamad Noor, J.*) CHARU CHANDRA ROY *v* SRI RADHA GOBINDA JIN THAKUR. **6 Cut.L T. 13.**

———**S. 12**--*Chairman—Representative—Capacity of.*

By S. 12, the Commissioners become a legal entity which legal entity is not represented by the Chairman; although reference is made to the Chairman from time to time in the Act, he is a person who apart from such reference is unknown to the law, is not a legal entity but is merely a person. If the Chairman is sued, the plaintiff is entitled to relief only against him. In no sense of the word can he be held to be the representative, for the purpose of the proceedings, of the Municipal Commissioners, and there is no justification on principle or on authority or under the Act itself to entitle a party to seek his relief against the Commissioners by bringing an action against the Chairman. It is not merely a mistake of form but it goes to the very root of the action. (*Wort, J.*) KALI PRASAD SINHA *v.* BADRI NARAIN SAHU. **182 I.C 457=12 R P. 16=5 B.R. 768=20 Pat.L.T. 613=A I.R. 1939 Pat. 236.**

———**S. 12**—*Suit by chairman—Maintainability.*

Although the position of a chairman of a Municipality is recognised by the Municipality Act, he is not a legal entity nor a corporation sole and therefore he is not entitled to sue on behalf of the Municipality. The suit must be brought by the body of Commissioners under S. 12 of the Act. The use of the word 'may' in that section must be construed in the sense that they shall by that name sue and be sued and by no other. (*Wort, J*) KAMAKHYA NARAYAN SINGH *v.* CHAIRMAN, HAZARIBAGH MUNICIPALITY. **5 B.R. 599=181 I.C. 486=11 R.P. 594=20 Pat.L.T. 563=A.I.R 1939 Pat. 499.**

———**S. 62**—*Disposal of road—Power of Municipality*

There is no exhaustive definition of "land" in the Bihar and Orissa Municipal Act and the phrase "may sell, lease, exchange or otherwise dispose of any land" in S. 62 seems to be wide enough to cover "road" But even if it be held that the word "land" does include a road, yet the Municipality has not an unrestricted right to sell such road. At its very highest, the power given to the Municipality by S 62 is to sell, lease, exchange or otherwise dispose of any land not required as a road or for other purposes of the Act. If such land is still required for any of the purposes of the Act, then it cannot be disposed of under the powers given by S. 62. (*Harries, C.J. and Fazl Ali, J.*) PATNA CITY MUNICIPALITY *v.* DWARKA PRASAD SINHA. **18**

Pat. 735=20 Pat.L T. 810=12 R.P. 214=6 B.R. 8=184 I.C. 52=A.I.R. 1939 Pat. 683.

——**S. 62**—*Land vested in Municipality under S. 58—Disposal of—Power of Commissioners.*

The power of sale, lease or exchange given to the Commissioners under S. 62 of the Bihar and Orissa Municipal Act is not confined to land which has been acquired by the Municipality under that section, but extends to land which is vested in the Municipality by reason of S. 58 of the Act. (*Harries, C.J and Fazl Ali, J.*) Patna City Municipality *v* Dwarka Prasad Sinha **18 Pat. 735=184 I.C. 52=6 B.R. 8=12 R.P. 214=20 Pat L.T. 810=A.I R. 1939 Pat. 683**

——**S. 64**—*Scope Non-compliance—Contract not in writing or under seal—Suit on—Maintainability—Implied contract — Limitation Act, Art. 115.*

Defendant took a lease or a licence to collect the tolls of a municipal market and agreed to pay a sum of Rs. 4,001 to the Municipality in con sideration of the licence giving him the right to collect the tolls. There was only a resolution of the Municipality, but no contract or document under seal as required by S. 64 of the Bihar and Orissa Municipal Act. Defendant, however, entered into possession of the market under the resolution. The Municipality through its representative sued to recover money due to it under the contract from the defendant.

Held, (1) that there was no contract binding under the Act, and the contract not being in accordance with S. 64 could not be sued upon; (2) that if the Municipality be held entitled to sue on the basis of an implied contract, Art. 115 of the Limitation Act applied to the case, and the suit brought more than three years after the breach was barred. (*Wort and Varma, JJ.*) Ganesh Prasad Sah *v.* Sheikh Jawad Hussain **17 Pat. 277=19 Pat L.T. 653=4 B.R. 801=177 I.C. 272 =11 R.P. 140=A.I.R. 1938 Pat. 429.**

——**S. 82**—*Burden of proof on assessee that meeting was not held—Failure of municipal officers to produce papers called for with explanation for non-production—Finding that meeting was not held—Irregularity of imposition of the tax.*

It must be assumed that what ought to have been done, that is, the holding of the meeting, was in fact done and hence the onus is on the assessee to show that the meeting was not held. An assessee called upon the Municipal Officers to produce papers. The Municipal Officers gave an explanation why the records relating to the meeting were not forthcoming. The Judge thereupon came to the conclusion that the meeting was in fact not held.

Held, that in these circumstances the imposition of the tax was irregular. It did not however prevent the Municipality from holding a meeting and imposing the tax in a proper and regular manner. (*Wort, Ag C.J.*) Commissioners of Darbanga Municipality *v.* Shiva Prasad. **179 I.C. 965=11 R.P. 432 (1)=5 B.R. 326=20 Pat.L.T. 119=A.I.R. 1939 Pat. 20.**

—— **S. 82 (2)**—*Construction—Licence fees for platforms under S. 180—Imposition without sanction of Provincial Government—Legality—If* ultra vires.

Licence fees to be imposed under S. 180 of the Bihar and Orissa Municipal Act in respect of platforms over municipal drains fall within the mischief of S. 82 (2) of the Act; and imposition of a scale of fees in respect of such platforms by the Municipality without the sanction of the Provincial Government is illegal and *ultra vires.* (*Harries, C.J. and Wort, J*) Commissioners of the Arrah Municipality *v.* Inder Chand. **19 Pat. 485=187 I.C. 701=6 B.R. 532=12 R.P. 626=21 Pat L.T. 289.**

——**S 82 (2)**—*Licences for platforms—Obligation to take out—Imposition of—Resolution by Municipal Commissioner—If sufficient authority*

There is nothing in the Bihar and Orissa Municipal Act requiring any other authority than a resolution of the Commissioners at a meeting to impose the obligation on the owners of platforms to take out licences. The Commissioners have power by their own resolution to make it obligatory on the owner of platforms to take out licences. (*Rowland, J.*) Ghadsiram *v.* Vice-Chairman, Sambalpur Municipality **160 I.C. 1076 =8 R.P. 415=37 Cr.L.J. 374=17 Pat.L.T. 148 =1936 P.W.N. 12=1936 Cr.C. 122=A I.R. 1936 Pat. 101.**

——**S. 99 (b)**—*Scope and applicability—Procedure under, if condition precedent to an assessment—Prescribing of tests—When necessary*

S. 99 of the Act does not prescribe the procedure which as a matter of course and on all occasions must be followed by municipalities before assessment is made. It comes into operation only when the question arises of how the words in Cl. (9) of S. 3 "held under one title or agreement" are to be interpreted. Then the Commissioners are to decide at a meeting what tests shall be applied. (*James and Dhavle, JJ.*) Chairman, Arrah Municipality *v.* Ramkumar Choudhury. **16 Pat 662=1938 P W N. 33=19 Pat.L.T. 91= =174 I.C 855=4 B R. 488=10 R.P. 558=A.I R. 1938 Pat 177.**

——**Ss. 100 and 111**—*Unoccupied holder—Owner's liability for latrine-tax—Claim by Municipality against owner—Sustainability.*

"Occupier" as defined in the Bihar and Orissa Municipal Act includes an owner in actual occupation of his own premises, but in the absence of an occupier for a holding which is actually unoccupied, the owner thereof cannot be deemed to be the occupier for purposes of payment of latrine-tax under S. 100 of the Act. The Municipality cannot therefore make the owner who has never been in actual occupation of his holding liable for latrine-tax under S. 111 of the Act.

Quaere.—Whether S. 111 of the Act applies at all to claims of the Municipality for latrine-tax. (*James and Agarwala, JJ.*) Patna City Municipality *v.* Krishnavati Bahoo. **175 I.C. 475= 4 B.R. 585=10 R.P. 626=19 Pat.L.T. 405=1938 P.W.N. 444=A.I.R. 1938 Pat. 391.**

——**S. 107 (2)**—*One month's notice—If condition precedent to alteration of assessment—Suit—Bar of.*

The effect of sub-S. (2) of S. 107 is to make the issue of at least one month's notice of the proposal to make an alteration a condition precedent to the making of the alteration itself. Where no such notice has been given, the fact that the Municipality had already gone into the matter of the merits of the objection to the increased assessment is not a bar to the plaintiff's suit for consideration of validity of such assessment on merits.

(*Courtney-Terrell, C.J.*) Lachminarayan Das *v* Chairman, Cuttack Municipality **163 I.C. 131=8 R.P. 616=17 Pat.L.T. 420=A.I.R. 1936 Pat. 322.**

———S. 107 (2)—*Scope—Non-service of notice—If fatal—Illegality if cured by assessee's appearance.*

The appearance of the assessee before the Committee appointed by the Municipality does not cure the non-service of notice under S. 107(2), Bihar and Orissa Municipal Act. (*Varma, J.*) Commissioner of Patna Municipality *v.* Bishambardeo Narain. **172 I.C. 109=10 R.P. 275=A.I.R. 1937 Pat. 586.**

———S. 109 (2)—*Sharahmoaiyan holding in Municipality consisting of several plots including house—Municipal tax paid by tenant for land—Right to deduct from rent payable to landlord—S. 3 (13)—"Owner".*

A tenant of a sharahmoaiyan holding consisting of a number of plots within a Municipality, one of which is a house occupied by him, is entitled to deduct from the rent payable by him to his landlord the municipal tax which he pays for the land, under S. 109 (2) of the Bihar and Orissa Municipal Act The tenant cannot be treated as the owner of the house or the land though he has an unrestricted right of transfer under the tenure. Owner as defined in S. 3 (13) of the Act is the person who is entitled for the time being to receive any rent with respect to the land and the landlord is therefore the owner. The tenant is consequently entitled to claim a set off for the municipal tax paid by him. (*Manohar Lall, J.*) Harihar Prasad *v.* Anant Prasad **183 I C. 48=12 R.P. 84=5 B.R. 854=20 Pat.L.T. 86=A.I.R. 1939 Pat. 352.**

———S. 111—Applicability—Latrine-tax—Claim against owner of unoccupied holding—Sustainability. *See* Bihar and Orissa Municipal Act, Ss. 100 and 111. **1938 P.W.N. 444**

———S 111—*Holding unoccupied—Owner—If bound to apply for remission of latrine-tax.*

When a holding becomes unoccupied and unproductive of rent, the owner of the holding must apply under S. 111 of the Bihar and Orissa Municipal Act for remission of liability for a portion of municipal taxes other than latrine-tax; but he is not bound to apply for remission of latrine-tax. (*James and Agarwala, JJ.*) Patna City Municipality *v* Krishnavati Bahoo. **175 I.C. 475=4 B.R 585=10 R.P. 626=19 Pat.L.T. 405=1938 P.W.N. 444=A.I.R. 1938 Pat. 391.**

———S. 115—*Applicability—Latrine taxes.*

S 115 relates not only to taxes on persons but also to latrine taxes; in other words, it is a "general provision" as stated at the head of S. 113 "relating to assessment." (*Wort, J.*) Kali Prasad Sinha *v.* Badri Narain Sahu. **182 I.C. 457=12 R.P. 16=5 B.R. 768=20 Pat.L.T. 613=A.I R. 1939 Pat. 236.**

———S. 115 (2)—*Applicability—Illegal enhancement of assessment—If can be looked into in revision of assessment as legal—Notice—Necessity.*

Where an original assessment is illegal by reason of the assessee not having been given an opportunity of presenting his case, it must be wiped out of consideration altogether. Such an enhancement of the assessment in the revised list

must be regarded as an enhancement made for the first time and therefore notice of the same must be given to the assessee under S. 115 (2) of the Bihar and Orissa Municipal Act. (*Harries, C.J*) Panchanan Mukherji *v.* The Commissioners of the Cuttack Municipality. **6 Cut.L. T. 9.**

———Ss. 116 and 117—*Applicability—Amendment of valuation list*

Ss. 116 and 117 of the Bihar and Orissa Municipal Act apply to objections to a proposed amendment of the valuation list by reason of S. 107 (3) of the Act. (*Harries, C.J.*) Panchanan Mukherji *v.* The Commissioners of the Cuttack Municipality. **6 Cut. L T. 9.**

———Ss 116 and 119—*Objection as to liability to assessment—Non-observance of procedure under S. 116—Bar under S. 119—Scope of.*

Where an assessee disputed his occupation of any holding or his liability to be assessed, it is necessary under S. 116 of the Act that he should apply to the Commissioners for review of the assessment or exemption; and S. 119 of the Act provides that no objection shall be taken to any assessment in any other manner than that provided by the Act. (*James and Dhavle, JJ.*) Chairman, Arrah Municipality *v.* Ramkumar Choudhury **16 Pat. 662=1938 P.W.N. 33=19 Pat. L.T. 91=174 I.C 855=4 B.R. 488=10 R.P. 558=A.I.R. 1938 Pat. 177.**

———S 117—*Cases of one Ward heard by Committee directed to hear cases of different Ward—Decision—If without jurisdiction.*

All that the Act provides is that the objections should be heard by a Committee consisting of not less than three Commissioners. It may be a domestic or internal arrangement of the Municipality in assigning cases of one Ward to one Committee and another Ward to another Committee. But it is purely domestic and in no way affects the jurisdiction. There is nothing in the Act to prevent the Municipal Commissioners from arranging their business in whatever way they desire so long as they comply with the provisions of the Act, and the fact that the objections regarding cases of one Ward were heard by the Committee which was directed to hear cases regarding different Wards does not go to the root of the jurisdiction. (*Wort, J.*) Kali Prasad Sinha *v.* Badri Narain Sahu. **182 I.C. 457=12 R P. 16=5 B.R. 768=20 Pat.L.T. 613=A.I.R. 1939 Pat. 236.**

———S. 117—*"Heard and determined"—Meaning—Objections disposed of without hearing assessee—Assessment—Legality of.*

Applications under S. 117 of the Bihar and Orissa Municipal Act urging objections to the proposed enhancement of assessment cannot be disposed of without the assessee being given an opportunity of presenting his case. If they are disposed of without giving such opportunity, then the assessment is clearly illegal and *ultra vires* and the increased amount collected by the Municipality cannot be retained. (*Harries, C.J.*) Panchanan Mukerji *v.* The Commissioners of the Cuttack Municipality. **6 Cut. L.T. 9.**

———S. 117—*Scope—Objection — Validity of assessment.*

S. 117 is quite clear that the objection should be heard and determined by a Committee consisting of not less than three Commissioners. The mere fact that the decision was by majority and that the two members of the Committee who heard the objection were unanimous in their decision makes no difference. But again it does not go to the root of the validity of the assessment but merely entitles the plaintiff to a declaration that the particular objection to the assessment which is objected to is invalid. (*Wort, J.*) Kali Prasad Sinha *v* Badri Narain Sahu. **182 I.C. 457=12 R.P. 16=5 B.R. 768=20 Pat.L.T. 613=A.I.R 1939 Pat. 236.**

——S. 119—Bar under—Scope of. *See* Bihar and Orissa Municipal Act, Ss. 116 and 119. **16 Pat. 662.**

——S. 172 (c)—*Power of Commissioners—Scope of.*

Under S. 172 (*c*) of the Bihar and Orissa Municipal Act, the power given to the Commissioners to turn, divert, discontinue or close any public road, is a power to do so when they are carrying out the road development or road improvement scheme. The section does not empower the Commissioners to close any public road if they so think fit. (*Harries, C. J. and Fazl Ali, J.*) Patna City Municipality *v.* Dwarka Prasad Sinha. **18 Pat. 735=184 I.C 52=6 R.B 8=12 R.P. 214=20 Pat.L.T. 810=A.I R 1939 Pat. 683.**

——S. 172 (f)—*Disposal of roadway—Power of Commissioners.*

Cl. (*f*) of S. 172 of the Bihar and Orissa Municipal Act must be read with the preceding clauses, and it does not give the Commissioners an unrestricted right to dispose of any roadway. (*Harries, C. J. and Fazl Ali, J.*) Patna City Municipality *v.* Dwarka Prasad Sinha. **18 Pat. 735=184 I C. 52=6 B R. 8=12 R P. 214=20 Pat.L.T. 810=A.I.R. 1939 Pat. 683.**

——S. 180—Licence fee for platforms over municipal drain—Imposition of—Sanction by Provincial Government under S. 82 (2)—Necessity. *See* Bihar and Orissa Municipal Act, S. 82 (2). **21 Pat.L T. 289.**

——Ss 180 and 363—Limitation—Municipal licence fee—Suit for—Limitation. *See* Limitation Act, Arts. 115 and 20. **A.I.R. 1938 Pat. 192.**

——S. 180 (2)—*Scope—Old platforms—Retention license—Necessity.*

S. 180 (2) contains nothing to distinguish between the cases of new platforms and old platforms. The intention is that while old platforms will be allowed to be retained, their owners must take out licenses. (*Rowland, J.*) Ghadsiram *v.* Vice-Chairman, Sambalpur Municipality. **160 I.C 1076=8 R.P. 415=37 Cr.L.J. 374=17 Pat. L.T. 148=1936 P.W.N. 12=1936 Cr. C. 122=A. I.R. 1936 Pat. 101.**

——S. 182 (5)—*Roadside lands—Powers of Municipality to lease—Lease for five years with option of renewal for erecting petrol pump—Competency.*

The powers conferred on Municipalities to deal with roadside lands are very limited. Roads (and roadside lands) are only vested in the Municipality as roads. A lease of such land by the Municipality for 5 years with an option of renewal and authorizing the erection of a petrol pump on roadside land is beyond the powers of the Municipality to grant in exercise of its powers under

the Act. It is not competent to the Municipality under the Act and the bye-laws under S. 185 (*b*) to make an income by putting up substantial buildings on roadside lands through lessees while largely destroying the value of the abutting properties of private owners. (*Dhavle, J.*) Dwarka Prasad Sinha *v* Patna City Municipality **177 I.C. 315=4 B R 806=11 R.P. 142=19 Pat. L.T. 511=A.I.R. 1938 Pat 423.**

——S. 185—*By-laws—Lease of road by Municipality for erection of permanent structures—Validity—Access to road—Right of owners of abutting land.*

The by-laws made under S. 185 of the Bihar and Orissa Municipal Act restrict the rights of the Municipality to grant licences for the use or occupation of any public road. In no case can they grant a licence for the erection of any permanent booth or stall, and the maximum period for which they can grant a licence for a temporary booth or stall is one year. A Municipality cannot, therefore, validly grant a lease of a piece of road for a period of five years with powers to renew which gives the lessee a right to erect permanent structures for the sale of articles. Under such a lease, the lessee has no right to erect permanent structures to the prejudice of the owners of land abutting the road. Such structures are a serious infringement of one of their most valuable rights, namely, a right of access to the highway along the whole length of their boundary, and that being so, they are entitled to insist on their removal. (*Harries, C. J and Fazl Ali J.*) Patna City Municipality *v.* Dwarka Prasad Sinha. **18 Pat. 735=184 I.C. 52=6 B.R 8=12 R.P. 214=20 Pat. L.T. 810=A I.R 1939 Pat. 683.**

——Ss. 194 and 360—*Notice requiring owner to demolish building or file objection—Failure to comply with—Objection filed after 5 days and enquired into by Municipality—Subsequent prosecution for failure to comply with original notice—Sustainability.*

Where in answer to a notice under S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act issued to the owner of building requiring him to demolish the building within a week or to file objection within five days, the owner files an objection after 5 days, that is not a sufficient compliance with the notice. But if the objection so preferred is in fact inquired into by the Municipal authorities, it is not competent to the Municipality thereafter to prosecute the owner of the building for non-compliance with the original requisition, taking advantage of the technical defect of delay in filing the objection. (*Dhavle and Rowland, JJ.*) Dwarka Mahton *v.* Patna City Municipality. **15 Pat. 36=162 I.C 550=8 R.P. 541=37 Cr.L J. 634 (2)=17 Pat.L T. 123=1936 Cr.C. 398=1936 P.W.N 215=A.I.R. 1936 Pat. 282.**

——S. 194—*Scope—Notice requiring demolition of building without alternative of repairing—Legality.*

A notice requiring the owner of a building requiring him merely to demolish the building without giving him the choice of one of the alternatives of securing or repairing it also is not illegal as being contrary to S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act. (*Dhavle and Rowland, JJ.*) Dwarka Mahton *v.* Patna City Municipality. **15 Pat. 36=162 I.C. 550=8 R.P**

541=37 Cr.L J. 634 (2)=17 Pat L T. 123=1936 Cr C. 398=1936 P W N. 215=A.I.R. 1936 Pat. 282.

——**S. 194 (1)** (ii)—*Notice to demolish building—Legality of—Dangerous and ruinous condition of the building—If to be proved before court of law—Decision of Municipality—If final.*

It is not necessary for the legality of a notice under S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act, requiring the demolition of a building, that the building should be found by the Courts to have been in a ruinous condition and dangerous to persons or property. The scheme of this Act is that it is for the Municipality to decide not only whether a building is in a ruinous condition or dangerous to persons or property, but also whether demolition is necessary or repairs would suffice. The decision of the Municipality cannot be questioned in the Courts. The rate-payer is not, however, absolutely helpless, for he has the alternative of preferring an objection under S. 360 of the Act. If he disputes the necessity for doing the thing required by the notice, he is entitled to prefer an objection under S. 360 within five days. (*Dhavle and Rowland, JJ.*) DWARKA MAHTON *v* PATNA CITY MUNICIPALITY. **162 I C. 550=8 R P 541=37 Cr L.J. 634 (2)=15 Pat. 36=17 Pat.L T. 123=1936 P W.N. 215=1936 Cr.C 398=A.I.R. 1936 Pat 282.**

——**S 194 (2)**—*Failure to comply with notice under S. 194 (1) (ii)—Prosecution—Plea that building not dangerous or ruinous—If open.*

In a prosecution of the owner or occupier of a building who has failed to comply with a notice under S. 194 (1) (*ii*) of the Bihar and Orissa Municipal Act, requiring him to demolish the building or to file objections, it is not open to the owner or occupier to contend in answer to the prosecution that the building was not in a ruinous or dangerous condition and that no demolition in fact was necessary. Neither the fact that repairs have been carried out by the owner nor the condition of the building as it appears to the trying Magistrate on inspection of the building has any bearing on the question of the liability of the owner to be convicted and fined under S. 192 (4) for failure to comply with the requisition. (*Dhavle and Rowland, JJ.*) DWARKA MAHTON *v.* PATNA CITY MUNICIPALITY. **15 Pat. 36=162 I.C 550 =8 R.P. 541=37 Cr.L.J. 634 (2)=17 Pat.L.T. 123=1936 Cr.C. 398=1936 P.W.N. 215=A.I.R 1936 Pat. 282.**

——**Ss. 203 and 197**—*Sentence imposing daily fine—Legality.*

Where a Magistrate convicted the petitioner under S. 197 read with S. 203 of the Bihar and Orissa Municipal Act and sentenced him to pay a certain fine and further directed him to pay a daily fine after the expiry of one month from his order till the encroachment was removed.

Held, that under S. 203 of the Act it was competent for the Magistrate to impose a daily fine in respect of an offence which had already taken place, that is to say, it was open to him to impose a daily fine from the date when the petitioner failed to comply with the Municipal order directing him to remove the encroachment, and that as the Magistrate had not seen fit to impose that fine but had imposed a fine in respect of an offence which had not been committed at the date of the order, the order directing the petitioner to pay a daily fine should be set aside. (*Agarwala, J.*) HALUMAN SAH *v* MOTIHARI MUNICIPALITY **167 I.C. 665=9 R.P 412 (1)=38 Cr.L J. 416 (2)=3 B R. 297=18 Pat.L.T. 332=A.I.R. 1937 Pat. 352.**

——**Ss. 285 and 286**—*Power to seize articles while in transit.*

Articles of the kind described in S. 285 intended for sale within the Municipality, which are in course of transit in public roads, can be seized by the Commissioners in virtue of the general powers given to them by S 285. Such articles could not, however, be legally seized if they were not intended for sale within the Municipality. (*James, J.*) RAMJAS MARWARI *v* PURULIA MUNICIPALITY **160 I.C 343=37 Cr.L.J. 289=8 R.P. 353=17 Pat.L.T. 253=1936 P.W.N. 45=1936 Cr. C. 231=A.I.R 1936 Pat. 145.**

——**S. 354**—*Applicability—Resolutions under S 259 (1) and (3) fixing local limits and requiring licences for mills—Order requiring licences and fixing fees—If rules or bye-laws—Confirmation by government—Necessity*

The fixing of local limits under S. 259 (1) of the Bihar and Orissa Municipal Act is not the making of a rule. It is more of the nature of an order applying a section of the Act. Resolutions passed by the Municipal Commissioners under S. 259 (1) and (3) of the Act fixing local limits and requiring licences for working surkhi mills and fixing licence fees do not fall under S. 354. Therefore orders requiring licences for working such mills and fixing the licence fees are not rules requiring confirmation by Government as a condition precedent to their taking effect under S. 354 of the Act Nor are they bye-laws. (*Rowland, J.*) MUZAFFERPUR MUNICIPALITY *v* TARA PRASAD. **185 I C. 630=12 R.P. 433=41 Cr.L.J. 217=1940 P.W.N. 255=6 B R. 226=A.I.R. 1940 Pat. 313.**

——**S. 359 (2)**—*Scope—Non-compliance with—Effect on notice and on prosecution for not complying with notice.*

A notice under S. 238 was served upon the manager of the estate asking him to construct a proper type of drains within one month. The other alternative, that if he did not do what he was being asked to do, the Commissioners would get it done themselves, was not mentioned in the notice

Held, that the provisions of S. 359, Cl. (2) were imperative and non-compliance with those provisions made the notice illegal. Hence prosecution could not be based thereon.

Held, further, that the notice was very vague as nothing was expressed regarding the idea of Municipal authorities about a proper type of drains and the notice was defective even from the point of view of S. 217 as no specification had been supplied. (*Varma, J.*) MANAGER, DALBHUM ESTATE *v.* OVERSEER, JUGSALAI NOTIFIED AREA COMMITTEE. **169 I C. 38=3 B.R. 511=9 R.P. 538=18 Pat. L.T 559=38 Cr.L.J. 685=1937 P.W.N. 602=A.I.R. 1937 Pat. 224.**

——**S. 377**—*Applicability—Suit for declaration that alteration in assessment is illegal and injunction restraining levy of same.*

S. 377 is for the purpose of protecting a public authority from suits in respect of acts *bona fide* purporting to have been performed under the ægis of a lawful act but in which in spite of the *bona fides* of the public authority the law has been overstepped and a tort has been committed. It is not intended to apply to suits for the recovery of sums of money other than damage for tort which are lawfully recoverable either under statute or at Common Law. It does not apply to a suit for a declaration that an alteration in assessment is illegal and for injunction preventing the Municipality for levying such assessment. (*Courtney Terrell, C.J.*) LACHMINARAYAN DAS *v.* CHAIRMAN, CUTTACK MUNICIPALITY. **163 I.C. 131=8 R P. 616=17 Pat.L T. 420=A.I.R. 1936 Pat. 322.**

——**S. 380**—*Scope—Notice served under S. 115 (2) instead of under S. 107 (2)—Defect—If curable.*

Where a notice instead of being served under S. 107 (2), Bihar and Orissa Municipal Act, is served under S. 115 (2) of the same Act, and there is no defect in form, the defect is not curable under S. 380 of the Act. (*Varma, J.*) COMMISSIONER OF PATNA MUNICIPALITY *v.* BISHAMBARDEO NARAIN. **172 I.C. 109=10 R.P. 275=A.I.R. 1937 Pat. 586.**

BIHAR AND ORISSA OPIUM SMOKING ACT (II OF 1928), S. 12—*Rules under R. 11—If* ultra vires—*Power of rule-making authority to create new offence and impose penalty for breach of rules.*

The Bihar and Orissa Opium Smoking Act does not provide for any penalty for the breach of the conditions and restrictions referred to S. 12, namely, the conditions and restrictions subject to which a registered smoker may manufacture, possess or smoke prepared opium. The Act neither imposes a penalty for breach of the terms of a licence granted to a licensed smoker, nor does it expressly empower the rule-making authority to provide for such penalty. The rule-making authority therefore has no authority to create an offence and impose a penalty for breach of the rules in the absence of statutory authority, as has been done by R. 11 of the rules framed under the Act. R. 11 of the Opium Smoking Rules is consequently *ultra vires* (*Agarwala and Varma, JJ.*) EMPEROR *v.* NEMU SINGH **16 Pat. 244=9 R.P. 479=3 B.R. 418=38 Cr L.J. 540=168 I C. 332=18 Pat L T. 118=1937 P.W.N. 128=A.I.R. 1937 Pat. 226.**

BIHAR AND ORISSA PREVENTION OF ADULTERATION ACT (II OF 1919), S 4 (b)—*Applicability—Conditions—Proof of fraud—Necessity—Mere presence of foreign matter in small quantity—Offence.*

Before applying S 4 (*b*), in a prosecution under the Act, what the Court has to determine is that foreign matter or ingredient has been added fraudulently to the food. The mere presence of some foreign matter in small quantity is not necessarily an offence inasmuch as Excep. (*ii*) to S 4 specially excludes the case where without fraud any extraneous matter has in the process of collection, preparation or conveyance become mixed with the food. The Court has to decide whether the admixture of the foreign matter is so large

that it cannot be explained otherwise than by fraud. (*Rowland, J.*) SARUP LAL *v.* EMPEROR. **166 I.C. 206=9 R.P. 264=38 Cr.L J 192=3 B. R. 137=17 Pat.L.T. 958=1936 Cr.C. 1067=A.I. R. 1936 Pat 636.**

——**S. 10**—*Prosecution under—Question as to absence of order or consent of local authority or that the Act has not been brought into force in the area—When to be raised.*

In proceedings started under the Bihar and Orissa Prevention of Adulteration Act, the questions that the prosecution was started without the order or consent in writing of the local authority or that it has not been shown that the Act has been brought in force in the local area by a notification of the Local Government are questions which ought to be raised and determined before the Courts of facts and cannot be raised in revision. (*Rowland, J*) SARUP LAL *v.* EMPEROR. **166 I.C. 206=9 R.P. 264=38 Cr L J. 192=3 B R. 137=17 Pat L.T. 958=1936 Cr.C. 1067=A I.R. 1936 Pat 636.**

——**S. 10**—*Scope—Absence of complaint by local authority—Effect—Irregularity, if cured by S. 537, Cr. P. Code.*

Where proceedings under the Bihar and Orissa Prevention of Adulteration Act are alleged to have been irregular, by reason of an absence of complaint by a local authority or an authorized person required by S. 10, S. 537, Cr P. Code, provides sufficiently to cure that irregularity. (*Rowland, J.*) SARUP LAL *v.* EMPEROR **166 I.C. 206=9 R.P 264=38 Cr.L J. 192=3 B R. 137=17 Pat L.T. 958=1936 Cr.C. 1067=A.I.R. 1936 Pat 636.**

BIHAR AND ORISSA PUBLIC DEMANDS RECOVERY ACT (IV OF 1914)—*Proceedings under—Doctrine of representation—Applicability—*Karta *of joint family—If represents entire family.*

The *karta* of a joint family effectively represents the family even although not expressly named as such The principle of representation cannot be regarded as foreign to certificate proceedings, but applies to such proceedings. (*Wort and Dhavle, JJ.*) KAMESHWAR SINGH *v.* ISHWARI PRASAD SINGH. **189 I.C. 114=6 B R. 761=21 Pat L T. 503.**

——*Sale under—Rights of purchaser—Debt due to Government by Company—Mortgage by Company to director to discharge part of debt—Subsequent liquidation of Company—Sale at the instance of Government—Suit by director to enforce mortgage—Right to priority over purchaser in Government sale.*

A limited company borrowed a sum of Rs.75,000 from the Government under the Bihar and Orissa State Aid to Industries Act and executed a mortgage of all its assets in favour of the Government; undertaking to repay annually a sum of Rs. 5.000. The mortgage was not, however, registered, and after the payment of two instalments the company executed to the Government a promissory note for the balance. As the company could not find the money for payment of the next instalment, the plaintiff, one of the directors of the company, advanced Rs. 5,000 for the purpose, and took from the company a mortgage of the assets of the company. The deed recited, ***inter alia*** that there was a prior mortgage to

Government, and that the mortgage to plaintiff was a second mortgage, the Government being recited as the first mortgagee. At the instance of another creditor, an order was made for a compulsory winding up of the company. The Government also proceeded under the Public Demands Recovery Act to realise the amount due to it and brought the assets of the company to sale under an order from the Court At the sale the second defendant became the purchaser. The plaintiff afterwards sued the company and the second defendant to enforce his mortgage. The lower Court having decreed the suit, the 2nd defendant appealed to the High Court.

Held, (1) that the second defendant, as the auction-purchaser at the sale under the Public Demands Recovery Act, stood in the shoes of the company and was entitled to and affected by the same equities and estoppels as those which the debtor-company might have enjoyed or laboured under; (2) that the plaintiff could not insist that his mortgage should take precedence of the debt due to the Government; (3) that it was not right that the plaintiff, a director of insolvent company, about to go into liquidation should be allowed the privileged position of a secured creditor by merely discharging a small portion of the company's indebtedness: and (4) that as against an innocent purchaser (defendant No. 2), for value of property sold in execution of a debt due to an unsecured creditor, the plaintiff should not be allowed to enforce his security, and the plaintiff's suit should therefore be dismissed. *(Courtney-Terrell, C.J. and James, JJ)* Thakur Das *v.* Ramgulam Singh. **15 Pat 762=168 I.C. 124=3 B.R. 391=9 R.P. 466=18 Pat.L.T. 217=1936 P.W.N. 768=A I R. 1937 Pat. 151.**

——**S 7**—*Notice under—Service of—Validity—Form of return by process-server—If material.*

The validity of the service of a notice under S. 7 of the Public Demands Recovery Act does not in any way depend upon the form of the process-server's return of service. Where it is found that the process-server had offered the notice to the party but that he refused it and that thereupon the process-server affixed it to the darwaza of his house, the service must be held valid according to the statutory rules under Sch. II of the Act. *(Courtney-Terrell, C.J. and James, J.)* Ramkeshwar Singh *v.* Kesho Prasad Sinha. **180 I.C. 740=11 R.P 528=5 B.R. 483=1938 P.W.N. 202=19 Pat.L.T. 645=A I.R. 1938 Pat. 622.**

——**S. 8 (b)**—*Scope and effect of—Charge—When comes into force—Sale of property in execution of mortgage decree after service of notice in certificate proceedings—Subsequent certificate sale—If rent sale or merely money decree sale.*

The charge provided by S. 8 (*b*) of the Bihar and Orissa Public Demands Recovery Act comes into existenee from the date on which the notice under S. 7 is served on the certificate debtor and subsists throughout from that date, and a sale held would have the effect of a rent sale subject to the provisions of S. 22 of the Bihar Tenancy Act. A purchaser of the property at a sale in execution of a mortgage decree held after the service of the notice on the certificate debtor in the certificate proceedings cannot therefore impeach the certificate sale or be allowed to contend that the certificate proceedings have only the effect of a money decree. *(Wort and Dhavle, JJ.)* Kameshwar Singh *v.* Ishwari Prasad Singh. **189 I.C. 114=6 B.R. 761=21 Pat. L.T. 503.**

——**Ss 24 and 25**—Order rejecting objections to sale by certificate officer—Suit by objector for title and possession—Limitation applicable. *See* Limitation Act, Art. 11. **17 Pat 446.**

——**S. 25**—*Scope — Certificate— Validity and finality of—Decision on claim preferred—If can be challenged or ignored in suit under S. 25—Plea raised in suit—If can be abandoned in appeal.*

The Certificate (Public Demands Recovery) Act has a procedure of its own according to which as soon as a certificate is signed by the certificate officer, it becomes a decree, and then may follow certain enquiries as a result of which the decree may either be cancelled, varied or may be proceeded with. The decree may be varied or cancelled under S. 10 of the Act on objection by the certificate-debtor, or under S 11 it may, subject to the law of limitation, be amended at any time by the addition, omission or substitution of the name of any certificate-holder or certificate-debtor or by the alteration of the amount claimed therein. But a party who prefers a claim to the certificate Court and gets a decision pronounced upon it cannot challenge it in a separate Civil Court and cannot ask the Civil Court to ignore the decision of the certificate Court on the ground that that Court had no jurisdiction to decide that question. Where a defeated claimant raises in a suit under S. 25 a plea which is outside the scope of such a suit, and the parties go to trial and adduce evidence upon that issue, he cannot be allowed at the appellate suit to ask the Court to dismiss that issue from consideration. *(Courtney-Terrell, C.J., Fazl Ali and James, JJ.)* Bindeshwari Prasad *v.* Shiva Dutt Singh. **176 I.C. 49=4 B.R. 661=11 R.P 43=1938 P.W.N. 329=19 Pat. L.T. 328=A.I.R. 1938 Pat. 315 (S.B).**

——S. 26—*Certificate sale—What passes.*

A certificate has no greater force than that of a simple money decree and nothing is sold in execution of it except the right, title and interest of the certificate-debtor mentioned therein. If a property which has devolved upon another person be sold as belonging to the certificate-debtor mentioned in the certificate, nothing passes to the auction purchaser. *(Mahomed Noor and Rowland, JJ)* Mangtulal Bagaria *v.* Daya Shanker. **165 I C 749=9 R.P. 205=18 Pat.L.T. 301=3 B.R. 73=A I R 1936 Pat. 572.**

——S. 26—Certificate sale in execution as against one of two co-sharers—Effect on interest of other co-sharer and his transferee—Suit for declaration by latter—Competency without prayer for consequential relief *See* Specific Relief Act, S. 42. **A.I R. 1937 Pat. 250.**

——S. 26—*Effect of sale under—What passes.*

The provisions of the Public Demands Recovery Act clearly show that the effect of a sale under that Act is the same as the effect of a sale under the C. P. Code and consequently all that passes to the purchaser is the right, title and interest of the persons named as the judgment-debtors. (*Courtney-Terrell, C J and James, J.*) MAHADEO RAM *v.* GANESH PRASAD. **171 I C. 232=10 R P 191=1937 P.W.N. 807=4 B.R. 9=A.I. R. 1937 Pat. 517.**

——**S. 26 (1)**—*Certificate sale—What passes—Certificate against Hindu father—Sale—Father's power of sale of son's share for own debts not illegal or immoral—If passes.*

It is beyond question that a Hindu Mitakshara son cannot, by reason of his pious obligation, successfully impugn a sale of the family property by the father to discharge his own debts provided they are not *avyavaharika*; the father may sell the joint family property including the son's interest therein to discharge such debts, or lay it open to be taken in execution proceedings for them. But this power of sale of the father cannot pass to a certificate purchaser of his own right, title and interest at a certificate sale. The certificate holder under S. 26 (1) of the Public Demands Recovery Act is a different position from that of a holder of a decree against a Hindu father. A sale held at his instance can only pass to the certificate purchaser the right, title and interest of the certificate debtor. This does not and cannot include the father's qualified power to dispose of the son's interest in the joint family property. (*Harries. C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v* LAL BEHARI SARAN SINGH. **21 Pat. L.T. 377=6 B R 713=1940 P.W.N. 420=A I.R. 1940 Pat. 328 (F B.).**

——**S. 45, Proviso**—*Certificate sale—Suit in Civil Court to set aside—Limitation.*

Under the proviso to S. 45 of the Public Demands Recovery Act, a suit in the Civil Court by a legal representative of a deceased certificate debtor for recovery of possession of the property sold or to declare the sale void on the ground that the certificate debtor died before the sale and the sale was held without notice to his legal representative, must be brought within one year from the date of delivery of the property to the purchaser. A suit brought after one year is clearly barred and cannot be entertained. (*Harries, C.J, Dhavle and Manohar Lall, JJ*) HARI PRASAD SINGH *v.* LAL BEHARI SARAN SINGH. **6 B.R. 713=21 Pat L.T 377=1940 P.W.N. 420=A I R. 1940 Pat 328 (F B.).**

——**S. 46**—*Scope—"Making of a certificate"—Meaning of—Deputy Collector enhancing rent of holding in suit by landlord—Appeal to Collector—Latter varying rate of rent in appeal—Jurisdiction—Suit to declare decision of Collector null and void—If barred.*

An appeal is a creation of statute and no one can constitute himself an appellate tribunal in a case where the statute does not constitute him an appellate tribunal for the purpose of an appeal. In the case of a decision by a Deputy Collector enhancing the rent of a holding in a suit by the landlord, the tribunal indicated by the statute to hear an appeal is the District Judge. The Collector has no jurisdiction to hear such an appeal and if he entertains an appeal and makes an order, that would be *ultra vires* and null and void. The making of a decision as to the validity of the Collector's order purporting to be passed in the appeal cannot be a question relating to the making of a certificate within the meaning of S. 46 of the Bihar and Orissa Public Demands Recovery Act. The "making of a certificate" in that section means the doing of those things which are required to be done by the Certificate Officer under the statute. It is not necessary for that officer to come to a decision as to the validity of the Collector's order as that order is on the face of it null and void. S. 46 of the Act is therefore no bar to a suit for a declaration that the decision of the Collector passed in appeal is *ultra vires* and that the tenants are therefore liable to pay rent at the rate to which it was enhanced by the Deputy Collector whose decision was varied by the Collector without jurisdiction. (*Agarwala, J.*) SARPANANDA SAMAL *v.* RAJA RAJENDRA NARAYAN BHUNJ DEO. **5 C L.T 6.**

——**S. 46**—*Scope of—Suit for declaration that sale does not affect plaintiff—If barred.*

There is wide difference between setting aside a sale and deciding that the plaintiff's right was not affected by it. S. 46 refers to a suit for setting aside a sale. It has got no reference to a case in which the plaintiff alleges that the sale though good has not in fact affected him. as there was no decree against him. (*Mahomed Noor and Rowland, JJ.*) MANGTULAL BAGARIA *v* DAYA SHANKER **165 I.C. 749=9 R.P. 205=18 Pat L.T. 301=3 B.R. 73=A I.R. 1936 Pat 572.**

——**S. 52**—*Scope—Death of debtor after notice and before sale—Absence of notice to legal representatives—Sale—If void.*

Dhavle, J—The certificate officer's jurisdiction to sell under the Public Demands Recovery Act is founded in a "duly filed" certificate and not on the actual existence of the certificate debtor himself. A notice to the legal representatives of a deceased certificate debtor cannot be placed on a higher footing than the notice to the certificate debtor. Where the certificate debtor who has been served with a notice under S. 7, dies before sale, but notice is given to his legal representatives, the sale held after the death of the certificate debtor without notice to the legal representatives, cannot be held to be void in respect of the interest of the deceased debtor.

Harries, C.J. and Manohar Lall, J.—Quaere: Whether the certificate officer while proceeding to enforce a certificate under the Public Demands Recovery Act has jurisdiction to sell the estate of the right, title and interest of a certificate-debtor who has died between the death of the service on him of the notice under S. 7 of the Act and the date of the actual sale without the issue of a notice to his legal representatives. (*Harries, C. J., Dhavle and Manohar Lall, JJ*) HARI PRASAD SINGH *v.* LAL BEHARI SARAN SINGH. **6 B R. 713=1940 P.W N. 420=21 Pat.L.T. 377=A.I.R. 1940 Pat. 328 (F.B.).**

——**Sch. II, R. 25**—*Notice under—Service on debtor's elder brother—Validity—Suit to set aside sale on ground of non-service of notice—Burden of proof.*

Where the notice of sale proclamation under R. 25 of Sch. II of the Public Demands Recovery Act is served on the elder brother of the debtor, that is a valid service as required by the rules. In a suit by the debtor to set aside the sale on the ground that he was not informed of such service it is for him to prove his allegation; it is not for the defendant to prove that the plaintiff knew or was informed of such service. (*Courtney-

Terrell, C.J. and James, J.) Ram Keshwar Singh *v.* Kesho Prasad Sinha. **180 I C. 740=11 R.P. 528=5 B.R. 483=1938 P.W.N. 202=19 Pat.L.T. 645=A I R. 1938 Pat. 622.**

BIHAR AND ORISSA ROAD CESS ACT—Scope—Road cess return—Admissibility in evidence. *See* Evidence—Admissibility. **A.I.R. 1937 Pat. 561.**

BIHAR AND ORISSA SUGAR CANE RULES (1934), R. 15 (d), (e) and (f)—*Object and scope of—Purchasing agent—Liability for infringement of rule by weighment clerk.*

Rule 15 of the Sugar cane Rules distinctly makes the purchasing agent liable if it is found that the weighment clerk acting on his behalf is guilty, unless he shows that he has used all due diligence to enforce the observance of the rules and that the offence was committed without his knowledge or consent. The object of the rule is to protect the cultivators who are not always educated from the wiles of persons dealing with them on behalf of the purchasing agent and hence rule 15 makes the latter himself liable along with the person acting on his behalf unless he shows that he was not negligent in his duties. Such cases are not likely to be detected easily, and when detected should not be dealt with leniently. A purchasing agent who merely says that he was not present at the time of the offence and that he never used to go to the weigment clerk who used to remain at the weighbridge cannot be absolved from liability under R. 15. (*Varma J*) Bala Bux *v.* Emperor. **176 I.C. 558=39 Cr L.J 732=11 R P. 85=4 B.R 734=1939 P.W.N. 181=19 Pat L T. 395=A.I.R 1938 Pat 366.**

———R. 18—Applicability—"Whoever"—If restricted to actual purchaser of sugar-cane. *See* Sugar-Cane Act, Ss. 5 and 7. **16 Pat. 251=18 Pat L T. 182.**

BIHAR AND ORISSA VILLAGE ADMINISTRATION ACT (III OF 1922) Ss. 53 (2) and 68—*Scope and effect of—Complaint before Magistrate—Transfer to Union Board—Application by accused for transfer to Magistrate—Power of Union Board to transfer case—Proper procedure*

S. 8 of the Bihar and Orissa Village Administration Act does not empower a Union Board or Panchayat to re-transfer a case to the Court of a Magistrate; it only empowers it to direct the complainant to file a complaint before the proper Court. Where a complaint was originally filed before a Magistrate and was transferred to the Union Board under S. 53 (2) of the Act, the procedure to be followed by an accused claiming trial by a Magistrate is to move the District Magistrate or the Sub-Divisional Magistrate under S. 53 (2) (*b*). (*Fazl Ali, J.*) Ramachandra Singh *v.* Baldeo Singh. **185 I C 748=12 R P. 445=6 B.R 247=41 Cr L.J 232=1939 P. W N 937=A I R 1940 Pat 184.**

———**S 58**—*Plaintiff obtaining decree in Panchayat Court—Right to get it transferred to Civil Court for execution.*

There no is provision anywhere in the Village Administration Act save in the special Panchayat Courts of Chota Nagpur for the transfer of a decree to the Civil Court for execution and the C. P. Code does not apply to the Panchayat Court. Accordingly, a plaintiff, who in a suit of the kind contemplated by S. 58 of the Village Administration Act obtains a decree in the Panchayat Court, cannot get that decree transferred to the Civil Court for execution. (*Courtney-Terrell, C.J and Muhammad Noor, J*) Banwari Lal *v.* Badri Ram. **160 I.C 345=8 R P 357 (1) =1936 P.W.N. 44=17 Pat.L.T. 12=A I.R. 1936 Pat. 150.**

BIHAR MONEY LENDERS' ACT (III OF 1938), S. 7—*Applicability to period after date of suit.*

The rule of Damdupat introduced by S. 7 of the Bihar Money-Lenders'Act is restricted to the period proceeding the institution of the suit and does not apply to the period subsequent to the institution of the suit. (*Agarwala and Rowland, JJ.*) Ram Sarup Sah *v.* Mukhi Singh. **187 I. C. 132=12 R P 564=6 B R 430.**

———**S 8**—*Discretion—Interference in second appeal.*

Where the Court of appeal below fails to exercise its statutory discretion in the matter of interest subsequent to the date of institution of the suit, it is open to the High Court in second appeal to pass necessary orders in respect of interest subsequent to suit. (*Agarwala and Rowland, JJ.*) Ram Sarup Sah *v.* Mukhi Singh. **187 I C. 132=12 R.P. 564=6 B.R. 430**

———**S 8**—*Reduction of interest—Discretion of Court.*

There is nothing in S 8 of the Bihar Money-Lenders' Act, 1938, to indicate that the Court is bound to exercise its discretion in favour of the debtor in every case. What appears to be contemplated is that the Court shall reduce the interest as indicated in the section in cases where the Court considers that the circumstances justify taking such a course. But where the original rate of interest is not exhorbitant, and there is nothing to indicate that the debtor has not been fairly treated by the creditor, there is no reason why the High Court in second appeal should exercise this discretion (*Agarwala and Rowland, JJ*) Baij Nath Thakur *v.* Sarwan Chaudhury. **6 B R. 369=186 I.C. 438=12 R P. 501=A.I R 1940 Pat 423**

———**S. 11**—*Appeal—Order determining instalments—Appealability—C. P. Code, S. 47.*

An order determining instalments under S. 11 of the Bihar Money-Lenders' Act is not appealable as an order under S. 47, C. P. Code. The only orders under S 47, C. P. Code, which are appealable are orders which finally determine the rights of the parties. Under S. 11 of the Bihar Money-Lenders' Act there is nothing for the Court to decide as to the rights of the parties in the suit. The question is one of procedure, whether the judgment-debtor should be given time to pay and the decree-holder restrained from exercising the right which he has under the law to execute his decree at once. An order regulating the procedure in this matter is an interlocutory order and is not appealable. (*Agarwala and Rowland JJ.*) Dhanukdhari Singh *v.* Ramrattan. **1940 P,W.N. 492.**

———**(as amended by Act V of 1938), S. 11**—*Applicability—Mortgage suit—Preliminary decree long before* 1938—*Final decree in terms of preliminary decree—If can be passed after* 1938.

S. 11 of the Bihar Money-Lenders Act has to be construed as not intended to affect a decree already passed; a Court cannot therefore go behind a preliminary decree already passed by it in a mortgage suit long before the Act. The Court cannot therefore refuse to pass a final decree for sale in accordance with the preliminary decree on the ground that S. 11 of the Act came into force before the application for final decree was made. (*Rowland and Manohar Lall, JJ.*) MUHAMMAD YUNUS *v.* CHAMPAMANI BIBI. **18 Pat 141=179 I.C. 549=5 B.R. 252=11 R.P. 382=1938 P.W.N. 885=19 Pat.L.T. 875=A.I.R. 1939 Pat. 49.**

——**S. 11**—*Application under—When to be made.*

An application under S. 11 for payment of decretal amount by instalments can be made at any time between the date of the first levying of execution and the date fixed for the sale. Therefore the fact that the application is made only when properties are going to be sold and not when decree was passed is no reason for the Court to decline to consider the merits of the case. (*Wort and Meredith, JJ.*) VISHANATH KUMARI *v.* SONU LAL. **6 B.R. 775=A.I.R. 1940 Pat. 352.**

——**S 11**—*Discretion of Court under—Circumstances to be considered in fixing and ordering instalments.*

The power conferred on the executing Court by S. 11 of the Bihar Money Lenders Act, is a discretion which the Court may exercise in derogation of the rights of the decree-holder to execute the whole of his decree immediately against the judgment-debtor. The Court is no doubt required to take into consideration the capacity of the judgment-debtor to pay the instalment; but the Court is also required to take into consideration the amount of the decree and the circumstances of the judgmedt debtor. If after taking into account the various circumstances mentioned, it appears to the Court that a judgment-debtor will be able to discharge his obligations to his creditor if he is given a reasonable time, the Court is empowered to give that time. The Court is, however, bound to consider whether the resources of the judgment-debtor are such as to justify an expectation that the decree-holder's claim will not be defeated by allowing instalments. Where it is clear that the resources of the judgment-debtor are so meagre in relation to his liability that he is not likely to be able to discharge the decretal debt within a reasonable time, the Court would not be exercising a wise discretion in prolonging the execution proceedings by fixing instalments. (*Agarwala and Rowland JJ.*) DHANUKDHARI SINGH *v.* RAMRATAN. **1940 P.W N. 492.**

——**S 11**—*Scope—Appellate Court—Power to reduce interest in the absence of appeal as to amount decreed for principal and interest.*

S. 11 of the Bihar Money-Lenders Act is clear and gives power to an appellate Court to reduce the interest, if the conditions mentioned in S. 11 are present, although there is no appeal by any of the parties concerned with respect to the amount decreed by the trial Court as principal and interest. (*Agarwala and Rowland, JJ.*) RAM SARUP SAH *v.* MUKHI SINGH. **187 I.C. 132=12 R.P. 564=6 B.R. 430.**

——**S 11**—*Scope—If ultra vires—If void as repugnant to any existing Indian Law—Government of India Act* (1935). *S.* 107 (1).

S. 11 of the Bihar Money-Lenders Act of 1938 is not *ultra vires* of the Provincial Legislature, as the latter has power to pass such an Act dealing with money-lending and money-lenders. But the section being repugnant to existing Indian law is void under S. 107 (1) of the Government of India Act, 1935.

Wort, J.—S. 11 of the Bihar Money-Lenders Act whether it be described as a mere rule of limitation or as a provision of substantive law, most certainly deprives the Court of the discretion given to the Court under S. 3 of the Usurious Loans Act of 1918 in cases in which the circumstances proved allow of the exercise of a discretion, and is most certainly opposed to the express provision of law laid down in the Usury Laws Repeal Act of 1855 in those cases to which the Usurious Loans Act does not apply. S. 11 of the Bihar Money-Lenders Act is therefore repugnant to the earlier existing Indian law and to the extent of the repugnancy is void under S. 107 (1) of the Government of India Act of 1935.

Dhavle. J.—S 11 of the Bihar Money Lenders Act has not been competently enacted so as to supersede S 2 of the Usury Laws Repeal Act and must be treated as void

Manohar Lall, J—S. 11 of the Bihar Money-Lenders Act is *intra vires* of the Bihar Legislature but it conflicts with existing Indian law, namely, the Usury Laws Repeal Act of 1855, the Usurious Loans Act of 1918 and the Contract Act of 1872 dealing with contracts, and is therefore void (*Wort Dhavle and Manohar Lall, JJ*) SADANAND JHA *v* AMAN KHAN. **18 Pat. 13=20 Pat.L.T. 1=179 I C 379=11 R P 357=5 B R. 265=1938 P.W N 913=A I.R 1939 Pat. 55 (F. B.)**

——**S 12**—*Exercise of powers—Discretion of Court.*

The word 'may' in the opening portion of S 12 of the Bihar Money-Lenders Act of 1938 does not mean "shall"; on the other hand, by the use of this word it was intended that the Court should consider the circumstances of each case and then decide whether it should or should not exercise all or any of the three powers mentioned in the section. (*Gwyer, C J , Sulaiman and Varadachariar, JJ.*) JAI GOBIND SINGH *v.* LACHMI NARAIN RAM. **I L R (1940) Kar. (F C.) 33=1940 O.L.R. 343=1940 P.W.N 614=187 I C. 796=6 B R 589=12 R F C 39=3 F.L.J. 46=A. I.R 1940 F C. 20=(1940) 1 M.L.J, (Supp) 14.**

——**S. 12**—*Reopening past transactions—Discretion of Court.*

In the case of successive renewals of handnotes which have the effect of charging compound interest, S. 12 of the Bihar Money-Lenders Act, no doubt, empowers the Court to reopen the transactions. But the Court will not be disposed to do so, if the lender appears to have behaved reasonably and forbearingly towards his debtor. (*Dhavle and Rowland, JJ.*) THAKUR PRASAD *v.* AJODHYA PRASAD **5 B R 394=11 R P. 503 (2)=1939 P W N. 305=180 I.C 365=20 Pat.L.T 321=A.I.R 1939 Pat 490.**

——**S. 12**—*Scope of—Discretion of Court.*

S. 12 of the Bihar Money-Lenders Act gives a complete discretion to the Court as to whether accounts are to be reopened; the section does not compel the Court to reopen the accounts and give relief regardless of the facts of the case, and when there is nothing which would justify a reopening of the accounts. (*Harries, C.J. and Chatterji, J.*) JAI GOBIND SINGH *v.* PACHKAURI RAM. **5 B.R. 613=181 I.C. 572=11 R.P. 599=A.I.R. 1939 Pat. 555.**

——**S. 12**—*Scope—If effects pending litigations.*

S. 12 of the Bihar Money-Lenders Act no doubt refers to transactions or contracts before the passing of the Act, but it does not and cannot be taken to affect pending litigations. The Legislature did not intend to interfere with those litigations which were pending when the Act came into force and certainly not those which had already culminated in a decree, whether of the trial Court or of the appellate Court (*Wort, A.C.J. and Manohar Lall, J.*) BIBI SHAIMA *v.* BANK OF BIHAR, LTD. **5 B.R. 94=11 R.P. 258=178 I.C. 383=1938 P.W.N. 603=19 Pat.L.T. 585=A.I.R. 1938 Pat. 484.**

——**S. 15**—*Scope—If void.*

S. 15, Bihar Money-Lenders Act, being repugnant to O. 20, R. 11, Cl. (2), C. P. Code, is under S. 107, Government of India Act, void. (*Mahomed Noor and Dhavle, JJ.*) MATHURA PRASAD SINGH *v.* BHAN KUMAR CHAND. **20 Pat. L.T. 513=5 B.R. 856 (2)=182 I.C. 989=12 R. P. 93=A.I.R. 1939 Pat. 217.**

——**S. 15**—*Scope—If void as repugnant to O. 34 and O. 21, R. 11 (2), C. P. Code.*

S. 15 of the Bihar Money-Lenders Act is repugnant to the provisions of O. 34, C. P. Code, and is therefore void.

Quaere.—Whether S. 15 is also void on account of its repugnancy to O. 21, R. 11 (2), C. P. Code. (*Khaja Mahomed Noor and Dhavle, JJ.*) BENIMADHO PRASAD SINGH *v.* HEM CHANDER MITTER. **183 I.C. 96=12 R.P. 101 (1)=5 B.R. 856 (1)=20 Pat.L.T. 32=1939 P.W.N. 7=A.I.R. 1939 Pat. 277.**

——**S. 15**—*Scope—Power of Court—Application for instalments in payment of decree amount—Maintainability.*

Both under S. 15 of the Bihar Money-Lenders Act of 1938 and under S. 11 of the new Act of 1939, a Court has jurisdiction to consider the question whether the judgment-debtor should be relieved to the extent of being allowed to pay the decree by instalment. A Court would be wrong if it summarily dismisses an application by a judgment-debtor on the ground that it has no power after the passing of a decree to allow the payment of the decretal amount by instalments. (*Wort and Varma, JJ.*) JUGESHWARI PRASAD *v.* KANIALA PRASAD. **21 Pat.L.T. 255=1940 P.W.N. 491.**

——**S. 16**—*Applicability—If confined to executions started after 15—7—1938—Pending executions—Sale—Procedure—If governed by S. 16—Amending Act V of 1938, S. 3 (2)—Scope and effect of.*

The application of S. 16 of the Bihar Money-Lenders Act is not restricted only to execution proceedings started after the Act came info force. The section applies to all pending executions and prescribes the procedure for the sale of the property of the judgment-debtor. Therefore in all execution cases which on 15—7—1938 (the date on which the section came into force) were at a stage when the properties were not sold, the sale must be according to the procedure laid down in S. 16 provided of course that the section is not void or *ultra vires*. S. 3 (2) of the Amending Act III of 1938 makes it clear that S. 16 applies to all pending proceedings whether instituted before or after the section came into force. (*Mahomed Noor and Chatterji, JJ.*) VISHWANATH NARAYAN SINGH *v.* HARIHAR GIR. **17 Pat. 714=11 R.P. 231=178 I.C. 279=5 B.R. 73=19 Pat.L.T. 760=1938 P.W.N. 765=A.I.R. 1939 Pat. 90.**

——**Ss. 16 and 11**—*Appeal from order under S. 16—Order relating to S. 11—If can be dealt with.*

An appeal lies to the Federal Court from an order of the High Court under S. 16 of the Act of 1938 (now S. 13 of the Act of 1939), and in this appeal the order of the High Court so far as it relates to S. 11 of the Act of 1938 (now S. 7 of the Act of 1939) can also be dealt with. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) RAMANANDAN PARSAD NARAIN SINGH *v.* GOSHWAMI MADHWANAND RAMJI **185 I.C. 1=12 R.F.C. 13=21 Pat.L.T. 24=1940 M.W.N. 7=6 B.R. 170=3 Fed. L.J. (Part 1) 1=71 C.L.J. 49=A.I.R. 1940 F.C. 1.**

——**Ss. 16 and 17**—Order dismissing application—High Court dismissing appeal—Appeal to Federal Court—If lies. *See* GOVERNMENT OF INDIA ACT (1935), S. 205. **20 Pat.L.T. 473=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

——**S. 16**—*Scope if void on the ground of repugnancy to O. 21, R. 66, C. P. Code (Patna Amendment)—Government of India Act, 1935, S. 107.*

The effect of S. 107 (1) of the Government of India Act, 1935, is that when a Provincial Legislature enacts any law in respect of any matter enumerated in the concurrent Legislative List which is repugnant to the existing Indian law, it will be void to the extent of that repugnancy, unless the assent of the Governor General or of His Majesty is given as laid down in sub-S. (2) of S. 107. O. 21, R. 66, C. P. Code, as amended by the Patna High Court is an existing Indian law within the meaning of S. 107 of the Government of India Act. While O. 21, R, 66, as amended, provides that the Court shall not enter any estimate of the value of the property in the sale proclamation other than the value, if any, given by the decree-holder and the judgment debtor and requires it not to vouch for the correctness of either S. 16 of the Bihar Money-Lenders Act, read with S. 17, enjoins the Court to estimate the value and mention it in the sale proclamation and to vouch for the absolute correctness of the value as fixed by it. S. 16 which must be read with S. 17 in effect repeals O. 21, R. 66, C. P. Code, and is thus repugnant to O. 21, R. 66, C. P. Code, and therefore void, having been assented to only by the Governor and not having been reserved for the assent of the Governor-General or for the signification of the pleasure of His Majesty. (*Mahomed Noor and Chatterji, JJ.*) VISHWANATH NARAYAN SINGH *v.* HARIHAR GIR. **17 Pat. 714=11 R.P. 231=178 I.C. 279=5 B.R. 73=19 Pat.L.T. 760=1938 P.W.N. 765=A.I.R. 1939 Pat. 90.**

BIHAR MONEY-LENDERS (REGULATION OF TRANSACTIONS) ACT (VII OF 1939)—*Scope—If void as repugnant to existing Indian law.*

Although the Act purports to regulate the transactions of money-lenders, it does not in terms profess to exercise powers only belonging to the Provincial Legislature under the Provincial Legislative List. In these circumstances, the new Act can only be challenged on the ground that it is repugnant to an existing Indian law, but the reservation of the Act for the consideration of the Governor-General and His Excellency's subsequent assent to it make such a challenge impossible. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Shyamakant Lal *v.* Rambhajan Singh. **I.L.R. (1939) Kar. 165=182 I.C. 161=12 R.F.C. 1=2 F.L.J. 183=43 C.W.N. (F.C.R.) 68=1939 O.L.R. 399=71 C.L.J. 369=5 B.R. 756=1939 M.W.N. 674=(1939) F.C.R. 193=1939 P.W.N. 533=20 Pat. L.T. 473=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

——**S. 2 (f) (2)**—*'Bond'—Meaning of—Balance entries in accounts signed by debtor.*

Per *Sulaiman, J.*—An instrument cannot be a "bond" as it is understood in India unless it contains an express obligation undertaken by the executants to pay or deliver goods. If the promise to pay is to be inferred by implication, then the document may amount to an acknowledgment of liability, or adjustment or even account stated, but would not be a bond.

Per *Varadachariar, J.*—Whether the word "bond" in S. 2 (*f*) of the Bihar Money-Lenders Act, 1939, is intended to be limited to a formal deed or to documents of the kind specified in the definition of "bond" in the Indian Stamp Act or not, mere debit entries or balance entries in accounts even though signed by the debtor are not comprised in the expression "transaction on a bond" used in that section. It is at least necessary that the document relied on should have been intended to embody the contract between the parties and should *ex facie* show a promise or undertaking to pay before it can be said to be a "bond". The mere mention of interest being payable at a particular rate and the possible implication therefrom of a promise to pay the principal would not suffice to bring an entry in an account within the category of "bond". (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Surendra Prasad Narain Singh *v.* Gajadhar Prasad. **3 F.L.J. 27=I.L.R. (1940) Kar. (F.C.) 14=187 I.C. 612=1940 O.L.R. 275=12 R.F.C. 25=6 B.R. 508=71 C.L.J. 557=1940 M.W.N. 686=1940 P.W.N. 542=A.I.R. 1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1.**

——**S. 7**—*Applicability—Mortgage suit—Preliminary decree passed before Act.*

In mortgage suits, the appropriate time for passing a decree for an amount of interest for the period preceding the institution of the suit is the preliminary decree. The final decree is entirely controlled by the preliminary decree and merely works out the arithmetical results of the preliminary decree. S. 7 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, has, therefore, no application in a case where the preliminary decree was passed in 1936 and confirmed on appeal in 1937 and it is only the final decree that has yet to be passed. The opening words of the section "Notwithstanding anything to the contrary contained in any other law or in

anything having the force of law or in any agreement," have little to do with the law of procedure. (*Dhavle, J.*) Chandrawati Debi *v* Nandkishen Prasad **6 B.R. 367=186 I.C. 401=12 R.P. 500=A.I.R. 1940 Pat 376.**

——**S. 7**—*Co-debtors—Suit against one to enforce his share of liability only—Maximum amount of interest which could be decreed.*

Where one of the executants of a document is liable only in respect of a portion of the total amount of loan mentioned in the document, the maximum amount of interest which could be decreed against him under S. 7 of the Bihar Money-Lenders Act, 1939, in a suit against him to enforce his share of the liability is the portion of the amount for which he is liable. The expression "amount of loan mentioned in the document" in that section must in such a case be read as referring to the amount which is due from the particular defendant who is sued. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Birendra Prasad Sukul *v.* Surendra Prasad Sukul. **3 F.L.J. 55=I.L.R. (1940) Kar. (F.C.) 42=187 I.C. 622=1940 O.L.R. 286=6 B.R. 517=52 L.W. 124=1940 P.W.N. 622=A.I.R. 1940 F.C. 19=12 R.F.C. 23=(1940) 1 M.L.J. (Supp.) 21.**

——**S. 7**—*Construction—"Evidenced by such document"—Meaning of.*

The meaning of the words "evidenced by such document" is that the Court should, in every case, look to the document on which the loan is based in order to find out the loan advanced. If the loan is based upon a single document then the Court will ascertain from that document what is the amount of loan mentioned in it, always bearing in mind the definition of the word "loan" which covers an engagement to fulfil a previous obligation; where the loan is evidenced by a series of letters or other documents like bahi khattas or by a handnote which for some purposes may be inadmissible in evidence, nevertheless a Court must refer to them for the purpose of S. 7 to find out what the loan was in order to apply the rule of damdupat adopted by the Legislature with the limitations provided by the Act. (*Varma and Manohar Lall, JJ.*) Singheshwar Singh *v.* Medni Prasad. **6 B.R. 453=187 I.C. 339=12 R.P. 582=A.I.R. 1940 Pat. 65.**

——**S. 7**—*"Document on which the loan was based"—Accounts settled every year and balance signed by debtor—Suit for amount shown in final entry and interest thereon—Entry, if "document on which loan is based"—Amount for which decree could be passed.*

The plaintiff had advanced a loan of Rs. 3,700 to the defendants. At the close of every year when the accounts were adjusted an acknowledgment of the amount found due, including interest was written out and signed by the debtors, and a chitha for the next year was opened with its head lines written and signed by the debtors. The last chitha was for the year 1929 and showed a balance of Rs. 11,249 as due to the plaintiff The accounts showed that an amount of Rs. 4,953 had by this time been paid towards interest. The plaintiff filed a suit for the recovery of Rs 11, 249 and interest thereon till date of suit.

Held per curiam.—That the chitta of 1929 was not a "document on which the loan was based" within the meaning of S. 7 of the Bihar Money-Lenders Act, 1939, and consequently under the said section the Court had no power to pass a decree for more than the principal amount of Rs. 3,700.

Per Varadachariar, J.—Even if it were possible to regard the accounts in this case as the document on which the loan is based, the accounts must be taken as a whole and the loan cannot be said to be based on the last entry alone. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Surendra Prasad Narain Singh *v.* Gajadhar Prasad **187 I.C 612=12 R.F.C. 25=1940 O.L.R 275=I.L.R. (1940) Kar. (F C) 14=3 F.L.J 27=6 B R. 508=71 C.L.J. 557=1940 M.W N. 686=1940 P.W.N. 542=A.I.R. 1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1.**

——Ss. 7 and 2 (f)—*"Loan"—Meaning of—Interest, whether "loan".*

Sulaiman, J.—"Loan" as defined in S. 2 (*f*) of the Bihar Money-Lenders Act, 1939, is a wider word than the principal amount actually lent, as it may be an advance in cash or kind or it may be a transaction on a bond bearing interest executed in respect of past liability, or may be any transaction which is substantially a loan. Interest that accrues is not an advance of money, but can become a loan if liability to pay it is undertaken in a "bond". Though the word "loan" is thus wider than the term "principal" it is used in some places in S. 7 of the said Act in contradistinction to "interest." The intention of the Provincial Legislature in enacting S. 7 of the said Act read with S. 2 (*f*), which draws a distinction between loan and interest appears to be to accept the amount of the loan mentioned or evidenced by a document, if the loan is based on such a document and amounts to a transaction on a bond bearing interest and duly executed. But when a statement of account, not amounting to a bond, itself shows that the whole of the amount mentioned therein is not a loan, but part of it is professedly interest, that interest cannot be accepted conclusively as a part of the loan within the meaning of S. 7 (*Gwyer, C.J., Sulaiman and Varadachariar. JJ.*) Surendra Prasad Narain Singh *v.* Gajadhar Prasad **187 I C 612=1940 O L.R 275=12 R F C 25=I L.R. (1940) Kar (F C) 14=3 F L J. 27=6 B.R 508=71 C L.J. 557=1940 M.W.N. 686=1940 P.W.N. 542=A I. R. 1940 F.C. 10=(1940) 1 M.L.J. (Supp.) 1.**

——S. 7—*"Loan"—Settlement of accounts by borrowing afresh—Nature of.*

Varadachariar, J.—Whatever may be the case with regard to ordinary "renewals", where the parties settle accounts in respect of a pre-existing liability and agree that money borrowed under a later transaction, even from the same creditor, should be applied in discharge of that pre-existing liability, the later transaction should in law be regarded as a loan by itself, though cash did not actually pass between the parties by way of lending and repayment (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Jai Gobind Singh *v.* Lachmi Narain Ram. **I L R (1940) Kar (F C.) 33=187 I C 796=6 B R 589=12 R.F C 39 =1940 O.L.R. 343=1940 P.W.N. 614=3 F.L.J. 46=A I R 1940 F.C. 20=(1940) 1 M.L J. (Supp.) 14.**

——S. 7—*Validity.*

S. 11 of the Bihar Money-Lenders Act, 1938, has now been re-enacted as S. 7 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, and as this Act has been passed in conformity with the procedure prescribed in S. 107 (2) of the Constitution Act, its validity is not open to question. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Jagdish Jha *v.* Aman Khan. **12 R F C. 16=3 Fed L J. (Part 1) 7=21 Pat L T 142=71 C L J 55=185 I.C 294=1940 O L R. 1=1940 P.W.N 71=6 B.R. 194=A.I.R. 1940 F C. 3**

——S 8—*Burden of proof—Duty of debtor claiming relief.*

Under S. 8 of the Bihar Money-Lenders (Regulation of Transactions) Act of 1939 it is for the debtor to establish a state of facts which would require the Court to reopen a transaction; the debtor must show that the amount claimed by the creditor as due includes sums due by way of interest in excess of the rate permitted by the Act. (*Harries, C. J. and Manohar Lall, J.*) Chatargoon Sao *v.* Ram Lal. **21 Pat L T. 104 =A I R 1940 Pat. 430.**

——S. 8 - *Scope—If mandatory—Duty of Court under.*

Under S 8 of the Bihar Money-Lenders (Regulation of Transactions) Act, the Court is not bound to reopen a transaction, though of course, it should do so in a proper case. (*Harries, C.J. and Manohar Lall, J.*) Chatargoon Sao *v* Ram Lal **21 Pat.L T. 104=A I R 1940 Pat 430.**

——S. 11—Decree—Application for payment in instalments—Power of Court to grant. *See* Bihar Money-Lenders Act (1938), S. 15 **21 Pat.L.T. 255.**

——S 13—*Proclamation of sale not issued before Act coming into force—Rights given by section—If can be availed of.*

There is no substance in the contention that litigants can only avail themselves of the rights given by S. 13 of the new Act in cases where a proclamation of sale has not been issued before 3rd May, 1939, the day on which the Act came into force. On the natural construction of S. 13 of the Act, the judgment-debtor can, if he so desires file an application even after 3rd May 1939, for an order under that section. (*Gwyer, C J., Sulaiman and Varadachariar, JJ.*) Shyamakant Lal *v* Rambhajan Singh **I L R (1939) Kar 165=71 C L J. 369=12 R F.C 1=2 F L J. 183=43 C W.N. (F C R.) 68=182 I C 161=1939 M.W.N. 674=1939 O L.R 399=1939 P.W. N. 533=5 B.R. 756=20 Pat L.T. 473=(1939) F.C R 193=A.I.R. 1939 F.C 74=(1939) 2 M. L J. (Supp) 45.**

——S. 13 - *Retrospective operation—Pending proceedings—If affected—Rejection of application under S. 16—Appeal—Amending Act of 1939 coming into force pending appeal—Effect—Sale taking place before hearing of appeal—Effect of on rights of parties to appeal.*

S. 13 of the Bihar Money-Lenders (Regulation of Transactions) Amending Act of 1939 is retrospective and applies to proceedings pending at the time when that Act came into force. The section applies to applications made before or after the commencement of the Act. When an order rejecting an application under S. 16 of the

Act of 1938, is appealed from, the appeal is a continuation of the application, and on the coming into force of the Amending Act of 1939 during the pendency of the appeal, the application must be held to be pending and must be dealt with under the provisions of S. 13 of the new Act of 1939. The fact that a sale has taken place following the rejection of the application and before the hearing of the appeal cannot affect the rights of the parties to the appeal, as the sale has taken place subject to the result of the appeal.) (*Harries, C.J. and Fazl Ali, J*) Bishun Singh v Palakdhari Singh. **185 I.C 129=12 R.P. 304=1939 P.W.N. 667=A.I.R 1939 Pat. 592.**

——**S. 13**—*Scope—If repugnant to O. 21, R. 66, C. P. Code, as amended by Patna High Court.*

Sulaiman, J.—Repugnancy should not be extended to a section by implication if it does not in fact exist. There is no repugnancy between the new S. 13 (old S. 16), Bihar Money-Lenders Act, and O. 21, R. 66, C P Code, as amended by the Patna High Court. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Shyamakant Lal v. Rambhajan Singh. **I L.R. 1939 Kar. 165=71 C L.J. 369=12 R.F C 1=(1939) F.C.R 193=2 F.L J 183=43 C.W N. (F.C R.) 68=182 I C. 161=1939 O.L R 399=5 B R. 756=1939 M.W N 674=1939 P W.N. 533=20 Pat.L.T 473=A.I R. 1939 F.C 74=(1939) 2 M.L.J. (Supp.) 45.**

——**S. 13**—*Validity.*

S. 13 of the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, which re-enacts S. 16 of the Act of the previous year, cannot now be questioned in any Court since the Act of 1939 has received the assent of the Governor-General. (*Gwyer, C J, Sulaiman and Varadachariar, JJ*) Ram Pratapji v. Hari Kishan Doss. **185 I C 4=12 R.F.C. 15=6 B.R. 172 (1)=71 C.L.J. 84.**

——**Ss. 13 and 14**—*Applicability— Mortgage decrees.*

Ss. 13 and 14 of the Bihar Money-Lenders Act, 1939, do apply to mortgage decrees and sales thereunder. (*Harries, C.J. and Fazl Ali, J.*) Razia Begum v. Krishnadeonarayan Mahtha. **184 I.C. 134 (1)=12 R.P. 221=6 B.R. 22=A.I R. 1940 Pat. 17.**

——**Ss. 13 and 14**—*Applicability—Sale confirmed before Act.*

There is nothing in either the Bihar Money-Lenders (Regulation of Transactions) Act, 1939, or the Bihar Money-Lenders Act, 1938, to express the intention of the Legislature to invalidate a completed sale which was otherwise good. If, therefore, the order confirming an execution sale was passed before either of the Acts were enacted, the provisions of Ss. 13 and 14 of the Act of 1939 cannot operate to invalidate the sale. In order that these sections may be applicable it is necessary that the execution should be still pending, and the execution is complete on the sale being confirmed. (*Rowland and Chatterji, JJ*) Razia Begum v. Kishundeo Narain Mahtha. **185 I.C. 404=21 P.L T. 541=12 R.P. 367=6 B. R. 177=A.I.R. 1940 Pat. 286**

——**Ss 13 and 14**—*If retrospective—Power af Federal Court—Relief under new Act—Formal application by Judgment-debtor—If necessary.*

The Bihar Money Lenders (Regulation of Transactions) Act, 1939, is retrospective and the Court has power to make such an order on an appeal as the Court below could have made if the case had been heard by them at the date of the appeal The Federal Court can, therefore, on appeal direct the Court below to dispose of the matter under the provisions of Ss 13 and 14 of the Act, the sections which have replaced Ss. 16 and 17 of the earlier Act. No formal application by the judgment-debtor to the Court is necessary before he can obtain relief under the provisions of the new Act. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) Brij Raj Kumari v. Subhkaran Das. **185 I C 804=12 R F.C. 21=1940 O L.R. 97=71 C.L.J. 86=6 B.R. 333=1940 P. W.N 275=A I R. 1940 F C. 5.**

——**Ss. 13 and 14**—*If retrospective.*

Gwyer, C J., and Varadachariar, J.—Ss. 13 and 14 of new Bihar Act are retrospective in the sense that they apply to proceedings pending at the time when the Act came into force, for they refer to applications made and decrees passed "before or after the commencement of this Act." (*Gwyer, C.J., Sulaiman and Varadachariar JJ.*) Shyamkant Lal v. Rambhajan Singh. **I.L.R. 1939 Kar. 165=71 C L.J. 369=12 R F.C 1=(1939) F.C.R 193=2 F L.J 183=43 C W N. (F C.R.) 68=182 I.C 161=1939 M.W.N. 674=1939 O.L.R. 399=1939 P W N. 533=5 B.R. 756=20 Pat.L T. 473=A.I R 1939 F.C. 74=(1939) 2 M.L J. (Supp) 45**

——**Ss. 13 and 14**—*Retrospective operation.*

Ss. 13 and 14 of the Bihar Money-Lenders Act, 1939, are retrospective in the sense that they apply to proceedings pending at the time when the Act came into force. (*Harries, C.J. and Fazl Ali, J.*) Mahabir Saran Prasad Singh v. Lachhmi Sao. **184 I.C. 64=12 R.P. 219=6 B. R. 12.**

BIHAR RESTORATION OF BAKASHT LANDS AND REDUCTION OF ARREARS OF RENT ACT (IX OF 1938), S. 15—*Applicability to execution proceedings.*

S. 15 of the Bihar Act IX of 1938 does apply to execution proceedings. (*Khaja Mohamad Noor and Chatterji, JJ.*) Razaur Rahman v. Udit Singh. **18 Pat. 694=185 I.C. 135=12 R.P. 303=20 Pat.L.T. 492=1939 P.W.N. 530=A.I.R. 1939 Pat. 570.**

——**S. 15**—Scope—If void as repugnant to S. 38, C. P. Code. *See* Government of India Act, S 107. **20 Pat.L.T. 492.**

BIHAR TENANCY ACT (VIII OF 1885)—*Person in possession recognised as tenant by receiver of estate—Payment of rent to receiver—Effect of—Receiver—If landlord—Tenant if acquires occupancy rights.*

A receiver in judicial possession of an estate by the implicit consent of the parties under the orders of the Court must be treated as the landlord for the time being. When the receiver acting *bona fide* recognises a person in possession as tenant, doing so in the ordinary course of management and receives rent from him for over seven years, the latter acquires rights as an occupancy *raiyat* under the Bihar Tenancy Act, on his showing continuous and unbroken possession for the statutory period. It is not open to the lawful owner to eject such tenant by pleading that the tenant's rights enure only so long as the receiver continues to manage the estate. (*Fazl Ali and Manohar Lall, JJ.*) Mahabir Das v. Udit

NARAIN VARMA 17 Pat. 594=178 I.C. 849=11 R.P. 306=5 B.R. 149=19 Pat.L.T. 570=A.I.R. 1938 Pat. 613.

——(as amended in 1934)—*Scope and effect of*—"Abwab"—*Law as to—If altered*—Kathiari—*If* abwab—Mutarfa bithouri—*Meaning and nature of*

The recent amendment of the Bihar Tenancy Act has not changed the law as to *abwab.* What was *abwab* before is *abwab* now, and what was not *abwab* before has not been made such by the new Act. The only modification has been as to the nature and amount of punishment for exacting an illegal *abwab. Kathiari.* which is payable by the weavers to their landlords on the basis of the looms which they work on the land, is a rent payable on the basis of the work to be done on the land and not on the basis of the area of the land occupied. It is not an *abwab* but an amount legally payable to the landlord. *Mutarfa* is ground-rent and *Kathiari* is profession-tax according as the settlor takes up cultivation or merely trade. *Bithouri* may be either *mutarfa* or *kathiari,* and is practically rent for homestead land based on the profession carried on on the land. (*Khaja Mahomed Noor and Dhavle, JJ.*) HALUMAN PRASAD *v.* PURAN TATMA. **18 Pat.190 =179 I C. 840=11 R.P. 419=1939 P.W.N 271 =5 B.R. 303=20 Pat.L.T. 88=A.I.R. 1939 Pat. 252.**

——**S. 5**—*Tenancy—Settlement by unregistered* hukumnama—*Possession and acceptance of rent —Effect of*

Where a landlord's son settled certain property with X by an unregistered *hukumnama* and the landlord accepted rent through his son and the person so settled got into possession of the property.

Held, that it was not necessary to register the *hukumnama* and that a contract of tenancy was constituted between the parties and that the landlord thereafter could not grant a patta of the same property to any one else by either a registered or unregistered deed. ((*Wort, J.*) BIHARI MIAN *v.* SONA MARIK. **167 I.C. 563=9 R.P. 417 =3 B.R. 312 (2)=A.I.R. 1937 Pat. 81.**

——**S. 5 (1)**—*Usufructuary mortgage by owner and lease back to him—Effect—Relation of landlord and tenant—If created—Incidents.*

Where the proprietor of a holding or estate executes a usufructuary mortgage and takes a lease of the same from the mortgagee, the transaction is essentially one transaction, and the relationship of landlord and tenant is created between the parties. A tenure as defined by S. 5 (1) of the Bihar Tenancy Act is created thereby and a suit by the lessor-mortgagee for rent against the mortgagor tenant is governed by that Act. (*James and Rowland, JJ.*) DEONANDAN *v.* GIRDHAR. **182 I.C. 863=12 R.P. 82=5 B.R. 839 =20 Pat. L.T. 697=1939 P.W.N. 120=A.I.R. 1939 Pat. 272.**

——**S. 15**—*Scope—Non-compliance—Effect—If justifies landlord in treating one of several tenants as representative of all.*

Failure on the part of the heirs of a tenant to give the notice of succession required by S. 15 of the Bihar Tenancy Act does not necessarily entitle the landlord to treat one of the several heirs of the original tenure-holder as representative of the tenancy. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v* LAL BEHARI SARAN SINGH. **21 Pat.L.T. 377=1940 P.W.N. 420=6 B.R. 713=A.I.R. 1940 Pat. 328 (F.B.).**

——**Ss. 20, 21 and 25**—*Settlement of land by co-sharer in good faith—Acquiescence by other co-sharer—Raiyat if can acquire occupancy right.*

If in the ordinary course of management one of two co sharers settles land in good faith and for the benefit of the estate, and the other co-sharer acquiesces in the settlement, the person who accepts settlement in good faith in this way becomes a raiyat, and after occupation for twelve years he acquires an occupancy right by the operation of Ss. 20 and 21 of the Bihar Tenancy Act, and under S. 25 of that Act, he cannot be ejected except on the conditions prescribed by that section. (*James and Chatterji, JJ.*) RAMASRAY PRASAD CHAUDHURY *v.* RAMSURAT SINGH. **6 B.R. 84=184 I C. 838=12 R.P. 282= 21 P.L.T. 181=A I.R. 1940 Pat. 131.**

——**S. 21**—*Cultivating lease—Lease to settled raiyat, of kharbaur and khudkasht land fixing annual jama payable to landlord—Tenant entitled to remain in possession and occupation till term of lease and to appropriate produce—Clause that tenant to have no right in land besides cutting wild khar—Effect of—If cultivating lease—Occupancy right—If accrues.*

Where a kabuliyat which purports to be a "lease of land" fixes an "annual *jama*" payable to the lessor, the lands being described as kharbaur and khudkasht, and provides that the lessee should, up till the term of the lease, remain in possession and occupation of the leasehold property and appropriate the produce thereof, it is fairly clear on the terms of kabuliyat that it creates an interest in the land and not merely in the *khar* growing on it, although there is a provision in the kabuliyat to the effect that "besides cutting the wild *khar* the lessee shall have no right to the land." The lease is cultivating lease and the absence of so many words in the lease that the land is let out for cultivation is no ground for holding that it is not a cultivating lease. The lessee under such a lease who is a settled raiyat of the village acquires an occupancy right in the lands in question under S. 21 of the Bihar Tenancy Act. There is a difference in law between a lease and license and though, generally speaking, it is true that the thatching grass grows spontaneously, it is treated as a form of crop, and in order to make the best use of this grass, the tenant must have recourse to certain process of cultivation. (*Fazl Ali and S. C. Chatterji JJ.*) W. W. M. MURRAY *v.* SUMRIT RAI. **186 I C 232 =12 R.P. 463=6 B R. 313=20 Pat L.T. 589= 1939 P.W.N. 635=A.I.R. 1939 Pat. 594.**

——**(as amended in 1934), S. 22**—*Applicability —If retrospective—Suit after Act on cause of action arising before—Period of limitation.*

A suit for produce rent instituted after the Bihar Tenancy Amendment Act came into force, though on a cause of action which arose before the Act came into force, is governed by the shorter period of limitation introduced by the Amending Act. The law of limitation applicable to a suit or proceeding is the law in force at the date of the institution of the suit or proceeding.

(*Rowland, J.*) Rameshwar Prasad Singh *v.* Mangar Kahar. **18 Pat.L.T. 193=169 I.C. 78 =9 R P. 524=3 B.R. 534=1937 P.W.N. 95=A. I.R. 1937 Pat. 311.**

——Ss. 22 (2) and 26-A—*Applicability and relative scope.*

The fact that in cases covered by S. 22 (2), Bihar Tenancy Act, the occupancy right ceases to exist upon transfer by operation of law or by virtue of some specific provision in the Act will not prevent S. 26-A of the Act and the other sections connected with it from being applicable to such a case, because the tenant who sells the holding purports to transfer it together with the occupancy right in it. Besides, there is nothing in the Act to suggest that the Legislature could have intended that the position of the co-sharer landlord when he acquires a raiyati holding should be worse than that of a third person acquiring such a holding. (*Fazl Ali and Dhavle, JJ.*) Miss G. B. Solano *v.* Umeshwari Koer. **16 Pat. 500=171 I.C 306=10 R.P. 196=1937 P.W. N. 742=18 Pat.L.T. 700=A.I.R 1937 Pat. 506.**

——S. 22 (2)—*Applicability—Non-transferable holdings.*

S. 22 (2), Bihar Tenancy Act, refers only to an occupancy holding which is transferable by custom and it does not apply to a non-transferable holding. It would however apply to a non-transferable holding also if the co-sharer landlord or permanent tenure-holder to whom the holding is transferred, can prove that the holding has been transferred to him with the consent of the other co-sharers or that the latter have waived their right to object to the transfer either expressly or by doing something which may amount to a recognition of the transfer. (*Fazl Ali and Dhavle, JJ.*) Miss. G. B. Solano *v.* Umeshwari Koer. **16 Pat. 500=171 I.C. 306= 10 R.P. 196=1937 P.W.N. 742=18 Pat.L.T. 700 =A.I.R. 1937 Pat. 506.**

——(before amendment of 1907), S 22 (2)—*Co-owner purchasing occupancy right—Right to retain possession after allotment of land to other co-sharer by partition.*

There is nothing in sub-S. (2) to suggest that a co-owner who purchases an occupancy right is entitled to retain possession after the land which he has purchased has been allotted to the patti of any other co-sharer by partition. (*Harries, C.J., Agarwala and Manohar Lall, JJ.*) Sundar Mall *v.* Lachhmi Tewari. **1940 P.W.N. 596=A.I.R. 1940 Pat. 467 (F.B.).**

——(before amendment of 1907), S. 22 (2)—*Co-proprietor purchasing occupancy right—Status of—If tenant of other co-proprietors.*

A co-proprietor purchasing an occupancy right in land is not a tenant under the other co-proprietors of the land. Nor can he be viewed as occupying the status of a tenant under himself and his co-proprietors, for that involves the purchaser being a tenant under himself and the other co-proprietors as landlords. (*Harries, C. J., Agarwala and Manohar Lall, JJ*) Sundar Mall *v.* Lachhmi Tewari. **1940 P.W.N. 596= A.I.R 1940 Pat. 467 (F.B.).**

——S. 22 (2)—*"Rent"—Meaning.*

The word "rent" used in Sub-S. (2), S. 22, Bihar Tenancy Act, means the rent which was payable in respect of the holding when it was transferred. The words "in respect of the holding" do not occur in Sub-S. (2) but they do occur immediately after the words "payable to them" in the illustration and this indicates clearly that the rent referred to is the rent of the original occupancy holding and not the rent payable in respect of the tenancies that might be created afterwards by the purchasing co-sharer. If the purchasing co-sharer sub-lets the land to a third person and realizes from him a higher rent than that paid by the original tenant, the other co-sharers are not entitled under this section to realize from the purchasing co-sharer their share of such rent. (*Fazl Ali and Dhavle JJ*) Miss G. B. Solano *v.* Umeshwari Koer. **16 Pat. 500= 171 I.C. 306=10 R P. 196=1937 P.W N. 742= 18 Pat.L T. 700=A.I.R 1937 Pat. 506.**

——(before amendment of 1907), S. 22 (2)—*Scope and effect of—Purchase by one co owner of occupancy right—Only occupancy right ceases to exist and not all tenancy rights.*

The effect of the purchase by one of the co-owners of land of an occupancy right is not that the tenancy rights cease to exist altogether but only the occupancy right which is an incident of the holding. (*Harries, C.J., Agarwala and Manohar Lall, JJ*) Sundar Mall *v.* Lachhmi Tewari. **1940 P.W N. 596=A.I.R. 1940 Pat. 467 (F B).**

——(as amended in 1907), S. 22 (2)—*Scope Retrospective effect.*

The amendments made in S. 22 (2) by the Amending Act of 1907 do not apply to a purchase made before that date. (*Harries, C.J., Agarwala and Monohar Lall, JJ.*) Sundar Mall *v.* Lachhmi Tewari. **1940 P.W.N. 596=A.I.R. 1940 Pat. 467 (F B.).**

——S. 22 (3)—*Construction—Occupancy holding—Purchase by* thicadar—*Effect*—Thicadar *selling right to co-sharer landlord—Right and status of latter—If can resist claim of other co-sharers to share by partition.*

Where a *thicadar* purchases an occupancy holding during the period of his lease, he becomes a non-occupancy raiyat in respect of the holding so purchased, as it is well-settled that land held in non-occupancy right is not ordinarily transferable, a vendee from the *thicadar* purchaser cannot acquire either non-occupancy or occupancy rights in the lands, though the vendee from the *thicadar* is a co-sharer landlord of the holding. A co-sharer landlord purchasing from the *thicadar* the holding of the occupancy raiyat purchased by the *thicadar*, cannot resist the claim of the other co-sharers to a share in the lands in proportion to their interests in the village in question. (*Fazl Ali and Varma, JJ.*) Harihar Prasad Singh *v.* Hitlal Singh. **21 Pat.L.T. 320.**

——S. 23 A, Proviso—*Scope and effect of—Trees on holding of tenant—Recording trees as in possession of landlord—Effect of—Right of landlords to produce of trees.*

Where it is recorded in the latest record of rights that there were trees on the tenant's holding and that they were in the possession of the landlord, the entry must be interpreted as meaning that the landlord is entitled not only to his common law right to the timber, but also to the produce of the trees. The trees being on the tenant's land, the landlord is in possession through his tenant and no question of limitation or adverse possession can arise in the absence of an assertion of a hostile title by the tenant. (*Agarwala, J.*) MAHOMED NAIM *v.* LACHCHU SAHU. **1939 P.W.N. 868=A.I.R. 1940 Pat. 175.**

——**Ss. 26-B and 26-N**—*Applicability to mortgages.*

S. 26-B and 26-N by their terms apply to transfers by sale, exchange, gift or will. They do not apply to mortgages and therefore do not protect sudhbharnadar. Assuming, however, that the view that when a mortgage is followed by a sale in execution of a decree on the mortgage the execution sale may be treated on the same footing as a voluntary sale and would therefore come within the purview of S. 26-B is correct, it does not hold good with regard to usufructuary mortgages. (*James and Chatterjee, JJ.*) RAM CHANDERJI *v.* HEM CHANDRA. **18 Pat. 184=182 I.C 557=12 R.P. 21=20 Pat.L.T. 469=5 B.R. 779=A.I.R. 1939 Pat. 200.**

——**(as amended in 1934), Ss. 26-B, 26-F and 26-O**—*Applicability and scope—Holding transferable by custom—Transfer of before 1934—Title of transferee—Payment of transfer fee—If condition precedent.*

The provisions of Ss. 26-B and 26-F of the Bengal Tenancy Act, as amended in 1934, apply to transfers made after the passing of the Amendment of 1934. They have obviously no application to cases where the holdings are transferable by custom and have been transferred before the commencement of the Act as amended. In such cases the title of the transferee will be deemed to be perfect even though the landlord may not have consented to the transfer; and if the title is already perfect, recourse to S. 26-O of the Act is unnecessary. The latter section providing for the payment of transfer-fee is clearly intended to apply only to those cases where the title of the transferee has not been perfected, or in other words, to those transfers only which relate to non-transferable holdings. (*Fazl Ali and Madan, JJ.*) HARGOURI PRASAD *v.* RAGHUNATH SINGH. **169 I C. 350=10 R.P. 11=3 B.R. 548=16 Pat. 239=1937 P.W.N. 202=18 Pat.L.T. 239=A.I.R. 1937 Pat. 314.**

——**(as amended in 1938), S. 26-B Proviso**—*Scope and operation of—Non-transferable holding—Transfer in 1912—Transferee in possession continuously thereafter—Consent of landlord—Presumption—Sale of holding in execution of rent decree against original tenant alone in 1931—Suit for ejectment of transferee by purchaser in execution—Competency.*

In the case of a transfer of a holding made before 1923, if the transferee has been continuously in possession since the transfer, the Court, under the proviso to S. 26-B of Bihar Tenancy Act as amended in 1938, must assume that the landlord consented to the transfer, and therefore the transferee cannot be ejected. A non-transferable holding was transferred by the original tenant in October, 1912. After the transfer, the transferees entered into possession of the holding and effected golas or pakka buildings thereupon, and they were in continuous possession for over twenty years thereafter. In 1930, the landlords sued the original tenant for arrears of rent, obtained a decree on 18—5—1930, in execution of which the holding was sold on 22—9—1931. It was purchased by the plaintiff who was a minor son of one of the landlords. The sale was confirmed on 18—11—1931. When the Civil Court peon went to deliver possession on 17—4—1933, he found there were pakka buildings and therefore could not deliver possession. On 29—11—1933, the plaintiff sued for a declaration of title and for possession after removal of the structures,

Held, that by reason of the proviso to S. 26-B of the Bihar Tenancy Act which was substituted for S. 26-N, in 1938, which provision was retrospective, it must be assumed that the transfer was made with the consent of the landlord; and the transferees who had been continuously in possession since the date of transfer could not be ejected.

Held, further, that the rent decree and execution sale consequent on it could not affect the interest of the transferees in any way. They were not parties to the rent suit or the execution proceedings and they were entitled to rely on the old S. 26-N and the new S. 26 B proviso of the Bihar Tenancy Act. (*Harries, C.J. and Fazl Ali, J.*) CHANDRIKA PRASAD SINGH *v.* RAM LAL SAHU. **187 I.C 629=6 B R. 521=12 R.P. 623=1939 P. W.N. 661.**

——**Ss. 26-E and 26-F**—*Scope—Duty of Collector under—Enquiry—Scope of—Power to refuse to accept tender of transfer fee.*

There is no provision in the Bihar Tenancy Act which authorises the Collector to refuse to accept a deposit of the landlord's transfer fee properly tendered to him. The only question which he has to determine before the issue of a receipt for the fee tendered is whether the deposit is in accordance with S. 26-E (1) (*c*) and the only questions for him after the grant of a receipt are to see whether the value stated in the transferee's application is the correct market value and, if not, whether the transferee has wilfully understated the value with a view to reduce the amount of the landlord's fee—in which case the transferee is liable to penalty, and to decide disputes as to who is entitled to receive the fee deposited. (*Agarwala, J.*) MAHADEO JHA *v.* JOGESHWAR THAKUR. **1938 P.W.N. 135.**

——**Ss. 26-E, 26-N and 26-O**—*Scope—If retrospective—Transfer of non-transferable holding—Decree in ejectment giving landlord right to re-enter—Decree confirmed on appeal—Second appeal—Act coming into force pending second appeal—Transferee depositing transfer-fee with Collector and getting receipt—Effect—Ejectment decree—If sustainable.*

A tenant of an occupancy holding having transferred the holding which was not transferable without the consent of the landlord, the landlord obtained a decree in ejectment giving him right to re-enter. Pending a second appeal the Bihar Tenancy Act came into force and the appellant transferee deposited the transfer-fee due to the landlord with the Collector and got a receipt therefor.

Held, that the effect of the deposit was that the landlord must be deemed to have consented to the transfer.

Held further, that the title of the transferee had not become extinct by reason of the decree of the lower Courts, as they had not become final since a second appeal was pending. Ss. 26-N and 26-O were retrospective in effect. (*Khaja Maho-*

med Noor and Rowland, JJ.) MT. WALIHAN *v.* PARAMESHWAR NARAIN PATAKH. **16 Pat. 405=18 Pat.L.T. 602=171 I.C. 657=10 R.P. 233=4 B.R. 48=1937 P.W.N. 585=A.I.R. 1937 Pat. 582.**

———(as amended in 1934), S. 26-E (1) (b) and (c)—*Scope—Transferee—Title of—Conditions of—Duty of transferee to pay landlord's fee to landlord and deposit same with Collector.*

Under the Bihar Tenancy Act as amended in 1934, a transferee of a non-transferable holding has no valid title as against the landlord until the landlord's transfer fee is paid to the landlord in accordance with S. 26-E (1) (*b*) of the Act, or deposited with the Collector in accordance with S. 26-E (1) (*c*), so that the consent of the landlord may be deemed to have been given to the transfer. (*Dhavle, J.*) GAYA PRASAD SAH *v.* RAM PRASAD PATHAK. **179 I.C. 923=5 B.R. 320=11 R.P. 425=A.I.R 1939 Pat. 358.**

———(as amended in 1934), S. 26-M—Scope and effect of—Sale held before coming into force of—Confirmation in ignorance of—Legality—Non-deposit of amount and non-filing of notice—If renders confirmation illegal. *See* C. P. CODE, S. 151. **1938 P.W.N. 192.**

———(as amended in 1934), S. 26-N—*Applicability—Non-transferable occupancy holding—Purchase of part by co-sharer landlord in 1908—Subsequent batwara proceedings—Effect of—Bengal Tenancy Act, S. 22.*

Plaintiff and defendants were co-sharers in a certain village of a plot of non-transferable occupancy land. The tenant of that holding sold a portion of it to the plaintiff in 1908, and about 1928 there was delivery of possession in a partition by which the portion of the holding sold to the plaintiff in 1908 fell to the path of the defendants.

Held, that the purchase by the plaintiff being prior to 1923, the same was governed by S. 26-N of the Bihar Tenancy Amendment Act of 1934, and the *batwara* proceedings of 1928 conferred no right on the defendants and did not affect the matter at all. S. 22 of the Bengal Tenancy Act would also apply to those cases of transfer in which the landlords had given their consent; under S. 26-N of the Bihar Tenancy Amendment Act the consent must be deemed to have been given. Plaintiff was consequently in the position of a third party purchaser of a holding or a part of a holding in which the landlords had given their consent to transfer. (*Courtney-Terrell, C.J. and James, J.*) NAGA RAI *v* BUCHI RAI. **18 Pat.L.T. 173=1937 P.W.N. 739.**

———S. 26-N—*Applicability—Pending litigation.*

S. 26-N of the Bihar Tenancy Amendment Act of 1934 governs all cases which were pending on June 10, 1935, whether the landlord be an appellant or respondent (*James, J.*) BABU LAL MANDER *v.* KAMESHWAR SINGH. **165 I.C. 801=9 R.P. 212=3 B.R. 80.**

———(as amended in 1934), S. 26-N—Scope and effect of—Decree for rent against tenant before coming into force of amended Act—Execution after amended Act—Right of mortgagee under S. 171—If lost. *See* BIHAR TENANCY ACT, S. 171. **1938 P.W.N. 654.**

———(as amended in 1934), S. 26-N—*Scope—If retrospective—Pending actions—If affected—Sale of holding—Dispossession of transferee by landlord in execution of money decree—Suit by transferee—Decree by first appellate Court—Second appeal—Amending Act coming into force—Effect—Landlord's right to resist claim.*

S. 26-N of the Bihar Tenancy Act introduced by the Amending Act of 1934 is retrospective and applies to pending actions. The landlord of a holding purchased it in execution of a simple decree for money on 2- 2-1931 and got delivery of possession on 21-[illegible]-1932. Plaintiffs who were purchasers of the holding from the tenant under a deed dated 26-6-1921 and who were dispossessed by the landlord's taking possession in execution instituted a suit for possession against the landlord on the ground that the landlord had purchased not the holding itself, but only the right, title and interest of the judgment-debtor tenant The suit was dismissed; but the appellate Court decreed it and the landlord thereupon preferred a second appeal to the High Court. Pending the second appeal, the Bihar Tenancy Amendment Act, introducing S. 21-N, came into force.

Held, that though the plaintiffs had no title on the date of their suit, yet as soon as the Amending Act came into force, the landlord must be deemed to have given his consent to the transfer which was prior to 1923, and the title of the plaintiffs therefore became complete, and there was no defence to their claim for possession. (*Khaja Mahomed Noor and Rowland, JJ.*) MAHOMED SHAFAIT *v.* NITHALI RAM. **169 I.C. 1000=3 B R 644=10 R.P. 62=18 Pat.L T. 345=1937 P.W.N. 371=A.I R. 1937 Pat 387.**

———S. 26-N—*Scope and operation of—Retrospective effect—Transfer of part of holding—Suit by landlord more than 10 years after against recorded tenant alone—Decree and execution sale—Transferee's title—If affected.*

Section 26-N of the Bihar Tenancy Act is retrospective and the object of the section is to quiet titles which are more than ten years old, and to ensure that if during those ten years the transferee has not been ejected, he shall have the right to remain on the land. In 1913 there was a transfer of a part of a holding to plaintiff, which transfer, according to the plaintiff, was recognized by the landlord. In 1931, the landlord brought a rent suit against the recorded tenants, without impleading the plaintiff as a party, and purchased the holding in execution of the decree in that suit. Plaintiff sued for a declaration of his right to possession.

Held, that the plaintiff had title by reason of the operation of S. 26-N of the Bihar Tenancy Act, and that he was in no way affected or extinguished by the decree in the suit against other parties, as he was not a party to that action. (*Wort and Varma. JJ.*) THAKUR RAI *v.* ISSARDYAL PARSHAD. **17 Pat. 333=179 I.C 104=11 R.P 3[illegible]7=1939 P.W.N. 239=5 B.R. 176=A.I.R. 1938 Pat. 559.**

———S. 26-N—*Scope—Retrospective effect—Pending suits.*

The language of S. 26-N, Bihar Tenancy Act, is plain and it was intended to be retrospective in operation, the object of the Legislature being to quiet titles which are more than ten years old. This provision applies even to holdings which at the date of the commencement of the Act are in question in a pending suit. (*Fazl Ali and Dhavle, JJ.*) Miss G.B. Solano *v.* Umeshwari Koer. **16 Pat. 500=171 I.C. 306=10 R P. 196=1937 P. W. N. 742=18 Pat. L. T. 700=4 B. R. 12=A.I.R. 1937 Pat. 506.**

——(as amended by Act of 1935), S. 26-N—*Sale before 1923—Consent of landlord is presumed even if purchaser is one of co-sharers.*

Sale before 1923 is presumed to be with consent of the landlord even if the purchaser is one of the co-sharer landlords and he is in the position of a third party purchaser of a holding or part of holding. (*Wort, J.*) Naga Rai *v.* Buchi Rai **162 I. C. 875=8 R. P. 594=2 B. R. 523=A.I.R. 1936 Pat. 285.**

——(as amended in 1934), S. 26-O—*Applicability and scope—Pending suit by landlord and pending suits by tenant—Distinction if any—Deposit pending appeal—Sufficiency.*

In applying S. 26 O of the Bihar Tenancy Act, as amended in 1934, to pending suits, it is not possible or permissible to draw any distinction between cases in which the landlord is the plaintiff and cases in which the tenant is the plaintiff. The title of the transferee would not become extinct by the passing of a decree against him unless and until that decree becomes final, as it might, by the lapse of the period of limitation for an appeal and the omission to file an appeal against the decree. Deposit pending appeal is sufficient. (*Agarwala and Rowland, JJ.*) Jaga Singh *v.* Basdeo Singh. **6 B.R. 483=187 I.C. 518=12 R.P. 601.**

——S. 26-O—*Discretion of Court—Application to be added as intervener by person depositing landlord's fee—Rejection—Revision.*

A Judge in the exercise of his discretion rejected the application, to be added as an intervener, of a person who deposited the landlord's fee under S. 26-O, Bihar Tenancy Act, 1934.

Held, that the Act gave the Court a discretion and when once the Judge had exercised it, the High Court would not interfere in revision. (*Wort, J.*) Jagdish Narayan Singh *v.* Alakhdeo Narain Singh. **166 I C. 948=9 R.P. 360 (2)=3 B.R. 239=A.I.R. 1937 Pat. 38.**

——(as amended in 1934), S. 26 O—*Retrospective effect—Transfer without consent—Action for ejectment by landlord—Deposit of landlord's fee with Collector and grant of receipt by latter—Effect—Consent of landlord—If deemed to be given.*

S. 26-O of the Bihar Tenancy Act as amended in 1934 is retrospective in operation. Where pending an action by the landlord for ejectment of the transferee on the ground of want of consent to the transfer of the holding, the transferee under a transfer, made before the commencement of the amending Act, deposits the landlord's fee with the Collector within the time and in the manner required by the Act and is granted the necessary receipt by the Collector the consent of the landlord to the transfer must, under S. 26-O (3), be *prima facie* be deemed to have been given from the date on which the receipt is granted, with the result that the landlord's action for ejectment must fail. (*Agarwala, J.*) Mahadeo Jha *v.* Jogeshwar Thakur. **1938 P.W.N. 135.**

——S. 26-O, cl. (3) (b)—*Scope—Consent of landlord—Date of—Objection by landlord as to sale price and distribution of rent—If sustainable.*

Landlord's consent shall be deemed to have been given on the date on which the receipt for deposit of sum as transfer fee, is granted by Collector. If the landlord objects to the alleged sale price and distribution of rent, he has a separate remedy under S. 26-J and his objection does not affect the effect of S. 26-O, Cl. (3) (*b*). (*Rowland, J.*) Rameshwar Bhagat *v.* Thakur Jeban Narayan Singh. **166 I C. 794=9 R.P. 353=3 B.R. 231=18 Pat.L T. 278=1936 P.W. N. 708=A.I.R. 1937 Pat 49.**

——S. 29—*Scope—Occupancy tenant—Kabuliat regarding land occupied by him together with new land at enhanced rent, to be doubled after certain period—Effect of.*

Where kabuliat was executed by a tenant with regard to bhaoli land, which he already occupied as occupancy tenant together with new lands at a certain rent per bigha for certain period after which it was to be doubled, the effect of the kabuliyat being that the rent for the portion previously held was enhanced and was subsequently again doubled.

Held, that the enhanced rent reserved for the period being for what was a substantially different holding did not contravene the provisions of S. 29. But its doubling after the period clearly contravened S. 29. (*Wort and Rowland, JJ.*) Rajniti Prasad Singh *v.* Ramudgar. **174 I.C. 367=4 B.R. 437=19 Pat.L.T. 380=10 R.P. 503=A.I.R. 1938 Pat. 116.**

——S. 29—Scope—Plea of illegal enhancement—Partition by Collector and fixation of rent on basis of enhanced rent—Party consenting and taking advantage of enhanced assets—Plea that enhancement was illegal—Sustainability. *See* Bengal Estates Partition Act, S. 81. **1938 P. W.N. 147.**

——Ss. 38 and 52—*Scope—Lands in Sonthal Parganas—Abatement of rent on diluvion—Right of tenants—Claim based on contract instead of on law—Failure to prove contract—If bar to relief.*

It has always been held to be the law that a tenant, whether he be an occupancy *raiyat* or otherwise, is entitled to an abatement of rent if the whole or part of the land held by him is diluviated. Ss. 38 and 52 of the Bihar Tenancy Act make this clear, so far as Bihar is concerned. S. 52 is wider than S. 38 in terms, the latter section being applicable to the case of a tenure-holder. Lands in Sonthal Parganas are no exception to this rule. The fact that the tenants fail to establish or prove a contract to that effect on which they rely would not in any way prevent their getting the relief to which they are entitled under the law, though they might base their claim on the contract and not on the general law. (*Wort and Agarwala, JJ.*) Fouzi Lal Kurmi *v* Dhana Kumari Devi. **17 Pat. 530=179 I.C. 92=11 R P. 322=5 B.R. 193=19 Pat.L. T. 658=A.I.R. 1938 Pat 597.**

——(as amended in 1938), S. 48-A—*Retrospective operation.*

S 48-A of the Bihar Tenancy Act as amended in 1938 is intended to be retrospective and applies to all pending actions. A suit shall be deemed to be still pending in appeal, although a decree for ejectment has already been passed by the Court below, and it has been duly executed and possession taken before the new S. 48-A came into force (*Rowland and Chatterji, JJ.*) Agin Singh *v.* Bhudeo Singh **187 I C. 580=12 R.P. 620=1940 P.W.N. 272=6 B.R 496.**

——**S. 49** — *Applicability — "Under-raiyat" — Homestead comprised in holding of agricultural and homestead land—Settlement on condition that lessee supplied milk, curd and ghee to settlor at certain prices on ceremonial occasions—Status of lessee—Notice of ejectment—Necessity.*

Where lands included in the holding of an agricultural *raiyat* consists partly of agricultural and partly of homestead land and the homestead is let out for use as homestead, the person to whom it is so let is an *under-raiyat*, and such person is not liable to ejectment unless a notice has been served upon him in accordance with the provisions of S. 49 of the Bihar Tenancy Act. Where homestead land is so let out and settled with a person on condition that he provided milk, curd and ghee to the settlor at certain prices on ceremonial occasions and assisted him in his cultivation, a produce tenancy is created, and the person taking such settlement is an under-raiyat, liable to ejectment only on notice served in accordance with S. 49. (*Agarwala, J.*) Mian Ahir *v.* Paramhans Pathak. **181 I C. 172=11 R.P. 571=5 B. R. 541=A.I.R. 1939 Pat. 409.**

——**(as amended in 1934), S. 50 (2)**—*Presumption under—When arises.*

S. 50 (2) of the Bihar Tenancy Act only provides for the presumption that land is held at a uniform rent since the permanent settlement from proof that the rent has not been changed during the 20 years immediately before the institution of a suit 'until the contrary is shown.' Where the rent was changed in 1889 to double the previous amount, it is obvious that the contrary has been shown. (*Dhavle and Verma, JJ*) Kameshwar Singh Bahadur *v* Krishna Chandra Jew. **175 I.C. 316=4 B.R. 561=10 R.P. 611=A.I.R. 1938 Pat. 396.**

——**Ss. 52 and 180**—*Relative scope—Right of tenure-holders to abatement.*

S. 52 is a much wider section than S. 180, inasmuch as it deals with every class of tenants. S 52 undoubtedly gives right of abatement to tenure-holders. (*Wort, J.*) Nripendra Nath Chatterji *v.* Jugal Prasad Mandal. **185 I.C. 144=12 R.P. 306=A.I R. 1939 Pat. 386.**

——**S. 53**—*Rent—When accrues—If accrues from day to day—Compromise providing for right in appellant to rents and profits as from that date—Kist falling beyond that date—Advance collection by respondent prior to compromise—Suit by appellant for recovery—Right to decree—Limitation—Limitation Act, Arts. 62, 109 and 120.*

A compromise entered into between the appellants and respondents on 20-7-1928 by which certain property was to be transferred to the appellants, *inter alia* provided that the appellant "should be entitled to all rents and profits accruing in respect of these properties as from the twentieth day of July, 1928." The kist in question was that of 29-9-1928 but the respondents had collected the rent in advance from the tenants prior to the date of the compromise, 20-7-1928. Appellant having sued the respondents for recovery of such collections,

Held, (1) that the rents in question accrued only on the date of the kist, *i.e.*, 29-9-1928 which was after the date of the compromise, although in fact there had been advance payment to the respondents which might in certain circumstances have been a complete discharge as against them. Rent in India does not accrue from day to day, and therefore did not accrue until the date of the kist of September, 1928, and there could therefore be no question of diminution of the amount claimed by the appellant; (2) that the compromise must be construed plainly on the assumption that the parties were contracting with the full knowledge of the law that there was an agreement and an undertaking by the respondents to pay those sums (if they had already collected them) to the appellant in so far as they were rents which accrued due after 20-7-1928; and (3) that the proper article of Limitation Act applicable to the case was not Art. 109, as there was no wrongful receipt of profits by the respondents, but either Art. 62 or 120 of the Limitation Act, and the cause of action did not accrue until the end of September, 1928, which was the date of the kist (*Wort and Agarwala, JJ.*) Ram Ranbijaya Prasad Singh *v.* Harihar Prasad Singh. **16 Pat. 184=168 I.C. 502=3 B.R. 434=9 R.P. 487=18 Pat.L.T. 162=A.I.R. 1937 Pat. 237.**

[*See also* under Transfer of Property Act, S. 38].

——**S. 60**—*Applicability—Conditions of.*

S. 60 of the Bihar Tenancy Act is intended to apply to cases where rent has accrued due to the proprietor of an estate and is still unpaid The fact that something happens to the proprietor cannot affect the character or the nature of the liability for rent, nor will the rent cease to be rent due to the proprietor. It is only where rent is due to a tenure-holder by an under-tenure holder or raiyat or due to a raiyat by an under-raiyat that S. 60 will not apply All that is required to make the section applicable is that the tenancy should be held under a proprietor, manager or mortgagee of an estate. If this condition is satisfied, the registered proprietor suing for rent shall be deemed to be the person to whom the rent is due and no plea to the contrary by the tenant will be permissible. (*Rowland and Chatterjee, JJ.*) Rama Prasad *v* Ram Ran Vijaya Prasad Singh. **18 Pat. 746=186 I.C. 269=12 R.P. 466=6 B.R. 321=20 Pat.L.T. 752=1939 P.W.N. 683=A.I R. 1939 Pat. 630.**

——**S 60**—*Construction—Registered proprietor really entitled to less interest than recorded or to no interest—Right to obtain full decree for rents of estate to extent of interest recorded.*

Under S. 60 of the Bihar Tenancy Act it is quite clear that the registered proprietor of an estate is not debarred from obtaining a full decree for the rents due to the estate to the extent of the interest for which he is recorded, notwithstanding that he may in reality have title only to a smaller interest or even to no interest at all. (*Rowland and Chatterjee, JJ.*) Rama Prasad *v.* Ram Ran Vijaya Prasad Singh. **18 Pat. 746=186 I.C. 269=6 B.R. 321=12 R. P. 466=20 Pat. L.T. 752=1939 P.W.N. 683=A.I.R. 1939 Pat. 630.**

——Ss. 60 and 72—Plea of payment of rent to proprietor after expiry of *thica*—Onus. *See* Bengal Land Registration Act, S. 79. **21 Pat. L.T. 336**.

——S 60—*Scope—Plea barred under.*

S. 60 of the Bihar Tenancy Act bars a plea that the rent is due to any third person. The section cannot be held to bar only a plea that the rent is due to some third person as proprietor. These words of limitation are not found in the section. (*Rowland and Chatterjee, JJ.*) Rama Prasad *v.* Ram Ran Vijaya Prasad Singh **18 Pat. 746=186 I.C. 269=6 B.R 321=12 R.P. 466=20 Pat. L.T. 752=1939 P.W.N. 683=A.I.R. 1939 Pat. 630.**

——S. 65—*Rent decree—Execution—Sale of holding subject to arrears of rent subsequent to suit but anterior to sale—Liability for such arrears—Landlord's right to proceed against tenant—Landlord purchaser and stranger purchaser—Distinction.*

A landlord decree-holder who purchases the tenant's holding in execution of his decree for rent subject to the liability for arrears of rent for a period anterior to the date of the sale cannot be heard to say that the tenant is liable for those arrears of rent. It is undisputed that a third party purchaser is liable to pay off the arrears, which are an encumbrance, notified in the proclamation of sale. On principle it is impossible to distinguish between the position of a third party purchaser who purchases subject to the encumbrance and that of the decree-holder landlord who himself purchases under like circumstances. (*Wort, C.J., Varma and Manohar Lall, JJ.*) Nripendra Nath Chatterjee *v.* Kuldip Misra. **17 Pat 694=11 R.P. 222=178 I.C. 10=5 B R. 68=19 Pat.L.T. 723=1938 P.W.N. 720=A.I.R. 1938 Pat. 545 (F.B.).**

——S. 65—*Scope and effect—Rent decree—Sale of holding—Purchaser in execution—Rights of as against mortgagee of holding under mortgage executed prior to sale—Priority—Delay in applying under S. 167—Effect of.*

A purchaser (not being a landlord) of a holding in execution of a decree for rent has a charge for the amount of the decree for rent as against the holder of a mortgage of part of the holding executed before the purchase, and is entitled to the same rights as the purchaser of a holding in execution of a decree passed on a prior mortgage. This priority is acquired by the purchaser as a matter of law in consequence of the rent being a first charge on the holding under S. 65 of the Bihar Tenancy Act, and it should not be confused with the special privilege conferred on him by S. 167. The fact that proceedings are not taken under S 167 of the Act until after the expiry of more than a year after the purchaser becomes aware of the mortgage cannot deprive him of his priority. (*Fazli Ali, J.*) Mahadev Maharaj *v.* Jagdev Singh. **18 Pat. 676=182 I.C. 678=12 R.P. 44=1939 P.W.N. 523=5 B.R. 799=20 Pat.L.T. 460=A.I.R. 1939 Pat. 339 (F.B.).**

——S. 65—*Scope and effect of—Two rent decrees—Property purchased in execution of one decree—If free from charge created by other decree.*

Where there are two rent decrees, if one decree is executed first and the holding is sold in execution, it will not pass subject to the charge created by the other decree. On general principle where there are two decrees of equal priority, and in execution of one of them the judgment-debtor's property is sold, the same property cannot be sold again in execution of the other decree. (*Rowland and Chatterji, JJ.*) Surya Mohan *v.* Bibi Tasiran Nisan. **A.I.R. 1940 Pat. 19.**

——S. 87—*Scope and applicability.*

S 87 of the Bihar Tenancy Act applies even in those cases where there has been no actual abandonment. Whenever a landlord takes a proceeding under that section and a notice is published in conformity with it, the tenant must have the matter settled within the time prescribed in the section. Taking steps under that section is not obligatory upon the landlord, but if he takes possession of the holding otherwise than in conformity with that section, he does so at his own risk and in that case he will not get the advantage of a shorter period of limitation prescribed for suits by the raiyats. (*Mahomed Noor, J.*) Jagat Mohan Prasad *v* L.W. Bion. **167 I.C. 817=9 R.P. 431=3 B.R. 338=1937 P.W.N. 236=A.I.R. 1937 Pat. 479.**

——S. 88—*Scope—Thicca lease—Amalgamation and sub-division of holdings by* thiccadar—*If binding on landlord—Covenant in lease restricting creation of new rights—Effect of.*

A recognition by a *thiccadar* to the amalgamation of separate holdings into one and the subdivisions thereof would be binding upon the landlord when the *thiccadar* has acted in good faith and in the ordinary course of business Where the action of the *thiccadar* has been absolutely *bona fide*, that binds the landlord and it is not necessary that it should also have been for the benefit of the estate. The fact that the *thicca* lease contains a covenant restricting the creation of new rights and tenures cannot make any difference; any amalgamation and subdivision made in good faith and in the ordinary course of business cannot amount to the creation of new rights. (*Manohar Lall and S.C. Chatterji, JJ.*) G. B. Solano *v.* Umeshwari Kuer. **175 I.C. 120=4 B.R. 529=10 R.P. 584=19 Pat.L.T. 157=1938 P.W.N. 239=A.I.R. 1938 Pat. 216.**

——S. 103-B — *Construction — Presumption under—Rebuttal — Question of fact—Entry of land as rent free—If rebutted by entry of another person as landlord of permanently settled village in which land is situate.*

Whether the presumption attaching to an entry in the record-of-rights has been proved to be incorrect is a question of fact and has to be decided on the facts of the particular case. The presumption of correctness of an entry in the record cannot be rebutted by another presumption under the general law in favour of the landlord. In many cases the very record which shows a tenancy as rent free also shows that a particular person is the landlord of the village and that the tenancy is held under him and is not revenue free, that is to say, it is assessed to revenue. "Landlord" under the Bihar Tenancy Act is one immediately under whom a tenant holds, and "tenant" is one who holds land from another person and who is, but for a special contract, liable to pay rent for that land to that person. A rent-free holder is in most cases a tenant. Proof that a particular person is the landlord of a land, holding it under the Permanent Settlement, cannot by itself rebut the presumption from the entry of land as rent-free in the record-of-rights. To so hold would lead to a vicious circle and would conflict with S. 103-B of the Bihar Tenancy Act, which clearly lays down that every entry in the record-of-rights shall be evidence of the matter referred to therein. and shall be presumed to be correct until it is proved by evidence to be incorrect. To hold that the entry of rent-free tenancy is rebutted by the proof that the land is within the permanently settled village of the landlord and is assessed to revenue would involve reading into the section an exception which is not there, that an entry about the land being rent-free shall not be presumed to be correct where the land is held under a landlord of a village which has been assessed to revenue. *(Khaja Mohammad Noor and Madan, JJ.)* Surpat Singh v Bhupendra Narayan Singh. **16 Pat. 105=166 I C. 123=9 R P. 256=3 B.R. 127=17 Pat.L.T. 824=1936 P.W.N. 817=A.I.R. 1937 Pat. 165.**

——S 103-B—*Entry in record-of-rights—Presumption of correctness — Rebuttal— Landlord proving land to be within regularly assessed estate—If rebuttal of entry of rent-tree or* miliki *—Onus of proving rent-free or* miliki—*If shifted on to tenant*

The correctness of an entry in the record-of-rights can only be rebutted by proof of facts which are inconsistent with the entry Assessment of land revenue on any land is not inconsistent with its having been made rent-free after the assessment of land revenue It is not therefore correct to hold that the presumption of the correction of an entry in the record-of-right about a certain land being rent-free is rebutted by the landlord proving that the land was included within the ambit of his village which was permanently settled with him. When therefore the land is recorded as rent-free or *miliki*, it is not enough for the landlord to show that the land is within the ambit of his regularly assessed estate to shift the onus on to the defendant, of showing the land to be rent-free or *miliki*, by reason of a contract or grant. *(Khaja Mohammad Noor and Madan, JJ.)* Surpat Singh v Bhupendra Narayan Singh. **16 Pat 105=166 I.C. 123=9 R.P. 256=3 B.R. 127=17 Pat.L.T. 824=1936 P.W.N. 817=A.I.R. 1937 Pat. 165.**

——S. 103-B—*Record finally published—Presumption attached to—Rebuttals — Proceedings before survey authorities before publication—Admissibility in evidence*:

The proceedings before the survey authorities prior to the publication of the record-of-rights are admissible in evidence for the purpose of rebutting the presumption which attaches to the finally published record. *(Agarwala, J.)* Khedu Mahto v. Khonka Mahto. **185 I.C 254=12 R.P. 330=20 Pat L T 929=6 B R. 142=1939 P. W.N. 700=A.I.R. 1939 Pat. 591.**

——Ss. 105 and 109—*Scope—Application for settlement of fair rent withdrawn — Subsequent suit on same matter—Bar of*

The withdrawal of an application under S. 105 for settlement of fair rent of kabil-lagan land debars the Civil Court from entertaining a subsequent suit on the same matter. S. 109 is a bar to such a suit. Such a suit is also barred by limitation when the defendants having denied in the case under S. 105 the plaintiff's right to get any rent from them, the plaintiff brings the suit more than 12 years after the assertion of the hostile right to hold the land rent free. *(Mohamad Noor, J.)* Ram Kanvijaya Prasad Saita v. Muni Pandey. **175 I.C. 342=4 B R. 576=10 R.P. 618=19 Pat.L.T. 566=A.I.R. 1938 Pat. 215.**

——S. 115 — *Interpretation — ' Thereafter '— Meaning of.*

If the expression 'thereafter' in S. 115 is interpreted so as to mean 'after the particulars have been finally recorded after recourse to all the provisions contained in Ch. 10,' it is definitely adding something to S. 115 of the Act which does not appear in that section and hence such interpretation is wrong. *(Wort, J.)* Surpat Sinha v. Pratap Mandal. **166 I.C. 955=9 R.P. 358=3 B.R. 236=A.I.R. 1937 Pat. 48.**

——S. 116—*Applicability—Conditions.*

In order to bar the acquisition of occupancy or of the right of a non-occupancy raiyat in respect of proprietor's private or *zirati* lands, it is necessary that such lands should be held under a lease for a term of years or under a lease from year to year. The proprietor is entitled to the benefit of S. 116 of the Bihar Tenancy Act if he has taken the precaution of letting out his zirat lands under a lease for a term of years or under a lease from year to year. If he has done this, S. 116 would apply to the land with the result that his lessee can neither acquire nor confer on any sub-lessee a tenancy carrying the benefits of Chapters V and VI of the Act. *(Agarwala and Rowland, JJ.)* Lala Rajbali Lal v. Partappur & Co., Ltd. **19 Pat. 398=1940 P.W.N. 498.**

——S. 116—*Construction—"Lease for term of years"—Meaning of.*

Quaere :—Whether the words "lease for a term of years", include a lease for one year or for a fraction of a year? *(Agarwala and Rowland, JJ.)* Lala Rajbali Lal v. Partappur & Co., Ltd. **19 Pat. 398=1940 P.W.N. 498.**

——S 116—*Construction—Lease for "a term of years"—Meaning of—If to be one for at least two years.*

The words "a term of years" in S. 116 of the Bihar Tenancy Act are merely a classificatory term and mean nothing more than any definite term, any definite term of time may be measured in years though not necessarily at an even number of years. The expression "a term of years" is a generic term and means merely a period of time which can be measured in years, *e.g.*, one year or half a year. A lease for a term of years truly means a lease for a definite period to come to an end at a definite date and nothing more. The words "a term of years" cannot be construed to mean that the term must be a term of at least two years. *(Courtney-Terrell, C. J. and James, J.)* Umashankar Prasad v. Kunj Behari Thakur. **17 Pat. 218=4 B.R. 356=1938 P.W.N. 254=173 I C. 904=10 R.P. 461=19 Pat.L.T. 180=A.I.R. 1938 Pat 299.**

——S. 116—*"Lease from year to year"—Meaning of—Zerait land—Lease for one year only end-*

ing on fixed date—If one from year to year—Tenant not delivering possession on date fixed—Status of—Liability to ejectment—Plea of occupancy rights—Maintainability.

A lease for a year certain is not the same as a lease from year to year; where the former expression is used, whether the landlord takes any steps or not, the tenant becomes a trespasser, when his lease comes to an end whereas when the latter expression is used, the tenant has the right to stay for a year certain, and if he shall not receive notice from the landlord to quit his tenancy at the end of the year certain, then his tenancy shall extend for another period of one year. The expression "from year to year" does not therefore cover the case of a lease for a year certain. A tenant to whom zerait land is let out orally for one year only ending on a fixed date, is bound to deliver up possession on that date, as his right to occupy the land ceases on that land, and if he does not so deliver up possession, he becomes a trespasser liable to eviction at any time. He cannot plead acquisition of occupancy rights. (*Courtney-Terrell, C. J. and James, J.*) UMASHANKAR PRASAD *v.* KUNJ BEHARI THAKUR **17 Pat. 218=4 B R. 356=1938 P.W.N. 254=173 I.C. 904=10 R.P. 461=19 Pat. L.T. 180=A.I.R. 1938 Pat. 299.**

——**S. 148**—*Suit for rent—Defect in frame of plaint—Omission to mention all plots in holding—Effect—Right to decree—Admission by defendant—Effect of.*

A suit for arrears of rent is a suit of a double nature. It is ordinarily a suit to enforce the charge upon the holding which is created by S. 65 of the Bihar Tenancy Act, but a decree enforcing this charge can only be made when the plaint is framed so as to exactly comply with S. 148 of the Act. The suit, however, does not necessarily fail because a decree cannot be made enforcing the charge in such a manner as to entitle the purchaser at the execution sale to annul all incumbrances. The suit being also one to enforce the personal liability of the tenant to pay a sum of money to the landlord, a decree enforcing this personal liability may be made even though no decree can be made enforcing the charge under S. 65. Where owing to the existence of a dispute regarding the real area of the tenancy, the land lord has, in the description given in the plaint. omitted to mention certain plots forming part of the tenant's holding, a money decree may properly be given against the tenant, especially when the latter admits that an amount of rent is due from him to the landlord. When the tenant is in possession of the area which he claims and there has been no ejectment by the landlord, the latter ought not to be deprived of the whole of the rent which the tenant admits to be payable. The landlord must in such cases pay to the tenant the costs of the contest which he has forced upon the tenant, and if it appears that he has not been willing to give a quittance in the manner required by law, he should not be allowed any damages or interest on his claim. (*Courtney-Terrell, C. J., Fazl Ali, Khaja Mohammad Noor, James and Manohar Lall, JJ.*) JEONANDAN SINGH *v.* JANKI SINGH. **17 Pat. 451=177 I C. 676=5 B.R. 6=11 R.P. 171=1938 P.W.N 379=19 Pat.L.T. 325=A.I.R. 1938 Pat 306 (S.B.).**

——**S. 148**—*Scope—Suit for rent of part of holding—Maintainability—Money decree—If can be passed.*

A suit for rent in respect of a part of a holding is not maintainable at all; nor can the Court pass a money decree even. (*Agarwala, J.*) DWARKA PRASAD SINGH *v.* BABU LAL SINGH. **174 I.C 583=10 R.P. 530=1938 P.W.N. 62=4 B R. 458=18 Pat.L.T. 1021=A.I.R. 1938 Pat. 124.**

——**S. 148-A**—*Applicability*—Diara *holding—Rent varying according to area under cultivation—Suit by landlord for part of rent—Maintainability.*

A suit by a landlord of a *diara* holding for the rent of a part of the holding, the rent of which varies according to the area under cultivation in a particular year, is maintainable. The fact that the tenant's entire holding is of a larger area is not always an obstacle against his landlord getting a decree based on the out-turn of a smaller area being the area from which crop is actually obtained. A decree should be given for the plaintiff's share of the rent calculated in that manner, leaving open the question of the total area of the defendant's holding. (*Rowland, J.*) KRISHNA BAHADUR *v.* HARICHARAN RAUT. **170 I.C. 783=10 R P. 151=3 B R. 787=1937 P.W.N. 427=18 Pat.L.T. 613=A.I.R. 1937 Pat. 475.**

——**S. 148-A**—*Construction—Suit for arrears of rent—Parties—Duty of plaintiff.*

S. 148-A, Bihar Tenancy Act, requires the plaintiff to join as co-defendants only the other landlords of the holding, not the other proprietors of the estate, and for whatever share the other proprietors may be recorded in Register D, they are not in the sense in which the word is used, in the Tenancy Act, landlords of these holdings unless they are actually co-sharers in the patti within which the holdings lie. (*James, J.*) MATBER SINGH *v* RAI KRISHNA BAHADUR. **168 I.C. 109=9 R.P. 457=1936 P.W.N. 530=3 B.R 385=A.I.R. 1937 Pat. 86.**

——**S. 148-A**—*Rent suit for part of holding—Maintainability—Money decree—If may be passed.*

A suit for rent with regard to a part of holding is not maintainable. In such suit the landlord is not entitled even to a money-decree. (*Wort J.*) RAM CHANDRA MAHTON *v.* RAM GULAM MAHTON. **177 I.C. 529=4 B.R. 826=11 R.P. 160=A.I.R. 1938 Pat 305.**

——**S. 148 A**—*Two suits by different co-sharers against same tenants—Two decrees—Nature of—If to be regarded as one consolidated rent decree.*

There can be only one rent decree for the entire rent of the holding and the effect of two decrees obtained in two suits by different co-sharer landlords, and framed according to the provisions of S. 148-A, Bihar Tenancy Act, is that one is supplementary to the other and both are regarded as a consolidated decree for the entire rent, payable to the different co-sharer landlords in proportion to their shares It cannot be said that the first is a rent decree and the second decree has the effect of only a money decree. (*Rowland and Chatterji, JJ*) SURYA MOHAN *v.* BIBI TASIRAN NISAN. **A.I.R. 1940 Pat 19.**

——**S. 148 (h)**—*Applicability—Decree for arrears of rent in favour of landlord—Latter assigning interest in zamindari to superior landlord—Subsequent assignment of decree to another—*

Application for execution by assignee of decree—Competency.

An assignee of a decree for arrears of rent who has not obtained assignment of the landlord's interest cannot make an application to execute the decree even as a simple decree for money. Where a landlord who has obtained a decree for rent assigns his interest in the zamindari to the superior landlord and then assigns the decree for rent to another, S. 148 (*h*) of the Bihar Tenancy Act is a complete bar to an application by the assignee of the decree for rent The decree does not become exempt from the bar of S. 148 (*h*) by reason of the fact that the landlord has parted with his interest before the execution is applied for. (*Fazl Ali and Rowland, JJ.*) KEDAR NATH *v.* SAMRU KAZI. **17 Pat. 189=173 I.C 609=4 B R. 312 (1)=10 R.P. 426=18 Pat. L.T. 1017=A.I.R. 1938 Pat. 95.**

——S. 153—*Conflicting claims—Suit for rent below Rs. 50 against* A—A *alleging that* B *was in possession of lands—*B *joined and allowed to contest—Decree—Appeal and second appeal.*

A landlord brought a suit for rent against *A* as tenant and the rent claimed was below Rs. 50. *A* alleged that suit lands were in possession of *B*. *B* was joined as party and allowed to contest the suit.

Held, that the appeal lay to the District Judge and also second appeal to the High Court, as there was conflict of interest and a decision of conflicting claims of *A* and *B*. (*Manohar Lall, J.*) BIKRAM RAJ *v* PALAK NONIA. **173 I.C. 29=4 B. R. 219=10 R.P. 380=A.I.R. 1938 Pat. 37.**

——S. 153—*Jeth raiyat relieved of duties—Claim to hold at lower rent—Claim that holding is other than occupancy and one burdened with service—Second appeal—Competency.*

Though *muafi* allowed to a jeth raiyat in lieu of wages, may not be rent, if the jeth raiyat had been relieved of his duties or if the right to pay lower rent is claimed irrespective of whether the duties had been performed or not, the question whether the jeth raiyat is liable to pay at a higher rate or at a lower rate, must be treated as a dispute relating to the amount of rent annually payable by the tenant. When the tenant also claims that his holding is something other than an occupancy holding, and that he is holding under a grant burdened with service, the dispute regarding the status of the tenant raises a question relating to an interest in land, and a second appeal is therefore competent under S. 153 of the Bihar Tenancy Act. (*Harries, C.J., James and Agarwala, JJ.*) DWARKA DAS *v.* BHEKU MAHTON. **18 Pat. 502=184 I.C. 308=6 B R. 34=12 R P. 236 =20 Pat. L.T. 659=1939 P.W.N. 607=A.I.R. 1939 Pat. 520.**

——S. 153—*Question as to amount of annual rent payable—Second appeal, if barred.*

Where the appellate Court has decided the question as to what the annual Jama of a holding was, it is only a question of the amount of rent payable annually by the tenant and comes under one of the exceptions mentioned in S. 153 of the Bihar Tenancy Act and a second appeal is not barred. (*Chatterji, J.*) SHIVA PRASAD SINGH *v.* DEOKI KUER. **175 I C. 61=4 B.R. 516=10 R.P. 573=A.I.R. 1938 Pat. 379.**

——S. 153—*Question of title—Suit for rent valued below Rs. 100—Decision by District Judge holding that right to collect rent alleged not made out—Second appeal.*

Certain co-sharer landlords instituted rent suits against the tenants for a certain percentage of the rent on the ground that by an arrangement their co-sharer landlords were entitled to realise the rent to the extent claimed by them. The suit was valued below Rs. 100 and the co-sharers of the plaintiffs were not impleaded as parties to the suit. The tenants-defendants did not claim any interest in the land adverse to the plaintiffs. The Munsif and, in appeal, the District Judge held that the arrangement set up by the plaintiffs was not established and that the plaintiffs did not prove separate collection of rent even to the extent of their shares and dismissed the suit. No question of title was decided between the parties.

Held. that no second appeal lay to the High Court, as S. 153 of the Bihar Tenancy Act barred a second appeal. (*Khaja Mohammad Noor, J.*) JAGDAM THAKUR *v.* HIRA THAKUR. **19 Pat.L.T. 212.**

——S. 155—*Applicability—Permanent mukarrari lease—Provision entitling lessor to re-enter on default of payment of rent on certain date of any year—Default by lessee—Lessor's right of ejectment.*

The application of the provisions of S. 155 of the Bihar Tenancy Act relating to ejectment is excluded by S. 179 where the conditions entailing forfeiture are provided by a contract between the parties to a permanent mukarrari lease. Where, therefore, such a lease contains a provision entitling the lessor to re-enter on default of payment of rent on a certain date of any year and the lease is forfeited by default in payment by lessee, the lessor can enforce his unqualified right of ejectment given him by the contract without conforming to the provisions of S. 155. (*Agarwala, J.*) MUKHAN SINGH *v.* CHANDRIKA PRASAD SINGH. **5 B R. 462=180 I.C. 624=11 R. P. 523=20 Pat.L.T. 440=A.I.R. 1939 Pat. 413.**

——S. 155—Mukarari lease—Landlord's right to contract out of section. *See* BIHAR TENANCY ACT, S. 179. **185 I.C. 278=19 Pat. 269.**

——S. 158-A—*Scope and effect of—Certificate sale in respect of rent of holding—What passes—Doctrine of representation—Applicability.*

S. 158-A of the Bihar Tenancy Act places certificates on the same footing as rent decrees in respect of the sale of a tenure or holding. In view of that section, the doctrine of representation is no longer foreign to certificate proceedings. In order to justify the sale of a tenure or holding under the Public Demands Recovery Act, all parties interested in the tenure or holding must be joined as debtors in the certificate proceedings or be sufficiently represented by the parties joined as such; unless this is done, the purchaser at the certificate sale would acquire neither the shares of other parties nor the power to annul incumbrances, but only the right, title and interest of the certificate debtors themselves. The certificate procedure, being a summary mode for the recovery of arrears, makes it all the more necessary for the certificate holder to make it clear that he is bringing the whole holding or tenure to sale. He can do so by joining as certificate debtors all the persons interested in the tenure or holding, but where he has not done so it becomes necessary for the purchaser at the sale (or his transferee), in a contest with other members of the debtors' family who were not joined in the certificate proceedings to establish clearly that these latter were represented by those against whom the landlord (certificate-holder) had taken the proceedings In order to entitle the purchaser to invoke the aid of the principle of representation, it would not be sufficient to show that the landlord chose to take a decree for rent against one out of several heirs. It must be established that the whole body of tenants had held on one of them as their representative in their transactions with the landlord. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) HARI PRASAD SINGH *v* LAL BEHARI SARAN SINGH **6 B R 713=1940 P. W. N. 420=21 Pat. L. T. 377=A.I.R. 1940 Pat. 328 (F.B.)**

—— **(as amended in 1938), Ss. 158-B (2), 163 (5) and 163-A**—*Construction and scope—Pending application for execution—If governed by—Intention of Legislature.*

The object of the Bihar Tenancy Amendment Act of 1938 which introduced Ss. 158-B (2), 163 (5) and 163-A, was to remedy a defect in the procedure of the executing Court which experience showed frequently resulted in the sale of agricultural holdings and tenures below their market value. The Act being a remedial one should be construed as widely as possible to give effect to the intention of the Legislature in as many cases as possible in so far as this can be done without injustice to the parties. It cannot be held that because S 158-B (2) contemplates that notice of the date on which the sale proclamation is to be drawn up should be given when the application for execution is made the remedial provisions of the amending Act should not be applied in cases where the application for execution is made before the amending Act came into operation. S. 158-B (2) is only one of a group of sections by which the legislature has sought to remedy an evil and must be construed in relation to the other sections in the group including S. 163-A. The latter expressly prohibits the sale of a holding for a price lower than that specified in the sale proclamation. S. 163-A too must be read with the group of sections of which it is a part and which includes Ss. 158 B (2) and 163 (5) which require the Court to hear the parties in the matter of the value of the property to be sold and to estimate the value of it or that part of it which the Court considers will be sufficient to satisfy the decree. A decree for rent was obtained by a landlord who applied on 9—2—1938 to execute that decree. On 7—3—1938 the executing Court directed the issue of a writ of attachment and a sale proclamation, fixed 5—5—1938 as the date of sale. The Bihar Tenancy Amendment Act meanwhile came into force on 10—3—1938 The writ and proclamation of sale were not however issued actually until 28—3—1938 On the date fixed for sale the judgment-debtor objected to the sale being held on the ground that the Court had not valued the property to be sold as required by S. 163 (5) of the Bihar Tenancy Act as amended in 1938.

Held, that Ss. 158-B (2), 163 (5) and 163-A applied to be execution though the application was made before the sections came into force and that inasmuch as the sale proclamation had not been issued when the amending Act came into force, there was no question of giving retrospective effect to the sections in question. The law had been amended before the proclamation was issued and the Court was required to hear the parties as to the value of the holding sought to be sold. (*Agarwala and Meredith, JJ.*) BIGAN SINGH *v* SYED SHAH ZAFFAR HUSSAIN. **19 Pat. 289=1940 P.W.N 412.**

——**S. 163**—*Scope—If mandatory.*

There is a certain method of procedure to be adopted as laid down by Bihar Tenancy Act for the purpose of executing a rent decree as such and parties cannot depart from the procedure so laid down. Hence in executing a rent decree, simultaneous issue of the sale proclamation and the order of attachment is necessary. (*Wort, J.*) RAMJANAN SINGH *v.* RAMPHAL LAL. **167 I C. 692 (1)=9 R.P. 419=3 B.R. 312 (1)=A.I.R. 1937 Pat. 93.**

——**(as amended in 1938), S. 163 (5)**—Scope—Retrospective operation—Pending proceedings—If affected—If to be read with S 158-B (2) and 163-A. *See* BIHAR TENANCY ACT (AS AMENDED IN 1938), Ss. 158-B (2), 163 (5) AND 163-A. **19 Pat. 289.**

——**(as amended in 1938), S. 163-A**—Scope—Retrospective operation—If to be read with S 158-B (2) and 163 (5). *See* BIHAR TENANCY ACT (AS AMENDED IN 1938), Ss. 158-B (2), 163 (5) AND 163-A. **19 Pat. 289.**

——**S. 167**—Scope—Purchaser at sale in execution for rent decree—Rights of—Failure to annul incumbrance created prior to sale—Effect of right to priority. *See* BIHAR TENANCY ACT, S. 65. **18 Pat. 676=1939 P.W N. 523=A I R. 1939 Pat. 339 (F.B.).**

——**S. 169 (a), (b) and (c)**—*Moneys payable under—If moneys realised in execution—Money payable to decree-holder in respect of rent falling due after suit and before confirmation of sale—If same as money due under decree—Fresh vakalat to draw out—Necessity.*

There is no reason to distinguish the claim to money payable to the decree-holder under S. 169 (*c*) of the Bihar Tenancy Act from money payable to him under Cls. (*a*) and (*b*) of the section. All such sums are moneys realised in execution of the decree. Where, therefore, a vakalat given by the decree-holder to his pleader gives him full authority to take out execution and to realise money in the suit or execution and to draw any decretal money deposited in Court on the decree-holder's behalf, the pleader has power to draw out on the party's behalf any balance due to his client on account of subsequently accrued rent, as well, *i.e.*, rent falling due between the institution of the suit and the confirmation of the sale of the holding in execution. No separate vakalat is necessary for that purpose. (*Rowland, J.*) KAMESHWAR SINGH *v* DHOLAI KHAWAS. **169 I. C. 725=3 B R 609=10 R.P. 32=1937 P W.N. 304=18 Pat.L T. 469.**

——**S. 170**—*Scope—Decree for rent—Execution—Claim under O. 21, R. 58, C. P. Code—*

Maintainability—Grounds—Decree alleged to be against wrong person—Claim, if sustainable.

A claim under O. 21, R. 58, C. P. Code, is barred under S. 170 of the Bihar Tenancy Act, if it is not disputed that the decree-holder is the landlord of the tenure or holding and that the decree is for the rent due in respect of it. A claimant cannot be allowed to plead that the decree had been obtained against a wrong person. If it can be shown that the decree is not a rent decree a third party can maintain a claim under O. 21, R. 58, C. P. Code; but if the decree is a rent decree but against a wrong person, the claim is barred. (*Khaja Mahomed Noor and Madan, JJ.*) Rani Chhater Kumari Debi *v.* Bhagwati Prasad. **15 Pat. 812=169 I.C. 72=3 B.R. 530=9 R.P. 546=1937 P.W N. 959=18 Pat.L.T. 604 and 928=A.I.R. 1937 Pat. 278.**

——**S. 170**—*Scope—Person purchasing holding in execution of rent decree—Same holding put up in execution of subsequent rent decree—Application under O. 21, R. 58, C. P. Code, by purchaser —Competency.*

A third party cannot avail himself of O. 21, R. 58, C. P. Code, against a rent decree merely on the ground that the tenure or holding in suit belonged to him. A person purchased a holding in execution of a rent decree. In execution of a subsequent rent decree, the same holding was put up for sale and an application was made by the purchaser under O. 21, R. 58, that the rent decree was a nullity.

Held, that the application was not competent in view of S. 170, Bihar Tenancy Act. (*Wort, J.*) Alakhnandan Prosad *v.* Bibi Salma. **169 I C. 729=10 R.P. 31=3 B.R. 610=A.I.R. 1937 Pat. 341.**

——**S. 171**—*Applicability—Rent decree against tenant—Subsequent coming into force of S. 26-N of amended Act—Effect—Decree—If ceases to be rent decree—Execution—Right of mortgagee to benefit of S. 171.*

Where a suit properly framed as a suit for arrears of rent under the Bihar Tenancy Act is instituted and a decree executable under the Act as a rent decree is passed, the fact that S. 26-N of the amended Act comes into force between the signing of the decree and its execution does not make the decree anything other than a rent decree. The fact that under S. 26-N of the amended Act, the landlord must be deemed to have given his consent to transfers made prior to 1923, and to the distribution of rent upon which the transferor and the transferee had agreed, and that thereby the decree in effect at the time of execution affects two holdings, is no ground for holding that the decree is not a rent decree. The new S. 26-N no doubt confers new rights on purchasers, but the decree remains a rent decree and for purposes of execution the parties are governed by the Bihar Tenancy Act. S. 171 of the Bihar Tenancy Act can therefore be applied to the decree in execution, and a usufructuary mortgagee of the holding can avail himself of the provisions of S. 171. (*James, J.*) Sital Singh *v.* Ramji Prasad. **177 I.C 338=4 B.R. 823=11 R.P. 149=1938 P.W.N. 654=A.I.R. 1938 Pat. 591.**

——**S. 171**—*Construction — "Debt"— Amount paid by mortgagee of recorded tenant to prevent sale—Amount payable by tenant to regain possession—Right to deduct from amount deposited by mortgagee sums due by mortgagee in respect of his share of rent payable and price of crops reaped by mortgagee.*

Where a mortgagee of a recorded tenant deposits the amount decreed against his mortgagor in a suit for rent at the instance of the landlord and gets delivery of possession under S. 171 of the Bihar Tenancy Act, it is only on repayment of the amount so deposited by the mortgagee to prevent the sale that the judgment-debtor tenant (mortgagor) would be entitled to regain possession of his holding. A deposit by the tenant judgment-debtor of any lesser amount arrived at after deducting from the amount deposited by the mortgagee an amount which the judgment-debtor claims to be due to him from the mortgagee as the share of the rent payable by the mortgagee and the price of crops reaped by the mortgagee, is not a valid deposit and is not in compliance with S. 171. (*Agarwala, J.*) Ram Lal Jha *v.* Thakur Das. **173 I.C. 721=4 B.R. 321=10 R.P 439=18 Pat.L.T. 1019=1937 P.W. N. 967=A.I.R. 1938 Pat. 94.**

——**S. 171**—*Jurisdiction—Mortgagee of tenant depositing decree amount to prevent sale of holding and getting possession—Application by tenant to be put back in possession offering to pay mortgagee amount deposited by him—Power of Court to entertain.*

Quaere.—Whether the Court has jurisdiction under S. 171 of the Bihar Tenancy Act to entertain an application by the tenant-judgment-debtor, who has been dispossessed under the section by a deposit made by his mortgagee to prevent a sale praying to be put back in possession by offering to pay the mortgagee the amount deposited by him. (*Agarwala, J.*) Ram Lal Jha *v.* Thakur Das. **173 I.C. 721=4 B.R. 321=10 R.P. 439=18 Pat.L.T. 1019=1937 P. W.N. 967=A.I.R. 1938 Pat. 94.**

——**S. 171 (e)**—*Rent decree—Execution—Usufructuary mortgagee paying off balance of decree amount and getting possession of holding—Right of judgment-debtor to recover possession of holding from mortgagee.*

Where a usufructuary mortgagee of a holding which was advertised for sale in execution of a rent decree has stepped in and obtained possession of the holding under S. 171 of the Bihar Tenancy Act on his paying off the balance of rent due under the rent decree, a judgment-debtor who desires to recover possession from the mortgagee must pay off the amount which the mortgagee has paid. On such payment, he would be entitled to recover possession of so much of the holding as has not been alienated by himself or his purchasers. (*James, J.*) Sital Singh *v.* Ramji Prasad. **177 I.C. 338=4 B.R. 823=11 R. P. 149=1938 P.W.N. 654=A.I.R. 1938 Pat. 591.**

——**S. 174**—Jurisdiction under—Omission to make deposit at time of application—Effect—Power of Court to set aside sale. *See* C. P. Code, S 151. **1938 P.W.N. 192.**

——**S. 174 (1)**—*Scope—Compliance — Deposit in full—Mistake in* challan *as to very small amount—Deposit of four annas deficit wrongly made in favour of decree-holder instead of in* *favour of auction-purchaser—Refusal to set aside sale—If justified*—De minimus non-curat lex.

When the judgment-debtor deposits the full amount due, the sale ought to be set aside. The mere fact that there is a mistake in the *challan* to the extent of a very small amount is no ground for refusing to set aside the sale. A judgment-debtor made the deposit but there was a deficit of 4 as in favour of the auction purchaser. He then made good the deficit, but he made the mistake of depositing it in favour of the decree-holder.

Held, that the Court had the power to alter the *challan* for the purpose of putting matters in order, and to hold that the strict letter of the law had not been complied with would be to ignore the well-known principle of *de minimus non-curat lex*; the judgment-debtor was under the circumstances entitled to have the sale set aside. (*Wort, J.*) RUKMINI KUER *v.* BALMIK PRASAD. **170 I.C. 64=10 R.P. 71=3 B R. 645=18 Pat. L. T. 314=1937 P.W.N. 279=A.I.R. 1937 Pat. 409.**

——**(as amended in 1937), S. 177-A (b)**—*"Occupied by him"—Meaning of.*

The words "occupied by him" in S. 177-A (*b*) of the Bihar Tenancy Act, as amended in 1937, mean occupied by the raiyat or under-raiyat as such raiyat or under-raiyat and do not exempt from attachment houses or buildings not occupied by a raiyat or under-raiyat as a dwelling house or for some purpose connected with his vocation as a raiyat or under-raiyat. (*Agarwala and Rowland, JJ.*) BAIJNATH RAM MARWARI *v.* RAI KUMAR SINHA. **19 Pat. 410=1940 P.W.N. 502.**

—— **S. 179**—*Lease falling under—Clause for re-entry on non-payment of rent—Validity.*

S. 179 of the Bihar Tenaacy Act is by its terms an exception to the law as laid down in the earlier sections. It permits the parties to a lease falling within that section to contract out of the provisions of the Act. A clause in such a lease entitling the landlord to re-enter on non-payment of rent is, therefore, perfectly valid and can be enforced by a suit at law. (*Harries, C.J. and Fazl Ali, J.*) MUHAMMAD HASAN *v.* BAIDYA NATH SAHAY. **6 B R. 62=12 R.P. 253=184 I.C. 605=21 Pat.L.T. 117=A.I.R. 1940 Pat. 140.**

——**S. 179**—*Mukarari lease—Landlord's right to contract out of S. 155—Lessee's right to equitable relief—T. P. Act, S.* 114.

There is nothing in S. 179 of the Bihar Tenancy Act to prevent the landlord from entering into a contract with the lessee to the effect that the right of ejectment which he shall have under the agreement shall not be subject to any such qualifications as are imposed by S. 155. The lessee cannot claim any relief under S. 114 of the Transfer of Property Act. That section is not applicable as the case is not governed by the Transfer of Property Act but by the Bihar Tenancy Act. Further the principle underlying that section is also embodied in S. 155 of the Bihar Tenancy Act and if that Act itself which contains this provision enables the tenant to contract himself out of the concession available to him under it, there can be no further room for the application of any equitable principle. (*Harries, C.J. and Fazl Ali, J.*) MUKHAN SINGH *v.* CHANDRIKHA PRASAD SINGH. **19 Pat. 269=185**

I.C. 278=12 R.P. 333=6 B.R. 145=1940 P.W. N. 484=A.I.R. 1940 Pat. 371.

——**S. 181**—*Grant of land to gorait in lieu of services—Resumability.*

Chakrana Jagirs when they are granted in lieu of remuneration for zamindari service differ essentially from those jagirs which may be granted as rewards for past services or grants of land burdened with some formal service; and there does not appear to be any particular reason why an office of which remuneration is given by the grant of chakrana lands should be distinguished from an office of which remuneration is given in any other way, in cash or kind. Therefore a zemindar when he appointed the first gorait and assigned for his remuneration the goraiti jagir cannot be supposed to have deprived himself thereby of the right to dismiss this servant and appoint another in his place if he should please, or of the right to take jagir away and substitute for it remuneration in cash or kind. The zemindar is entitled to dismiss at his pleasure a servant of this kind, whose services are private and personal to the zemindar although the remuneration of his office consists of the enjoyment of certain land. (*James, J.*) SHILLINGFORD *v.* GENA TATMA. **174 I.C. 588=4 B.R. 463=10 R.P. 529=A.I.R. 1938 Pat. 141.**

——**(as amended in 1934), S. 184, Sch. 3, Art. 2, (b) (ii)**—*If retrospective—Suit for rent on cause of action arising before Amending Act came into force—If affected.*

The rule ordinarily applicable is the law which is in force at the time of the institution of suit. But where the Amending Act prescribes a period of limitation shorter than the one under the old law, the Amending Act does not apply to suits in which the cause of action arises before the Amending Act comes into force, when the Amending Act comes into force on the very day on which it is passed into law. The case is otherwise when there is a sufficient interval between the passing of the Amending Act and its coming into force; because the passing of the Amending Act gives full notice to the litigant of the law to come into force and the interval thus gives him a fair and reasonable opportunity of availing himself of the right of suit which is soon to be extinguished by the Amending Act. In such a case the limitation is governed by the Amending Act even in the cases of suits in which the cause of action has arisen before the Amending Act came into force. Where, therefore, limitation for filing suits for rent under the Bengal Tenancy Act was three years and later on the Act was amended by the Bihar Tenancy Amendment Act and the period was reduced to one year, and a suit for rent was brought in respect of a cause of action which arose before the Amending Act came into force,

Held, that inasmuch as the Amending Act was passed into law on 14th November, 1934, and was brought into force on 10th June, 1935, the suit even though within limitation under the old Act, was barred by limitation under the Amending Act as there was sufficient time intervening between the passing of the Amending Act and its coming into force. (*Rowland, J.*) RAMESHWAR PRASAD SINGH *v.* MANGAR KAHAR. **169 I.C. 78=**

9 R.P, 524=3 B.R. 534=18 Pat.L.T. 193=1937 P.W.N. 95=A.I R. 1937 Pat. 311.

——**(as amended in 1934), S. 184 and Sch. III, Art. 2 (b) (ii)**—*Scope—If retrospective—Interpretation of statutes—Act amending statute of limitation and shortening period of limitation—Retrospective operation—Limitation—Law applicable.*

The Bihar Tenancy Amending Act of 1934 applies to all suits instituted after the 10th June 1935, whether the cause of action had accrued or not before that date. There is a great difference between a case where a statute amending the law of limitation comes into force immediately and the case where a period of time is given between the passing of the Act and the date upon which it comes into force, during which suits can be brought which would otherwise be barred by the Amending Act. Where in an Act amending and shortening a period of limitation, a period of time is given between the passing of the Act and the date upon which it is intended that it should come into force, such an Act must be given retrospective effect.

Agarwala, J.—The law of limitation being a breach of the objective law, the statute of limitation applicable to a particular suit or legal remedy is that which is in force at the date when the suit is instituted or the remedy is sought and not the statute which was in force at the time of the transaction or the vesting of the cause of action on which the suit or remedy is based. (*Harries, C.J. and Agarwala, J.*) REYASAT *v.* GOPINATH MISSIR. **18 Pat. 1=180 I.C. 414=11 R.P. 510=5B.R. 398=1938 P.W.N. 975=20 Pat. L.T. 38=A.I.R. 1939 Pat. 122.**

——**S. 193 and Sch. III, Sub-Cl. 2 (b)**—*Applicability—Money reserved under settlement in respect of right to cut grass—Suit for—Limitation.*

The rights to which S. 193 of the Bihar Tenancy Act relates are rights which do not create the relationship of landlord and tenant. A right in respect of pasturage, whether it be an actual grazing or cutting of grass,. falls within S. 193, for whatever purpose it may be used. The period of limitation for a suit to recover payment of money reserved under a settlement of the right to cut grass is that prescribed by sub-Cl. 2 (*b*) of Sch. III of the Act. (*Wort, A. C. J. and Manohar Lal, J.*) KAMESHWAR SINGH BAHADUR *v.* RAMPAT THAKUR. **179 I.C. 164=11 R.P. 334=5 B.R. 200=19 Pat.L.T. 701=1938 P.W.N. 736=A.I.R. 1938 Pat. 607.**

——**(as amended in 1934), Sch. II, Art. 2 (b) (ii)**—*Scope—If retrospective—Suit for produce rent after Act on cause of action arising before—Limitation.*

Quaere.—Whether the Bihar Tenancy Amending Act is retrospective, and whether the shorter or the longer period of limitation applies to a suit for produce rent instituted after the Amending Act on a cause of action which arose before the Act came into force. (*Wort and Manohar Lall, JJ.*) BADRI NARAYAN SINGH *v.* HARI LAL SINGH. **10 R.P. 314=172 I.C. 202=1937 P.W.N. 843=18 Pat.L.T. 812=A.I.R. 1937 Pat. 639.**

——**(as amended in 1934), Sch. III, Art. 2 (b) (ii)**—*Scope—Retrospective operation—Suit after*

Act in respect of cause of action accrued before—Law applicable.

Ordinarily an Act of Limitation is placed in the category of adjective law and under the established rules of interpretation it has retrospective effect. The new Bihar Tenancy Act of 1934 curtailing the period of limitation for a suit for produce rent is retrospective and affects causes of action already accrued. The Act would apply to suits instituted after it came into force though the cause of action may have arisen prior to it. (*Fazl Ali and Varma, JJ.*) BIRANCHI SINGH *v.* NAND KUMAR SINGH. **18 Pat. 355=183 I.C. 212=12 R.P. 116=5 B.R. 902=1939 P.W. N. 108=20 Pat.L.T. 139=A.I.R. 1939 Pat. 282.**

——**(as amended in 1934), Sch. III, Part I, Art. 2 (iii) (b) (ii)**—*Applicability—Holding consisting of lands partly on cash rent and partly on produce rent—Suit for rent instituted after November, 1934—Limitation.*

A suit for rent of a holding for part of which cash rent is paid and for part of which produce rent is paid, instituted after the Bihar Tenancy Amending Act of 1934 came into force is governed by the shorter period of limitation prescribed by Art. 2 (*iii*) (*b*) (*ii*) of Sch. III, Part I of the Act, though the cause of action might accrue before the passing or coming into force of the Amending Act of 1934. (*James and Rowland, JJ.*) SIDHESHWAR PRASAD *v.* RAM CHARITER CHOUDHURY. **182 I.C. 454=5 B.R. 746=12 R.P. 19=1939 P.W.N. 217=A.I.R. 1939 Pat. 269.**

——**Sch. III, Art. 3**—*Applicability—Dispossession—If must be by landlord as such.*

Art. 3, Sch. III of the Bihar Tenancy Act does not provide, even by implication, that dispossession must be by the landlord *as such*. Dispossession of the tenant by the landlord as auction-purchaser of the right, title and interest of the tenant also comes under the special law of Limitation under Art. 3, Sch. III of the Bihar Tenancy Act. In a case where the decree obtained by the landlord against the original tenant, is only a money decree, and the landlord purchases only the right, title and interest of the original tenant (whatever that may be) and not the holding or the tenancy right of the tenant, the dispossession of the tenant by the landlord purchaser effected long after the sale and out of Court, is not really as auction-purchaser but merely upon the excuse of being auction purchaser. The special limitation under Art. 3, Sch. III of the Bengal Tenancy Act is applicable to such a case. (*Fazl Ali and Meredith, JJ.*) DEORATI KUER *v.* DASARATH DUBEY. **187 I.C. 539=12 R.P. 612=21 Pat.L.T. 374=6 B.R. 495=1940 P.W.N. 358=A.I.R. 1940 Pat. 476.**

——**Sch. III, Art. 3**—*Applicability—Sale of holding for arrears of rent—Purchase by landlord and delivery of possession—If "dispossession of tenant by landlord."*

Where a landlord in execution of his decree for arrears of rent puts up his tenant's holding for sale, and, having purchased it, himself obtains delivery of possession as auction purchaser, that does not amount to dispossession of the tenant by the landlord within the meaning of Art. 3 of Sch. III of the B. T. Act, so as to make that article applicable. (*Agarwala and Rowland, JJ.*)

JAGA SINGH *v.* BASDEO SINGH. **6 B.R. 483=187 I.C. 518=12 R.P. 601.**

——**Sch. III, Art. 6**—*Applicability—Single suit by same proprietor far rent of two different tenures held by different tenants—Two separate decrees for amounts less than Rs. 500 against respective tenants—Execution—Limitation—Article applicable—Rent decree or money decree.*

The plaintiff the sole proprietor of an estate instituted a suit and claimed the full rent of two tenures for 4 years, one tenure being recorded in one khewat and the other tenure in another khewat. The tenants interested in one khewat were not identical with the tenants interested in the other, *i.e.*, each khewat was held by a different set of tenants separate from the other. The plaintiff got a decree for Rs. 204-4-6, against one set of tenants and another decree for Rs. 309-11-9 against the other set of tenants.

Held, that the position resulting from this was precisely the same as if the plaintiffs had brought two distinct suits, for rent against the respective tenants in respect of each tenancy and that each of these decrees was executable each being for an amount less than Rs. 500, as a rent decree under the Bihar Tenancy Act, and execution of either of them was governed by Art. 6 of Sch. III of the Bihar Tenancy Act.

Held, further, that the fact the suit was a single suit for rent of more than one tenure did not make it a suit in which only a money decree could be passed, so as to exclude the operation of Art. 6 of Sch. III of the Act. (*Rowland, J.*) JANKI RAI *v.* RAM RAN BIJAYA PRASAD SINGH. **187 I.C. 49=12 R P. 560=6 B.R. 416=20 Pat. L.T. 889=A.I.R. 1940 Pat. 145.**

——**(as amended in 1934), Sch. III, para. 2 (b) (ii)**—*Applicability—Suit for* bhaoli *rent after Act in respect of rent accrued due prior to Act—Limitation.*

The period of limitation prescribed by para. 2 (*b*) (*ii*) of Sch. III of the Bihar Tenancy Act as amended in 1934 is not applicable to suits for arrears of *bhaoli* rent, which had accrued due and in respect of which the causes of action had arisen before the amended Act, though the suits are instituted after the Act. (*Courtney-Terrell, C.J.*) BADRI NARAYAN SINGH *v.* GANGA SINGH. **171 I.C. 953=10 R.P. 268=4 B.R. 88=18 Pat. L.T. 731=1937 P.W.N. 723=A.I.R. 1937 Pat. 605.**

——**Ch. V**—*Occupancy rights—If conferred by mere recognition.*

The institution of an occupancy right is a creature of statute. Recognition means existence of something from before. If the occupancy right had not been acquired from before, mere recognition by landlord would not confer occupancy right upon a raiyat. (*Varma, J.*) DEO NARAIN LAL *v.* RAM KHELAWAN SINGH. **167 I.C. 47=9 R.P. 373=3 B.R. 257=A.I.R. 1937 Pat. 98.**

——**Ch. V and Ch. VI**—Applicability—Land comprised in holding of raiyat acquired by Government for purposes of Railway—Effect—Subsequent transferee from raiyat paying rent to zamindar—If protected from ejectment. *See* LIMITATION ACT, ART. 149. **18 Pat.L.T. 486.**

BILL OF LADING—*See* SHIPPING—BILL OF LADING.

BIRBHUM GHATWALI REGULATION (XXIX OF 1814), S. 5—*Ghatwal—Power of Government to dismiss and to forfeit tenure—Grounds for dismissal.*

The Ghatwal is not liable to be proceeded against under the provisions of S. 5 of the Regulation, 1814, for non-payment of choukidari dues. The Government therefore have no right to dismiss the Ghatwal acting under the provisions of S. 5 (2) in cases where he is in arrears for the payment of the choukidari dues. The power to dismiss a Ghatwal then for non-payment of choukidari dues must be fonnd, if at all, elsewhere. The ruling power however always has a customary right, as a necessary incident of a Ghatwali tenure to dismiss a Ghatwal for misconduct or for non-payment of his dues which are as a matter of ancient and customary form enumerated in the muchalka.

Per *Chatterjea, J.*—S. 5 gives in clear terms to the Government full power to forfeit the tenure of the defaulting Ghatwal and to make it over to any person whom it may approve or otherwise to dispose of it in such manner as it may think proper. It is thus evident that notwithstanding the hereditary character of the Ghatwali tenure the Government in case of breach of the condition to pay rent is at liberty to forfeit the tenure and to take it away from the family of the defaulting Ghatwal. It must be as a matter of policy of the State based on grounds of expediency touching the administration of police duties by the Ghatwals that this right of the Government was recognised by legislative enactment. When for breach of the conditions on which he holds the tenure the Ghatwal is dismissed from his office by the Government his tenure is forfeited and the Government has a right to make a new grant to any person whom it may consider fit. Once a tenure is forfeited the right of the Government to resettle it with any new Ghatwal whom it may consider fit comes in. Ordinarily the Government should consider and respect the hereditary claim of the next heir of the dismissed Ghatwal but he cannot force such claim upon Government. (*Manohar Lal and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. **17 Pat. 398=175 I.C. 854=19 Pat.L.T. 519=4 B.R. 633=11 R.P. 20=A.I.R. 1938 Pat. 245.**

——**S. 5**—*Scope—If incorporated in S. 8 (2), Sonthal Parganahs Rural Police Regulation.*

S. 5 of the Regulation of 1814 is not by necessary implication incorporated in S. 8 (2) of the Regulation of 1910 for the simple reason that if that was the intention of the Legislature they could easily have said so. (*Manohar Lal and Chatterjee, JJ.*) JOGENDRA NARAIN *v.* RADHA PRASAD. **17 Pat. 398=175 I.C 854=19 Pat.L. T. 519=4 B.R 633=11 R.P. 20=A.I.R. 1938 Pat. 245.**

BOILERS ACT (V OF 1923), Ss. 2 and 23—*'Owner'—Absentee owner—Liability of.*

The word 'owner' in S. 23, Boilers Act, has been used in its dictionary meaning and also includes an agent or other persons mentioned in S. 2. The question whether an owner who is absent should or should not be prosecuted, and, if prosecuted, how he should be dealt with, is one which depends upon the facts and circumstances of each particular case. As a mere proposition of law an absentee owner of a boiler, which is being used for his work comes within the purview of S. 23 of the Boilers Act. (*Mohamad Noor and Madan, JJ.*) EMPEROR *v.* JUGAL KISHORE. **16 Pat. 495=1937 P.W.N. 759=171 I C 143=10 R.P. 189=38 Cr.L.J. 1054=4 B.R. 10=18 Pat. L.T. 734=A.I.R. 1937 Pat. 500.**

——S. 2 (b)—*Boiler—Meaning of definition.*

The meaning of the definition of 'boiler' in S. 2 (*b*) of the Boilers Act is, that the definite and clear object of the contrivance should be to generate steam under pressure. The fact that in a particular contrivance though steam is generated under pressure, the steam is used only for sterilizing some vessels, cannot take it away from the definition of a 'boiler', for the use to which the steam is ultimately put is quite irrelevant to the issue. (*Mulla, J.*) A. S. AGARWAL *v.* EMPEROR. **I.L.R. 1939 All. 883=41 Cr.L.J. 26=184 I. C. 488 (2)=1939 A L.J. 806=1939 A.Cr.C. 176=1939 A.W.R. (H.C.) 618=A.I.R. 1939 All. 697.**

BOMBAY ACTS.

- Abkari Act (V of 1878).
- Bhagdari and Narwadari Act (V of 1862).
- Borstal Schools Act (XVIII of 1929).
- Children's Act (XIII of 1924).
- City Land Revenue Act (II of 1876).
- City Municipal Act (III of 1888).
- City Police Act (IV of 1902).
- Civil Courts Act (XIV of 1869).
- Civil Medical Code.
- Co-operative Societies Act (VII of 1925).
- Court of Wards Act (I of 1905).
- District Municipal Act (III of 1901).
- District Police Act (VI of 1890).
- Finance Act (1932 as amended in 1939).
- Hereditary Offices Act (III of 1874).
- High Court Civil Circulars (1925).
- High Court Rules (Appellate Side).
- ,, ,, Original Side.
- Jail Manual.
- Khoti Settlement Act (I of 1880).
- Land Revenue Code (V of 1879).
- Land Revenue Rules.
- Local Boards Act (VI of 1923).
- ,, ,, Amendment Act (XIII of 1935).
- Motor Vehicles Act (XIV of 1935).
- ,, ,, Rules (1905).
- Municipal Boroughs Act(XVIII of 1925).
- Native Shares and Stock Brokers' Association Rules.
- Pleaders Act (XVII of 1920.)
- Prevention of Adulteration Act(V of 1925)
- Prevention of Gambling Act (IV of 1887.)
- Primary Education Act (IV of 1923).
- Public Conveyances Act (VII of 1920)
- Regulation (XVII of 1827).
- Regulation (XIX of 1827).
- Rent Free Estates (Inam) Act XI of 1852.
- Revenue Jurisdiction Act (X of 1876).
- Survey and Settlement Act (I of 1865).
- Title to Rent Free Estates Act (XI of 1852).
- (District) Tobacco Act (II of 1933).
- Town Tobacco Duty Act (IV of 1857).
- Wages Act (III of 1865).

BOMBAY ABKARI ACT (V OF 1878),—*Scope and object of—Introduction of total prohibition of intoxicants—If contemplated.*

The primary object of the Bombay Abkari Act was to secure Abkari revenue, though some of the sections of the Act show that the Legislature

intended also to confer power to control the trade in drink and drugs, and to obviate abuses which might arise from such trades. Nowhere in the Act is there anything to suggest that the Legislature contemplated the introduction of total prohibition of intoxicants as a measure of social reform, and it is obvious that such introduction would virtually make an end of the purposes of the Act. (*Beaumont, C.J., Wadia, Macklin, Wassoodew and Sen, JJ.*) EMPEROR *v.* CHINUBHAI. **42 Bom.L R. 669 (F.B.).**

——S 14-B—*Construction — Object of Act—Relevency.*

In construing S. 14-B of the Bombay Abkari Act, the Court is entitled to have regard to the objects of the Act. (*Beaumont, C.J., Wadia, Macklin, Wassoodew and Sen, JJ.*) EMPEROR *v.* CHINUBHAI. **42 Bom.L.R. 669 (F.B.).**

——(as amended in 1912)—**S. 14-B (1) proviso and (2)**—*Construction and scope—Proviso—If controls Sub-sec. (2)—"Any person or class of persons"—Meaning—If includes public generally—Notification by Government prohibiting any person within specified area from possessing any intoxicant—Legality—If* ultra vires.

The proviso to Sub-sec. (1) of S. 14-B of the Bombay Prohibition Act is clearly a part of Sub-sec. (1), and there is no doubt that it is competent to Government under Sub-sec. (2) of the section to prohibit the possession by any person or class of persons of foreign liquor as fully as they can prohibit the possession of country liquor. But this power to prohibit the possession by any person or class of persons either throughout the whole presidency or any local area of any intoxicant will not justify Government in prohibiting possession by the public generally. The natural meaning of the expression "any person or class of persons" in S. 14 B (2) is a person designated by name or description or a class of persons designated. It does not extend to the public generally Therefore notification by the Government of Bombay under S. 14-B (2) prohibiting the possession by any person within a specified area of any intoxicants (excepting certain specified preparations) is *ultra vires* and of no effect. (*Beaumont, C.J., Wadia, Macklin, Wassoodew and Sen, JJ.*) EMPEROR *v.* CHINUBHAI. **42 Bom.L.R. 669 (F.B.)**

——**S. 43**—*"Possession"—Son producing bottle containing illicit liquor—Presumption of joint possession by son and father—If arises.*

When a search was made, the son produced the key of the box from which a bottle containing illicit liquor was found. The father was not present at the time of the search.

Held, that before a presumption could be raised that the bottle was in the joint possession of both the son and the father, it was incumbent upon the Crown to prove that both of them had either physical or constructive possession of the contraband liquor or the son had such a possession that he had it on behalf of himself and his father to the knowledge of the latter. (*Rupchand Bilaram and C. Mehta, A.J.Cs.*) DODO RADHO *v.* EMPEROR. **169 I.C. 561=10 R.S. 16=38 Cr.L.J. 796 (1)=A.I.R. 1937 Sind 154.**

——**S. 43 (1) (a)**—*"Transportation"—Meaning of—Transportation from one place to another—If transportation to every place on the route.*

Transportation of an excisable article from one place to another does not involve transportation to every place between those two places. When the Bombay Abkari Act talks about transport from one place to another it means only transport from the starting point to the ultimate destination. It is a question of fact for the Court to determine what the destination may be. If a man comes to a place and stays there for an appreciable time—and what amounts to an appreciable time would have to be considered in relation to the purposes of the Act—the Court might hold that that place was the destination although it appeared that the journey was to be resumed subsequently. But merely passing through a place in the course of a journey does not amount to transporting to that place.

Norman, J.—The word "place" in the definition of "Transport" in the Abkari Act means the place from which the journey starts and the place to which the liquor or excisable article is ultimately taken. It cannot mean every place on the route. Where the ultimate destination of the liquor is a place where the still-head duty is the same as at the place from which the journey starts, it cannot be said that there is a transport from a lower to a higher still-head duty area merely because the journey is through a place where the still-head duty is higher, so as to constitute an offence under S. 43 (1) (*a*). (*Beaumont, C. J. and Norman, J.*) EMPEROR *v.* DAGADU SHETIBA. **I.L.R. (1938) Bom. 49=172 I.C. 764=10 R.B. 295=39 Cr.L.J. 197=39 Bom.L.R. 1062=A.I.R. 1938 Bom. 43.**

——**S. 43-A**—*Charge jointly, against three persons—What must be proved.*

Where three persons are charged with joint illegal possession of liquor, it is incumbent upon the Crown to prove (*a*) that each of the accused had either physical or constructive possession of the property in question, or (*b*) that one or more of them had possession thereof either physical or constructive on behalf of themselves and the other accused and to their knowledge. (*Rupchand Bilaram and Mehta, A. J. Cs.*) NARUMAL DAYALDAS *v.* EMPEROR. **162 I.C. 263=37 Cr.L.J. 546=8 R.S. 165=1936 Cr.C. 316=A.I.R. 1936 Sind 44.**

——**Ss. 43-A and 53**—*Three brothers forming a joint Hindu family charged under S. 43-A—Bottles containing liquor found in godown owned by—If evidence of possession by any one of them.*

In order to convict a person of illegal possession of liquor, it is necessary for the Crown to prove that he had knowledge of his possession. A person who is unaware that the liquor has been placed in his custody cannot be so convicted. Where therefore three brothers, who are members of a joint Hindu family are accused under S. 43-A, Bombay Abkari Act, the mere fact that they are members of a joint Hindu family and as such own the godown in which the bottles containing the liquor are found concealed, does not at all prove that any one of them was in conscious possession of the bottles found there, so as to bring them within the purview of S. 53. (*Rupchand Bilaram and Mehta. A. J. Cs.*) NARUMAL DAYALDAS *v.* EMPEROR. **162 I.C. 263=37 Cr.L.J. 546=8 R S. 165=1936 Cr.C. 316=A.I.R. 1936 Sind. 44.**

——**S. 43 (h)**—*Burden of proof—Shifting of.*

The burden of proof on prosecution which shifts under proceedings under the Abkari Act, does not shift until the factum of possession is proved. (*Davis, J.C. and Lobo, J.*) EMPEROR *v.* HAJI GHULAB SHAH. **32 S.L.R. 689=174 I.C. 835=10 R.S. 269=39 Cr.L.J. 504=A.I.R. 1938 Sind 80.**

——**S. 47**—*Licensee's liability for acts of servant—"All due and reasonable precautions"—Construction of.*

The language used by the Legislature in S. 47 of the Bombay Abkari Act is very wide. But a statute should be construed not with reference to its language, but also its subject-matter and object; further in construing the provisions of S. 47 regard must also be had to the express terms of the limitation contained in the section. The section which expects the discharge of a duty by the licensee must always be regarded in the administration of the law subject to the maxim *lex non cogit ad impossibilia ant inutilia.* The phrase "all due and reasonable precautions" cannot be read as implying "all precautions" having no room for loophole whatever. That would be an impossible construction. The phrase only implies precautions that are reasonable or practical and due or necessary and which a prudent and sensible person, would take in endeavouring to prevent transgressions of the terms of the license in carrying out the object of the license. The licensee's liability must be decided according to the circumstances of each case. (*Wassoodew and Samjee, JJ.*) EMPEROR *v.* GANPAT LAXMAN. **177 I.C. 665=11 R.B. 112=39 Cr.L.J. 933=40 Bom. L.R. 820=A.I.R. 1938 Bom. 427.**

——**S. 53**—Scope—Liquor found in godown of joint Hindu family—Coparceners—If in possession of liquor. *See* BOMBAY ABKARI ACT, Ss. 43-A AND 53. **1936 Cr.C. 316=A.I.R. 1936 Sind 44.**

BOMBAY BHAGDARI AND NARWADARI ACT (V OF 1862), S. 1—*Scope—Lands forming unrecognised sub-divisions of bhag—Attachability in execution—Appointment of receiver in execution—Power of Court.*

Lands of a judgment-debtor which are unrecognised sub-divisions of a *bhag* cannot be attached and sold in execution of a decree against him in the face of the prohibition contained in S. 1 of the Baghdari and Narwadari Act. Nor can the Court appoint a receiver in execution in respect of such lands. To make such an appointment would be to contravene the provisions of the Act. (*Beaumont, C.J and Divatia. J.*) HARILAL CHHOTALAL *v* CHATURBHAI. **165 I.C. 604=9 R.B. 157=38 Bom.L.R. 938=A.I.R. 1936 Bom. 399.**

——**Ss. 3 and 5**—*"Recognised sub-division"—Meaning of.*

There can be no doubt that "recognised sub-division" in the Act means a sub-division recognised by Government and not any sub-division by partition or otherwise. (*Broomfield and Macklin JJ.*) GOVINDBHAI *v.* DAHYABHAI. **163 I.C. 632=9 R.B. 38=38 Bom.L.R. 175=A.I.R. 1936 Bom. 201.**

BOMBAY BORSTAL SCHOOLS ACT (XVIII OF 1929), S. 6 (as amended by Act XVII of 1935)—*Period of detention—Duration of—Sentence of two years—Legality.*

Under S. 6 of the Borstal Schools Act as amended in 1935 the minimum period of detention for which a youthful offender can be sentenced is three years. It is not therefore competent to a Magistrate to pass a sentence of detention for a

period of two years only. (*Davis, J.C. and Lobo, A.J.C.*) EMPEROR *v.* KISHNO CHOPO. **30 S.L.R. 98=163 I.C. 373=9 R.S. 1 (1)=37 Cr.L.J. 855 (2)=1936 Cr.C. 661=A.I.R. 1936 Sind 78.**

——**S. 6**—*Previous convictions as evidence of criminal habits—Proof—Necessity for—Degree of proof.*

Where the evidence of criminal habits or tendencies from which it is to appear to Court that it should take action under S. 6 is that of previous convictions, the Court should require these previous convictions to be properly proved before it can say that there is evidence from which it can appear to the Court that the accused is of criminal habits or tendencies within the meaning of Cl. (*b*) of S. 6. The standard of proof in such a case is the same as that required for purposes of S. 75, I.P. Code. Where the only evidence of previous convictions was merely the extracts from records of the Central Bureau of finger-prints and no certificate from jail officer or warrant of commitment was produced to prove it,

Held, that the Court could not on such evidence take account of the previous conviction and that it could not therefore take action under S. 6. (*Davis, J.C. and Tyabji, J.*) EMPEROR *v.* ABDULLAH KARIM. **I.L.R. 1940 Kar. 83=41 Cr L.J. 143=185 I.C. 268=12 R.S. 161=A.I.R. 1939 Sind 335.**

——**S. 6**—*Reference under—Conditions precedent to—Maintainability.*

Before a case is referred to the High Court under S. 6 a reference should be first made to the Inspector-General and only when he is of the opinion that he cannot by reason of the particular circumstances of the case or the provisions of S. 11 transfer a young offender to Borstal School by his own order or with the previous sanction of Government, should any reference in such matters be made to High Court. (*Davis, J. C. and Tyabji, J.*) EMPEROR *v.* ABDULLAH KARIM. **I.L.R. (1940) Kar. 83=41 Cr.L.J. 143=185 I.C. 268=12 R.S. 161=A.I.R. 1939 Sind 335.**

——**S. 6**—*Scope—Magistrate sentencing accused below* 18 *years to two years' rigorous imprisonment for one offence and for one year for another—Direction that in lieu of sentences accused be detained in Borstal School for three years—Legality.*

Where a Magistrate sentences the accused, who is found to be under 18 years of age to two years' rigorous imprisonment for one offence and for one year's rigorous imprisonment for another, the sentences to run consecutively, and directs that in lieu of the sentences the accused should be detained for three years in a Borstal School, his order offends against the provisions of S. 6, Bombay Borstal Schools Act. So also the order of detention passed should be one for three years and not divided up into two parts, *i.e.*, two years and one year. S. 6 contemplates not a sentence of imprisonment passed under any one particular section or sections of Penal Code either concurrent or consecutive, but, an order for detention for the period prescribed. (*Davis, J.C. and Mehta, A J C.*) EMPEROR *v.* KUNDAN. **166 I.C. 831=9 R.S. 155=38 Cr.L.J. 320=A.I.R. 1937 Sind 2.**

——**(as amended by Act XVII of 1935), S. 6**—*Scope—If mandatory.*

The wording of the Bombay Borstal Schools Act is designed not only to reform the offender but to save him from the stigma of conviction, and therefore the Magistrate should follow the wording of S. 6 of the Act and should find the youthful offender guilty of an offence but should not convict him of an offence and should pass in lieu of a sentence of imprisonment an order for detention within the provisions of S 6. (*Davis, J.C. and Lobo, A.J.C.*) EMPEROR *v.* KISHNO CHOPO. **30 S.L.R. 98=163 I.C. 373=9 R.S. 1 (1)=37 Cr.L.J. 855 (2)=1936 Cr.C. 661=A.I.R. 1936 Sind 78.**

BOMBAY CHILDREN ACT (XIII OF 1924), Ss. 3 (a) and (c) and 22—*Conviction of youthful offender—Detention in prison—Certificate—Necessity.*

Where the accused, convicted of the offence of murder, is a child within the meaning of Cl. (*a*) of S. 3, and is a youthful offender within the meaning of Cl. (*c*), the Court can lawfully commit him to prison only under the provisions of S. 22 after it certifies that the boy is so unruly or of so depraved a character that he is not a fit person to be sent to a certified school and that none of the methods by which a case may be legally dealt with is suitable. (*Davis, J. C. and Lobo, J.*) EMPEROR *v.* KAURO MIZARI. **I.L.R. (1939) Kar. 189=11 R.S. 79=39 Cr.L.J. 996=178 I.C. 126 (1)=A.I.R. 1938 Sind 224.**

——S. 7—*Appeal—Order in proceedings under S. 7—Person alleging but not proving to be father of children concerned*—Locus standi *to appeal.*

Quaere :—Whether a person alleging, but failing to prove, that he is the father of certain children has any *locus standi* to appeal against an order passed in proceedings under S. 7 of the Bombay Children Act. (*Beaumont, C. J. and Wadia, J.*) ANANDI MAHAR, *In re.* **171 I.C. 274=10 R.B. 187=38 Cr.L.J. 1053=39 Bom.L.R. 468=A.I.R. 1937 Bom. 388.**

——**S. 51**—*Revision—Order by District Magistrate in appeal—Revision to High Court—Competency.*

An order passed by the District Magistrate in appeal under S. 51 of the Bombay Children Act is revisable by the High Court. Sub-S. (3) of S. 51 cannot be construed as restricting or limiting by implication the High Court's powers of revision conferred by statute. (*Beaumont, C.J. and Wadia, J.*) ANANDI MAHAR, *In re.* **171 I.C. 274=10 R.B. 187=38 Cr.L.J. 1053=39 Bom.L.R. 468=A.I.R. 1937 Bom. 388.**

——**S. 51 (3)**—*Powers of High Court—Power to extend period of detention of youthful offender—Limits.*

The High Court has, under S. 51 (3) of the Bombay Children's Act, jurisdiction to extend the period of detention of a youthful offender sentenced under S. 23 of the Act, provided the extended period does not exceed the limit specified in S. 32 of the Act. There is no limit of time within which the revisional powers may be invoked, and the powers can be exercised at any time before the expiration of the term of detention limited in the order under revision. (*Beaumont, C. J. and Lokur, J.*) EMPEROR *v.* MAHOMED ISLAM. **184 I.C. 205=12 R.B. 153=40 Cr.L.J. 900=41 Bom.L.R. 554=A.I.R. 1939 Bom. 371.**

BOMBAY CITY LAND REVENUE ACT (II OF 1876), S. 8—*Superior holder claiming total exemption from assessment—Burden of proof.*

Where a superior holder claims total exemption from assessment to land revenue, the burden is on him to show that as the superior holder of the property in question he has a right in limitation of the right of Government to make an assessment in consequence of a specific limit to assessment having been established or preserved and that that specific limit is nill. *(Lord Macmillan.)* KAMALA VAHOOJI *v.* COLLECTOR OF BOMRAY, **64 I.A. 334=31 S L.R. 665=1937 P.W.N. 985=169 I.C. 778=41 C.W.N. 1194=46 L.W. 227=1937 O.L.R. 413=1937 A.L.R. 647=I.L.R. (1937) Bom. 756=10 R.P.C. 54=1937 M.W.N. 939=3 B.R. 759=39 Bom.L R. 1046=66 C.L.J. 43=A. I.R. 1937 P.C. 271=(1937) 2 M.L.J. 362 (P.C.).**

BOMBAY CITY MUNICIPAL ACT (III OF 1888), S. 19 (3) and (4)—*Scope—Mandatory nature of—Ward lists—Voters grouped in order according to communities—Legality—Right of voter to impeach election held on basis of such list—If causes injury to franchise or personal right of voter—Specific Relief Act, S.* 45.

The provisions of S. 19 (3) and (4) of the City of Bombay Municipal Act are mandatory; but there is nothing in them which prevents the voters from being grouped in alphabetical order according to communities; the ward lists would still be in alphabetical order, though literally the names of voters appearing in alphabetical order are grouped according to the communtties to which they belong. Nor would an electorate be any the less a joint electorate, even though its component members are grouped according to the communities to which they respectively belong. It cannot be said that the ward lists so prepared are in material deviation from S. 19 (3) and (4). Even if the ward lists are not literally prepared in accordance with the provisions of those subsections, they are substantially so prepared, and in the absence of any allegation and proof that any injustice has resulted to any one on that account, it cannot be held that there is no proper electoral roll or that the elections held under that roll are in law a nullity. Such lists are not illegal and it cannot be said that any voter who is in fact enrolled as such in his ward is injured from exercising his right to vote. There is really no act or omission in such a case which can be said to really interfere with or cause injury to the franchise or personal right of a voter, so as to entitle him to an order under S. 45, Specific Relief Act, against the Election Officer. *(Wadia, J.)* SHANKARLAL *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **186 I.C. 203=12 R.B. 301=41 Bom.L.R. 911=A.I.R. 1939 Bom. 481.**

——**Ss. 28 (k) and 32**—*Scope—If mandatory.*

The provisions of Ss. 28 (*k*) and 32 of the City of Bombay Municipal Act are mandatory; and so long as an election has not been called in question, the Municipal Commissioner cannot forbear to act under Ss. 28 (*k*) and 32. *(Wadia, J.)* SHANKARLAL *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **186 I.C. 203=12 R.B. 301=41 Bom.L.R. 911=A. I.R. 1939 Bom. 481.**

——**S. 33**—*Scope—Remedy under—If excludes application under S. 45, Specfic Relief Act, before declaration of result of election.*

S. 33 of the City of Bombay Municipal Act only comes into operation after the declaration of the results of an election is complete under S. 32, and it does not take away a voter's right, if any, to go to the High Court in a proper case under S. 45 of the Specific Relief Act even before the declaration of the result is completed. The remedy under S. 33 would be the more complete remedy; and a voter cannot say that he has no other remedy whatsoever, though before the declaration of the results is complete, he has technically no remedy under S. 33. *(Wadia, J.)* SHANKARLAL *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **186 I.C. 203=12 R.B. 301=41 Bom.L.R. 911=A.I.R. 1939 Bom. 481.**

——**Ss. 106 and 110**--*Loan by corporation—Issue of debentures with option of renewal—If compulsory.*

S. 106 of the City of Bombay Municipal Act gives to the corporation power to borrow on the security of debentures and S. 110 provides for debentures in a certain form. But the corporation is not compelled under the Act to borrow, and in the second place, having decided to borrow, although they are compelled to issue debentures, they are not compelled to issue debentures containing a right or option of renewal. *(Beaumont, C. J. and Wadia, J.)* VISHWANATH SADASHIV *v.* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY. **I.L.R. (1938) Bom. 715=177 I.C. 636=11 R.B. 108=40 Bom.L.R. 685=A.I.R. 1938 Bom. 410.**

——**S. 140**—*"Property tax"—Meaning of—Charge for water supplied to premises by meter—Nature of—If a charge on premises.*

Charges for water supplied by meter to property do not constitute a "property tax" under S. 140 of the City of Bombay Municipal Act and are not a charge on the premises under S. 212 of the Act. S. 212 in terms imposes a charge in respect of property taxes due, which taxes include water-tax, but do not include the charge by meter under S. 169. S. 169 distinguishes a charge by meter from a water-tax. *(Beaumont, C.J. and Blackwell, J.)* MUNICIPAL CORPORATION OF THE CITY OF BOMBAY *v.* HAJI EISA HAJI OOSMAN. **60 Bom. 232=161 I.C. 10=8 R.B. 300=37 Bom. L R. 1017=A.I.R. 1936 Bom. 49.**

——**S. 169**—Construction—Charge for water by meter—If water-tax—If a charge on premises. *See* BOMBAY CITY MUNICIPAL ACT, S 140. **60 Bom. 232=37 Bom.L.R. 1017=A.I.R. 1936 Bom. 49.**

——**S. 212**—Applicability—Charge for water supplied by meter—If a charge on property. *See* BOMBAY CITY MUNICIPAL ACT, S. 140. **60 Bom. 232=37 Bom.L.R. 1017=A I.R. 1936 Bom. 49.**

——**Ss. 217 and 219**—*Scope—Chief Judge of Court of Small Causes hearing municipal appeal—If Court or* persona designata—*Writ of* certiorari *—High Court's jurisdiction to issue—Grounds for issue of writ—Erroneous decision.*

The High Court has power to issue a writ of *certiorari* in respect not only of the orders of Subordinate Courts, but also of the proceedings of any tribunal or officer, who, though not a Court, is yet acting judicially. It is true that the Chief Judge of the Small Causes Court, Bombay, is not a Court when hearing municipal appeals, but acts as a *persona designata*, as the wording of

S. 217 of the City of Bombay Municipal Act shows. But his decision is a judicial act, and if he acts without jurisdiction or in excess of his legal authority, his act can be controlled by the High Court by a writ of *certiorari* or prohibition, as the case may be, S. 219 does not affect the power of the High Court to issue a writ of *certiorari* in such cases. The High Court has therefore power to issue a writ of *certiorari* if a proper case is made out. Before a writ can be issued two conditions have to be fulfilled: (1) the tribunal or officer whose act is complained of must be acting judicially, and (2) the act complained of must be without jurisdiction or in excess of the legal authority of that tribunal or officer. But an officer or tribunal having jurisdiction to decide a question cannot be said to have acted in excess of the legal authority if the decision happens to be wrong. The fact that the Chief Judge of the Small Cause Court has wrongly interpreted the sections of the Municipalities Act and has thus arrived at an erroneous decision does not justify the issue of a writ of *certiorari.* (*Macklin and Lokur, JJ.*) MULJEE SICKA & CO. *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **187 I.C. 8=12 R.B. 395=3 Fed. L.J. 61 (H.C.) =41 Bom. L.R. 984=A.I.R. 1939 Bom. 471.**

——S. 219—If takes away High Court's power to issue writ of *certiorari* in respect of decision of Chief Judge of Small Cause Court under S. 217. *See* BOMBAY CITY MUNICIPAL ACT, SS. 217 AND 219. **41 Bom.L.R. 984.**

——**S. 231**—*Powers of Commissioner under—Notice—Requisites of validity—Notice requiring owner within 15 days to connect unconnected waste water to municipal storm water drain—Validity.*

The notice authorised by S. 231 of the Bombay City Municipal Act is one requiring the owner or occupier of a house to make a drain of the character therein specified, that is to say, of such material, size and description and so forth as may appear to the Commissioner necessary. A notice served by the Commissioner on the owner or occupier of a house requiring him within 15 days to connect the unconnected waste water of the naharies and wasting places to the municipal storm water drain at a particular place after obtaining necessary permit of the owners of the drain is not a sufficient notice to comply with S. 231. (*Beaumont, C.J. and Wassoodew, J.*) EMPEROR *v.* EUGENE MIRANDA. **175 I.C. 1001=11 R.B. 1 (1)=39 Cr.L.J. 684 (2)=40 Bom. L.R 320=A.I.R. 1938 Bom. 315.**

——**S. 384-A**—*Liability of owner of building for act of tenant.*

S. 384-A of the City of Bombay Municipal Act is a penal provision and must be construed strictly; the owner of a building cannot be held liable for an act of the tenant, when he is not himself using the premises for any prohibited purpose. The language of the section is not appropriate to the case of the owner unless he is also the occupier, and uses the premises. (*Broomfield and Macklin, JJ.*) EMPEROR *v.* DATTATRAYA RAMCHANDRA. **180 I.C. 97=11 R.B. 290=40 Cr.L.J. 343=41 Bom.L.R. 82=A.I.R. 1939 Bom. 95.**

——**S. 394 (1) (b) and Sch. M, Part III**—*"Timber"—Plywood—If timber.*

The object of requiring a licence for the keeping of articles mentioned in Part III of Sch. M of the City of Bombay Municipal Act, is to safeguard the public against nuisance or danger. Timber is not used in Part III of Sch. M, in any technical sense; it only means wood used for building or carpentry. "Timber" in Part III of Sch. M does not include plywood. Keeping plywood for sale without licence is not an offence under S. 394 (1) (*b*), for which the person keeping it can be convicted. (*Beaumont, C J. and Wassoodew, J.*) EMPEROR *v.* AHMEDALLI ESUFFALLI. **175 I.C. 358=39 Cr.L.J. 575=10 R.B. 537=40 Bom. L.R. 322=A.I.R. 1938 Bom. 282.**

——S. 394 (4) (a) and (b)—*Discretion of Commissioner under—Licence for melting vegetable oil—Breach of condition in licence—Refusal to renew licence—Propriety.*

Under S. 394 (4) (*a*) of the City of Bombay Municipal Act, the Commissioner has a discretion to issue a licence for carrying on the business of melting vegetable oil subject to such conditions and restrictions as he shall think fit to prescribe, *e.g.*, he can impose a condition to the effect that "ghee or butter or other animal fat, whether unmixed or mixed with vegetable oil or with other subject shall be kept on the premises." And under Cl. (*b*) of S. 394 (4), he has likewise the discretion to refuse to renew the licence on the ground that the licensee has infringed the condition imposed, The imposition of such a condition is not *ultra vires.* (*Kania, J.*) PACHAN LADHA *v.* MUNICIPAL COMMISSIONER, BOMBAY. **60 Bom. 838=164 I.C 101=9 R.B. 54=38 Bom.L.R. 556 =A.I.R. 1936 Bom. 264.**

——**S. 411**—*Construction—Power of Municipal Commissioner to refuse licence or renewal of licence for butcher's shop—Discretion—Exercise of—Interference by Court—Specific Relief Act, S. 45.*

S. 411 of the City of Bombay Municipal Act, in terms, deprives every citizen living within the city or to whom the Act applies, of the power to carry on the business of a butcher, and the only exception is the grant of a licence by the Municipal Commissioner and carrying on the trade of a butcher in conformity with the terms of that licence. The Commissioner has power under that section either to grant a licence or refuse to grant or to refuse to renew a licence for carrying on the business of a butcher within the city. So long as the Commissioner exercises his power in a proper manner, *i.e.*, not arbitrarily or for an ulterior motive, and the discretion is exercised for the proper Municipal administration in accordance with the considered policy of the Municipality, the High Court will not be justified in interfering with the exercise of that discretion under S. 45 of the Specific Relief Act. (*Kania, J.*) FAKIR MAHOMED MALANG *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **I.L R. (1937) Bom. 774=171 I.C. 331=10 R.B. 191=39 Bom.L.R. 536=A.I.R. 1937 Bom. 395.**

——**S. 527**—*Applicability—Act done in pursuance of contract authorised but not required by Act — Suit against corporation — Limitation—Period of six months—Starting point of.*

The protection of S. 527 of the City of Bombay Municipal Act extends only to acts done in direct execution of the powers conferred by that Act of the local authority or corporation, and does not cover acts done in pursuance of contract which the local authority or corporation is empowered to enter into, but is not required to enter into, by the Act. Plaintiff and *N* were joint holders of eight debentures issued by the corporation of Bombay, under the terms of which either the plaintiffs or any of them or *N* could deal with them. *N* died on 13—7—1930, and shortly after, *A*, to whom the debentures had been handed over for collection wrongfully dealt with them by forging an endorsement by *N* in favour of himself and of a nominee for himself and subsequently endorsing them over to a Bank. The Bank lodged the debentures with the corporation who cancelled them and issued fresh debentures to the Bank. On 30—11—1932, plaintiffs wrote to the corporation pointing out that *A* had forged *N's* signatures and asking the corporation to return the original debentures to the plaintiffs. They sent a reminder on 15—2—1933. On 6—3—1933, the corporation wrote to the plaintiffs asking them to wait for their next letter and to take no action in the meanwhile. After further correspondence the corporation wrote on 27—7—1933 to the effect that it was not possible to reply definitely, but that they could not give a definite promise to admit or deny the plaintiffs' claim and that they require to keep in view their position as against all parties concerned. On 11—8—1933, the plaintiffs filed a suit against the corporation for a declaration that the endorsement of *N* on the debentures was a forgery, and that the plaintiffs were the owners of the debentures and they further asked that the defendants may be ordered to transfer and hand over to the plaintiffs the said debentures, or alternatively, to pay the plaintiffs the market value thereof together with accrued interest.

Held, (1) that the action was clearly in tort and not in contract; (2) that the issue of a debenture containing an option of renewal, and the giving effect to that option were not acts done in direct execution of any power contained in the Act, but were acts done under a contract authorised, but not required, by the Act; (3) that the wrongful action charged against the corporation not being an action directly required by the statute, S. 527 of the Act had no application to the case; (4) that assuming S. 527 applied to the case, the cause of action for suit did not arise until a demand was made for return of the debentures and that demand is refused, and as the cause of action did not arise until 27—7—1933, the suit filed on 11—8—1933 was well within time. *(Beaumont, C.J. and Wadia, J.)* Vishwanath Sadashiv *v.* Municipal Corporation of the City of Bombay. **I.L.R. (1938) Bom. 715=177 I.C. 636=11 R.B. 108=40 Bom.L.R. 685=A.I.R. 1938 Bom. 410.**

BOMBAY CITY POLICE ACT (IV OF 1902), S. 22 (b) and (c), Rr. 1 and 12—*Applicability—Parking of motor car in front of owner's place of business for driving owner home—Offence—Conviction—Sustainability.*

S. 22 (*c*) of the Bombay City Police Act speaks about regulating conditions under which vehicles may remain standing in streets and R. 1 framed under that sub-section speaks of a person allowing his vehicle to be halted or kept standing at any street, while S. 22 (*b*) and R. 12 framed thereunder are quite general and speak of any person occupying a portion of a street and thereby causing obstruction or inconvenience to the public. Petitioner, a chauffeur, kept his car near the kerb on a public road in front of a shop, which was his master's place of business, where he took it in order to drive his master home at the close of the day. He was prosecuted and convicted under R. 12 framed under S. 22 (*b*) of the Bombay City Police Act.

Held, in revision, that the R. 12 did not apply to the case, and that the case fell under the specific words of Cl. (*c*) of S. 22 and the rule framed thereunder, rather than under any rule under S. 22 (*b*) of the Act; but that there being no proof that the obstruction was wilful, the conviction was wrong in law and must be set aside. *(Barlee and Divatia, JJ.)* Emperor *v.* Bhana Makan. **163 I.C. 847=9 R.B. 50=37 Cr.L.J. 883=38 Bom.L.R. 432=1936 Cr.C. 702=A.I.R. 1936 Bom. 256.**

——S 22 (c), R. 1—*Conviction under—Essentials—Proof of wilful obstruction.*

An obstruction under R. 1 framed under S. 22 (*c*) of the Bombay City Police Act must be wilful; and there can be no conviction under that rule unless that element is proved. *(Barlee and Divatia, JJ.)* Emperor *v.* Bhana Makan **163 I.C. 847=9 R.B. 50=37 Cr.L.J. 883=38 Bom. L.R. 432=1936 Cr.C. 702=A.I.R. 1936 Bom. 256.**

——S. 27—*Construction and scope—Order under—Conditions for making—Commissioner's power to deport dangerous or undesirable character.*

S. 27 of the City of Bombay Police Act is of very limited application, and it is one of a group of sections which confer upon the Commissioner of Police power to deal with various emergencies so as to secure the public safety, and the orders to be made by the Commissioner under those sections are mainly of a strictly temporary character. It is clear from the language of S. 27 that the foundation for any order under the section is the movements or encampment of any gang or body of persons. Before any action can be taken under the section it must appear to the commissioner that the movements or encampment of a gang or body of persons are or is causing or calculated to cause danger or alarm, or a reasonable suspicion that unlawful designs are entertained by such gang or by any member or members thereof; then only can the Commissioner give directions to the members of the gang or body. He has no power under the section to deport any one whom he regards as a dangerous or undesirable character apart from his actions as a member of a gang or a body of persons moving or encamping in the city. *(Beaumont, C.J., Rangnekar, Wadia and Wassoodew, JJ.)* Emperor *v.* Yarmahomed Ahmedkhan. **I.L.R. (1938) Bom 403=176 I.C. 839=11 R.B. 53=39 Cr.L.J. 792=40 Bom.L.R. 483=A.I.R. 1938 Bom. 338 (F.B.).**

——S. 27—*Order under—Validity—If can be impeached in Court of law—Prosecution for disobedience of order—Duty of Court—Burden of proof.*

An order made under S. 27 of the City of Bombay Police Act is, it is true, an order made by an executive officer and is not subject to appeal or revision in any Court. But that is very different from saying that when an attempt is made to impose a penalty for breach of an order under S. 27, the validity of the order cannot be impeached. In all charges before a Magistrate under S. 128 of the Act for disobedience of an order under S. 27, it is incumbent upon the Magistrate to be satisfied, first, that the accused was informed by the Commissioner of the charge against him with sufficient particularity to enable him to answer the charge, and that he was given an opportunity of answering; and, secondly, that there was material before the Commissioner of Police on which he could properly hold that the conditions of S. 27 had come into operation. In a prosecution under S. 128, the burden is not on the accused to show that the order is invalid; the burden is on the prosecution to satisfy the Court that the order alleged to have been disobeyed was a valid one. There is no reason why the Commissioner should not give evidence before the Court as to the general character of the material which he had before him. (*Beaumont, C.J., Rangnekar, Wadia and Wassoodew, JJ.*) EMPEROR *v.* YARMAHOMED AHMEDKHAN. **I.L.R. (1938) Bom. 403=176 I.C 839=11 R.B 53=39 Cr.L.J. 792=40 Bom.L.R. 483=A.I.R. 1938 Bom. 338 (F.B.).**

———**S. 70**—Scope—If subject to S. 167 (2), Cr. P. Code. *See* CR. P. CODE, S. 167 (2). **A.I.R. 1937 Sind 251.**

———**S. 128**—Charge under—Burden of proof—Validity of order disobeyed—If can be gone into. *See* BOMBAY CITY POLICE ACT, S. 27. **40 Bom.L. R. 483 (F.B.).**

BOMBAY CIVIL COURTS REGULATION (IV OF 1827), S. 26—Law to be applied in the trial of suits. *See* CONFLICT OF LAWS. **39 Bom. L.R. 1324.**

BOMBAY CIVIL COURTS ACT (XIV OF 1869), S. 8—*Applicability—Suit for account in Second Class Sub-Court in Bombay—Plaint valued at Rs. 200—Decree for over Rs. 5,000—Appeal—Forum.*

In a suit for account filed in the Court of a Second Class Subordinate Judge in Bombay, the plaint was valued at Rs. 200, but the decree passed was for over Rs. 5,000.

Held, that S. 8 of the Bombay Civil Courts Act was the law governing appeal, and under that section, the appeal lay to the District Court and not to the High Court. (*Macklin and Sen, JJ.*) GOPAL TRIMBAKRAO *v* CHIMABAI PRABHAKAR. **I. L.R. (1938) Bom. 833=11 R.B 146=178 I.C. 116=40 Bom.L.R. 1040=A.I.R. 1938 Bom. 464.**

———**S. 23 (5)**.—*Construction and scope—Transfer of suit—Powers of Subordinate Judge—If controlled by S. 24, C P. Code—Transfer of suit after another Judge has taken cognizance—Competency.*

The powers of transfer of suits conferred on a Subordinate Judge by S. 23 (5) of the Bombay Civil Courts Act are controlled by the provisions of S. 24 of the C. P. Code and are necessarily limited to administrative orders allocating business. Consequently an order by a Subordinate Judge transferring a suit pending before another Subordinate Judge and after the latter had taken cognizance of the suit to some other Judge is incompetent. (*Wassoodew, J.*) AJAM IBRAM *v.* HAVA BIBI **I.L.R. (1939) Bom. 472=41 Bom.L R. 892=185 I.C. 813=12 R.B. 266=A.I.R. 1939 Bom. 485.**

———**S. 24**—*If controlled by S. 8, Suits Valuation Act—Suit for declaration and injunction—Reliefs valued at Rs. 230—Properties worth over Rs. 15,000—Valuation for jurisdiction—Second class subordinate Judge—Jurisdiction to try.*

S. 24 of the Bombay Civil Courts Act has to be read with S. 8 of the Suits Valuation Act, which again must be read with the Court Fees Act. Under S. 7 (*IV*) (*c*) and (*d*) of the Court-Fees Act a suit to obtain a declaratory decree with consequential relief or for an injunction has to be valued according to the amount at which the relief sought is valued in the plaint. The same is the value for purposes of jurisdiction. Where the plaintiff values the suit at Rs. 230, though the properties which are the subject-matter of the suit are worth over Rs. 15,000, the valuation for jurisdiction is governed by S. 8 of the Suits Valuation Act which must affect the construction of S. 24, Bombay Civil Courts Act. A second class subordinate Judge has therefore jurisdiction to try the suit, though the properties are worth more than Rs. 5,000. (*Beaumont, C.J.*) JAMNADAS *v.* CHANDULAL. **I.L.R. (1937) Bom. 623=168 I C. 449=9 R.B. 369=39 Bom.L.R. 138=A. I R. 1937 Bom. 167.**

———**S. 26**—*Appeal — Forum—Administration suit—Subject-matter valued for court-fees at sum below Rs. 5,000—Plaint returned by First Class Subordinate Judge for presentation to proper Court—Appeal—If lies to District Court or to High Court—Sind Courts Act, S. 8.*

In suit for administration the court-fees payable determine the jurisdiction of the Court and the Court to which an appeal lies depends not upon the pecuniary jurisdiction of the Subordinate Court, but on the value of the subject-matter in dispute. Hence, where the subject-matter valued for purpose of court-fee is below Rs. 5,000 and First Class Sub-Judge has returned the plaint for presentation to the proper Court an appeal from his order lies to the District Court and not to the High Court. Since the Subordinate Judge does not decide the suit in such a case, an appeal does not lie to the High Court under S. 26, Bombay Civil Courts Act. S. 8 of the Sind Courts Act is the appropriate section. The Bombay Civil Courts Act, the Sind Courts Act, and the Suits Valuation Act must be read with the Court-Fees Act. (*Davis, J.C. and Tyabji, J.*) KALAWANTIBAI *v.* UDHAVDAS GIRDHARIDAS. **I.L. R (1940) Kar. 1=185 I.C. 244=12 R.S. 154=A I.R. 1939 Sind 305.**

———**Ss. 26, 28-A and 32**—*Appeal—Forum—Suit below Rs. 5,000—Decision of Sub-Judge, First Class—Appeal to High Court—Competency.*

Where a suit is filed against the manager of the Incumbered Estates in Sind in the Court of the Subordinate Judge, First Class, but the subject-matter of the suit is below Rs. 5,000, an appeal from the decision of Subordinate Judge lies to the District Court and not to the High Court. Jurisdiction is determined by pecuniary considerations and not by the powers of the Subordinate Judge. (*Davis, J.C. and Mehta, A J.Cs*) NATHASINGH MULSINGH *v.* MANAGER, INCUMBERED ESTATES IN SIND. **30 S.L.R. 335=9 R.S. 107=165 I.C. 742=A.I.R. 1936 Sind 190.**

——S. 26—Suit for administration of estate in Court of First Class Subordinate Judge valued at Rs. 200—Decree—Appeal—Forum—High Court or District Court. *See* COURT-FEES ACT, S. 7 (*iv*) (*f*) AND (*v*). **38 Bom L.R. 754.**

——S. 40—*Clerk authorised to receive and register plaints—Power to accept plaint outside Court hours and outside Court buildings—C. P. C., O. 4, R. 1.*

There is nothing in O. 4, R. 1, C. P. Code, to suggest that the plaint must be presented during Court hours or within the precincts of the Court. The clerk of the Court who is a duly constituted officer of the Court with power to accept a plaint under S. 40 of the Bombay Civil Courts Act can accept plaints outside office hour, and outside the Court buildings, although he is not bound to so accept. (*Beaumont, C. J.*) RATAN JOYAKISAN SHUKLA *v.* BAPU HIRAJI KUNBI. **I.L.R. (1937) Bom. 136=166 I.C. 896=9 R.B. 261=38 Bom. L.R. 1196=A.I.R. 1937 Bom. 25.**

BOMBAY CIVIL MEDICAL CODE, R. 7—*Applicability—If confined to cases brought to hospitals by police—"Brought"—Meaning of.*

The word "brought" in R. 7 of the Bombay Civil Medical Code should not be unduly stressed; it really does not mean more than "is admitted." Rule 7 cannot be regarded as having reference only to cases brought to the hospitals by the police themselves. (*Broomfiled and Norman, JJ.*) S.D. MARATHE *v.* PANDRANG NARAYAN. **I.L.R. (1938) Bom 770=177 I.C. 589=11 R.B. 98=40 Bom. L.R. 825=39 Cr.L.J. 903=A.I.R. 1938 Bom. 419.**

BOMBAY CO-OPERATIVE SOCIETIES ACT (VII OF 1925), Ss. 54 and 59 (1) (a)—*Award under—If "decree"—Application for execution within three years of Registrar's certificate—If barred—Limitation Act, Art. 182.*

An award of an arbtrator made under S. 54 is not a decree of a Civil Court within the meaning of Art. 182 of the Limitation Act. An application for execution of such an award within three years of the grant of a certificate by the Registrar under S. 59 (1) (*a*) of Act is in time and not barred.

Quaere.—Whether the award, on the grant of a certificate under S. 59 becomes a "decree of a Civil Court" within the meaning of Art. 182 of the Limitation Act. (*Beaumont, C.J. and Wadia, J.*) RAGHAVENDRA *v* INDUSTRIAL BANK, GULEDGUD. **165 I.C. 512=9 R.B. 147=38 Bom.L.R. 927=A.I.R. 1936 Bom. 396.**

——Ss. 54 and 57—*Scope and effect—Award by arbitrator—Suit to set aside on ground of fraud and undue influence—Jurisdiction of Civil Court.*

The terms of S. 57 of the Bombay Co-operative Societies Act *prima facie* show that the award of the arbitrators or a decision by the Registrar or his nominee cannot be called in question in any Civil Court. When a question may arise as to whether there has been undue influence or fraud in any transaction involved in the reference to the Registrar under the Act, that would be a question for the arbitrator to decide and would not be a matter on which a Civil Court would be competent to inquire. It is not open to a Civil Court to go behind the award of the arbitrator and to call in question any matter which might have arisen in connection with the decision of the dispute which necessitated that award. (*Wadia and Sen, JJ.*) DHARWAR URBAN CO-OPERATIVE BANK, LTD. *v.* RAMCHANDRA. **169 I C. 439=10 R B. 27=39 Bom.L.R. 249=A.I.R. 1937 Bom. 231.**

——Ss. 57 and 59—*Award—Executability by Civil Court.*

Awards made under the Act which have become final are not liable to be questioned by Courts under S. 57 and are under S. 59 executable by Civil Court in the same manner as decrees of Civil Court, being effective from the date on which they are made and not only from the date when they are filed. (*Tyabji, J.*) KARACHI URBAN CO-OPERATIVE BANK *v.* SAHIBDIN ALANDIN. **A.I.R. 1940 Sind 147.**

——S. 59 (1) (b)—*Award—Execution—Sale proceeds in hands of Collector—Liability to attachment at the instance of other creditors—Rateable distribution—Right of.*

S. 59 (1) (*b*), Bombay Co-operative Societies Act, provides for the execution of an award according to law applicable for the recovery of arrears of land revenue. Where therefore an award under the Bombay Co-operative Societies Act is executed under S. 59 (1) (*b*) of that Act according to the procedure provided for recovery of arrears of land revenue by the sale of the judgment-debtor's land, the sale proceeds in the hands of the Collector are not liable to attachment at the instance of other creditors of the person whose land is sold as the sale proceeds are specifically to be applied in payment of the claim of the person obtaining award. The principle of S. 73, C. P. Code, cannot be applied to such case. (*Lobo, J.*) KHUDABADI AMIL CO-OPERATIVE CREDIT BANK, LTD. *v.* HYDERABAD AMIL CO-OPERATIVE URBAN BANK, LTD. **I.L.R. (1939) Kar. 104=176 I.C. 709=11 R.S. 32=A.I.R. 1938 Sind 157.**

——S. 59 (1) (b)—Collector acting under—If "Court"—Proceedings under—If step in aid of execution. *See* LIMITATION ACT, ART. 182 (5). **40 Bom.L.R. 889.**

——S. 70—*Scope—Mandatory nature of—Failure to give requisite notcie—Effect.*

The terms of S. 70 of the Bombay Co-operative Societies Act are mandatory, and the omission to give the notice as required by the section makes a suit unsustainable *in limine.* (*Wadia and Sen, JJ.*) DHARWAR URBAN CO-OPERATIVE BANK, LTD. *v.* RAMCHANDRA **169 I.C. 439=10 R.B. 27=39 Bom.L.R. 249=A.I.R. 1937 Bom. 231.**

BOMBAY COURT OF WARDS ACT (I OF 1905), Ss. 4 (1) and 10 (1) (a)—*Relative scope and distinction—Temporary custody of landholder's property under S. 10—Effect of—Subsequent execution of promissory note by landholder—Subsequent assumption of superintendence by Court of Words—If relates back to date of temporary custody—Suit on promissory note—Maintainability—S. 37.*

Taking temporary custody of the property of a disqualified landholder under S. 10 (1) (*a*) of the Bombay Court of Wards Act is not the same thing as the assumption of superintendence of his property under S. 4 (1) of the Act. The two kinds of orders have to be distinguished in nature and importance. The conditions necessary for assuming superintendence under S. 4 (1) are: (1) disqualification under S. 5; (2) previous sanction of the Government; (3) the actual assumption by the Court of Wards or some declaration to that effect; and (4) notification in the Government Gazette setting out the fact of assumption and the date of the sanction. If these conditions are fulfilled, then only the property of the landholder is deemed to be under the superintendence of the Court of Wards. The Act never intended that the assumption of superintendence by the Court of Wards under S. 4 (1) should relate back to the temporary custody under S. 10 or the order for it. S. 37 of the Act has no application to a liability incurred by the disqualified landholder prior to the assumption of superintendence under S. 4 (1), though after the taking of temporary custody under S. 10. Where after the Court of Wards have taken temporary custody of the property of a disqualified landholder the latter executes a promissory note and the sanction for the assumption of superintendence under S. 4 (1) is given by the Governor-in-Council only subsequently, the property of the landholder must be deemed to be under the superintendence of the Court of Wards only from the date of such sanction, and he becomes a Government ward only as and from that date. The promissory note executed prior to such date does not fall within the prohibition of S 37 of the Act, and there is no legal bar to a suit being maintained on it in a Civil Court.

Tyabji, J.—The order for the temporary custody and protection of the property is not linked up with the scheme of the Act for the assumption of superintendence; whereas S. 37 is a necessary corollary of the assumption of superintendence. To give to an order under S. 10 (1) (*a*) the effect for which the Act requires compliance with Ss. 4,5, 13 and 14, would not be giving efficacy to the Act, but setting the Act at nought. (*Rangnekar, Ag. C. J. and Tyabji, J.*) BOMBAY NAMDEO CO-OPERATIVE AGENCY, LTD *v.* VIRDHAVAL. **170 I.C. 162=10 R.B. 55=39 Bom.L.R. 189=A.I.R. 1937 Bom. 266.**

——**S. 31**—*Applicability and construction—Suit on promissory note executed by ward's ancestor—Suit against ward as legal representative of maker of note—Notice of suit—Necessity.*

The words "suit relating to the person or property of any Government ward," in S. 31 of the Bombay Court of Wards Act are very wide and include a suit to enforce the liability of a ward as legal representative of his deceased ancestor under a promissory note executed by such ancestor, in other words, the section applies to a suit in which the liability sought to be enforced against the property was incurred before the property was acquired by the defendant. Notice of suit is therefore essential in the case of the suit, and the omission to deliver a notice renders the suit incompetent. (*Broomfield and Tyabji, JJ.*) PARSHRAM SHIVAJIRAM *v.* GULABSING FATTESING. **167 I.C. 816=9 R.B 342=38 Bom.L.R. 1306=A.I.R. 1937 Bom. 113.**

——**S. 37**—Applicability—Promissory note by disqualified landholder after taking of temporary custody but before assumption of superintendence by Court of Wards—Validity—Suit on—Competency. *See* BOMBAY COURT OF WARDS ACT, Ss. 4 (1) AND 10 (*a*). **39 Bom.L.R. 189.**

——**S. 44-A**—*Power to call for documents.*

S. 44-A gives the Court of Wards power to call for production of documents for the purposes of the Act referred to in S. 4 and other sections of the Act and not only for the purposes of Ss. 15 and 16; and an enquiry under Ss. 15 and 16 is not a condition precedent for the exercise of the power. So also the mere fact that a claimant to the estate has filed a civil suit against the Court of Wards would not deprive it of the power to call for documents under S. 44-A. (*Davis, J. C. and Mehta J.*) TAKHTRAM TULSIDAS *v.* EMPEROR. **I.L R. (1939) Kar. 238=40 Cr.L.J. 75=11 R.S. 90=178 I.C. 381=A.I.R. 1938 Sind 217.**

BOMBAY DISTRICT MUNICIPAL ACT (III OF 1901), Ss. 11 (1) (c) (iv) and 22—*Orders of District Judge and Assistant Judge in appeal relating to amendment of list of voters—Revision by High Court*—Persona designata *or Court.*

The whole scheme of Act III of 1901 is that in matters of dispute relating to Municipal election, while inquiry shall be held by a Judicial Officer as distinct from a Revenue Officer, that Judicial Officer shall hold an inquiry as a *persona designata* and not as a Court. It was not the intention of the Legislature that the words "judicial authority" in Cl. (*iv*) of sub-S. (1) (*c*) of S. 11 should be construed to mean a Court as such. There is no distinction between an inquiry relating to the validity of the election itself and objections regarding the lists of voters. Hence the orders of the District Judge and of the Assistant Judge in an appeal relating to the amendment of the list of voters are in the capacity of *persona designata* and therefore an application against such orders does not fall under S. 115, C. P. Code. (*Davis, J.C. and Dadiba C. Mehta, J.*) HARCHANDRAI *v.* TANDO ADAM MUNICIPALITY. **I.L.R. (1939) Kar. 121=176 I.C. 826 =11 R.S. 38=A.I.R. 1938 Sind 153.**

——**(as amended in 1930), S. 23 (7-A)**—*Construction—Right of retiring president to preside—If exclusive—Non-compliance—If fatal to validity of proceedings.*

Cl. (7-A) of S. 23 of the District Municipal Act, which was inserted by the Amending Act XXVI of 1930 confers on the retiring president the exclusive right and privilege of convening the meeting and presiding until a new Chairman is elected for the meeting. It is the intention of the Legislature that the retiring president only and no one else should have the right to preside. The natural meaning of the language of the clause is that the retiring president is an integral part, or that his presence in the chair is an integral part, of the machinery for the election of a Chairman at the meeting at which the new president has to be elected. It is not a reasonable construction of the clause to hold that it is a mere matter of procedure which can be disregarded without affecting the validity of the proceedings. (*Broomfield and Tyabji, JJ.*) TRIMBAK RAVJI *v.* VISHNU WAMAN. **I.L.R. (1937) Bom. 158=167**

I.C. 548=9 R.B. 332=38 Bom.L.R. 1314=A.I.R. 1937 Bom. 114.

——Ss. 46 and 48—*Bye-laws and rules—Powers of Municipality to make—Rule for levy of toll—Bye-law imposing penalty for breach of rule—If competent.*

Matters relating to payment of tolls ought to be dealt with by rules under S. 46 of the Bombay District Municipal Act, and not by bye-laws under S. 48. A bye-law framed by a Municipality imposing a penalty for the infringement of a rule under S. 46, prescribing payment of toll-tax on conveyances is not within the powers of a Municipality under S. 48. (*Barlee and Tyabji, JJ.*) Emperor *v.* Vishnushankar. **I.L.R. (1937) Bom. 304=9 R.B. 365=168 I.C. 219=38 Cr.L.J. 538=39 Bom. L.R. 89=A.I.R. 1937 Bom. 150.**

——S. 50 (2) (*f*)—*"Public street"—Sub-soil—If vests in Municipality—Public street converted to private street—Effect on right of owner to land.*

It does not follow from S. 3 (13) of the Bombay District Municipal Act that the soil of every public street must necessarily be of the ownership of the Municipality. "Public streets" in S. 50 (2) (*f*) cannot include the sub-soil, unless it is definitely proved that the soil of any public street belongs to the Municipality, it cannot be presumed to be of the ownership of the Municipality merely on the ground that it is used as a public street. The section cannot have the effect of depriving a person of any right of private property that, he might have in the land used as a public street, nor does it vest the sub-soil of such land in the Municipality. When such land is no longer required as a public road or when it is converted into a private street from a public street, the owner can contend that by reason of such conversion the land of the street reverts to him. (*Lokur, J.*) Chhotalal Panachand *v* Borough Municipality of Nadiad. **187 I.C. 166=12 R.B. 417=41 Bom.L.R. 1097=A.I.R. 1939 Bom. 501.**

——S. 65 (3)—*Scope—Non-compliance—Confirmation of increased assessment without hearing assessee—Legality—Suit to contest—If barred—S. 86.*

S. 65 (3) of the Act lays down an essential condition, namely, that the assessee who objects to an increase in his assessment must be afforded an opportunity of being heard; and when that is not complied with the order passed by the assessing committee confirming the increased assessment is without jurisdiction and *ultra vires*. A suit by the assessee to cancel such assessment as being illegal and *ultra vires* is maintainable in a Civil Court and is not barred by S. 86 of the Act. S. 86 is only an enabling section and does not oust the jurisdiction of the Civil Courts in a case where the attack goes to the very root of the assessment fixed. (*Rupchand and Mehta, A.J.Cs.*) Karsondas Dharamsi *v.* The Karachi Municipality. **30 S.L.R. 59=164 I.C. 170=9 R.C. 43=A.I.R. 1936 Sind 114.**

——S. 86—Construction and scope—Increased assessment to house-tax—Confirmation without hearing assessee—Suit to contest in Civil Court—If barred. *See* The Bombay District Municipal Act, S. 65 (3). **30 S.L.R. 59=A.I.R. 1936 Sind 114.**

——S. 96—Scope—Powers of Municipality—Refusal of permission to build on land which is intended to be acquired later by Municipality—If justified. *See* Land Acquisition Act, S. 23. **39 Bom. L.R. 142=A.I.R. 1937 Bom. 177.**

——S 96 (5)—*Offence under—Ingredients—Prosecution—Notice under S. 96 (3)—If condition precedent to maintainability.*

In order to establish an offence under S. 96 (5) of the Bombay District Municipal Act, all that is necessary is to show that the accused had begun a construction, or started altering an existing construction, or added to it or re-constructed it, without giving a notice thereof in writing to the Municipality as required by S. 96 (1). The question whether a wrong notice was given by the Muncipality or no notice at all was given is entirely immaterial. The Municipality is not bound to give the notice mentioned in S. 96 (3) before launching a prosecution although ordinarily it would. But whether it does or does not give, the offence is complete under sub-S. (5) as soon as a person begins any construction, alteration, addition or reconstruction without the notice under sub-S. (1). (*Rangnekar, Ag. C.J. and Tyabji, J.*) Bhaguji *v* The Alandi Municipality. **166 I.C. 925=9 R.B. 267=38 Bom.L.R. 1098=A.I.R. 1937 Bom. 37.**

——S. 139—Scope—If overrides S 1 of Bombay Markets and Fairs Act. *See* Bombay Markets and Fairs Act, S. 1. **42 Bom.L.R. 584.**

BOMBAY DISTRICT POLICE ACT (IV OF 1890, as amended in 1920), S. 6—Assistant Superintendent of Police—Power to issue search warrant under Prevention of Gambling Act. *See* Bombay Prevention of Gambling Act, Ss. 6 and 7. **42 Bom L.R. 203.**

——S. 39-A—Order by District Magistrate under—Revision application to High Court—Competency. *See* Cr. P. Code, S. 435. **A.I.R. 1939 Sind 340.**

——S. 48 (1) (a)—*Rule-making powers under—Extent and limits—Rule prohibiting processions along streets in specified areas except with pass obtained previously from police authorities—If* ultra vires.

The rules which a District Superintendent or an Assistant Superintendent can make under S. 48 (1) (*a*) of the Bombay District Police Act must be rules with reference to possible future events, but the rules as made can only regulate the conduct of persons as members of assemblies and processions. A rule which provides that no procession shall pass on or along the streets within specified areas unless a pass has been obtained from the Sub-Divisional Police Officer, having jurisdiction, or the District Superintendent of Police, and upon the conditions mentioned in the pass except *bona fide* religious or funeral or marriage processions, is not *ultra vires*. Such a rule no doubt involves that a person requiring a pass shall apply for it before the procession actually starts, but the actual prohibition under such a rule is against some action by a person who is at the time a member of an assembly or procession. (*Beaumont, C.J. and Wadia, J.*) Emperor *v.* Dinkar Krishnalal. **184 I.C. 203=12 R.B. 154=40 Cr.L.J. 889=41 Bom.L.R. 557=A.I.R. 1939 Bom. 364.**

——S. 71—*Scope—Order under S. 42 prohibiting playing of music—Ringing of temple bell at time of worship—If breach—Presence of*—Mens rea—*Effect.*

A notification was issued by the District Magistrate of Poona under S. 42 of the Bombay District Police Act, prohibiting the playing of music in or at a Hindu temple, which was specified in the notification. The accused, a worshipper at the temple, rang but once a small temple bell when he worshipped there, as was usual for the worshippers to ring it when they visited the shrine to make *darshan.*

Held, that the bell was not a musical instrument, and the mere ringing of the temple bell by the accused did not amount to the making of a music, although a bell could be used for the production of music, and the accused was not therefore liable to conviction for breach of the notification in question.

Wasoodew, J.—In as much as the act of the accused in ringing the bell was in itself not contrary to the notification, the mere presence of *mens rea* in the accused would not render him liable to conviction, because both the intention and the act must concur before any one could be convicted. (*Barlee and Wasoodew, JJ.*) EMPEROR *v.* RAMAKRISHNA GOPAL BHIDE. **174 I.C. 478=39 Cr L J. 408=10 R B. 454=40 Bom.L.R. 59=A I R 1938 Bom. 179.**

BOMBAY FINANCE ACT (1932 as amended in 1939), **Part VI**—*Scope—If* ultra vires—*Urban Immovable Property Tax—If tax on income or tax on capital value of lands and buildings—Government of India Act* (1935), *S.* 100 (1) *and* (3)—*Income-tax Act, S.* 9.

Part VI of the Bombay Finance Act of 1932, as amended in 1939, is not *ultra vires* the Provincial Government, and the Urban Immovable Property Tax imposed by that Act is a valid tax. It is a tax on lands and buildings, imposed on the owners *qua* owners, and assessed by a somewhat arbitrary but not inequitable standard, which is not dependent either on the income of the assessees or on the capital value of the properties. It is not a tax upon income. The charging S. 22 of the Act imposes the tax on lands and buildings, and not on income and the basis of the tax is annual value. This is an arbitrary basis which might be applied as well for ascertaining capital value as for ascertaining income. The fact that some concession is allowed to the small owner, and that an allowance may be made where the property is shown to produce no income cannot alter the nature of the tax. It is impossible to say that the tax is a tax on the capital value of the lands and buildings as it is imposed without any relation to the capital value except so far as such value can be ascertained by reference to rateable value. The tax in question falls within item 42 of the Provincial List, List 3 of S. 100 (3) of the Government of India Act, 1935, and does not fall under items 54 and 55 of the Federal List, List 1 of S. 100 (1) of the Government of India Act.

Kania, J.—If land and buildings are treated as investments and, the return, as income, is taxed, it is a tax on income. On the other hand, if the tax is on the lands and buildings themselves, and the assessment is on a standard named by the legislature which may fluctuate or vary on the produce or income from it, it would be tax on the property. The measure of the tax is not itself the test. From the fact that the owner is liable to pay the tax it does not follow that the tax is income-tax. The impugned tax is not a tax on income. (*Beaumont, C.J., Broomfield and Kania, JJ.*) SIR BYRAMJI JEEJEEBHOY *v.* PROVINCE OF BOMBAY. **I.L.R. (1940) Bom. 58=186 I.C. 817=12 R.B. 379=3 Fed.L.J. (Part II) 25=42 Bom.L.R. 10=1939 I.T.R. 670=A.I.R. 1940 Bom. 65 (F.B.).**

BOMBAY HEREDITARY OFFICES ACT (III OF 1874), S. 4—*"Watandar"—Meaning of—Person holding watan lands without acquiring office—Status of—Amendment Act* (*V of* 1886), *S.* 2—*"Watandar family."*

A "watandar" as defined by S. 4 of the Bombay Hereditary Offices Act means a person having an hereditary interest in a watan, *i e*, the hereditary office and the property attached thereto, and includes, so far as watan property is concerned, a person holding watan property acquired in the manner set out in the definition. But a person who merely acquires watan property without acquiring the office is not a watandar, and to such a person and his family the special law of inheritance enacted by the Watan Amending Act of 1886 has no application.

N. J. Wadia, J.—"Watandar family" in S. 2 of the Watan Amendment Act of 1886 must be taken to mean the family of a person who has a hereditary interest in the property of a watan and in the hereditary office and the rights and privileges attached to that office. (*Beaumont, C.J. and Wadia, J.*) TARABAI *v.* MURTACHARYA. **I.L.R. 1939 Bom. 576=185 I.C. 874=12 R.B. 275=41 Bom L.R. 924=A.I.R. 1939 Bom. 414.**

——**S. 5**—*Permanent lease of watan land—Validity.*

A permanent lease of watan lands is expressly prohibited by S. 5 of the Bombay Watan Act. (*Broomfield and Macklin, JJ.*) BABASAHEB APPASAHEB *v.* LAXMANAPPA RAMAPPA. **178 I.C. 854=11 R B 198=40 Bom.L.R. 1015=A.I.R. 1938 Bom. 492.**

——**S. 5**—Scope—If overridden by Bombay Land Revenue Act, S. 217. *See* BOMBAY LAND REVENUE ACT, S. 217. **40 Bom. L.R. 461.**

——**S. 9**—*Construction—Jurisdiction of Collector and Revenue Officer under—Alienation when to be declared null and void—Jurisdiction to decide whether there has been an alienation—Decision of Revenue Officer—Finality.*

Under S. 9 of the Bombay Hereditary Offices Act (Watan Act), an alienation of a Watan (that is the passing of the Watan into the ownership or beneficial possession of a person not a Watandar of the same Watan), before the Act came into force may be declared null and void by the Collector whenever it has taken place (*a*) otherwise than by virtue of a decree or order of a British Court and (*b*) without the consent of the Collector and transfer of ownership in the revenue records. The two conditions laid down by the section must both be satisfied before alienation can be set aside. The consent of the Collector must relate to the time when the lands pass to the ownership and beneficial possession of a non-watandar. Unless the alienation has taken place before the Act without the consent of the Collector, and unless in addition to it the alienation has taken place otherwise than by virtue of a decree or order, the revenue authorities have no power or jurisdiction to declare it null and void. A Collector acting under S. 9 is not in the same position as a Court and has no jurisdiction to decide finally the facts on which his jurisdiction depends. A Revenue Officer can exercise the prescribed powers if the conditions mentioned in the statute are satisfied and has no jurisdiction to determine finally whether those conditions are in fact satisfied. If he holds after inquiry that a land is Government land and deals with it accordingly, or if he holds that there has been a breach of the conditions of an occupancy and forfeits the holding, but the Civil Court comes to the conclusion that the land was not Government land or that the conditions of the occupancy have not been broken, then the order of the Collector will be treated as a nullity which does not require to be set aside. It will be regarded as an order of an officer not "duly authorised in that behalf" within the meaning of S. 4 (*a*) (3) of the Revenue Jurisdiction Act. (*Broomfield and Tyabji, JJ.*) Mallappa *v.* Tukko. **I L R. (1937) Bom. 464=170 I.C. 801=10 R.B. 121=39 Bom. L.R. 288=A.I.R. 1937 Bom. 307.**

——S. 9—"*Passed by virtue of a decree into the ownership or beneficial possession, etc.*"—*Meaning of.*

The words "passed by virtue of a decree into the ownership or beneficial possession of a person not a Watandar" surely imply that there must have been a change of ownership or possession effected by the decree. If the transfer of ownership and possession has taken place previously, and the decree merely recognises or confirms it, it cannot with propriety be said that it has taken place by virtue of a decree. (*Broomfield and Tyabji, JJ.*) Mallappa *v.* Tukko, **I.L.R. (1937) Bom. 464=170 I.C. 801=10 R B. 121=39 Bom. L.R. 288=A.I.R. 1937 Bom. 307.**

——**Ss 9 and 11**—*Jurisdiction of Collector—Status of watandar—Power to adjudicate on—Decision by Collector as to whether or not there has been alienation—Finality—If binding on Civil Courts.*

The determination of the status of being a watandar is one of the matters from which the jurisdiction of the Collector is excluded, and there is no provision in the Watan Act (Hereditary Offices Act) for the determination by the Collector of what persons shall be held to be watandars, but only what persons shall be recognised as representatives of watandars. There is no warrant for holding that the Civil Courts are bound by the finding of the Collector on the question of fact whether there has or has not been an alienation, in view of the language of Ss. 9 and 11 of the Watan Act. (*Broomfield and Tyabji, JJ.*) Mallappa *v.* Tukko. **I.L.R. (1937) Bom 464=170 I.C 801=10 R.B. 121=39 Bom. L.R. 288=A I.R. 1937 Bom. 307.**

——**S 11**—"*Alienation*"—*Meaning of—If covers title by immemorial possession—Bombay Land Revenue Code, S.* 83.

The alienation referred to in S. 11 of the Bombay Watan Act must be of the nature described in S. 10. The alienation described in S. 11,

read with S. 10, covers any case where a watan or any part thereof has passed without the sanction of the Government into the ownership or beneficial possession of any person other than the officiator or, if the property has not been assigned, into the ownership or beneficial possession of any person not a watander of the same watan. But the alienation referred to in S. 11 does not cover a title sought to be made under S.83 of the Bombay Land Revenue Code by possession from time immemorial.

Quaere.—Whether the alienation under S. 11 would cover other cases of a title sought to be established by adverse possession. (*Beaumont, C.J.*) Shamrao *v.* Holya Subhanna. **172 I.C. 464=10 R.B. 283=39 Bom. L.R. 920=A.I.R. 1937 Bom. 494.**

——**S. 11**—"*Alienation*"—*Actual transfer or conveyance by watandar to stranger—If necessary.*

The word "alienation" in S. 11 does not necessarily imply a transfer or conveyance by a watandar to a stranger. What is meant by "alienation" is only the passing of watan property into the ownership or beneficial possession of any person other than the officiator or a person not a watandar of the same watan as the case may be. No transfer or conveyance by a watandar is necessary at all. (*Broomfield and Tyabji, JJ.*) Khangouda *v.* Secretary of State for India. **I.L.R. (1937) Bom. 236=168 I.C. 73=9 R.B. 356=38 Bom.L R. 1308=A.I.R. 1937 Bom. 121.**

——**Ss. 11 and 11-A**—*Watan lands—Entry of one adopted son as representative watandar—Adoption held invalid by competent Court—Orders annulling alienation and resuming lands and removing name from—If* ultra vires—*Suit by adopted son in Civil Court for register of declaration of title and for restoration of land—If barred—Revenue Jurisdiction Act, S.* 4 (a).

The holder of a watan died in about 1877 leaving three widows, *F.*, *Sh.* and *Sa.* The last gave birth to a posthumous son who, however, died shortly after birth; subsequently *F* adopted one *C* in 1901 and the plaintiff in 1908. The plaintiff was put in possession of the property of the deceased watandar and the Revenue authorities recognised his adoption and entered his name in place of the deceased watandar as one of the representative watandars, in 1909. In 1920, *C* sued the plaintiff claiming the property as the adopted son of the deceased watandar. The Court held both adoptions invalid and the suit was dismissed finally. The plaintiff, however, continued in possession, but in 1926, the 4th defendant relying on the decision of the Civil Court applied for restoration of the watan land to him as the heir of the deceased posthumous son of the former watandar. In September, 1926, the District Deputy Collector, on the application of the 4th defendant decided that the plaintiff was a stranger to the watan, and held the alienation of the lands to him was null and void and ordered the removal of his name. In June, 1927, the Commissioner, on the recommendation of the Collector, cancelled the order of 1909 by which the plaintiff's name had been entered; and ordered the District Deputy Collector to hold a fresh enquiry. As a result of the enquiry, the latter held that the lands should be restored to defendants 2 and 3, members of the watandar family and his order was confirmed on appeal by the Collector in June, 1929. Plaintiff then field a suit in 1930 against the Secretary of State and defendants 2 to 4 for a declaration of the title to hold the property and for restoration of the same. It was contended that the order setting aside the alienation and resuming the land and the order removing the plaintiff's name from the register were *ultra vires*. There was a previous suit in 1928 by the plaintiff against the 4th defendant seeking a declaration that he was the validly adopted son, but it was dismissed.

Held. (1) if *F* had power to adopt at all, her adoption of *C* in 1901 would *prima facie* be valid, and that would render the subsequent adoption of the plaintiff invalid, and the Revenue authorities were therefore justified in holding the plaintiff to be a stranger to the watan, and the orders annulling the alienation under S. 11, and resuming the lands under S. 11-A, were legal orders and not *Ultra vires*; (2) that the suit regarded as a claim against Government relating to property appertaining to the office of a village patil, was barred under S. 4 (*a*) (1) of the Bombay Revenue Jurisdiction Act; (3) that it also apparently fell under S. 4 (*a*) (4), regarded as a claim against Government relating to land declared by Government to be held for service; and (4) that the orders of the Revenue authorities not being *ultra vires* the suit, would be barred under Cl. (3) of S. 4 (*a*) as well as under Cls. (1) and (4) of S 4 (*a*) of the Revenue Jurisdiction Act. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE FOR INDIA. **I.L.R. (1937) Bom. 236=168 I C 73 =9 R.B. 356=38 Bom. L.R. 1308=A.I.R 1937 Bom. 121.**

——S. 15—"*Holder*"—*Meaning of—Widow of deceased watandar—Competency to effect—Commutation of service.*

The widow of a deceased watandar whose name has been entered as representative watandar is not a holder of the watan within the meaning of S. 15 of the Bombay Hereditary Village Offices Act, and she is not consequently competent to enter into an agreement for commutation of services under that section. (*Broomfield and Macklin, JJ.*) GOVERNMENT OF BOMBAY *v.* GANPAT MANOHAR. **I.L.R. (1939) Bom. 482=186 I.C. 324=12 R.B. 321=41 Bom.L.R. 772=A.I.R. 1939 Bom. 398.**

——S. 34—"*Decree*"—*Meaning.*

The word "decree" in S. 34 must be deemed to include the judgment on which the decree is based. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE FOR INDIA. **I.L R. (1937) Bom. 236=168 I C. 73=9 R.B. 356=38 Bom. L.R. 1308=A.I.R. 1937 Bom. 121.**

——Ss. 34 and 36 (3)—*Construction and scope—Decree declaring adoption invalid—Power of Collector to remove name of adopted son from register.*

S. 34 does not say that the name of an adopted son whose name is registered as such, can only be removed when there is a decree setting aside the adoption. Under S. 36 (3) of the Act as amended in 1930, the Collector has power to amend the entry on production before him of a decree of a competent Court which gives any person the right to have his name registered as the nearest heir of the deceased watandar in preference to the person whose name has been ordered to be registered. It would be a strange position if the Collector could declare an alienation null and void and resume the land, and yet should have no power to remove from the Register of representative watandars the name of a person whose adoption has been held to be invalid and who is held to have no title by a competent Court. (*Broomfield and Tyabji, JJ.*) KHANGOUDA *v.* SECRETARY OF STATE. **I.L R. (1937) Bom. 236=168 I.C. 73=9 R.B. 356=38 Bom. L.R. 1308=A I.R, 1937 Bom. 121.**

——S. 36—*Scope—Principle underlying—Rule of legal primogeniture—Applicability before* 1910 *—Effect of Amending Act III of 1910.*

The real intention of S. 36 of the Bombay Hereditary Offices Act, as it stood before the amendment of 1910 was that the nearest heir of a deceased watandar was to be determined according to the rule of lineal primogeniture, and the Amending Act of 1910 merely made explicit the real intention of the section. The amendment of 1910 did not introduce the principle of lineal primogeniture for the first time. (*Wadia, J.*) BASANGOWDA *v.* FAKIRGOWDA. **I.L.R. (1939) Bom. 123=179 I.C. 984=11 R.B. 269=40 Bom. L.R. 1288=A.I.R. 1939 Bom. 56.**

——S. 36, proviso (3)—*Suit to declare plaintiff's right as nearest heir of deceased watandar as against defendant—Defendant recognised by Government as representative watandar and entered in the register—Absence of prayer to set aside order entering defendant—Limitation—Limitation Act, Arts.* 14 *and* 120.

Art. 14 of the Limitation Act has no application to a suit filed under S. 36, proviso (3) of the Bombay Hereditary Offices Act, for a declaration that the plaintiff is the nearest heir of the deceased last holder of a watan as against the defendant who has been recognised by the Government as the representative watandar without any express prayer for setting aside the order of the Collector entering the defendant's name as the successor to the watan. The suit is really one for a declaration and is governed by Art. 120 of the Limitation Act. (*Wadia, J.*) BASANGOWDA *v.* FAKIRGOWDA. **I.L.R. (1939) Bom. 123=179 I.C. 984=11 R.B. 269=40 Bom. L.R. 1288=A.I.R. 1939 Bom. 56.**

——S. 58—Officiating kulkarni—Status—If Public servant. *See* CR. P. CODE, S. 197. **40 Bom. L.R. 1286.**

BOMBAY HIGH COURT CIVIL CIRCULARS (1925), **Ch. VIII**—Suit dismissed with costs—Several defendants incurring separate costs—Separate sets of costs—Award of—If justified. *See* COSTS—AWARD OF. **41 Bom.L.R. 575.**

BOMBAY HIGH COURT RULES (Appellate Side), Rr. 1 (a) and 2 (c)—*Applicability—Finding that suit bad for multifariousness—Failure to amend plaint—Rejection—Pleader's fee—Calculation.*

Where a plaint is rejected on the ground that the suit is bad for multifariousness, the plaintiff having failed to amend the plaint as ordered by the Court on its finding on the issue as to multifariousness, there is no decision on the merits between the parties within the meaning of R. 1 of the Appellate Side Rules of the Bombay High Court. The case falls under R. 2 (*c*) and the plaintiff in such a case can only be required to pay one-fourth of the full fees payable under the rules as pleader's fee. (*Broomfield and Macklin, JJ.*) NARHARI *v.* BABURAO. **183 I.C. 655=12 R.B. 117=41 Bom.L.R. 413=A.I.R. 1939 Bom. 299.**

——**R. 1 (a)**—"Subject-matter"—Meaning of. *See* ADMINISTRATION SUIT—PLEADER'S FEE. **41 Bom.L.R. 413.**

——**App. E, R. 6**—*Applicability—Land acquisition proceedings—Suit by owners of lands for declaration of invalidity and injunction—Dismissal—Appeal—Valuation—Advocate's fee—Calculation of.*

A representative suit by owneres of properties which are sought to be compulsorily acquired for a declaration that the notifications under the Land Acquisition Act issued by the Government are *ultra vires* and illegal and for an injunction restraining them from going on with the acquisition proceedings is one in which the value of the subject matter is not capable of ascertainment. An appeal from a decree dismissing such a suit is governed for purposes of advocate's fees by R. VI of Appendix E of the Appellate Side Rules of the High Court of Bombay. (*Broomfield and Wassoodew, JJ.*) PARSHOTTAM *v.* SECRETARY OF STATE. **174 I.C 67=10 R.B. 420=39 Bom.L.R. 1257=A.I.R 1938 Bom 148.**

——**App. E, R. 97**—"First hearing"—Meaning of—Engagement of two pleaders before date on which appeal is first heard—Fees of two pleaders —If to be allowed. *See* BOMBAY PLEADERS ACT, S. 20. **38 Bom.L.R. 518.**

——**(Original Side), R. 40 (Ch. II, Part I)**—*Advocate enrolled on original side—Right to appear in Mofussil Court without vakalatnama—Memorandum signed by himself—Sufficiency—C. P. Code, O. 3, R. 4 (5).*

Rule 40, in Ch. II, Part I of the Bombay High Court Rules is not confined to the High Court, but is intended to apply to all Courts in the Presidency. An advocate enrolled on the original side of the High Court is not required to file any authority authorising him to appear in a Mofussil Court. Where such an advocate files a memorandum signed by himself in accordance with O. 3, R.4 (5), that is sufficient to entitle him to plead in a Mofussil Court, and the latter Court is not justified in rejecting the memorandum and insisting on a vakalatnama. (*Beaumont, C.J and Sen, J.*) AMBEDAS KASHIBHAI *v.* VADILAL CHHAGANLAL. **42 Bom.L.R. 515=A.I.R. 1940 Bom 272.**

——**(1936), R 150**—Effect of. *See* C. P. CODE O. 23, R. 3. **39 Bom.L.R. 1179.**

——**R. 314**—*Receiver in execution—Appointment—Right to—Attachment of property—If condition precedent.*

An attachment of property is not always a condition precedent to the appointment of a receiver in execution. In order that a receiver may be appointed, it is not necessary that there should be an attachment, or that an attachment once effected should be subsisting. If the decree-holder makes out proper grounds for equitable or indirect execution, a receiver can be appointed; and there is nothing in the High Court Rules which

prohibits such an appointment. (*Wadia, J.*) VARJIWANDAS *v.* MAGANLAL. **39 Bom.L.R. 493 =170 I.C. 850=10 R B. 140=A.I R. 1937 Bom. 382**

——**R. 373**—Scope—Award—Setting aside on ground of misconduct of arbitrator—Remedy—Suit—If lies. *See* ARBITRATION ACT, S. 14. **38 Bom.L.R. 380.**

——**R. 444**—*Remuneration of Court Receiver—Transfer of money from the Accountant General to the Receiver—Right to commissian.*

Where a Court Receiver gets a transfer to himself as the guardian of the property of a minor, of a sum of money standing to the credit of the minor with the Accountant-General, it really amounts, only to a transfer of the sum in question from one officer of the Court to another. In such a case the receiver is not entitled under R. 444 of the Bombay High Court Rules (Original Side) to any remuneration. (*Wadia, J.*) ZULEKHABAI, *In re.* **39 Bom. L.R. 1175=173 I. C. 783=10 R.B. 379=A.I R. 1938 Bom. 75.**

——**R. 767**—*Construction and scope—Mofussal Court—Proceedings for compulsory winding up of company—Costs—Taxation—General instruction charges—If to be allowed—Rules—Practice to be followed.*

The words 'so far as the same are applicable" in R.767 of the Bombay High Court Rules (O.S) govern the rule that "the fees must be allowed as set forth and referred to in the second schedule" referred to in the rule. It is not reasonable to apply the schedule in such a manner and for such reasons as to deprive parties of costs which they have necessarily and properly to incur. In proceedings in mofussil Courts for compulsory winding up of a company, the costs of which have to be taxed under R. 767, on the same scale as on the original side of the High Court, there is no reason or principle why advocates should be deprived of fair remuneration for work necessarily undertaken by them which in the High Court would have to be done through counsel. The advocates in the mofussil are therefore entitled to "general instruction charges" including remuneration for getting together the evidence, preparing themselves with the facts of the case and the law on the subject, and looking up the authorities for being able to address the Court. This is a species of work going beyond mere attendance in Court. In the mofussil special directions would ordinarily have to be applied for at the proper time, so as to indicate that in the opinion of the Court the questions of law involved were of such a nature and complexity that the advocates ought to be allowed special remuneration for the same; that the services rendered were such that counsel might properly have been briefed to render them in the High Court. A failure to observe the strict practice ought not to be made a ground for disallowing the item in the taxation of the bill of costs. (*Barlee and Tyabji, JJ.*) CHHOTALAL *v.* SOMESHWAR. **39 Bom. L.R. 820=173 I C. 489=10 R.B. 337=A I.R. 1938 Bom. 10.**

——**R. 767**—**Mofussil Court—Proceedings for compulsory winding up of company—Incidental or interlocutory proceedings in—Costs of—Order as to—Jurisdiction of Court and of taxing officer —Nature of jurisdiction in appeal from taxing** officer—Duty of parties and advocates to apply for orders and directions—Duty of Court. *See* C. P. Code, S. 35. **39 Bom.L.R. 820.**

———**R. 865**—*"Given in charge to the jury"—Jury empanelled and challenged and sworn in—Substance of offence charged not stated to jury—Prisoner if given in charge—Alteration of charge necessitating special jury—Permissibility.*

The expression "given in charge to the jury" is used in R. 865 of the High Court rules in a technical sense. The question whether the prisoners have been given in charge to a jury must be determined by reference to the form of the oath administered and the procedure followed thereafter. When the jury has been merely sworn in and allowed to be challenged with a view to their trying the accused in due turn, but the substance of the offence charged in the indictment has not been stated to the jury, it cannot be said that the accused has been given in charge to jury. But even if the prisoner has been given in charge to a common jury, the rule will not operate as a bar to the trial of the prisoner by a special jury on an altered charge. (*Wassoodew, J.*) Emperor *v.* Yeshvant Vithu. **I.L.R. (1937) Bom. 369=170 I.C 153=38 Cr.L.J 850 (2)=10 R.B. 49=39 Bom.L.R. 355=A.I.R. 1937 Bom. 260.**

———**Tables of Fees, Items 54 and 55**—Ex parte *motion and hearing of motion—Costs to be awarded—Proper rule as to—Practice.*

It is desirable that Judges hearing *ex parte* motions on the original side of the High Court; instead of making the costs of the *ex parte* motion costs in the motion to be heard on notice, reserve the costs to be dealt with on the hearing of the motion. Then the Judge who hears the motion can allow such additional sum beyond the costs of the motion as he thinks will compensate the successful party for the costs of the *ex parte* motion. (*Beaumont, C. J. and Rangnekar, J.*) Calico Printers Association *v.* Ahmed Abdul Karim Bros. **60 Bom. 861=164 I C 695=9 R. B. 91=38 Bom.L.R. 531=A.I.R. 1936 Bom. 310.**

———**Table of fees, Item 56**—*Construction and scope—"Unless otherwise ordered"—Discretion of trial Judge in allowing costs of Solicitor.*

Under item 56 of the Table of fees given in the Bombay High Court Rules (Original Side), costs for *ex parte* short causes, "unless otherwise ordered" confer a complete discretion upon the trial Judge, and it is not desirable that the Appellate Court should seek to limit the grounds upon which that discretion should be exercised. It was contemplated that the fixing of lump sum would save expenses and discharge unnecessary work and would at the same time provides reasonable remuneration for the solicitor. In a suit to recover a sum of Rs. 15,000 odd, the defendants who were residents of Arabia remained *ex parte.* An effort to serve them in accordance with the provisions of O. 5, R. 26, C. P. Code, proved abortive and ultimately substituted service had to be effected, and as the defendants were Arabians, many documents had to be translated into Arabic. The plaintiff's solicitors had to do a good deal of work, substantially more than they would have to do normally on an *ex parte* short cause. The Solicitors filed an affidavit setting out in detail the out-of-pocket expenses which amounted to Rs. 449—10—6. The Judge allowed a sum of Rs. 400 for costs in decreeing the suit. The plaintiff appealed against the order for costs.

Held, that the case was one in which either the costs should have been taxed or else a sum should be allowed which would provide reasonable remuneration for the solicitors and also cover the out-of-pocket expenses. A sum of Rs. 650 was allowed as the lump sum costs. (*Beaumont, C.J. and Kania, J.*) Abdul Lalif *v.* Khalaf Abdulla. **42 Bom.L.R. 578.**

BOMBAY JAIL MANUAL, R. 387 (c)—*Order of Court in conflict with—Procedure.*

The rules of the Jail Manual are administrative rules for the guidance of the Jail officials, and it is for the Jailor to keep in safe custody a prisoner consigned to his care under the lawful order of the Court. If any conflict occurs between an order of Court and an administrative rule, the order of Court should be sent to the High Court through proper channels for consideration and modification, if need be. (*Davis, J. C. and Mehta, A.J.C.*) Emperor *v.* Kadu. **29 S. L.R. 353=164 I.C. 576=9 R.S. 49=37 Cr.L.J. 1003=1936 Cr.C. 802=A.I.R. 1936 Sind 125.**

BOMBAY JURISDICTION OF JAGIRDARS' REGULATION (XIII OF 1830), S. 4—*Construction—Execution of decree by Jagirdar—Sale of agriculturists' land—Procedure—Application to set aside sale—District Judge's power to transfer to Subordinate Judge's Court.*

S. 4 of the Bombay Regulation XIII of 1830 gives authority to the Jagirdar to execute his own decrees. That does not mean that the sale of land of an agriculturist must be done by him, and no other person has a right to do so. The regulation lays down no special procedure at all and therefore the normal rule found in the Code of Civil Procedure under which sales of property of agriculturists are required to be transferred to the Collector applies also to the Jagirdar's decrees. The District Judge has jurisdiction to transfer an application to set aside a sale from the Jagirdar's Court to a Subordinate Judge's Court. (*Kania, J.*) Malegaon Budruk Co operative Credit Society *v.* Gangadhar Narayan. **42 Bom.L.R. 525.**

BOMBAY KHOTI SETTLEMENT ACT (I OF 1880), S. 5—Applicability—Tenant proved to be in occupation from 1848—Absence of proof of prior occupation—Permanent tenancy—Presumption of—*Presumitur retro*—Application of doctrine. *See* Bombay Land Revenue Code, S. 83. **40 Bom.L.R. 534.**

———**S. 6**—*Permanent tenant of Khoti land—Mortgage with possession for term—Effect of—Vendee from tenant after expiry of term of mortgage—Right and status of vendee—Right to redeem mortgage.*

Where a permanent tenant of Khoti lands executed a mortgage with possession for a term, and the mortgagee is in actual possession, the mortgagee, as the actual holder of the land, is to be deemed to be the tenant of that land, by virtue of S. 6 of the Bombay Khoti Settlement Act. But under the proviso to S. 6, the actual holder being in possession as mortgagee, his occupation or cultivation must, for the purposes of S. 6, be deemed to be the occupation or cultivation of the mortgagor. So that if the mortgagor (permanent tenant) transfers his right, title and interest by way of sale to another person, it must be held that the transferee steps into the shoes of the mortgagor, and must be deemed to be the actual holder, and the rights which can be claimed by the actual holder under S. 6 become vested in such transferee. The transferee thus becomes the actual holder and is entitled to redeem the mortgage, though the transfer in his favour has not been made with the consent of the Khots or the managing Khot. The transferee is at least an ordinary tenant entitled to be in possession until evicted by the Khots in exercise of the right conferred on them by S. 10 of the Act. (*Lokur, J.*) Gafur Usman *v.* Sakharam Tanshet. **I L.R. (1939) Bom. 713=41 Bom.L R. 1199=186 I.C. 643=12 R.B. 357=A.I.R. 1940 Bom. 15.**

——**Ss. 6 and 8**—*Scope of — Unauthorised transfer of Khoti land by occupancy tenant—Effect—Rights and status of transferee—Possession for over 12 years—If becomes occupancy tenant—Right of Khot to eject—Notice to quit.*

The respondents were the Khots of a village, *D.* who was an occupancy tenant of the lands sold the same on 13—5—1896 to the appellants. After *D'S.* death, his nephew sold the same lands to the respondents on 21—10—1927, and in December, 1928, passed a rajinama in their favour. The respondents, the admitted Khots of the occupancy holding of *D*, gave notice to the appellants to quit on 27—12—1929 under S. 84 of the Bombay Land Revenue Code, and on 7—12—1930, sued for ejectment of the appellants and for possession. The appellants pleaded that they had become occupancy tenants of the respondents by reason of their having held the occupancy holding adversely to the respondents for over 12 years.

Held, (1) that under S. 6 of the Khoti Settlement Act, the appellants became the tenants of the respondents by virtue of the sale in their favour by *D*, in 1896; (2) that in the absence of any special agreement set up by the appellants, the latter become yearly or annual tenants of the respondents under S. 8 of the Act; (3) that the appellants, as transferees under a wrong transfer could not claim to be occupancy tenants merely because they had been in possession for over 12 years and set up adverse possession; and (4) that the respondents, having determined the tenancy by a notice to quit under S. 84 of the Land Revenue Act, were entitled to evict the appellants. (*Rangnekar and Sen, JJ.*) Ramkrishna *v.* Baburao. **175 I.C. 518=10 R.B. 564 =40 Bom.L.R. 390=A.I.R. 1938 Bom. 284.**

——**Ss. 8 and 10**—*Permanent tenant of Khoti lands—Transfer by sale—Absence of consent of Khots—Effect —Status of transferee—If mere trespasser or ordinary tenant.*

Where a permanent tenant of *Kularag Khoti* lands sells his rights to another without the consent of the Khots or the managing Khot, the only result is that the Khots thereby get the right to dispose of the lands as they choose, and it is open to them to evict the transferee and take possession of the lands under S. 10 of the Bombay Khoti Settlement Act. But it does not follow that the transfer without the consent of the Khots or the managing Khot does not confer any interest in the khoti lands on the transferee. The transferee is not a trespasser. The permanent tenancy is terminated by such transfer, and the transferee becomes only an ordinary tenant within the meaning of S. 8 of the Act, and the Khots would be entitled to eject the transferee, who is only an ordinary annual tenant, after giving him a proper notice to quit under S. 84 of the Bombay Land Revenue Code. But until the tenancy is determined by such a notice, the transferee is entitled to remain in possession of the lands as a tenant. (*Lokur, J.*) Gafur Usman *v.* Sakharam Tanshet. **41 Bom L R. 1199=I L R (1939) Bom. 713=186 I.C. 643=12 R.B. 357=A.I.R. 1940 Bom. 15.**

——**Ss. 9 and 10**—*Sale or relinquishment of holding—Consent of managing* Khot—*Sufficiency and validity—Presumption of consent—If arises from fact of managing* Khot *being party to deed.*

The managing *Khot* is entitled under S. 9 of the Khoti Settlement Act to give consent to a transfer by way of sale of a holding. But the consent to be a valid consent on behalf of all the *Khots* under S. 9 must be given by him as managing *Khot* and not in his individual capacity. The consent must also be express and cannot be presumed from the mere fact that the managing *Khot* himself is the executant of the deed of transfer in his personal capacity. The same consideration as to the necessity of the consent of the managing *Khot* as such also apply to a relinquishment under S. 10 of the Act. (*Macklin, J.*) Vinayak Yeshwant *v.* Ghanashyam. **164 I.C. 177=9 R B. 59=38 Bom. L.R. 511=A.I.R. 1936 Bom. 287.**

——**(as amended in 1912), S. 9**—*Scope—If retrospective.*

The amendment to S. 9 of the Khoti Settlement Act made in 1912 has no retrospective effect and does not apply to the case of a transfer made by the tenant prior to 1912. (*Rangnekar, and Sen, JJ.*) Ramkrishna *v.* Bapu Rao. **175 I.C. 518=10 R. B 564=40 Bom. L.R. 390=A.I.R. 1938 Bom. 284.**

BOMBAY LAND REVENUE CODE (V OF 1879)—*Construction—Rule of strict construction.*

The Land Revenue Code not only imposes a pecuniary burden on the subjects but restricts the use and enjoyment of his property. Such a statute must always be strictly construed. The proprietor is therefore entitled to ask the Court to construe it in his favour. (*Wassoodew, J.*) Rai Chand Gulab Chand *v.* Secretary of State. **185 I.C. 495=12 R B. 242=41 Bom. L.R. 1077=A.I.R 1939 Bom. 505.**

——**S. 31 (2)**—*Applicability— If confined to public sales by auction—Private sale—Purchase by revenue officer—If prohibited.*

S. 31 (2) of the Bombay Land Revenue Code which prohibits a Revenue Officer from being directly or indirectly concerned in any of the transactions or acts set out in it, is not confined to purchases at public sales; it prohibits purchases by Revenue Officers, without express permission of Government, not only at public sales by auction but also at private sales. The section itself does not in particular refer to a purchase at a public sale or a private sale and makes no distinction of that character. The prohibition cannot be restricted to a purchase at a public sale only. (*Rangnekar, J.*) Dharwar Urban Bank Ltd. *v.* Krishnarao. **I.L.R. (1937) Bom 293=169 I.C. 381=10 R.B. 22=39 Bom L R. 203=A.I.R. 1937 Bom. 198.**

——S. 48—*Applicability—Altered assessment—When leviable—Intention to use or actual use.*

S. 48 of the Bombay Land Revenue Code comes into operation when land is put to any use unconnected with agriculture. The determining factor in the levy of altered assessment under S. 48 is the altered use to which the property is put But the mere intention to use property for a particular purpose, without its actual use for that purpose, will not enable Government to alter the agricultural assessment which is the lowest standard of assessment on property under the Land Revenue Code. (*Wassoodew, J.*) Rai Chand Gulab Chand *v.* Secretary of State. **185 I C. 495=12 R B. 242=41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

——S. 48—"*Fixed*"—*Meaning.*

The word "fixed" in S. 48 of the Bombay Land Revenue Code as it stood before the amendment of 1901 cannot mean "fixed in perpetuity". (*Davis, J.C. and Rupchand, A.J.C.*) Ramchand *v.* Secretary of State for India in Council. **29 S.L.R. 382=163 I.C. 887=9 R.S. 17=A.I.R. 1936 Sind 108.**

——S. 48—*Revised assessment—Power to levy retrospectively.*

The Collector has no power to levy revised assessment retrospectively. (*Broomfield and Tyabji, JJ.*) Ahmadabad Ginning and Manufacturing Co., Ltd. *v.* Secretary of State. **39 Bom. L.R. 266=169 I.C. 542=10 R.B. 39=A.I. R. 1937 Bom. 226.**

——S. 48—*Scope—Conversion of agricultural land to non agricultural use by trespasser—Altered assesment—If leviable.*

S. 48 of the Bombay Land Revenue Code which provides for the levy of altered assessment when land held for agricultural purposes is converted to a non-agricultural purpose, makes no distinction between conversion of the land by the occupant or persons holding through or under him, and by trespassers without the knowledge or permission of the occupant. (*Beaumont, C.J. and Wadia, J.*) Secretary of State for India *v.* Ganesh Narayan. **I.L.R. (1937) Bom. 801=172 I.C 194=10 R B. 257=39 Bom.L.R. 885=A.I.R. 1937 Bom. 456.**

——Ss. 48 and 52—*Agricultural lands converted to non-agricultural use—Government permitting and levying fine—Non-levy of altered assessment—Effect—If bar to subsequent levy of revised assessment.*

Where agricultural lands are appropriated to non-agricultural purposes, *i.e.*, building purposes, with the permission of the Government on payment of fine, and the Government do not then levy an altered assessment on such lands that does not imply that there is any agreement on the part of the Government that the assessment would not be altered. It is still open to the Government to levy an altered assessment on a non-agricultural basis. It would be opposed to principle to imply, from the mere circumstance that non-agricultural assessment has not been previously levied, any limitation on the prerogative of the Crown to assess the land to land revenue, and to revise the assessment periodically according to law. (*Broomfield and Tyabji, JJ.*) Ahmadabad Ginning and Manufacturing Co., Ltd. *v.* Secretary of State. **169 I.C. 542=10 R. B 39=39 Bom. L.R. 266=A.I.R. 1937 Bom. 226.**

——S. 48 (1) and (2)—*Construction and relative scope of.*

Cl. (1) of S. 48 of the Bombay Land Revenue Code clearly means that assessments are to be made in future, and shall be deemed to have been made in the past with reference to the use of the land. It may also mean that whether assessments are actually fixed with reference to the use of the land or not, they shall be deemed to have been so fixed. But in any case Cl. (1) lays down the conditions for the operation of Cl. (2). It cannot be held that it deals with two categories of cases, only one of which is dealt with by Cl. (2) and the other not at all. (*Broomfield and Tyabji, JJ.*) Ahmedabad Ginning and Manufacturing Co., Ltd *v* Secretary of State. **169 I.C. 542=10 R. B. 39=39 Bom,L.R. 266=A.I.R. 1937 Bom. 226.**

——S, 65—*Construction—"Farm-building"—If includes godown.*

The term "farm-building" in S. 65 of the Land Revenue Code would absorb within its meaning many kinds and classes of buildings such as storehouses for implements, manure, seed and farm produce, and would include a godown. The character of the building or the amount of money spent upon its construction is immaterial in judging the purpose for which it is eventually put by the former. It cannot be said that a strong or substantial store-house or a godown is unnecessary for facilitating farm operations and the protection of agricultural produce; the substantial character of a godown cannot alter its character as farm-building. (*Wassoodew, J.*) Rai Chand Gulab Chand *v* Secretary of State. **185 I C. 495=12 R.B. 242=41 Bom. L.R. 1077=A.I.R. 1939 Bom. 505.**

——S. 65-"*Make any other improvements thereon for the better cultivation of the land*"—*Meaning of—Erection of godown to store agricultural produce, such as grass for being sold in favourable market—If protected—Altered assessment—If justified on ground of non-agricultural use.*

The words "make any other improvements thereon for the better cultivation of the land" in S. 65 of the Bombay Land Revenue Code, ought not to receive a narrow construction limited to some object directly connected with agricultural operations or the act of production merely. Any improvement which conduces to profitable husbandry and facilitates the marketing of agricultural produce would fall within the class of improvements protected by S. 65. That would include provision for store-houses made by an agriculturist for the protection of his agricultural produces until it leaves his farm. Thus, if grass as agricultural produce is cut, pressed, baled and stored in a godown with the object of eventually selling it when the market improves and it is profitable to sell the produce, the construction of a godown which facilitates that object would be protected. The erection of a godown for such purpose would not be a ground for holding that the land has been "used for any purpose unconnected with agriculture" within the meaning of R. 80 of the Land Revenue Rules or be a basis upon which altered assessment can be levied. (*Wassoodew, J.*) Rai Chand Gulab Chand *v.* Secretary of State. **185 I.C. 495=12 R.B. 242 =41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

——S. 65—*Scope—Kinds of improvement—Enumeration of—If exhaustive.*

The use of the words " farm-buildings, wells or tanks" in S. 65 of the Bombay Land Revenue Code does not exhaust but only illustrates the kind of improvements intended by the Legislature to entitle the owner to the benefit of lesser assessment. (*Wassoodew, J.*) Rai Chand Gulab Chand *v.* Secretary of State. **185 I.C. 495=12 R.B. 242=41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

——S. 66—*Applicability—User of agricultural land for non-agricultural purposes by trespasser without consent or knowledge of occupant—Liability of occupant to fine.*

S. 66 of the Bombay Land Revenue Code is not confined to user of agricultural land for non-agricultural purposes by the occupant or any of the persons referred to in the first paragraph of S. 65 *i.e.*, servants, tenants, agents or other legal representatives. The words of the section are quite general and clearly include the case of user by even a trespasser; and an occupant is liable to fine under S. 66, if there is any user of his agricultural land for purposes other than agriculture, whether or not the occupant has consented to or has knowledge of such user. (*Beaumont, C.J. and Wadia, J.*) Secretary of State for India *v.* Ganesh Narayan. **I.L.R. (1937) Bom. 801=172 I.C. 194=10 R.B. 257=39 Bom.L.R. 885=A.I.R. 1937 Bom. 456.**

——S. 83—*Applicability—Khoti lands*—Presumitur retro—*Application of doctrine — Tenant shown to be in occupation from* 1848—*Absence of proof of prior occupation—Rent notes passed to landlord from* 1855 *to* 1901 *admitting annual tenancy—Presumption of permanent tenancy.*

The doctrine of *presumitur retro* might apply to a case falling under S. 83 of the Bombay Land Revenue Code where the only thing to be proved is that the the origin of the tenancy was lost in antiquity, that is, it cannot be proved to have commenced from a particular year or period. In such a case if the tenant proves that he was on the land, say in 1848, and if it is not shown that his occupation commenced in that year, a presumption could be made that his ancestors were on the land even before that date, though there is no presumption as to the actual date from which the occupation commenced. But the doctrine has no scope for application to a case falling under S. 5 of the Bombay Khoti Settlement Act; that section requires proof of occupation from or before a particular year and the burden lies on the tenant to prove that particular fact. The fact that the tenant was proved to be on the land in 1848, three years after the particular year fixed by S. 5, would not entitle him to the benefit of the presumption that his tenancy began from or before 1845—1846. Where the evidence establishes the tenant's possession since 1848, but there is no definite evidence that he was on the land before that year, and it is found that there were various

kabuliyats passed by the tenant's ancestors and himself from 1855 to 1901 admitting an annual tenancy, the tenant cannot be held to have established a permanent tenancy under S. 83 of the Bombay Land Revenue Act. Nor can the tenant claim the benefit of S. 5 of the Khoti Settlement Act, when his possession is not shown to have commenced on or before 1845—1846. (*Divatia, J.*) Sonu Kashiramshet *v.* Shankar Sakharam. **I.L.R. (1938) Bom. 524=177 I.C. 614=11 R.B. 106=40 Bom.L.R. 534=A.I.R. 1938 Bom. 381.**

——S. 83—*Applicability to khoti tenures—General and special enactments.*

Quaere.—Whether S. 83 of the Bombay Land Revenue Code would apply to a case falling under S. 5 of the Khoti Settlement Act, having regard to the fact that the latter is a special enactment while the former remains a general enactment. (*Divatia, J.*) Sonu Kashiramshet *v.* Shankar Sakharam. **I.L.R. (1938) Bom, 524 =177 I.C. 614=11 R.B. 106=40 Bom.L.R. 534 =A.I.R. 1938 Bom. 381.**

——S. 83—*Applicability — Watan lands—Permanent tenancy—Acquisition by adverse possession—Conditions of.*

S. 83 of the Land Revenue Code would ap in the case of watan lands if the tenancy is shown to have commenced before the watan lands were rendered inalienable by the operation of Regulation No. 16 of 1827. Tenants of watan lands whose tenancy has commenced subsequently cannot acquire title to a permanent tenancy of the lands by adverse possession as against the watan lands from whom they hold. When the tenancy has been ascertained with reasonable definiteness, S. 83 cannot in terms assist the tenant. The section has no application to a case where the commencement of the tenancy has been traced either to particular year or to a reasonably short and definite period of time on satisfactory evidence. (*Broomfield and Sen, JJ*) Krishna Bhima *v.* Lahmibai. **I.L.R. (1938) Bom 465=176 I.C. 398=11 R.B. 30=40 Bom.L.R. 439=A.I.R. 1938 Bom. 316.**

——S. 83—*Landlord's right to claim enhanced rent—Burden of proof.*

The right of the landlord to claim enhanced rent from his tenants is regulated by S. 83 of the Land Revenue Code, and the words "if he have the same either by virtue of agreement, usage or otherwise" in the saving clause of the section, cast the burden primarily on the landlord to establish the right which he claims. It is not for the tenants to establish that fixity of rent attaches to their tenure. (*Wassoodew, J.*) Suryaji Rao *v.* Shivakacharu. **186 I.C. 445=12 R B. 335=41 Bom.L.R. 951=A.I.R 1939 Bom. 421.**

——S. 83—*"Or otherwise"—Construction—If* ejusdem generis *with preceding words.*

The words "or otherwise" cannot be interpreted as *ejudem generis* with the words "agreement or usage" preceding them. The term "or otherwise" cannot be said to be controlled by its association with the preceding words "agreement or usage." (*Wassoodew, J.*) Suryaji Rao *v.* Shivakacharu. **186 I.C. 445=12 R.B. 335=41 Bom.L.R. 951=A.I R. 1939 Bom. 421.**

——S. 83—*Rent—Rate—Demand for enhanced rate—Propriety of—Just and reasonable rate—What is.*

If the landlord is not hampered by agreement or ancient usage to enhance the rent, and if in accordance with the prevailing rates of the locality, the landlord in other instances has been raising the rent, S. 83 of the Bombay Land Revenue Code would not exempt the tenant from yielding to the demand if it is just and reasonable having regard to the prevailing rates. The proper standard to apply under S. 83 in fixing a just and reasonable rate, would be the prevailing rates in the locality, particularly the rates which the landlord has levied for similar class of land let out for similar purposes. (*Wassoodew, J.*) Suryaji Rao *v.* Shivakacharu. **186 I.C. 445=12 R.B. 335=41 Bom.L.R. 951=A.I.R. 1939 Bom. 421.**

——**S. 83**—Title by possession from time immemorial—If alienation under S. 11, watan Act. *See* Bombay Hereditary Offices (Watan) Act, S. 11. **39 Bom.L.R. 920.**

——**S. 83**—*"Usage"—Meaning of—Evidence.*

The term "usage" in S. 83 might imply practice prevailing in a locality or business under uniform or common circumstances and conditions. It is generally qualified by antiquity, as a practice long continued or shown to have existed immemorially. It is therefore reasonable to expect that evidence of usage should be in relation to circumstances which are similar or common prevailing for a long time as opposed to current practice. (*Wassoydew, J.*) Suryaji Rao *v.* Shivakacharu. **186 I.C 445=12 R B. 335=41 Bom.L.R. 951=A.I.R. 1939 Bom. 421.**

——**S. 84**—*Notice under—Proper service of—What amounts to—Notice sent by registered post but refused by tenant—Sufficiency.*

All that S. 84 of the Bombay Land Revenue Code requires the landlord to do is to give to the tenant a notice in writing; if the landlord sends such a notice by registered post or through the village officers, but the tenant declines or refuses to accept the notice it must be held that the notice is properly served. (*Broomfield and Macklin, JJ.*) Babasaheb Appasaheb *v.* Laxmanappa Ramappa. **178 I.C 854=11 R.B. 198=40 Bom. L.R 1015=A.I.R. 1938 Bom.. 492.**

——**Ss. 85 and 86**—*Scope—Injunction against Government not to pay superior holder but to pay direct to purchaser of latter's rights—Competency.*

Under S. 85 of the Bombay Land Revenue Code, the superior holder is entitled to receive his dues through the village officers; and under S. 86 of the Act the superior holder only is entitled to assistance from Government. An injunction against Government not to pay to the superior holder but to pay direct to a person who claims to be entitled to payment by reason of his having become purchaser of the rights of the superior holder would be contrary to the spirit, if not to the express terms, of the Land Revenue Code. The relation between the Government and the superior holder is not affected by the sale of the superior holder's rights. The Government cannot therefore be ordered not to pay the superior holder and to pay it to the purchaser direct. But as long as Government is not prepared to pay it to the purchaser direct, the superior holder whose rights have been sold may be ordered to pay it to the purchaser who is entitled to the

income as purchaser, as soon as the superior holder receives it from the treasury. (*Broomfield and Macklin, JJ*) Dattatraya *v.* Sadashiv. **185 I.C. 839=12 R B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.**

——**Ss. 86 and 87**—*Co-sharers of inam village not registered as sharers in Village Form* 3—*Right to sue* khatedar *for share of land revenue directly—Proper remedy.*

It is only the registered managing inamdar who has the sole right to manage the village, *i.e.*, to recover revenue, etc. If it were not so, every co-sharer who is not registered in the Village Form No. 3, as such, might file a suit to recover his own share individually from different *khatedars* in the village. Co-sharers who are not recognised as managing inamdars and whose names are not registered in the Village Form No. 3, though they are entered as sharers in the *khatawni* cannot file a suit or seek assistance against the *khatedars* directly. Their remedy is to sue the managing inamdars for an account and to recover their share in the land revenue which may have been recovered or which may have been negligently omitted to be recovered by the managing inamdars. (*Lokur, J.*) Narhar Sonajee *v.* Trimbak Shridar. **12 R.B. 255=185 I.C. 608=41 Bom.L.R. 1174=A.I.R. 1940 Bom. 12.**

——**Ss. 102 and 106**—*Assessments fixed at survey settlement—Duration of—If cease to be operative on expiry of period of guarantee.*

The assessments fixed at a survey settlement do not cease to be operative at the expiry of the period of guarantee unless and until they are revised. (*Broomfield and Tyabji, JJ.*) Ahmedabad Ginning and Manufacturing Co. Ltd. *v.* Secretary of State. **169 I.C. 542=10 R.B. 39=39 Bom.L.R. 266=A.I.R. 1937 Bom. 226.**

——**Ss. 132 and 133**—*Construction and scope—Survey fee and penalty—Liability for—When arises—Public notice—If condition precedent—Burden of proof.*

Ss. 132 and 133 of the Bombay Land Revenue Code that survey fee is payable by the holder of a property in the city in which survey is introduced within six months from the date of the public notice given by the Collector, and if default is committed by such holder, that is to say the survey fees are not paid within six months from the date of the public notice, then the Collector is authorized to levy a penalty not exceeding one rupee for each sanad. The payment of the survey fees and the grant of a sanad seem *prima facie* to be concurrent conditions. Unless a public notice is given as provided by S. 132, the Collector would not be entitled to levy a penalty under S. 133. The burden to prove that the requirements of law have been complied with is clearly on the Government and it is for them to prove that every condition precedent to the levy of the survey-fee and penalty was fully complied with. (*Rangnekar and Wadia, JJ.*) Hariprasad Chotubai *v.* Secretary of State. **182 I.C. 987=12 R B. 54=41 Bom. L.R. 348=A.I.R. 1939 Bom. 234.**

——**S. 133**—*Sanad under—If document of title—Order granting sanad—If conclusive—Suit for possession against grantee of sanad—Limitation—Order granting sanad—If to be set aside—Limitation Act, Art.* 14.

A sanad granted under S. 133 of the Bombay Land Revenve Code is not strictly speaking in the nature of a document of title between litigating parties. It is a document affecting rights only between the crown and the person to whom it is granted. The object of an inquiry under the Land Revenue Code is to determine the right of Government to revenue, and for that purpose to survey the land and to determine who is the holder, and, therefore, liable to assessment. But an order made under the Land Revenue Code is not intended to operate, and does not operate, finally as a determination of title between subjects of Government. No doubt such an order is *prima facie* evidence of title, but it is not conclusive and may be overriden as other evidence may be overriden. It is not essential for a person claiming possession against another person to whom a sanad has been granted under S. 133 to obtain an order setting aside that sanad before he can obtain an order for recovery of possession from a Civil Court. Art. 14 of the Limitation Act does not govern such a suit and the order of the revenue authorities granting a sanad is not an act or order of a Government officer within the meaning of Art. 14, which has to be set aside before possession could be decreed. (*Beaumont, C. J. and Wadia, J.*) Narbheramji *v.* Vivekramji **I.L.R. (1939) Bom. 564=186 I C. 164=12 R.B. 299=41 Bom.L.R. 939=A.I.R. 1939 Bom. 425.**

——**S. 133 and Sch, H**—*Sanad—Form and contents of—Duty of Government to describe property fully by boundaries and dimensions.*

The sanad issued under S. 133 of the Bombay Land Revenue Code are valuable documents and evidence of title and must be in proper form. Having regard to the form of Sch. H of the Land Revenue Code, it is the duty of the Government to issue sanads describing not merely the plot or building in question, but also describing the property fully by its boundaries and its full dimensions. (*Rangnekar and Wadia, JJ.*) Hariprasad Chotubhai *v* Secretary of State. **182 I.C. 987=12 R B. 54=41 Bom.L.R. 348=A.I.R. 1939 Bom. 234.**

——**S. 137**—*Government claims—Priority over other debts—Nature of—If extends to arrears of past years or is confined to demands of current year, S.* 151.

The right of priority given to the claim of Government by S. 137 of the Bombay Land Revenue Code is very much more extensive than that given by the common law, since it creates on behalf of the Government a right to priority over all debts of every kind, whether secured or unsecured. But such right of priority is curtailed by S. 151 of the Code. Ss. 137 and 151 should be read together, and the priority is therefore confined to the demands of the current year and not for arrears of past years. S. 151 in terms restricts the common law prerogative of the Crown. The prerogatives of the Crown can be affected with the consent of the Crown, that is, by statute. (*Barlee and Wadia, JJ*) The Secretary of State *v.* Vedavyas Venkatesh Bhatta. **163 I.C. 357=9 R.B 18=38 Bom.L.R. 267=A.I.R. 1936 Bom. 213.**

——**Ss. 137, 187, 150 (2)**—*Liquor licence granted to firm forfeited and sold as result of its inability to pay instalments—Stocks of liquor in bonded warehouse belonging to firm—Government's right as against secured creditor.*

Where the liquor licence granted to a firm for sale of liquor in its premises, is forfeited and sold as a result of its inability to pay the instalments due and subsequent instalments, the stocks of liquor in the bonded warehouse belonging to the firm come within the scope of S. 150 (*c*), Bombay Land Revenue Code, and they are movables in respect of which the Government has no prior charge, and the claims of the Government do not have preference over secured creditors in whose favour the stocks of liquor have been mortgaged. (*Davis, J.C. and Tyabji, J.*) Secretary of State *v.* Peoples Bank of Northern India, Ltd **I L.R. (1939) Kar. 393=179 I.C. 863=11 R.S. 155=A.I.R. 1939 Sind 46.**

——**S. 151**—Scope and effect of—Prerogative of Crown—If affected—Priority of Crown debts—If confined to demands of current year. *See* Bombay Land Revenue Code, S. 137. **38 Bom.L. R. 267.**

——**S. 189**—*Applicability—Mutation proceedings.*

S. 189 would apply as much to an enquiry relating to the record of rights under Chap. 10-A as to a summary or formal enquiry within the provisions of S. 196. (*Davis, J.C. Weston, J.*) Assudomal Ramandas *v.* Jhamandas Hotchand. **A.I.R. 1940 Sind. 100.**

——**Ss. 213 and 214, Rules of 1905, R. 56**—*"Co-terminous"—Meaning.*

The word "co-terminous" in Part V of R, 56 of the Rules framed in 1905 under Ss. 213 and 214 of the Bombay Land Revenue Code applies only to the revision settlement in the course of which the appropriation takes place and not to subsequent periods of settlement (*Davis, J.C. and Rupchand A.J.C.*) Ramchand *v.* Secretary of State for India. **29 S.L.R. 382=163 I.C. 887=9 R.S. 17=A.I.R. 1936 Sind 108.**

——**S. 217**—*Applicability—Watan lands—Alienation contrary to S. 5, Watan Act—Permanent tenant under—If becomes occupant by introduction of survey settlement.*

S. 217 of the Land Revenue Code would not apply in the case of watan lands governed by S. 5 of the Bombay Watan Act. S. 217 cannot override the clear provisions of S. 5 of the Watan Act. An alienation by way of a permanent lease made by wantandar in contravention of S. 5 of the Bombay Watan Act is not binding on the successor of the alienating watandar. A tenant under such a lease granted by the watandar does not therefore become an "occupant" of the lands by reason of the introuction of survey settlement into the village under S. 217 of the Land Revenue Code. It would be contrary to the principle of S. 5 of the Watan Act (Bombay Hereditary Officers Act of 1874) to hold that the lessees acquires occupancy rights under S. 217 of the Land Revenue Code. (*Rangnekar and Wadia, JJ.*) Shripad Ramachandra *v.* Tuljaramrao. **177 I.C. 593=11 R B. 101=40 Bom.L.R. 461=A.I.R. 1938 Bom. 372.**

——**(as amended in 1913), S. 217**—*Scope—Retrospective operation.*

S. 217 of the Bombay Land Revenue Code, as amended in 1913, has retrospective effect. (*Rangnekar and Wadia, JJ.*) SHRIPAD RAMACHANDRA *v.* TULJARAM RAO. **177 I.C. 593=11 R.C. 101=40 Bom.L.R. 461=A.I.R. 1938 Bom. 372.**

BOMBAY LAND REVENUE RULES, R. 80 —"Used for any purpose unconnected with agriculture"—Erection of godown and use of same for storing agricultural produce—If justifies levy of altered assessment. *See* BOMBAY LAND REVENUE CODE, S. 65. **41 Bom.L.R. 1077.**

——**R. 91**—*"Assessed"—Meaning of.*

The expression "any holding which has been assessed" in R. 91 of the Land Revenue Rules implies "legally assessed". When the basis for altered assessment fails, the levy of altered assessment would be illegal. (*Wassoodew, J.*) RAI CHAND GULAB CHAND *v.* SECRETARY OF STATE. **185 I.C. 495=12 R.B. 242=41 Bom.L.R. 1077=A.I.R. 1939 Bom. 505.**

BOMBAY LOCAL BOARDS ACT (VI OF 1923), S. 4 (3)—*District Local Board—Power to levy octroi on goods imported in notified area.*

A District Local Board under the Bombay Local Boards Act has power to impose and levy octroi duty on goods imported in a notified area in its district. (*Broomfield and Macklin, JJ*) EMPEROR *v.* MOHIDIN. **180 I.C. 940=11 R.B. 318=40 Cr L.J. 522=41 Bom.L.R. 93=A.I.R. 1939 Bom. 97.**

——**S. 8 (b)**—*Scope—If controlled by S. 14 (3)—Right of person whose name appears in voters' list as finally published to stand as candidate—If can be challenged.*

S. 8 (*b*) of the Bombay Local Boards Act cannot be construed as meaning that if the name of any person appears in the voters' list, he was entitled to stand as a candidate or that the names appearing in the list are to be treated as conclusive. S. 8 (*b*) is to be read along with S. 14 (3). The effect of this provision is that nobody whose name does not appear on the list of voters is qualified to stand as a candidate but that does not mean that if a person's name appears on the voters' list and he is therefore entitled to stand as a candidate at the election, his candidature cannot be challenged on the ground that although his name appears on the voters list, he is not duly qualified as a voter. The list as finally published is not conclusive and does not bar the right of any person to challenge the names appearing therein. (*Divatia, J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **I.L.R. 1938 Bom. 515=177 I.C. 302=11 R.B. 77=40 Bom.L.R. 525=A.I.R. 1938 Bom. 377.**

——**Ss. 13 and 14 (2)**—*Construction and scope—Voters' list—Finality as regards the right to vote or to be elected.*

There is nothing in Ss. 13 and 14 of the Bombay Local Boards Act which provides that the voters' list is conclusive in the sense that no one has a right to challenge the names appearing in that list after it has been duly published before the election. S. 14 (2) is clearly negative and it says nothing about the name of a person who is on the list but who is not qualified to be a voter. The marginal note to the section to the effect that the lists are conclusive evidence of the right to be elected or to vote is clearly incorrect, because the section does not say so. (*Divatia, J*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **I.L.R. 1938 Bom. 515=177 I.C. 302=11 R.B. 77=40 Bom. L.R. 525=A.I R. 1938 Bom. 377.**

——**S. 14 (3)**—Scope and effect—If control, S. 8 (*b*). *See* BOM. LOCAL BOARDS ACT, S. 8 (*b*). **40 Bom. L.R. 525.**

——**S. 15 (2) (a) (ii) and (4) (c)**—*Construction and scope—If to be read together—"In his own right"—Meaning—Joint Hindu family—Right of member other than manager to vote at election—Family property entered in revenue records in member's name—If sufficient.*

The words "in his own right" in S. 15 (2) (*a*) (ii) of the Bombay Local Boards Act mean that he must own the land by himself, in other words he must be the exclusive owner of the land. Sub-S. 2 (*a*) (ii) must be read with sub-S. 4(*c*) of S. 15, and both of them read together mean that in the case of a joint Hindu family no other person than the manager has the right to vote except in a case where one of the coparceners is holding some separate or self-acquired property in his own right, and in such a case he is entitled to be a voter if he fulfils the other requisites of the section. The fact that some family property is entered in the name of a coparcener in the revenue records would not entitle him to have his name on the voters' list. (*Divatia, J.*) VINAYAK VASUDEO *v.* GOPAL CHIMNAJI. **I.L.R. 1938 Bom. 515=177 I C. 302=11 R.B. 77=40 Bom. L.R. 525=A I,R. 1938 Bom. 377.**

—— **S. 35 (1) and (2) (k)**—*Scope—Power to make regulations—Regulation providing for voting by ballot in case of election of President and Vice President—If* ultra vires—*Ordinary meeting and meeting for election of President or Vice-President—Distinction.*

Sub-Cl. (*k*) of S. 35 (2) of the Bombay Local Boards Act clearly and explicitly confers upon the members of a Board the right to have the names of persons who voted for or against a resolution disclosed. The power of a Board to make regulations under S. 35 (1) must also be subject to the provisions of Sub-Cl. (*k*) among others. A regulation framed by a Board, which provides for votes being taken by ballot in the case of election of President and Vice-President, is clearly in consistent with sub-Cl. (*k*) of S. 35 (2) and therefore *ultra vires*, as under the Act there can be no voting by ballot. The Act further makes no distinction between a meeting held by the Board for electing a President or Vice-President and any other meeting held to transact any other business. S. 35 would equally apply to both. (*Rangnekar, Ag. C.J. and Tyabji, J.*) SAMALBHAI *v.* JESANGBHAI. **I.L.R. (1937) Bom. 225=9.RB. 359=168 I.C. 20=38 Bom. L.R. 1331=A.I.R. 1937 Bom. 104.**

——**S. 100**—*Rules under—Rule 8—Scope—Goods on board ship brought to* Naka *but not landed as destined for another part—Demand of octroi duty—Refusal—Obstruction to seizure of goods—If offence—Conviction—Legality—Penal Code, S.* 183.

Accused was the Tandel or master of a country ship which arrived at the port of Jitapur, at the mouth of a creek in the Ratnagiri District, carrying goods consigned to various places in Jitapur and in Rajapur, the latter being a port about 18 miles further up the creek. The goods consigned to persons in Jitapur were landed and octroi duty was duly paid thereon as per rules framed under S. 100 of the Bombay Local Boards Act. There being no separate *Naka* in Rajapur, the *Nakedar* of Jitapur went on board the ship and demanded octroi in respect of goods in the ship destined to Rajapur, but the accused refused to pay. The *Nakedar* thereupon seized part of the cargo and proceeded to weigh it, in virtue of the powers under rule 8 of the rules, but the accused obstructed him and removed the same and sailed away to Rajapur. On these facts the accused was prosecuted under S. 183, Indian Penal Code, for the offence of resisting to the taking of property by the lawful authority of a public servant and convicted, the conviction being confirmed in appeal.

Held, in revision, (1) that the rules framed under S. 100 of the Local Boards Act could not confer on the *Nakedar* power to board the ship and seize cargo, since that was beyond the powers given by the Act itself, and consequently, R. 8 being inconsistent with the Act, could not be held to be validly framed; (2) that the rules did not make it clear that goods on board the ship destined to Rajapur, where there was no *Naka*, could be said to be brought to *Jitapur Naka*, so as to make rule 8 applicable to the case; (3) that it was not made out that the District Local Board had any jurisdiction or authority to levy octroi on goods on board the ship in the port but not landed; and (4) that as the prosecution had not produced full, clear and satisfactory proof of the existence of the necessary authority as required by S. 183, Indian Penal Code the conviction of the accused was unsustainable and must be set aside. (*Broomfield and Wassoodew, JJ.*) EMPEROR *v.* DEMA MAHADU AMBERKAR. **165 I.C. 637=9 R.B. 159=38 Bom.L.R. 790=38 Cr.L.J. 37=1936 Cr.C. 921=A.I.R. 1936 Bom. 376.**

——S. 136—*Applicability and scope—District Local Board—Administrative officer—Delivery of false travelling allowance bill to get higher rate of allowance—Prosecution under S. 420, Indian Penal Code—Absence of notice under S. 136—If bar to maintainability.*

An officer of a District Local Board who deliberately delivers a false bill of travelling expenses cannot be said to be acting or purporting to act in pursuance of the Bombay Local Boards Act within the meaning of S. 136 of the Act. Such a protection clause was never intended to protect a dishonest rascal from the consequences of his rascality. It is intended to protect people who from excess of zeal or negligence, or other cause, exceed their powers. Where the Administrative Officer of a District Local Board submits a false bill for travelling allowance in order to obtain a higher rate of allowance than he would be entitled to in fact, a prosecution against him for cheating under S. 420, Indian Penal Code, can be commenced without the notice required to be given under S. 136 of the Bombay Local Boards Act. There is nothing in that Act or in the rules which compels him to claim travelling allowance or to put in a bill therefor if he does not desire to do so. The delivery of the travelling allowance bill is not a duty imposed upon him by the Act.

And since the charge of cheating by the suppression of the true facts in order to make a false claim for a higher rate involves an act outside the accused's official duties, the absence of the notice required by S. 136 is no bar to a prosecution under S. 420, Indian Penal Code. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* R. K. NAIK. **I.L.R. (1940) Bom. 29=168 I.C. 133=41 Cr.L.J. 256=12 R.B. 316=41 Bom. L.R. 1227=A.I.R. 1940 Bom. 35.**

——**(as amended by Act XIII of 1935), S. 136** (2)—*Applicability—Test of—President and servant of Taluk Board charged with offences under S. 120-B read with S. 406 or S. 409, Penal Code and S. 406 or S. 409 read with S. 477-A, Penal Code—Notice as required by sub-S. (2) not given to accused—Prosecution launched more than three months after acts complained of—Effect—"act" in S. 136 (2)—If means "offence".*

Per *Davis, J.C.* and *Mehta, A.J.C.* (*Rupchand Bilaram, A.J.C.*, dissenting).—The general test applicable in cases of the kind, as for instance a case falling under S. 136, Bombay Local Boards Act is, whether the act complained of is an act done by the protected person in his public capacity in relation to the public or whether it is done in relation to a private individual. The protection applies only to the performance of duties towards the public. The words of sub-S. (2) of S. 136 of the Act, as applicable to prosecutions can be compared with the corresponding words in S. 197 (1), Cr. P. Code. In S. 197 (1) of the Code occur the words "while acting or purporting to act in discharge of his official duty". It is true that in S. 197 (1) occurs the word "offence" while in S. 136 (2) of the Act occurs the word "act", but the word "prosecution" as introduced into that sub-section by the amendment by necessary implication, gives to the word "act" in reference to a prosecution the meaning of "offence" and as an official acting or purporting to act in the discharge of his official duty must of necessity act or purport to act in pursuance of statutory duties conferred on him by law, there is in this respect no difference of substance between the relevant words of S 197 (1), Cr. P. Code and S. 136 (2) of the Act. If therefore for the words "acting or purporting to act in the discharge of his official duty" in S. 197 (1), the words "acting or purpurporting to act in pursuance of this Act" are substituted, the analogy between the two is clear. Official duty is something done in pursuance of some Act or Statutory authority. The words used in the Act are merely a variation of the words used in S. 197 of the Code considered necessary by the Legislature to apply the same principle of protection to the members or officers or servants of a Local Board acting or purporting to act under the particular statute which governs them. S. 136 (2) of the Act can apply only to acts done by the protected persons in discharge of their public duties towards the public. A President and a servant, who was sub-overseer of a certain Taluk Board, were charged with conspiring with a contractor to commit criminal breach of trust (S. 120-B read with S. 406 or S. 409, Penal Code) and with the commission of criminal breach of trust and falsification of accounts (S. 406 or S. 409 read with S. 477-A of the Code). No notice as required by sub-S. (2) of

S. 136 of the Act was served on the accused and the proceedings were commenced more than three months of the acts complained of:

Held, that it could not be said that the President was not acting or purporting to act in exercise of his statutory duties towards the public when in pursuance of the Act he got measurement books and got bills prepared by the sub-overseer or that the sub-overseer was not acting or purporting to act in pursuance of the Act when he recorded measurements, prepared bills, signed a certificate, and wrote a cheque. It being alleged that they committed the acts complained of in order to defraud the public, the acts complained of could not fall outside the scope of S. 136 (2) of the Act. S. 136 (2) of the Act as amended by Act XIII of 1935 was therefore applicable to the offences with which the accused were charged. (*Davis, J C., Rupchand Bilaram and Mehta, A.J. Cs.*) NURALHAQSHAH *v.* EMPEROR. **32 S L R. 567=169 I.C 274=9 R.S 257=38 Cr.L.J. 723=A.I R. 1937 Sind 129 (F.B.).**

———S. 136 (2)—*Public and private prosecutions—Distinction.*

Obiter.—There is no distinction between public and private prosecutions in S. 136 (2), Bombay Local Boards Act. (*Davis, J.C. Rupchand Bilaram and Mehta, A. J. Cs.*) NURALHAQSHAH *v.* EMPEROR. **32 S L.R. 567=169 I.C 274=9 R S. 257=38 Cr.L.J. 723=A.I.R. 1937 Sind 129 (F.B.).**

———(as amended by Act XIII of 1935), S. 139 (2)—*Applicability—Sub-overseer of Local Board preparing false bills and overcharging Board in course of his duty of taking measurements of work and preparation of bill—Prosecution for—Limitation.*

A part of the duties of a sub-overseer under a Local Board was the taking of measurements of repair and other work done and the preparation of bills in respect thereof. The overseer prepared false bills and overcharged the Board.

Held, that the acts which were alleged to constitute a criminal offence on his part were acts done by him, or, in any case purported to have been done by him, in pursuance of the Local Boards Act, and whether they were *bona fide* or otherwise, he was immune from prosecution after a lapse of three months from the date of the act complained of. ((*Davis, J.C. and Lobo, J.*) TARACHAND PRIBHDAS *v.* EMPEROR. **32 S.L.R. 622=175 I.C. 834=39 Cr.L.J. 668=11 R.S. 7=A.I. R. 1938 Sind 116.**

BOMBAY LOCAL BOARDS AMENDMENT ACT (XIII OF 1935)—*Scope—If retrospective.*

The general rule of construction is *nova constitutio futuris formam imponere debet, non praeteritis*. This rule does not apply to statutes relating to procedure and the law of Limitation being held to be a law of procedure, has retrospective effect unless the Legislature has made a distinct provision to the contrary. The amending Act lays down rules of limitation and they are *prima facie* rules of procedure. The amending Act has therefore a retrospective effect. (*Davis, J.C. Rupchand Bilaram and Mehta A.J. Cs.*) NURALHAQSHAH *v.* EMPEROR. **32 S.L.R. 567=169 I.C. 274=9 R.S. 257=38 Cr.L.J. 723=A.I.R. 1937 Sind 129 (F.B.).**

BOMBAY MARKETS AND FAIRS ACT (IV OF 1862), S. 1—*Scope—If conflicts wlth S. 139. Bombay District Municipal Act—Establishment of cattle market on private land within municipality without sanction of District Magistrate—Offence.*

It cannot be held that the provisions of S. 1 of the Bombay Markets and Fairs Act conflict with S. 139 of the Bombay District Municipal Act and therefore the provisions of the latter Act override those of the former so far as Municipal areas are concerned. If a person establishes a (cattle) market on his private land within Municipal limits without obtaining permission from the District Magistrate, he commits an offence under S. 1 of the Markets and Fairs Act and is liable to conviction under that section. (*Wadia and Sen, JJ.*) EMPEROR *v.* NAJMUDDIN IBRAHIMSAHEB. **42 Bom.L.R. 584.**

BOMBAY MOTOR VEHICLES ACT (XIV OF 1935), S. 3—Scope—Vehicle liable to tax under—If also liable under Bombay Municipal Boroughs Act. *See* BOMBAY MUNICIPAL BOROUGHS ACT, S. 73 (2). **41 Bom.L.R. 1249.**

BOMBAY MOTOR VEHICLES RULES (1905), R. 3 (1)—*Applicability—Letting for hire in public places—Private arrangement with selected customer not done in public place—Permit of District Superintendent of Police not obtained—If breach of rule.*

Rule 3 (1) of the Bombay Motor Vehicles Rules applies to letting in public places, and this implies that actual transaction of letting must be done in a public place where it is open for any member of the public to take the vehicle on hire. It cannot apply to a case where the letting is to selected customer and is not done in a public place and where the vehicle is not available to any member of the public. In the latter case it is no offence or breach of the rule if the permit of the District Superintendent of Police is not obtained. The accused arranged with the Principal of a school to bring the pupils of the school from their homes in several places to the schools and to take them back for a certain fixed amount in reach of each pupil per month and was paid at that rate every month. He did not obtain a license under R. 3 (1) of the Motor Vehicles Rules from the District Magistrate,

Held, that the accused had not committed a breach of R. 3 (1). (*Broomfield and Wadia, JJ.*) EMPEROR *v.* NANDKISHORE SINCH. **I.L.R. (1937) Bom. 719=171 I.C. 277=10 R.B. 186=38 Cr.L. J. 1049=39 Bom.L.R. 616=A.I.R. 1937 Bom. 399.**

———R. 21—If *ultra vires. See* MOTOR VEHICLES ACT, Ss. 11 AND 16. **40 Bom.L.R. 1099.**

BOMBAY MUNICIPAL BOROUGHS ACT (XVIII OF 1925), S. 33—*Applicabity—"Removal or reduction"—If confined to removal or reduction by way of punishment—Separation of two offices held jointly by one and the same individual and offer of one of them alone to him on lower salary—If covered by S.* 33.

The language of S. 33 of the Bombay Municipal Boroughs Act is wide enough to cover the case of removal or reduction of the Chief Officer, which is not by way of punishment but is the result of a separation of offices formerly held. Where the combined offices of Chief Officer and

Engineer are held by one and the same person, but the Municipality resolve to separate posts and offer one of them alone to the incumbent on a salary which is less than what he has been getting for the combined posts, the effect is that he is removed from the office held by him and relegated to an inferior position. That amounts to a removal or reduction within the meaning of S. 33 of the Act. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I.L.R. (1937) Bom. 867 =174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269 =A.I.R. 1938 Bom. 137.**

——**S. 33**—*Construction—Resolution passed by majority of Councillors present at meeting—Majority not amounting to two-thirds of the whole number of Councillors of Municipality—Effect—Action taken upon such resolution—If* ulra vires.

Where a resolution of removal from office or reduction is passed by a mojority of fifteen to eleven Councillors out of those present, the total number of Councillors of the Municipality then being thirty-one, there is no majority of two-thirds of the whole member of Councillors as required by S. 33 of the Bombay Municipal Boroughs Act, and the resolution therefore contravenes the statutory provisions of S. 33 of the Act. The rule contained in that section is conducive to stability in the higher grades of service and is essentially for public good. Any action taken by the Municipality in the contravention of or in violation of that rule must be regarded as *ultra vires.* Although every resolution passed by a majority of votes is an expression of the will of the public body passing it, when the law as laid down in S. 33 requires that the resolution upon the particular matter must contain the expression of the pleasure or will of a stated number of members of the Municipality, the failure to comply with such provisions would render the expression nugatory and of no consequence. Consequently any action taken on a resolution passed by a majority with less than two-thirds of the whole number of Councillors is wrong and irregular. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I L.R. (1937) Bom. 867=174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269=A.I.R. 1938 Bom. 137.**

——**S. 33**—*Dismissal of Chief-Officer in contravention of—Suit for damages—Measure of damages.*

The Chief Officer of a Municipality is only entitled to one month's notice before discharge like any other Municipal officer or servant, the only difference between his position and that of the other servants and officers being that he cannot be discharged except in the manner provided by S. 33. He cannot claim as of right to remain in service until he reaches a particular age fixed by the rules under the Act; nor can he claim a gratuity the grant of which is entirely at the discretion of the Municipality under the rules made under the Act. Since there is nothing to prevent him from being removed from office at any time by a valid resolution under S. 33, the only damages which he can claim and which can be awarded to him in a suit for damages for wrongful dismissal are wages for the period of notice, *i.e.,* one month's pay. (*Broomfield and Wassoodew, JJ.*) MUNICIPAL BOROUGH OF DHULIA *v.* RAMACHANDRA BAPUJI KALE. **I.L.R (1937) Bom. 867 =174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269 =A.I.R. 1938 Bom. 137.**

——**S. 33**—*Scope and effect—Removal of Chief Officer in contravention of procedure prescribed—Suit for damages in Civil Court—If barred—Servants of Municipalities and local bodies—Tenure of—Rule as to Crown servants—Applicability—Right of suit—If to be expressly given by statute—Jurisdiction of Civil Courts.*

The general rule applicable to the tenure of servants holding office under the Crown and their liability to dismissal without notice and without reason assigned cannot be applied in its entirety to other public servants not in the employment of the Crown, *e.g.*, servants holding offices under a Municipality under the Bombay Municipal Boroughs Act. Whatever justification there may be for bringing the servants of local bodies within the statutory definition of public servants, it cannot be concluded from that circumstance that local bodies enjoy all the prerogatives of the Crown governing its relations with its servants. Even the Crown's prerogative of dismissal can be curtailed by a statute, and if a statute regulates the procedure of dismissal of a public servant the Crown will be bound by it. The provision in S. 33 of the Bombay Municipal Boroughs Act is a limitation of the right to dismiss at pleasure; that section may reasonably be said to affect the tenure of the post of the Chief Officer and to give him a right to hold his office until removed from his Office in the manner prescribed by the section. Even if the general rule as to the tenure and dismissal of Crown servants be applicable to the case of the Chief Officer of a Municipality. S. 33 of the Act would take the case out of the general rule and would prevent the officer from being removed from office except in accordance with the provisions of that section. The removal of the Chief Officer in contravention of S. 33 is an infringement of his right to hold office unless or until he is lawfully removed; it gives him a cause of action for a suit for damages for wrongful dismissal in the Civil Court, as it cannnot be denied that the infringement of the right causes damage. Nor is it necessary that a right of suit should be expressly given by statute. The maxim ***ubi jus ibi remedium*** may fairly be applied.

Wassoodew, J.—Where the act complained of is professedly done under the sanction of the law and in the exercise of the power conferred by statute upon the Municipality, the fact that it is done by the Municipality under a supposed delegation of Sovereign authority but in actual disregard of the procedure in that respect laid down by law will not afford justification in a Civil Court. Even the Crown could not put forward such a plea in such a case. There is no warrant for holding that no action lies against Municipality even if it violates the rules of procedure laid down by the law of its incorporation. Where a right and an infringement thereof are alleged, and a cause of action is disclosed, the Civil Courts are bound to entertain the same in the absence of any legal bar. (***Broomfield and Wassoodew, JJ.***). MUNICIPAL BOROUGH OF

DHULIA v. RAMACHANDRA BAPUJI KALE. **I.L.R. (1937) Bom. 867=174 I.C. 643=10 R.B. 477=39 Bom.L.R. 1269=A.I.R. 1938 Bom. 137.**

———**Ss. 48 and 49**—Scope—If exceptions to S. 70, Contract Act—Act done in contravention of Ss. 48 and 49—Right to compensation—"Lawful Act"—Liability to make compensation—If excluded by Ss. 48 and 49. *See* CONTRACT ACT, S. 70. **39 Bom.L.R. 835.**

———**S. 68 (1) (d)**—*Scope—Duty of Municipality—Cutting off of water supply at night—Destruction of house by fire owing to delay in getting water to extinguish fire—Liability to damages—Tort—Nonfeasance—If actionable.*

Appellant had a shop within the Municipality of Ahmedabad. The Municipality had, under the advice of a Government expert and owing to shortage of water, passed an order to prevent waste of water, to the effect that the water supply should be cut off from 10 P.M. in the night until 5 A.M. in the morning. One night the house adjoining the appellant's shop caught fire and the fire spread to the shop and destroyed it. It was found that the spreading of the fire was due to the fact that water could not be obtained from the mains for about half an hour after the arrival of the fire engines. The appellant sued the Municipality for damages on the ground that the latter were guilty of a breach of the duty imposed by S. 68 (1) (*d*) of the Municipal Boroughs Act to make reasonable and adequate provision for extinguishing fires and protecting life and property, and that the same amounted to misfeasance.

Held, that though the Municipality had negligently failed in its duty to make an adequate and reasonable provision for extinguishing fire, its action in cutting off the water supply could not be regarded as a misfeasance of a kind which gave the appellant a right of action for damages; that it was only a case of non-feasance and therefore no action lay. (*Broomfield and Sen, JJ.*) MOHANLAL BAPA LAL v. BOROUGH MUNICIPALITY OF AHMEDABAD. **I.L.R. (1938) Bom. 696=177 I.C. 160=11 R.B. 66=40 Bom.L.R. 552=A.I.R. 1938 Bom. 370.**

———**S. 73 (ii)**—*Construction—"Kept for use within the said borough"—Meaning of—Vehicle kept and used for main purpose in one municipality but making occasional visit to another municipality for minor object—Right of latter municipality to tax vehicle.*

S. 73 of the Bombay Municipal Boroughs Act is a taxing section and has to be construed strictly in favour of the tax payer. The words "kept for use" in S. 73 (ii) cannot be construed as involving a liability to tax in case of every vehicle which is kept with the intention of being used even occasionally within the borough imposing the tax, what has to be considered is the main real or pressing object in keeping the vehicle. The words "kept for use" really mean "maintained with the main object of being used." Where a vehicle makes a visit to a Municipality occasionally for a very minor object their main and major use being outside that municipality, the vehicle is not liable to be taxed by that Municipality. In such a case it cannot be said that the vehicle is kept for use so as to enable that Municipality to tax it. (*Barlee and Macklin, JJ.*) BANDARA MUNICIPALITY v. BURMA SHELL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. **I.L.R. (1938) Bom. 111=174 I.C. 985=10 R.B. 514=40 Bom. L.R. 111=A.I.R. 1938 Bom. 214.**

———**S. 73 (x)**—*Construction—Water supplied by the municipality"—Meaning of—Water rate—Levy of—Conditions—Actual house connection—If necessary.*

The true meaning of the words "water supplied by the municipality" in S 73 (x) of the Bombay Municipal Boroughs Act is water supplied for general public purposes by the Municipality. The words cannot be construed as meaning supplied to, that is connected up with, particular premises, under S. 73 (x), the Municipality can charge a water rate if they supply water to the borough. The mere fact that water supply system has not yet been extended to a particular district in which a particular person's premises are situate, so as to enable these premises to be connected, does not show that the Municipality has not supplied water within the meaning of the section. (*Beaumont, C.J, and Sen, J.*) BRAHMIN MITRA MANDAL CO-OPERATIVE HOUSING SOCIETY LTD. v. AHMEDABAD MUNICIPALITY. **42 Bom.L.R. 587=A.I.R. 1940 Bom. 269.**

———**S. 73 (2)**—*Construction—"Kept for use"—Meaning of—Same vehicle—If liable to taxation under two Acts—Bombay Motor Vehicles Act, S. 3.*

The words "kept for use within the borough," in S. 73 (2) of the Bombay Municipal Boroughs Act mean "kept for normal use within the borough" and there is no doubt that where a vehicle is kept for normal use outside the borough, an occasional user within the borough can be rejected on the principle of *de minimis non curat lex*. A vehicle which is both used in the Presidency of Bombay and is also used within the borough may be the subject of taxation by two taxing bodies, *i.e.*, both under the Municipal Boroughs Act and under the Motor Vehicles Act of 1935. There is no principle to prevent such double taxation. (*Beaumont, C. J.*) CHUNILAL JETHALAL v. AHMEDABAD BOROUGH MUNICIPALITY. **186 I.C. 518=12 R.B. 345=41 Bom.L.R. 1249=A.I.R. 1940 Bom. 41.**

———**Ss. 80 and 81**—*Individual notice under S. 81—Presumption that public notice under S. 80 was given and other formalities followed—If arises.*

If individual notice is proved to have been given under S. 81, the presumption as to official or legal acts which may be raised under S. 114, Evidence Act, should be raised, and it can be presumed that public notice under S. 80 was properly given of the assessment list, and that all formalities required for the proper assessment of the tax were followed by the municipality. (*Davis, J.C. and Lobo, J.*) JAMNADAS v. EMPEROR. **187 I.C. 127=12 R.S. 223=41 Cr.L.J. 401 (2)=A.I.R. 1940 Sind 42.**

———**S. 90**—*License fee under—If rent—Suit for—Limitation—Limitation Act Arts. 110 and 120.*

The license to use Municipal land for temporary purposes under S. 30 of the Bombay Municipal Boroughs Act is not a demise or lease of the premises and the fee charged by the Municipality for issuing such a license is not "rent" within the meaning of Art. 110 of the Limitation Act. It is only a tax as defined by the Municipal Boroughs Act. Hence a suit for recovery of such license fee or tax is governed for purposes of limitation not by Art. 110 but by Art. 120 of the Limitation Act. (*Rupchand and Havelivala, A.J.Cs.*) Masand Motiram *v.* Shikarpur Municipality. **30 S.L.R. 146=165 I.C. 369=9 R.S. 100=A I.R 1936 Sind 184.**

——S. 105—*Limitation—Distraint under—Conditions for taking out—Claim barred by time—Recoverability by distraint.*

Once a bill is presented "with the least possible delay' as required by S. 104 (1) of the Bombay Municipal Boroughs Act, the right to issue a notice of demand and then to recover the amount of the bill by distress warrant under S. 105 accrues to the Municipality, and that right is not lost by lapse of time. S. 105 does not prescribe any period of limitation. The powers of the Municipality acting under Ss. 104 and 105 are not governed by the Limitation Act, and the fact that the remedy of the Municipality to recover the amount by filing a suit in a Civil Court is time-barred cannot prevent it from exercising the special powers conferred upon it by the Act. (*Lokur, J.*) Surat Borough Municipality *v.* Sarifa Karunnissa. **I.L.R. (1939) Bom. 685=185 I.C 366=12 R.B 233=41 Bom.L.R. 1002=A.I.R. 1939 Bom. 494.**

——**S. 110 (2) (b) (i)**—*Applicability and construction—Water tax imposed in the form of rate on buildings or lands—If a rate on buildings or lands.*

The expression "a rate on buildings or lands" in S. 110 (2) (*b*) (*i*) of the Bombay Municipal Boroughs Act includes a tax in the form of a rate on buildings or lands; and the clause applies not merely to a rate on buildings or lands, but also to a water-tax imposed in the form of a rate assessed on buildings or lands. (*Beaumont, C.J.*) Borough Municipality of Ahmedabad *v.* Ahmedabad Manufacturing and Calico Printing Co., Ltd. **I.L.R. (1939) Bom. 701=186 I.C. 456=12 R B. 341=41 Bom L.R. 1015=A.I.R. 1939 Bom. 478.**

——**Ss. 110 and 111**—*Scope—Jurisdiction of Civil Court—Decision of Magistrate in appeal—Suit in Civil Court—Maintainability in the absence of appeal or revision to superior Court.*

The words of S 111 of the Bombay Municipal Boroughs Act that the decision passed on appeal by the Magistrate is, at the instance of either party, subject to revision etc., are not mandatory in the sense that it is incumbent on either party to adopt the remedy provided in the section, and there is nothing to prevent an assessee to municipal tax from filing a suit in the Civil Court even though he may not have followed in its entirety the procedure for appealing to the Magistrate laid down in S. 110 of the Act quite apart from the Municipal Boroughs Act, the Civil Court has jurisdiction to entertain a suit with regard to any liability to municipal taxation. Such a suit is an independent one and need not be filed after exhausting the other remedies provided in S. 110 and 111 of the Bombay Municipal Boroughs Act. (*Divatia, J.*) Bhopshetti *v.* B. V. Bhat. **188 I. C. 531=42 Bom.L R. 223=A.I.R. 1940 Bom. 188.**

——S. 111—Order of Sessions Judge under—Revision to High Court—Competency. *See* C. P. Code, S.115. **41 Bom.L.R. 937.**

——**S. 114 (2)**—*"Purchase'—Meaning—If includes compulsory acquisition.*

The word "purchase" in S. 114 of the Bombay Municipal Boroughs Act includes compulsory acquisition, if necessary, and not merely acquisition by private negotiations. (*Broomfield and Wassoodew, JJ.*) Parshottam *v.* Secretary of State. **174 I C. 67=10 R.B. 420=39 Bom.L.R. 1257=A.I R. 1938 Bom. 148.**

——**Ss. 123 and 137**—*Construction and relative scope—Notice of proposed construction—No steps taken by Chief Officer within one month—Right of owner to proceed with construction—Drains constructed for house—Right to demand demolition on the ground of want of sanction or notice.*

Where a notice specifying the building sought to be constructed is given, and the Chief Officer of the Municipality has not taken steps within a month in relation thereto, the building owner can proceed with his proposed construction; that is on the basis that the consent of the Chief Officer must in such circumstances be implied. There is no warrant for holding that S. 123 of the Bombay Municipal Boroughs Act is not concerned with the question of drainage. The section in terms does deal with the drains and sewers of the proposed new building. Where a proper notice has been given under S. 123, and the proposed building including the drains has been proceeded with properly under S. 123 (5), the Municipality cannot require the drains to be removed under S. 137. S. 137 is primarily designed to give the Municipality a power exercisable at any time merely by notice in writing to require the demolition of a drain constructed without proper consent or contrary to regulations, whereas the penalty under S. 123 for breach of that section is primarily a fine, and demolition can only be ordered after conviction has been obtained under sub-S. (7) (*b*). (*Beaumont, C.J. and Divatia, J.*) Emperor *v.* Dirajlal Dalsukhram. **174 I.C. 466=39 Cr.L.J 413=10 R.B. 451=40 Bom.L.R 67=A.I.R. 1938 Bom. 186.**

——**S. 123 (1)**—*Notice under—Form of—Endorsement on plan showing proposed drain—If sufficient notice—Separate letter asking for leave—If necessary.*

The sending of a plan to the Municipality showing a drain and a septic tank, with an endorsement upon it saying that it is a plan as to the proposed drainage and septic tank amounts to the giving of notice to the Chief officer of the Municipality within the meaning of S. 123 (1) of the Bombay Municipal Boroughs Act, as to the work proposed to be constructed, without any separate covering letter asking for leave. There is nothing in S. 123 which requires that the notice should be in a document separate from the plan itself. (*Beaumont, C. J. and Divatia, J.*) Emperor *v.* Dirajlal Dalsukhram. **174 I C. 466=39 Cr. L.J. 413=10 R.B. 451=40 Bom.L.R. 67=A.I.R. 1938 Bom. 186.**

——**S. 129**—*Construction and scope—Notice under—Requisites of validity—Powers of chief officer—Notice calling for plan for laying out drain, etc.—Legality.*

S. 129 of the Bombay Municipal Boroughs Act gives power to the chief officer to require something to be done, and it is for him to say what he requires to be done and not for the owner of the house or buildings to submit proposals. A notice calling upon the owners of houses or buildings to submit a plan for laying out a six inches drain in their property and to get it passed by the engineering department and after laying out a six inches drainage line according to the passed plan and getting a connection only through the Municipality to join it therewith within thirty days of the receipt of the notice is not a proper or valid notice under S. 129, and a failure to comply with such a notice is not a breach of S. 129 which would render the owners liable to conviction. The chief officer is bound in his notice to specify the size, materials, level and fall which he requires in respect of the drain which he is ordering. A notice which does not comply with these requirements is not a good notice under S. 129. The house-holder is entitled to know in the first instance what he is required to do. (*Beaumont, C.J. and Wassoodew, J.*) Emperor *v.* Trikamlal Keshavlal. **175 I C. 765=11 R B 5=39 Cr.L. J. 667=40 Bom.L.R. 314=A.I.R 1938 Bom.303**

——**Ss. 167 and 193**—*Low lying land comprising several acres—Order by chief officer of Municipality calling upon owner to fill up to level of surrounding ground within* 15 *days—Validity—Failure to obey—Liability to conviction under S.* 193—*"Fill up, cover over or drain off"—Construction.*

S. 167 of the Bombay Municipal Boroughs Act gives power to the Chief Officer of a Municipality to require the owner of the property referred to in the section "to fill up, cover over or drain off" the property. These words refer back without distinction to clauses (*a*), (*b*) and (*c*) of the section, though obviously all the words are not equally appropriate to all that precedes. It is by no means clear that the words "fill up" were intended to apply to land on which water accumulates and it is extremely doubtful whether they would apply or could have intended to apply to filling up in the sense of raising the level of a large area of land which is naturally low lying land. The power to order levelling of this kind is on the face of it so harsh and oppressive that one cannot suppose that the Legislature intended to confer this power. The words of the section cannot be held to confer on the chief officer the power to make an order requiring the owner of low lying land (comprising several acres) to fill it up with dry earth to the level of the surrounding ground which was two to three feet higher in level. Where the chief officer ordered the owner to raise the level of low lying land by about two to three feet within 15 days, and it was found that the work would cost about four to five thousand rupees which was beyond his resources and out of all proportion to the value of the land and that the work would take at least two or two and a half months,

Held, that the order was beyond the powers conferred by S. 167 of the Act, even if the officer had the power, the order must be regarded as an arbitrary and oppressive one and the time being unreasonably short, the accused could not be convicted under S. 193 of the Act for failure to obey the order. (*Broomfield and Sen, JJ.*) Emperor *v.* Don Fillius D'Silva. **168 I.C 199=39 Bom. L.R. 77=38 Cr.L.J. 535=9 R.B. 363=A.I.R. 1937 Bom. 165.**

——S. 167—*Powers of chief officer of Municipality to act under—Nuisance—If should be proved to exist in fact—Opinion of Chief Officer—Proof of—Necessity for—Mere production of notice—If sufficient proof.*

Under S. 167 of the Bombay Municipal Boroughs Act, what is required is that the chief officer of a Municipality be satisfied of the existence of a nuisance, because he is given power to issue the notice there provided for if in his opinion a nuisance exists. It is not necessary that it should be proved by evidence that a nuisance exists in fact. But it is necessary that the opinion of the chief officer should be properly proved. The mere production of a notice signed by him is not sufficient proof of his opinion. (*Broomfield and Sen, JJ.*) Emperor *v.* Don Fillius D'Silva. **168 I.C. 199=38 Cr.L.J 535=9 R.B. 363=39 Bom.L.R. 77= A.I R. 1937 Bom. 165.**

——S. 167 (c)—*Construction—"Or to take such order with the same, etc"—Meaning—If empowers Chief Officer of Municipality to require filling up of low lying land to a height of two to three feet.*

The words "or to take such order with the same for removing or abating the nuisance as the Chief Officer shall prescribe" must be considered with their context. It is a case of *noscitur a sociis*, The words in question cannot be construed as empowering the Chief Officer of a Municipality to make an order requiring the owner of low lying land comprising several acres to fill it up with dry earth to the level of the surrounding ground, to a height of two to three feet. (*Broomfield and Sen, JJ*) Emperor *v.* Don Fillius D'Silva. **168 I.C. 199=38 Cr.L.J. 538=9 R.B. 363=39 Bom.L.R. 77=A.I.R. 1937 Bom. 165.**

——S. 193—Applicability—Order under S. 167 beyond powers conferred by section—Time given unreasonably short—Non-compliance—Offence—Liability to conviction. *See* Bombay Municipal Boroughs Act. Ss. 167 and 193. **39 Bom.L.R. 77.**

——S. 198—*Scope—Proceedings under—Compensation—Additional* 15 *per cent. for compulsory acquisition—If can be awarded—Land Acquisition Act, Ss.* 23 *to* 25—*Applicability.*

Ss. 23, 24 and 25 of the Land Acquisition Act constitute a Code laying down the principles on which the District Court is to act in arriving at the compensation to be paid for the compulsory acquisition and it is impossible to leave out of that Code, S. 23 (2) which provides for an additional 15 per cent. These sections have to be treated as applicable to proceedings in the District Court under S. 198 of the Bombay Municipal Boroughs Act. The District Court in fixing compensation under S. 198 of the latter Act is therefore competent to allow the 15 per cent. for compulsory purchase in addition to the compensation awarded under the section. (*Beaumont. C.J.*) The Borough Municipality of Ahmedabad *v.* Jayendra Vajubhai Divatia. **I.L.R. (1937) Bom. 632=171 I.C 692=10 R.B. 222=39 Bom L.R. 329=A.I.R. 1937 Bom. 432.**

——S. 203—*Scope—If affects rights given by Ss.* 104 *and* 105.

S. 203 of the Bombay Municipal Boroughs Act only provides an alternative procedure for the recovery of taxes, and does not deprive the Municipality of its right to proceed under Ss. 104 and 105 when that is available. The fact that the remedy under S. 203 is barred by time does not lead to the conclusion that the remedy by way of distress under Ss. 104and 105 is also lost. (*Lokur, J.*) Surat Borough Municipality *v.* Sarifa Karunnissa. **I.L R. (1939) Bom. 685=185 I.C. 366=12 R.B. 233=41 Bom.L.R. 1002=A.I.R. 1939 Bom. 494.**

——**S. 206**—*Applicability and scope—'Purporting to have been done in pursuance of the Act' meaning—Acts done* mala fide *if covered—Prosecution by municipality under Act—Acquittal—Suit for malicious prosecution—Limitation applicable—Limitation Act, Arts. 2 and 23—Application of.*

S. 206 of the Bombay Municipal Boroughs Act is not confined to acts of the Municipality or its officers which are done *bona fide*. The section applies also to acts done *mala fide*. Though the general tendency of the Court is to construe provisions protecting persons from the consequences of acts done under a particular statute so as to limit those provisions to acts of a *bona fide* character, and not to extend them to acts done *mala fide*, it cannot be held that if the legislature expresses itself in sufficiently clear language, it cannot afford protection to acts done *mala fide*. The effect of the section is to protect the Municipality or its officers in respect of any thing done or purporting to have been done in pursuance of the Act. The words "purporting to have been done" must bear their natural meaning. If a prosecution is launched for an alleged infringement of some provisions in the Act, then the prosecution purports to be in pursuance of the Act, whether the action is a *bona fide* one or not. An action against the municipality for malicious prosecution falls under S. 206 of the Act, and unless instituted within 6 months from the date when the plaintiff was acquitted in the prosecution. Neither Art. 2 nor Art. 23 of the Limitation Act applies to such a suit; because S. 206 of the Municipal Boroughs Act is a specific section which covers the case on the point of limitation. (*Beaumont. C.J. and Wadia, J.*) Parveteppa *v.* The Hubli Municipality. **172 I.C. 430=10 R. B 276=39 Bom.L R. 881=A.I.R. 1937 Bom. 491.**

——**S. 206**—*Applicability—Suit for injunction against Municipality—Notice—Necessity.*

A suit for an injuction against a Borough Municipality is a suit to which S. 206 of the Bombay Municipal Boroughs Act applies, and notice of suit should therefore be given to the Municipality before it is brought. (*Wadia, J.*) Municipal Borough of Dhulia *v.* Mahomed Isak Abdul Karim. **160 I.C 736=8 R.B. 278=37 Bom.L R. 1027=A.I R. 1936 Bom. 43.**

——**S. 206** — *Limitation — Starting point — Wrongful dismissal of Municipal servant—Suit for damages—Period of six months—When commences to run—Date of resolution of dismissal or date of actual handing over of charge.*

A suit by a dismissed servant of a Municipality for damages for wrongful dismissal is not barred by limitation because it is brought after six months of the municipal resolution finally removing the servant from office or after six months of the intimation given to him that he would have to hand over charge. Until the plaintiff is actually forced to vacate his office by the appointment of his successor, he is entitled to say that he is not actually damnified, and the cause of action for the suit does not arise until he actually hands over charge. A suit brought within six months of the date of handing over charge is in time under S. 226 of the Bombay Municipal Boroughs Act. (*Broomfield and Wassoodew, JJ.*) Municipal Borough of Dhulia *v.* Ramachandra Bapuji Kale. **I.L.R. (1937) Bom. 867=174 I.C. 643=10 R B 477=39 Bom.L.R. 1269=A.I. R. 1938 Bom. 137.**

BOMBAY NATIVE SHARE AND STOCK BROKERS' ASSOCIATION RULES, Rr. 16 and 17—*Applicability—Member of association dying leaving no son—Will naming beneficiary—Right of widow to sale proceeds of membership card—Liability to account to beneficiary—Deed of Association, Cl. 12—Card, if property of member.*

Under Cl. 12 of the Deed Constituting the Bombay Native Share and Stock Brokers' Association a membership card held by a member of the Association gives a merely personal right to the holder and does not constitute in the ordinary sense property. Under the rules of the Association the widow of a member who dies leaving no son is entitled in her own right to the proceeds of the sale of the card held by her deceased husband. Such sale proceeds do not form part of the corpus of the estate of the deceased member. The fact that the deceased member has left a will disposing of his property makes no difference; the widow cannot under the rules be made accountable for the proceeds to the beneficiaries under the will of her husband. Where a case falls under R. 15, R 17 can have no application; if the sale has already taken place under Rr. 15 & 17 will not apply. (*Beaumont, C.J. and Blackwell, J.*) Tribhovandas Motilal *v.* Bhikhubhai Ravchand. **172 I.C 233=10 R.B 258=39 Bom L.R 666=A.I.R. 1937 Bom. 477.**

——**R. 297**— *Brokers' havala transactions — Making up price—Directors' power to alter—When to be exercised—Power to alter making up price in respect of one broker's transactions only.*

R. 297 of the Bombay Native Share and Stock Brokers' Association enables the Board of Directors of the Association under exceptional circumstances to alter the making-up price which has been fixed in respect of havala transactions carried through by the members on the exchange. But the alteration must be made before the pay out day. But there is nothing in the rules to justify the directors in altering the making-up price in respect of one broker's transactions only. The making-up price is settled for the whole market and if it is to be altered, it must be altered for the whole market. (*Beaumont, C.J. and Sen, J.*) Bhagwandas Purshottamdas *v.* Chunnilal Dahyabhai. **42 Bom.L R 518.**

BOMBAY PLEADERS ACT (XVII OF 1920), S. 20—*"First hearing"—Meaning of—If date fixed in notice under O. 41, R. 12. C. P. Code—Bombay High Court Rules (Appellate Side), Appendix E, R. 97—Engagement of two pleaders before date on which there is hearing—Right to fees of two pleaders.*

The term "first hearing" in S. 20 of the Bombay Pleaders Act, as also in R. 97, Appendix E of the Bombay High Court Rules (Appellate Side) must be taken to mean the day on which there is for the first time a hearing in Court, and not the date fixed in the notice issued under O. 41, R. 12, C. P. Code, and a party who engages more than one pleader in an appeal before that date is consequently entitled to fees of two pleaders. (*Barlee and Macklin, JJ.*) RAMCHANDRA *v.* SERVANTS OF INDIA SOCIETY. **60 Bom. 696=164 I C 566=9 R B 80=38 Bom.L.R. 518=A.I.R. 1936 Bom. 272.**

——S 20 (c)—*"On the merits" — Meaning—Appeal decided on preliminary point—If decided on merits.*

"In any appeal....decided on the merits in S. 20 of the Act, cannot be interpreted as meaning a decision on the merits in the High Court, but a decision in the High Court even on a preliminary point, from a decree on the merits in the lower Court. (*Barlee and Macklin, JJ.*) RAMCHANDRA *v.* SERVANTS OF INDIA SOCIETY **60 Bom 696=164 I.C. 566=9 R.B 80=38 Bom.L.R 518 =A.I.R 1936 Bom. 272.**

BOMBAY PREVENTION OF ADULTERATION ACT (V OF 1925), Ss. 3 (a), 4 (4) (a), 13—*Plea of warranty—Duty of accused—Right to adjournment.*

In a trial for an offence under the Bombay Prevention of Adulteration Act, if the accused rely on the defence of warranty, they must prove it and must have the witnesses ready on the date of hearing. They are not entitled to an adjournment as of right for the purpose of proving warranty. Where however neither the summons served on the accused nor the evidence for the prosecution makes it clear what the case is that the accused have to meet, the accused may be pardoned if they do not state clearly the defence of warranty before the case for the prosecution is closed. (*Davis, J.C and Lobo, J.*) CHOITHRAM *v.* EMPEROR. **32 S.L.R 684=174 I.C. 685=39 Cr.L.J 474=10 R.S 259=A.I.R. 1938 Sind 70.**

——S. 4—*Applicability — Sale of articles of food containing ghee—Offence.*

It cannot be said that S. 4 applies only to sale of ghee simply as such and does not apply to the sale of articles of goods of which it is a necessary ingredient. The words of the section are wide enough to include articles of food which contain ghee mixed with other substance. (*Davis, J.C. and Tyabji, J.*) NEBHANDAS HOLLARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 91=185 I C 832=41 Cr.L.J. 246=12 R S. 192=A.I.R. 1939 Sind 337.**

——S. 4 (1)—*Conviction—Validity.*

S. 4 (1) contemplates three distinct offences, under Cls. (*a*), (*b*) and (*c*) respectively and a conviction under S. 4 (1) generally is bad in law. (*Davis, J.C. and Lobo, J.*) CHOITHRAM *v.* EMPEROR. **32 S.L R. 684=174 I.C. 685=39 Cr.L.J. 474=10 R S. 259=A I.R. 1938 Sind 70.**

——S 4 (1) (a)—*Applicability—Sale to public officer—Offence.*

An offence under S. 4 (1) (*a*) is committed in respect of adulterated food even though it is purchased by a public officer as such public officer. (*Davis, J.C. and Lobo, J.*) GOBINDRAM JAMIATRAI *v.* KARACHI MUNICIPAL CORPORATION. **I.L.R. (1939) Kar. 191=178 I.C. 119=11 R.S. 80=40 Cr.L.J. 7=A.I.R. 1938 Sind 218.**

——S. 4 (1) (a)—*Liability of sleeping partner.*

A proprietor of a shop is liable for the sale of adulterated stuff sold in his shop, although such proprietor is only a sleeping partner. (*Davis, J.C. and Lobo, J.*) GOBINDRAM JAMIATRAI *v.* KARACHI MUNICIPAL CORPORATION. **I.L.R. (1939) Kar. 191=178 I.C. 119=11 R.S. 80=40 Cr.L.J. 7=A.I R. 1938 Sind 218.**

——S. 4 (1) (a)—*Selling as "vinegar" synthetic vinegar produced not by fermentation but by diluting acetic acid and with water—Offence.*

The question whether the particular article sold was not of the nature, substance or quality demanded so as to contravene the provisions of S. 4 (1) (*a*) of the Act, is a question of fact to be determined on the evidence. In a case the prosecution examined an analyser who said that "vinegar" was the product of fermentation or brewing and that the substance sold by the accused was "artificial" or synthetic vinegar produced not by fermentation or brewing but merely by diluting acetic acid with water. The defence produced no evidence whatever:

Held, that the accused was guilty under S. 4 (1) (*a*). (*Lobo, J.C. and O'Sullivan, J.*) PARSRAM TEKCHAND *v.* EMPEROR. **I.L.R. (1940) Kar. 282 =A.I.R. 1940 Sind 127.**

——S. 4 (1) (b)—*Burden of proof—Admission of accused—Effect of.*

It is true that the burden of proof that an article of food is adulterated lies upon the prosecution, but that burden may in effect be assisted or even completely discharged by the admission of the accused himself. (*Davis, J.C. and Tyabji, J.*) NEBHENDAS HOLLARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 91=185 I.C. 832=41 Cr.L.J. 246=12 R. S. 192=A.I.R. 1939 Sind 337.**

——S. 4 (1) (b)—*Scope—Adulterated ghee taken from sweetmeat shop out of frying-pan—Presumption.*

Where ghee alleged to be adulterated was taken from a shop where sweetmeats and pakoras were offered for sale and indeed from a frying-pan in which other sweetmeats and pakoras were being made a presumption can be raised that the sweetmeats and pakoras in accused's shop had been manufactured for sale within the meaning of S. 4 (1) (*b*) of the Act and that he was manufacturing and offering for sale sweetmeats and pakoras as containing pure ghee which contained impure ghee. (*Davis J.C. and Tyabji, J.*) NEBHENDAS HOLLARAM *v.* EMPEROR. **I.L.R. (1940) Kar. 91= 185 I C. 832=41 Cr.L.J. 246=12 R.S. 192= A.I.R 1939 Sind 337.**

——S 4 (4) (b)—*Commission to warrantor—Powers of Court.*

The words in the 'exception' contained in S. 4 (4) (*b*) are wide enough to cover the power of a Magistrate to ask for the issue of a commission under S. 506, Cr. P. Code, in case where he thinks that it is only just and proper that that power should be exercised. The cases in which the Court would grant a request for the issue of a commission to a warrantor would be rare, but there is nothing in S. 4 (4) (*b*) to prevent the Court asking the District Magistrate to issue a commission for the examination of the warrantor. It is not, however, necessary for the Magistrate rejecting the application for the issue of commission to give his reasons for doing so in writing. (*Davis, C. J. and Lobo, J.*) GIRDHARILAL *v.*

EMPEROR. **32 S.L.R. 659=174 I.C. 542=39 Cr.L.J. 477=10 R.S. 257=A.I.R. 1938 Sind 72.**

——**Ss. 4 (4) (b) and 5**—*Warranty—Proof of—Personal attendance of warrantor—Necessity for.*

Under S. 4 (4) (*b*), it is the rule that a warranty must be proved by the personal attendance in Court, of the person by whom or on whose behalf it was given and it may well be that this provision of S. 4 (4) (*b*) is to be read with S. 5 whereby provision is made for the punishment of the warrantor in case a false warranty is given. It is the rule that the warrantor must personally attend in Court, and it is only in exceptional circumstances that he should not do so. (*Davis, J.C. and Lobo, J.*) GIRDHARILAL *v.* EMPEROR. **32 S.L.R. 659=174 I.C. 542=39 Cr.L.J. 477=10 R.S. 257=A.I.R. 1938 Sind 72.**

——**S. 12 (1)**—*Complaint addressed to Bench of Honorary Magistrates as such—Verification of complaint signed by one Magistrate only—If implies presence of one only.*

In Hyderabad the Magistrates who constitute the 'B' Bench, are Magistrates of the Second Class only when sitting together as a Bench, and when sitting singly they are Magistrates only of the Third Class. Where the complaint was addressed to a Bench of Honorary Magistrates as such, from the fact that upon the verification of the complaint itself there was only the signature of one Magistrate, it would not follow that two magistrates were not present sitting as a Bench. (*Davis, J.C and Mehta, J.*) LILARAM LADAKMAL *v.* WADHUMAL. **I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.**

——**S 13 (1)**—*Scope—Summons not applied for within 30 days—If fatal.*

S. 13 should be considered separately as regards its two sub-sections, because sub-s. (1) relates to a condition of time, and if it can be shown that a summons was not applied for within 30 days of the date of the grant of the certificate by the public analyst, that would be fatal to the prosecution case, for time once gone is gone beyond recall. This cannot be regarded as a mere irregularity which can be cured. (*Davis, J.C. and Mehta, J.*) LILARAM LADAKMAL *v.* WADHUMAL. **I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.**

——**S. 13 (2)**—*Scope—If mandatory—Absence of date in summons—If fatal.*

Though it is very desirable indeed that the provisions of S. 13 (2) should be closely followed, that the name of the complainant should be given the name and place fixed for hearing should be shown, it cannot be held that if for instance the date be omitted from the summons it would be a fatal flaw in the proceedings. All that can be said is that it is an irregularity which can be cured, if necessary by an issue of amended summons and by the Magistrate allowing such adjournment as the omission of any particular from the summons may seem to require so as to give the accused the notice in the summons to which he is entitled. (*Davis, J.C. and Mehta, J.*) LILARAM LADAKMAL *v.* WADHUMAL. **I.L.R. (1939) Kar. 230=178 I.C. 648=11 R.S. 100=40 Cr.L.J. 122=A.I.R. 1938 Sind 209.**

——**Ss 14 and 16**—*Construction and scope—Certificate of Public Analyst—Value of—Production of certificate—If casts burden on accused—Right of accused to require Analyst to be summoned—Evidence to prove certificate wrong—If to be led by accused in the first instance.*

There is nothing in the language of Ss. 14 and 16 of the Bombay Prevention of Adulteration Act to suggest that the ordinary rule with regard to the burden of proof in a criminal case is to be departed from S. 14 does not deal with the procedure to be followed in a trial for an offence under the Act. and has nothing to do with the order of proceedings at the trial; it merely lays down a rule of evidence and allows a presumption to be drawn. The certificate of a Public Analyst is to be accepted as correct without further proof until the contrary is proved. Nor is there anything in either S 14 or S. 16 to justify the view that before the accused can ask the Court to summon the Public Analyst as a witness, he must prove by other evidence that the certificate of the Public Analyst is not correct. S. 16 nowhere says that the accused's right to insist on the Analyst being summoned and examined is to be exercised only after the accused has led evidence in his own evidence challenging the correctness of the certificate of the Public Analyst. It is open to the accused under the section at the commencement of the trial, as soon as he is accused of the offence, to require the Court to summon the Public Analyst as a witness, and if he deposits the requisite amount in Court, he is entitled as of right to have the Public Analyst called as a witness. (*Broomfield and Wadia, JJ.*) BOMBAY MUNICIPALITY *v.* HARIDAS VALLABHADAS. **I.L.R. (1937) Bom. 751=170 I.C. 867=10 R.B. 141=38 Cr.L.J. 975=39 Bom. L.R 629=A I.R. 1937 Bom 364.**

——**S. 14 (1)**—*Applicability—If confined to certificate of Analyst produced by prosecution.*

Broomfield, J.—S. 14 (1) of the Prevention of Adulteration Act applies to any certificate of a Public Analyst and not only to a certificate on which the prosecution is based. The rebuttable presumption under S. 14 (1) will equally apply to a certificate of a Public Analyst produced by the accused himself. (*Broomfield and Wadia, JJ.*) BOMBAY MUNICIPALITY *v.* HARIDAS VALLABHDAS. **I.L.R. (1937) Bom. 751=170 I.C. 867=10 R.B. 141=38 Cr.L.J. 975=39 Bom L.R. 629=A.I.R. 1937 Bom. 364.**

——**S. 16**—Pulbic Analyst—Right of accused to be summoned and examined—If conditional on his leading evidence to disprove correctness of certificate. *See* BOMBAY PREVENTION OT ADULTERATION ACT, Ss. 14 AND 16. **39 Bom.L.R. 629=A.I R. 1937 Bom. 364.**

BOMBAY PREVENTION OF GAMBLING ACT (IV OF 1887), S. 3—*Applicability—"Using or keeping"—Meaning of.*

The expression "using or keeping" in S. 3 of the Bombay Prevention of Gambling Act means having a right to use or keep as in S. 4 (*a*), and if the accused was not a person having a right to use this passage, then it would be irrelevant to prove that he was making a profit out of the gaming carried on there. To bring a case within the definition, it would be necessary to show that profit was to be made for the person owning, keeping or using the passage, that is, presumably the landlord. (*Beaumont, C.J. and Sen, J.*)

EMPEROR *v.* IBRAHIM HAJI ABDUL RAHIMAN. **I.L.R. (1940) Bom. 322=42 Bom.L.R. 161=188 I.C. 316=41 Cr.L J. 571=A.I.R. (1940) Bom. 129.**

——**S. 3**—*Common gaming house—"Using"—Meaning of—Passage—If common gaming house.*

The word 'using' in the definition of a common gaming house in S.3 of the Bombay Prevention of Gambling Act connotes some sort of right or some sort of possession. The use is not of the kind prohibited unless it imports some measure of possession or control, for the person using as one who, although the designations of owner, occupier or keeper do not apply to him, is nevertheless some other person who is analogous to, and is of the same terms as owner, occupier or keeper. In cases where a passage is a place to which the public have access, or are permitted to have access there may be an offence under S. 12. (*Broomfield, Ag.C.J. and Sen J.*) EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I.C. 242=12 R. B. 338=41 Cr.L J. 273=41 Bom.L R. 1114=A. I.R. 1940 Bom. 18.**

——**(as amended in 1936), S. 3**—*Construction "Act intended to aid or facilitate, etc."—Meaning of—"Gaming"—Distribution of profits of gaming—When an offence punishable under Act.*

"Gaming," as defined by S. 3 of Act IV of 1887 as amended in 1936, includes various ancillary and accessory acts, among others the carrying or conveying of the winnings of gaming for the purpose of distribution. But it must be noted that gaming is not an offence except as made punishable by certain other sections of the Act, *viz.*, Ss. 4 and 5 and S. 12. Where the Court is concerned with a particular form of gaming made punishable under the Act and the charge is based on one of the ancillary acts in the definition, some connection ought to be shown between that act and the particular form of gaming which is the subject of the charge. The distribution of the profits of gaming in a public place is a part of that offence and so is any act facilitating the same. But if the charge is gaming in a public place and the only act alleged is one which facilitates the distribution of profits of some other kind of gaming, the ancillary act cannot be said to form part of the offence charged unless it is an overt act which itself amounts to gaming in public within the intendment of the section. Though the distribution of the winnings of gaming and any act facilitating the same is gaming, it is not gaming in a public place, unless (*a*) the winnings are the winnings of gaming in a public place, in which case the mischief aimed at has been committed somewhere or (*b*) the distribution or ancillary act is itself public

Beaumont, C.J.—The words "intended to aid or facilitate" the various acts described must be read as ancillary to the general words of the definition. Before the Court can convict a man of aiding or facilitating an act,it must be shown that the act has taken place and that it is an offence. (*Beaumont, C J., Broomfield and Norman, JJ.*) EMPEROR *v.* SOMABHAI GOVINDBHAI. **I.L R. (1939) Bom. 53 =178 I C. 588=11 R B 176=40 Cr L.J. 97=40 Bom.L R. 1082=A.I R. 1938 Bom. 484 (F.B).**

——**S. 3**—*Instruments of gaming—Marked coin.*

A marked coin may be an instrument of gaming. It becomes an instrument of gaming if it has in fact been used as a means of gaming. (*Broomfield, Ag.C.J. and Sen, J.*) EMPEROR *v* KRISHNAJI MADHUSUDAN. **186 I.C. 242=12 R.B. 338 =41 Cr.L J 273=41 Bom.L.R 1114=A.I.R. 1940 Bom. 18,**

——**Ss. 3 (a) and 13**—*"Gaming"—Operations necessary for gaming—Person performing—If guilty.*

Where in a certain game, certain operations are to be performed to enable the gamester to play the game, the persons taking part in such operations must be deemed to be "gaming" within the provisions of the Act as they actually assist in the gaming. (*Davis, J.C. and Mehta, A.J.C*) MOHAMMAD HASAN *v.* EMPEROR **31 S L.R. 44=169 I.C. 35=38 Cr.L J. 668=9 R S. 255=A.I.R 1937 Sind 99**

—— **S. 4**—*"Place"—Meaning of.*

The word 'place' in S. 4 has a wide meaning, and its application is not excluded by S. 12 in proper cases even though the latter section might apply to the same 'place'. Hence a shop abutting on to a public street, though a 'place' under S. 12, is a place under S. 4, and a search warrant under the Act can be issued, and presumption under S. 7 can be drawn against the keeper of such a shop for the purposes of gaming for profit, and he can be convicted under S. 4. (*Davis, J.C.*) SAT NARAIN AMRATLAL *v.* EMPEROR. **I.L.R. (1939) Kar. 741=183 I.C. 562=12 R.S. 60=40 Cr.L.J. 817=A I.R. 1939 Sind 184.**

——**Ss. 4 and 5**—*Convictions under, on same facts—Separate sentences—Legality.*

Where the prosecution have relied upon the same facts and upon the same acts of the accused to prove that the offences under Ss. 4 and 5 were committed, the convictions under both sections may be confirmed, but there should be one punishment for both. He should not be punished twice over for the same acts. (*Davis, J.C.*) BHAGWANDAS *v.* EMPEROR. **I.L R. (1940) Kar. 150=187 I.C 78=12 R.S. 219=41 Cr.L.J. 399=A.I.R. 1940 Sind 28.**

——**Ss. 4 and 5**—*Prosecution under—Evidence—Failure to examine* panchas *and to produce independent evidence as to what was found at raid—Effect.*

In a prosecution under Ss. 4 and 5 of the Bombay Prevention of Gambling Act, the failure to examine the *panchas* in whose presence a *panchnama* was made at the raid or search, and to produce independent evidence as to what was found at the raid is a serious omission and a vital defect. (*Broomfield, Ag.C.J. and Sen, J.*) EMPEROR *v.* DESOUZA. **185 I.C. 203=12 R.B. 229=41 Cr L.J 127=41 Bom.L.R. 974=A.I.R. 1939 Bom. 465.**

——**Ss. 4, 5 and 7**—*Scope—Presumption of common gaming house—Rebuttal—Conviction—Conditions for.*

Under S. 7 of the Prevention of Gambling Act a presumption arises when instruments of gaming are found in a place that it is a common gaming house. But if the circumstances show that the only person who can make a profit from the gaming is not the owner, occupier, or person using or having the use of the same within the meaning of Ss. 3 and 4 of the Act, the presumption must be rebutted and no conviction would be possible under S. 4 or S. 5. (*Broomfield, Ag. C.J. and Sen, J.*) Emperor *v.* Krishnaji Madhusudan. **186 I C. 242=12 R.B. 338=41 Cr L J. 273=41 Bom L. R. 1114=A.I.R. 1940 Bom. 8.**

———**S. 4 (a)**—*"Having the use of"—Interpretation.*

The words "having the use of" in S. 4 (*a*) of the Prevention of Gambling Act, in the context seem to imply something more than mere using even though the use may be habitual. (*Broomfield, Ag C.J. and Sen, J.*) Emperor *v* Krishnaji Madhusudan. **186 I.C 242=12 R B 338 =41 Cr L.J. 273=41 Bom.L.R. 1114=A.I.R. 1940 Bom. 18.**

———**Ss. 4 (a) and 5**—*Applicability—Accused living in second floor of building found gambling in passage in ground floor—Passage used by accused for going to and from his room—Conviction under Ss.* 4 (*a*) *and* 5—*Sustainability.*

The accused occupied a room on the second floor of a certain building and was found by the police with another person in a passage on the ground floor of the building. He was writing something on a piece of paper and talking with the other person and on search of the passage instruments of gaming were found in that passage. He was convicted under Ss. 4 (*a*) and 5 of the Prevention of Gambling Act.

Held, (1) that in the absence of evidence to the contrary, the accused had only a right to pass and repass along the passage, and there being no evidence that the accused had a right to the use of the passage within the meaning of S. 4 (*a*) and his conviction under S. 4 (*a*) could not therefore stand; (2) that since the accused did not give any evidence to prove that the passage was not a common gaming house to rebut the presumption arising under S 7 of the Act on the facts proved by the prosecution, his conviction under S. 5 was justified and must be upheld. (*Beaumont, C.J. and Sen, J.*) Emperor *v.* Ibrahim Haji Abdul Rahiman. **I.L R. (1940) Bom 322=186 I.C. 316=41 Cr.L.J. 571=42 Bom.L R. 161=A.I.R. 1940 Bom 129.**

———**Ss 4 (a) and 5**—*Applicability and construction—"Place"—Passage leading from house to road—"Person having the use of"—Meaning of —Trespasser found gaming in passage—Offence —Liability for conviction under S.* 4 (*a*) *or* 5.

The words "person having the use of" in S. 4 (*a*) of the Bombay Prevention of Gambling Act, must be read *ejusdem generis* with the previous words "owner or occupier" and mean "a person having the right to the use of" under some title, *e.g.*, a licence which is less than ownership or right of occupation. It does not include a trespasser. The whole of S. 4 is directed against those who enable premises to be used as a common gaming house; while S. 5 deals with persons who resort to such premises for the purpose of gaming. The accused was receiving bets in a passage on the ground floor of a house in a road. A marked coin proved to have been used for the purpose of placing a bet, a note book and a sutta chit, were found in this passage, on a police raid. He was a mere trespasser in the passage in question, and there was no evidence that his user of the passage was with the knowledge or permission of any person who owned or controlled the passage. The accused was convicted under Ss. 4 (*a*) and 5 of the Prevention of Gambling Act.

Held, (1) that the passage in question was a place within the meaning of S 4 (*a*); (2) that since there was no evidence to show that the accused had got anything in the nature of a licence to use the passage from a person entitled to give such licence, he could not be convicted under S. 4 (*a*) of the Act; (3) that the Crown having proved the finding of instruments of gaming and the presence of the accused in the passage, the burden, in view of the presumption arising under S 7, was thrown upon the accused to show that the place was not a common gaming house, the accused, who had not discharged that burden, was properly convicted under S 5 of the Act. (*Beaumont, C.J. and Sen, J*) Emperor *v.* Gulam Hussein Rawji. **I L R. (1940) Bom. 105=186 I C. 148=12 R B 310=41 Cr.L J. 253=41 Bom. L.R 1326=A.I.R 1940 Bom. 62**

——**Ss. 4 (a) and 5**—*Conviction under—Grounds for—Finding of marked coins and slips of paper with figures—Sufficiency.*

The mere fact of finding of marked coins and slips of papers with figures on it in the room or house of the accused would not be sufficient to justify his conviction under Ss. 4 (*a*) and 5 of the Bombay Prevention of Gambling Act, unless the evidence made it perfectly clear that these articles were instruments of gaming. (*Broomfield, Ag. C J and Sen, J.*) Emperor *v.* De Souza. **185 I. C 203=12 R B. 229=41 Cr.L J. 127=41 Bom. L R 974=A.I.R. 1939 Bom. 465.**

———**S. 5**—*Applicability—Taking bets over telephone—Offence.*

S 3 makes "gaming" within the meaning of the Act the collection or soliciting of bets, and it makes no difference if these bets are brought by a messenger or person or sent by telephone or sent and received by telephone. It is gaming within the definition of S. 3, and in S. 7 the word "persons" includes "person", the plural includes the singular. Hence, a person caught actually in the act of taking bets over telephone can be convicted of gaming under S 5. (*Davis, J.C.*) Bhagwandas *v.* Emperor. **I.L.R. (1940) Kar. 150=187 I.C 78=12 R.S. 219=41 Cr.L.J. 399= A.I.R. 1940 Sind 28.**

———**S. 5**—*Charge under—Proof — Evidence necessary—Evidence of police agent—Value of—Corroboration—Necessity*

A charge of gambling, like any other criminal charge, must be proved by the prosecution by proper evidence Police agents are not only accomplices, but are also unreliable witnesses, because they are generally paid by the results. It is always in their interest to secure a conviction in the hope of getting a part of the fine which may be imposed. The evidence of a police agent in these cases must always be corroborated before it can be acted upon. Nor is the case improved by providing the police agent with a companion and calling him a panch (*Beaumont, C.J. and Wadia, J.*) Emperor *v.* Harilal Gordhan. **I.L.R. (1937) Bom 670=171 I.C 282=10 R.B. 184=38 Cr.L.J. 1047=39 Bom.L.R. 613=A.I.R. 1937 Bom. 385.**

——**Ss. 6 and 7**—*Construction and scope—Search warrant issued by Assistant Superintendent* *of Police—Legality—Presumption under S. 7—If arises—Bombay District Police Act, S. 6—Scope.*

The words "specially empowered by Government in this behalf" in S. 6 of the Bombay Prevention of Gambling Act cover the Assistant or Duputy Superintendent of Police. A Magistrate of the first clause or a District Superindent of Police can exercise the power without any special authority from Government. There is however nothing said in the section about an additional Superintendent of Police. An additional Superintendent of Police appointed under S. 6 of the Bombay District Police Act, as amended in 1920, has no power to authorise the issue of a search warrant under S 6 of the Prevention of Gambling Act. Where a search warrant is issued by an Assistant Superintendent of Police the presumption under S.7 of the Gambling Act does not arise, and a conviction based on such presumption connot be sustained. (*Beaumont, C.J. and Sen, J.*) EMPEROR *v.* ASGARALLI MAHOMEDALLI. **187 I.C. 459=12 R B. 487=41 Cr.L.J. 485=42 Bom.L.R. 203=A.I.R. 1940 Bom. 127.**

——Ss. 6 and 7 as amended by Bombay Act I of 1936—*In gambling cases as well, corroboration of evidence of approver by other independent evidence is necessary—Amount of evidence required depends upon circumstances of each case.*

In a gambling case, as in any other case, the evidence of approvers or accomplices must be corroborated, in the usual manner, by evidence other than that provided by themselves, whereby the Court can be satisfied that they speak the truth not only when they speak to the factum of the crime but when they speak as to the identity of the accused. The purpose of requiring independent evidence corroborating the evidence of the approver is that the Court can be satisfied that he is speaking the truth. It has no other purpose The amount of that evidence depen 's upon the circumstances of each particular case; the question as to whether it provides sufficient corroboration for the evidence of the approver to be relied on with confidence also depends on the circumstances of each case. (*Davis, J.C. and Dadiba, C. Mehta, J.*) EMPEROR *v.* ALI MOLO. **I. L.R (1939) Kar. 217=179 I.C. 794=11 R.S. 150 =40 Cr.L J. 271=A.I.R. 1938 Sind 228.**

——Ss. 6 and 7, as amended by Bombay Act I of 1936—*Interpretation of.*

Ss. 6 and 7 must be interpreted in a reasonably broad spirit having some fair relation to the realities of the kinds of people to which the Act was intended by the Legislature to apply. (*Davis, J.C. and Dodiba C. Mehta, J.*) EMPEROR *v.* ALI MOLO. **I.L.R. (1939) Kar, 217=179 I C. 794=11 R.S. 150=40 Cr.L.J. 271=A.I.R. 1938 Sind 228.**

——Ss. 6 and 7, as amended by Bombay Act I of 1936—*Reason for suspicion—If includes information given by police informant.*

The reason for suspicion which is referred to in Cl. (*a*) of S. 6 includes the information given by a police informant, for, in many cases it is only upon such information that the police can act at all. So also, so far as the seizure of all things, reasonably suspected to have been used or intended for the purpose of gaming under Cl. (*c*) is concerned, it cannot be expected that the police-officer must wait for a translation or interpretation of a writing, otherwise unintelligible to him, found upon slips of paper on the person of the suspected man. He must judge and be judged by all the surrounding circumstances and the information he then possesses. He may particularly, where his information is that the betting is betting in American Futures, have reason to suspect that when slips of paper with writing upon them are considered of sufficient importance by the suspected person to be kept upon his person, those slips of paper are betting slips used or intended to be used for the purpose of gaming, even though the writing is to him unintelligible at the time. (*Davis, J.C. and Dadiba. C. Mehta, J.*) EMPEROR *v.* ALI MOLO. **I. L.R. (1939) Kar. 217=179 I C. 794=11 R.S. 150=40 Cr L.J. 271=A.I.R. 1938 Sind 228.**

——Ss 6 and 7, as amended by Bombay Act I of 1936—*Scope and effect—Presumption of gambling—When to be raised—Duty of Court.*

Ss. 6 and 7, Bombay Prevention of Gambling Act, must be read together. The words "which he has reason to suspect" in S 6 must be read with the words "had reasonable ground for suspecting, which occur in S. 7; for, though it is true that under S. 7 it is the Court that has to be satisfied that where a thing seized is not obviously an instrument of gaming, but is to come if at all, within the category of "any other thing" referred to in S 7, that the police-officer had reasonable grounds for suspecting the thing did so come, yet even the Court must look at it from the police officer's point of view, from the point of view of the information the police-officer had before the seizure and not after. Indeed, the words in Ss. 6 and 7 must mean very much the same thing Where, on the information of a police informant that gambling is going on in a particular house in American Futures, a Sub-Inspector finds a number of persons of different communities, who have no particular relationship or connexion among themselves, sitting at a table in a room in that particular house at midnight, who can give no satisfactory account of their presence and who, when searched, are found to have considerable sums of money upon them, while upon one of them are found slips of paper on which there is a writing not necessarily intelligible to the Sub-Inspector at the time the Sub-inspector has every reason to suspect that these slips of papers with the unintelligible writing, so taken from one of the persons, contain record of bets, and the Court, under the circumstances is justified in raising the presumption against the accused which puts upon them the burden of proof under S. 7. Where in such a case the accused fail to give an account of their presence in the room on the particular night which the Court can accept, the High Court will not interfere in revision and acquit the accused. (*Davis, J.C and Dadiba C Mehta, J.*) EMPEROR *v.* ALI MOLO. **I. L R. (1939) Kar. 217=179 I.C. 794=11 R.S. 150=40 Cr.L.J 271=A.I.R. 1938 Sind 228.**

——Ss. 6 (d) and 8—*Money found in coat pocket of accused convicted of gaming—Liability to forfeiture.*

It was not the intention of the Legislature that moneys should be forfeited when there was no reason to believe that these moneys were connected with the gaming. The power of forfeiture exercisable by the Magistrate under S. 8 is discretionary. Where the money was found in the coat pocket of the accused convicted of gaming it cannot be said, in the absence of any satisfactory explanation by the accused that this money cannot be seized under S. 6 and was not connected with the gaming of which the accused had been convicted. *(Davis, J.C.)* BHAGWANDAS *v.* EMPEROR. **I.L.R (1940) Kar. 150=187 I.C. 78=12 R.S. 219=41 Cr.L.J. 399=A I.R. 1940 Sind 28.**

——S. 7—*Applicability—Conditions—Presumptions—When raised.*

Under S. 7 of the Bombay Prevention of Gambling Act, certain presumptions arise when two things are proved. It must be proved first that there was a house, room or place, entered under S. 6; and secondly that an instrument of gaming was found in such a house, room or place on the occasion of the raid under S. 6 or upon the person of any one found therein. When these two facts are proved, then two presumptions arise: (1) that the house, room or place is used as a common gaming house, and (2) that the persons found therein were there for the purposes of gaming *(Beaumont, C.J. and Sen, J.)* EMPEROR *v.* IBRAHIM HAJI ABDUL RAHIMAN. **I L R. (1940) Bom 322=188 I C 316=41 Cr.L J. 571=42 Bom L.R. 161=A.I.R 1940 Bom 129.**

——S. 7—*Finding of marked coin—Presumption.*

The mere finding of a marked coin only does not give rise to any presumption under S. 7 of the Bombay Prevention of Gambling Act. *(Broomfield, Ag. C.J. and Sen, J.)* EMPEROR *v.* KRISHNAJI MADHUSUDAN. **186 I C 242=12 R B 338=41 Cr.L J 273=41 Bom.L R. 1114=A. I R. 1940 Bom. 18.**

——S. 7—*Presumption under—When arises—Finding of things other than instruments of gaming—Evidentiary value of.*

There are two events on which the presumption under S. 7 of the Prevention of Bombay Gambling Act arises. As to the first event, namely, the seizing of any instrument of gaming, all that the Court has to do is to see whether the documents or things found in the house raided fall within the definition of "instruments of gaming." If they do, then the presumption arises. The other event is more difficult to determine. There are two things required to prove the occurrence of that event first, that something has been seized which is other than an instrument of gaming, and, secondly, that the police-officer had reasonable grounds for suspecting that the thing so seized was an instrument of gaming. When these two things are proved, then the Court must presume that the house which has been entered was used as a common gaming house until the contrary is proved. But if the only evidence of the house being used as a common gaming house lies in the seizure in the house of something which is in fact not an instrument of gaming, although the police-officer had reasonable grounds for suspecting that it was an instrument of gaming, then there is no evidence of such user, and the presumption is rebutted. The presumption arising in the second event specified in S. 7 must always be still-born, because it is rebutted by proof of the very event which gives it birth, namely, seizure of something other than an instrument of gaming. The section must be construed strictly, and the second event can only arise, on the language of the section. When it is proved that the thing which was found in the house raided was not an instrument of gaming and directly one proves it one destroys the evidential value of the thing found. *(Beaumont C.J. and Wadia, J.)* EMPEROR *v.* NATHALAL VANMALI. **I.L.R. (1939) Bom. 434=184 I C. 252=40 Cr L.J. 891=12 R. B 155=41 Bom.L.R. 548=A.I.R 1939 Bom. 339.**

——S 8—*Money found on persons of those gaming or present in common gaming-house—Forfeiture—Conditions of—Burden of proof.*

In S. 8 there is no general provision that money as such found upon persons keeping or using a common gaming-house or gaming therein or being present therein for the purpose of gaming can be forfeited Money found on the persons of those gaming or present in the common gaming-house and so on can be forfeited only as instruments of gaming within the definition of S. 3, Prevention of Gambling Act. That definition is wide because it covers any article used or intended to be used as the subject or means of gaming or proceeds of gaming so that any money or currency notes used or intended to be used as a means of gaming or the proceeds of gaming, found on the person of one present in the common gaming-house for the purpose of gaming and so on, can be forfeited, but the prosecution must, of course, show that any particular money to be forfeited as means of gaming falls within the definition of "instruments of gaming" in S 3. *(Davis, J.C)* DOONGERSI AWTHAR *v.* EMPEROR. **I L R. (1940) Kar. 125=186 I.C. 883=12 R.S. 221=41 Cr.L J. 385=A.I.R. 1940 Sind 22.**

——S 12—*Applicability—"Found gaming"—Meaning af.*

S. 12 does not require that the police should apprehend persons in the actual act of gaming. The words "found gaming" have a wider meaning than "seen gaming". "Found" is more akin to "discovered" in its nature and purpose, and therefore, if people are found by the police in such circumstances that it is clear that when the police came upon the scene they were engaged in gaming, the section applies. *(Davis J C and Mehta, A J.C.)* GHANSHAM DAS *v.* EMPEROR. **29 S L R. 349=164 I.C 642=9 R.S. 50=37 Cr.L.J. 1005=1936 Cr.C 803=A.I.R. 1936 Sind 126.**

——S 12—*Gaming—Game of dart—If game of skill or chance.*

A game of dart in which skill cannot enter into the game to any material extent is not a game of skill but one of chance. Law is enacted for the average man and not for a person of unusual skill, and, if, taking the average man, chance and not skill is the deciding factor in a particular game, the game is a game of chance and amounts to gaming under the Act. *(Davis, J.C. and Mehta, A.J.C.)* GHANSHAMDAS *v.* EMPEROR. **29 S L.R. 349=164 I.C. 642=9 R.S. 50=37 Cr L.J. 1005=1936 Cr.C. 803=A.I.R 1936 Sind 126.**

——S. 12—*Person selling tickets in respect of game—If guilty.*

Where the person seeking to gain by chance has to pay money and purchase a ticket before he will be allowed to take part or participate in the game at all, the selling of tickets, is a part and parcel of the particular gaming: and therefore, the person who sells the tickets and receives the money, which is the wager takes just as great a part in the act of gaming as does the actual participant, and is therefore guilty under S. 12 of the Act. (*Davis, J.C. and Mehta, A.J.C.*) GHANSHAMDAS *v* EMPEROR. **29 S.L.R. 349=164 I.C. 642=9 R.S. 50=37 Cr L J 1005=1936 Cr.C. 803=A.I.R. 1936 Sind 126.**

———(as amended in 1910), S. 12—*Public place—Test of—Private garden—If may be "place to which public have or are permitted to have access"—Owner reserving right to exclude undesirable persons—If material.*

Whether a place is one to which the public have or are permitted to have access within the meaning of S. 12 of the Act is a question of fact. No distinction can be made between a right conferred on the public by a statutory provision or a resolution of a Municipality, and a right conferred on the public by a private owner. The deciding factor is not whether the place is or is not owned by a private individual, or a public or statutory body, but the use to which it is put. If a private owner expressly or by implication invites the public generally to enter his garden, then the garden is a "place to which the public have or are permitted to have access" within the meaning of S. 12. The fact that the owner reserves to himself the right to exclude undesirables, is not material. (*Davis, J.C. and Lobo, A.J.C.*) TAHIRALI *v.* EMPEROR, **30 S.L.R 72=164 I C 58=9 R.S. 29=37 Cr.L.J. 876=1936 Cr C. 674=A.I.R. 1936 Sind 90.**

———S. 12 (as amended)—*Scope—Conviction for merely gaming—Order of forfeiture—If justified.*

In S. 12 of the Act, before as well as after its amendment the forfeiture of money and the other severer penalties imposed by the section relate to a person convicted of wagering or betting but not to a person convicted merely of gaming; and so in a case of gaming the money and instruments of gaming found in a public place should be disposed of as directed in the section. Money should be returned to the owner thereof and instruments of gaming should be directed to be destroyed and not sold. (*Davis, J.C. and Mehta, A.J.C.*) MOHAMMAD HASAN *v.* EMPEROR. **31 S.L.R. 44=169 I.C. 35=38 Cr. L. J. 668=9 R S. 255=A.I.R 1937 Sind 99.**

———S. 12 (a)—*Construction and scope—Offence—Essentials of—Conviction—Proof requisite—Mere reasonable suspicion of gaming—Sufficiency—Accused found to be in possession of money, proceeds of gaming and betting chits in public place—Liability to conviction—Proof of overt act—Necessity.*

It would be a remarkable departure from the accepted principles of criminal justice if the mere fact of being reasonably suspected by a police officer were to be held sufficient to justify a conviction of a criminal offence. Under S. 12 (*a*) of the Bombay Prevention of Gambling Act, a man may be arrested on a reasonable suspicion of gaming in a public place, but he can only be convicted of the offence at which the section is aimed, *viz*, actual gaming in public. The conviction must be of gaming, and not merely of being reasonably suspected to be gaming. The accused, a cotton broker, working in Surat, and belonging to a village called Bhadran in Baroda territory, used to visit his village where he had a house several times a month. Where he was travelling by train from Surat to Anand which is the Railway Station for Bhadran he was arrested at Anand Railway Station by a police officer and on being searched there was found in his possession a substantial sum of money which, it was found, represented the proceeds of gaming and which he was taking to another place for the purpose of distribution, there were also found upon him certain chits of the description known as satta chits which were instruments of gaming. The accused was, on these facts, charged under S. 12 (*a*) of the Bombay Prevention of Gambling Act, with gaming in public place, *viz.*, Anand Station,

Held, that since there was no evidence in the case that what might be called the actual or substantive gaming took place in a common gaming house or in a public place—there being in fact no evidence in the least as to how or where the actual gaming took place—since it could not be said that the money with the accused was the winnings of gaming in a public place, and since the accused obviously did no overt act which in itself amounted to gaming in public, it could not be held that any offence under S. 12 (*a*) had been committed and the accused could not therefore be convicted under the section. (*Beaumont, C.J. Broomfield and Norman, JJ*) EMPEROR *v.* SOMABHAI GOVINDBHAI. **I.L.R. (1939) Bom. 53=178 I.C. 588=11 R B. 176=40 Cr.L.J. 97=40 Bom. L.R. 1082=A.I.R. 1938 Bom. 484 (F.B.).**

———S. 13—*"Mere skill"—Meaning of—Game of cards* pettin-ata, *for money stakes—If exempt under S.* 13.

The phrase "mere skill" in S. 13 of the Bombay Prevention of Gambling Act means pure skill, skill and nothing else. A game in which there is a substantial element of chance cannot be described as a mere element of mere skill or pure skill. In view of the provisions of S. 13, it is clear that if a game is played for stakes, it amounts to gaming and comes within the mischief of the Act, quite irrespective of the question whether chance or skill predominates, provided of course that it is not a mere game of skill, that is to say, a game in which there is no element of chance. No doubt, if the element of chance in a game is so small as to be negligible, it may be reasonable to ignore it. Playing a game of cards called *pettin-ata*, for money stakes, is a gambling game and is not a game of mere skill so as to be exempted under S. 13. (*Broomfield, Ag. C.J. and Sen, J.*) EMPEROR *v.* KALLAPPA GURAPPA. **I.L.R. (1939) Bom. 679=185 I C 315=12 R. B. 231=41 Cr.L.J. 157=41 Bom L.R. 970=A.I R. 1939 Bom. 481.**

———S. 13—*Scope—"Game of skill"—Test to decide.*

No game can be a game of skill alone, and in any game in which even great skill is required, chance must play a certain part. Even a skilled player in a game of mere skill may be lucky or unlucky, so that even in a game of mere skill chance must play its part. But it is not necessary to decide in terms of mathematical precision the relative proportion of chance to skill when deciding whether a game is a game of mere skill within the provisions of S. 13 of the Act. When in a game the elements of chance most strongly preponderate, it cannot be a game of mere skill. *(Davis, J.C. and Mehta, A.J.C.)* MOHAMMAD HASAN *v.* EMPEROR. **31 S.L.R. 44=169 I.C. 35=38 Cr. L.J. 668=9 R.S. 255=A.I.R. 1937 Sind 99.**

BOMBAY PRIMARY EDUCATION ACT (IV OF 1923)—District School Board constituted under—Chairman of—If public servant—Liability to prosecution without sanction of Government—Cr. P. Code, S. 197. *See* CR. P. CODE, S. 197. **38 Bom.L.R 956.**

——Ss. 4 (2) and 8 (2)—*Teacher in School under local authority—Services transferred under S. 8 (2)—Compulsory retirement and subsequent reinstatement—Grant of half pay for period of absence—Suit for full-pay—Maintainability.*

Plaintiff, a teacher in a school under the control and management of a local authority, whose services were transferred under S. 8 was made to retire by the District Local Board before he was actually due, but was reinstated after some time and was treated as on leave on full pay for half the period and on half pay for the rest, and he sued the District Board for the remaining half pay.

Held, that under sub-S. (2) of S. 4, the rights and liabilities of the local authority with respect to the transfers of the teachers were not vested in or transferred to the School Board, and that the Legislature intended that so far as such teachers were concerned the rights as regards them and liabilities towards them should remain with the local authority and not with the School Board and hence the suit of the plaintiff lay against the local District Board. *(Davis, J.C. and Weston, J.)* DISTRICT LOCAL BOARD, SUKKUR *v.* NAVALRAI TOPANDAS. **I.L.R. (1939) Kar. 518=182 I.C. 669=12 R.S. 19=A.I.R. 1939 Sind 150.**

——S. 8—*Appeal—Power of appellate authority—Discretion—Interference.*

Where a teacher in the employ of a District Local Board is given a right of appeal with regard to his suspension, dismissal, etc., and a statutory rule governing such a case provides that in case the appellate authority orders the reinstatement of such teacher it may grant him full pay for the period during which such teacher was under suspension or dismissal, the word "may" does not mean "shall," but merely confers upon such appellate authority a discretion in the matter, and such statutory discretion, if exercised according to statutory rules, cannot be interfered with. *(Davis, J.C and Weston, J.)* DISTRICT LOCAL BOARD, SUKKUR *v.* NAVALRAI TOPANDAS. **I.L.R. (1939) Kar. 518=182 I.C. 669=12 R.S. 19=A.I.R. 1939 Sind 150.**

BOMBAY PUBLIC CONVEYANCES ACT (VII OF 1920), S. 24—*Applicability—Ingredients of offence under.*

To convict an accused under S. 24, it is not sufficient merely to show that the accused is a licensee of a public conveyance and that he permitted it to be driven by a driver who is not licensed; it must be shown that when this unlicensed driver was driving, he was driving a public conveyance for use as such. S. 24 does not mean that if the licensee of a public conveyance himself takes his family out for a treat or permits an unlicensed driver to take his family out for a treat, an offence is committed; for, the public conveyance is not then used for the purpose of public conveyance at all. It is used for the purpose of private conveyance. *(Davis J.C. and Lobo, J.)* BHOJRAJ PHEROOMAL *v* ABDUL WAHEED. **I.L.R. (1939) Kar. 187=177 I.C. 783=11 R.S. 68 (1)=39 Cr.L.J. 976=A.I.R. 1938 Sind 190.**

BOMBAY REGULATIONS (XVII OF 1827) and (XIX OF 1827)—*Property in Bombay. city—Prescriptive right to exemption from land revenue—If can be claimed.*

Bombay Regulation XVII of 1827 does not apply to property in the city of Bombay. Regulation XIX of 1827 which does apply to such property, contains no provision for recognizing a prescriptive right to exemption from land revenue as is contained in Chap. 9, S. 36 of the Regulation XVII. Therefore no statutory prescriptive title to exemption from land revenue can be claimed in respect of property in the city of Bombay. *(Lord Macmillan.)* KAMALA VAHOOJI *v.* COLLECTOR OF BOMBAY. **I.L.R. (1937) Bom 756=10 R.P.C 54=1937 M.W.N. 939=3 B.R 759=39 Bom. L.R 1046=66 C L.J 43=169 I.C 778=41 C.W.N. 1194=31 S.L.R 665=1937 P.W.N. 985=64 I.A. 334=46 L.W. 227=1937 O L.R. 413=1937 A.L.R. 647=A I.R 1937 P.C. 271=(1937) 2 M.L.J. 362 (P.C.).**

BOMBAY RENT-FREE ESTATES (INAM) ACT (XI OF 1852)—*Powers of Inam commissioner—Inquiry—Scope of—Power to direct resumption of soil—Order directing that certain villages be resumed and assessed as khalsat—Meaning and Effect of.*

What have to be considered by the Inam commissioner in inquiries under the Bombay Rent-free Estates Act (Inam Act), are claims made to hold lands free from, or partially free from, assessment, and all that the commissioner can do under the Act is direct resumption by Government of the claim to exemption from assessment. Government is only entitled to resumption of possession of the privilege claimed by the inamdar and not of the possession of the soil. Government under the Act is not entitled to interfere with actual possession. All that they can deal with was the claim of certain person to hold lands free from the ordinary obligation to contribute to Government revenues. An order by the Inam Commissioner that certain villages should be resumed and assessed as khalsat, cannot be construed as amounting to a resumption of the soil of the villages; it must be taken as meaning only that the privilege claimed by the holder holding the villages free from liability to assessment is resumed. *(Beaumont, C.J. and Wadia, J.)* RAMSOMAPPA *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **172 I.C. 271=10 R B. 263=39 Bom. L R. 851=A.I.R. 1937 Bom. 465.**

BOMBAY REVENUE JURISDICTION ACT (X OF 1876), S. 4—*Scope—Order of revenue authorities setting aside mortgage by watandar—Observation that claim to permanent tenancy by reason of ancient possession not established—Suit to declare title as permanent tenant—Jurisdiction of Civil Court—If barred.*

A, the owner of a certain watan property mortgaged it to the plaintiffs for a period of ten years in 1923. *A* died in 1930, and in 1931, his widow adopted the defendant. After the adoption the defendant claimed from the revenue authorities restoration of the watan property and the Assistant Collector ordered such restoration. Before him the plaintiffs relied on their mortgage of 1923, and also claimed that they were permanent tenants under S. 83, Bombay Land Revenue Code as having been in possession from time immemorial. The Assistant Collector declared the mortgage null and void; he also expressed the view that the plaintiffs did not establish their claim of ancient possession. Their orders of restoration was confirmed on appeal by the Collector and subsequently by the Commissioner. The plaintiffs thereupon filed a suit for a declaration that they were permanent tenants of the land in suit, and for an injunction to restrain the defendant from interfering with their possession. It was pleaded that under S. 4 of the Bombay Revenue Jurisdiction Act the Civil Court had no jurisdiction to entertain the suit.

Held (1) that the order of the revenue authorities merely set aside the mortgage of 1923 and did not in fact go so far as to hold that the plaintiffs' claim to be permanent tenants was invalid; (2) that if the order did in fact purport to dispose of the plaintiffs' claim to be permanent tenants, the order to that extent was then *ultra vires*; (3) and that though the plaintiffs were not entitled to challenge in a Civil Court the order setting aside the mortgage, the suit based on the claim to permanent tenancy was not barred by S. 4 of the Revenue Jurisdiction Act. (*Beaumont, C.J.*) SHAMRAO *v.* HOLYA SUBHANNA. **172 I C. 464=10 R.B. 283=39 Bom.L.R. 920=A.I.R. 1937 Bom. 494.**

——**S. 4**—*Scope—Suit to declare plaintiff's right to be registered as watandar for patilki service—If barred*

A suit for a declaration that plaintiff is entitled to have his name entered in the watan register for the sixteen annas right of patilki service is in effect a claim to perform the duties of patil, and cannot be granted by the Civil Court, as it is barred by S. 4 of the Revenue Jurisdiction Act. (*Broomfield and Wadia, JJ.*) BASANGOUDA *v.* BASALINGAPPA. **164 I.C. 703 (2)=9 R.B. 92=38 Bom.L.R. 593=A.I.R. 1936 Bom. 301.**

——**S. 4**—*Tenures specified in—Nature of.*

The tenure of lands the title to which has been of a permanent nature and neither precarious nor limited in character is not a tenure of the kind specified in S. 4 of the Bombay Revenue Jurisdiction Act. To all of such tenures there is attached an element of grace and of precariousness. (*Lord Roche.*) VINAYAKRAO DHUNDIRAJ BIWALKAR *v.* SECRETARY OF STATE. **164 I.C. 753=9 R P.C 112=64 C.L.J 178=1936 All L.R. 855=1936 O.L. R. 569=3 B.R. 37=45 L W. 739=1937 M.W.N. 619=38 Bom.L.R. 1265=A.I.R. 1936 P.C. 312=(1937) 1 M.L.J. 367 (P.C.).**

——**S. 4 (a) (1) and (3)**—*Construction and scope—"Claim against Government"—Meaning of—Suit for declaration of status as watandar and for possession of watan lands—Jurisdiction of Civil Court—Government made party to suit—Suit—If barred—Valid orders of revenue authorities and ultra vires orders—Distinction.*

In S. 4 (*a*) of the Bombay Revenue Jurisdiction Act a distinction is made between claims and suits. Cls. (1) and (4) speak of claims against Government; Cl. (2) speaks of claims to perform duties; and Cl. (3) speaks of suits to set aside or avoid orders. It may be necessary under Cls. (2) and (3) that Government should be a party. But Cls. (1) and (4), on the other hand will as a rule apply only where Government is a party, since otherwise it could hardly be said that there was any claim against Government. But the mere fact that the Government is a party will not be enough to bring the case under those clauses. The words "claim against Government relating to property or lands" may fairly be said to imply that relief of some kind is sought against Government. Government must be more than a purely formal party. If Government is to be bound by the decree to make any payment or to restore any property, or if an injunction is sought against Government, the position is clear—that is a "claim against Government". A suit for a declaration of title against Government cannot be held to be a claim against Government within the meaning of Cl. (1), though it would seem to fall under Cl. (3). If what the plaintiff seeks is an order for delivery of possession of property which is merely to bind a private party and is not to be enforced against Government, the suit may offend against Cl. (3) but can hardly be brought under Cl. (1), A suit, whether between private parties or against Government, which would have the effect of nullifying an order made by the Collector would be barred under S. 4 (*a*) (3), at any rate, if the order is validly made under the Watan Act. If the relief sought does not affect the position of Government at all, for instance, if a person seeks a declaration of his status as watandar simply with a view to approach the revenue authorities under S. 36 (3) of the Watan Act, it cannot be regarded as a suit to set aside or avoid an order. In such suits Government is neither a necessary nor a proper party. If, however, a declaration of status is sought and a claim for possession of lands is made in flat contravention of the orders of the revenue authorities, the suit certainly comes within the mischief of Cl. (3) of S. 4 (*a*) of the Revenue Jurisdiction Act, assuming that the orders are not *ultra vires*. But it is not necessary to set aside an order made without jurisdiction. Such an order is no bar to a suit for relief inconsistent with it. An order validly made within the powers conferred by the Watan Act will bar a suit. An order without jurisdiction will not. But the order must have been made by an officer "duly authorised in that behalf" as required by S. 4 (*a*) (3). In order to decide whether a suit is barred under S. 4 (*a*)(3), the Court has to ascertain whether the orders of the revenue authorities were within their jurisdiction. (*Broomfield and Tyabji, JJ.*) MALLAPA *v.* TUKKO. **I.L.R. (1937) Bom. 464=170 I.C. 801=10 R B. 121=39 Bom.L.R. 288=A.I.R. 1937 Bom. 307.**

——**S. 4 (a)**—*Scope—Alienation of watan land made before Bombay Watan Act of* 1874—*Refusal by Assistant Collector to set aside—Suit in Civil Court to set aside and for possession—If barred.*

Where an Assistant Collector refuses to set aside an alienation of watan land made before the passing of the Watan Act (Bombay Hereditary Village Offices Act) of 1874, in the exercise of his discretion under S. 9 of that Act, such refusal does not oust the jurisdiction of the Civil Court which has an inherent jurisdiction to declare void such an alienation of watan property to a stranger. A civil suit to have such alienation set aside and the land restored to the possession of the plaintiff is not barred by S. 4 (*a*) of the Revenue Jurisdiction Act. (*Beaumont, C. J. and Lokur, J.*) WASUDEV VISHNU *v.* PANDU VISHNU. **I.L.R (1939) Bom. 428=184 I.C. 633=12 R.B. 186=41 Bom L R. 578=A I.R. 1939 Bom. 369.**

——**S. 4 (a) (1), (3) and (4)**—Scope Watan lands—Name of adopted son entered as representative watandar—Subsequent removal after annulment of alienation and resumption of lands on decree of Court holding adoption invalid—Suit by adopted son for declaration of title and for restoration of lands—If barred. *See* BOMBAY HEREDITARY OFFICES ACT, Ss. 11 AND 11-A. **38 Bom.L.R. 1308.**

——**S. 4 (a) (3)**—"Duly authorised in that behalf"—Meaning—Collector acting under S. 9 of Watan Act—Powers of. *See* BOMBAY HEREDITARY OFFICES ACT, S. 9. **39 Bom.L R. 288.**

——**S. 4 (a) (3)**—*Scope—Grant of watan land prior to 1827—If alienation under Watan Act—Order of Collector setting aside "alienation"—If* ultra vires—*Suit by grantee for declaration and for possession of watan lands—If barred.*

Certain lands form part of a Nadgoudki watan inam granted to the ancestor defendant No. 1 in 1694 Plaintiff alleged that they were granted in pot inam to his ancestor in 1811 before the introduction of British rule in 1827 or 1828 and claimed to have been in possession of the same since then until evicted by the revenue authorities. In 1862, defendant 1's grandfather *S.* brought an ejectment suit against *A*, a member of the plaintiff's family, got a decree in 1864 and sought to execute it. But *A's* nephew *N.* obstructed *S.* and under the rules of procedure then in force *S.* had to file a fresh suit, which he did in 1867. *N*, the defendant in that suit, claimed under a sanad given to his father by *S.* in renewal of an order of grant. In execution, *S.* admitted *N's* claim, as a result of a settlement between the parties. This admission was produced in the suit of 1867 and was acted upon with the result that the suit was dismissed. There was no further litigation and the plaintiff's family remained in undisturbed possession. In 1924 defendant No. 1 applied to the revenue authorities for restoration of the land to him under the Watan Act. The District Deputy Collector found that the plaintiff had been in possession from before the introduction of British rule, and that he was a watandar and therefore refused to interfere holding that there was no alienation. But the Collector on appeal reversed the order, and the Collector's order was confirmed by the Commissioner. Plaintiff was ultimately evicted in 1926 He then instituted a suit against defendant No. 1 and the Government for declaration of title as watandar and for possession of the lands.

Held, that there having been a grant to the plaintiff's predecessor before 1827, the revenue

authorities had no power under S. 9 or 11 of the Watan Act to set aside the alienation, for in fact there was no alienation within the meaning of that Act, and consequently the orders of the Collector and of the Commissioner were *ultra vires* and not duly authorised, and the suit was therefore not barred by S. 4 (*a*) (3) of the Bombay Revenue Jurisdiction Act. (*Broomfield and Tyabji, JJ.*) MALLAPPA *v* TUKKO. **I L R (1937) Bom. 464=170 I.C. 801=10 R.B. 121=39 Bom. R. 288=A.I.R. 1937 Bom 307.**

——**S. 4 (b) and (d)**—*Applicability—Suit to declare order of Government revising and increasing revenue on plaintiff's lands* ultra vires *and void as being contrary to law—If barred.*

The provisions of Cls. (*b*) and (*d*) of S. 4 of the Bombay Revenue Jurisdiction Act apply only to a suit which hits directly at the amount or incidence of land revenue or at its mode assessment or the principle on which it is assessed or aims directly at the alteration of entries in land records. They do not apply so as to exclude a suit for a declaration that the powers exercised by Government have no basis in law or that the power is exercised contrary to law. (*Davis, J.C. and Rupchand, A.J.C.*) RAMCHAND *v.* SECRETARY OF STATE FOR INDIA. **29 S.L.R 382=163 I.C. 887=9 R S. 17=A.I.R. 1936 Sind 108.**

——**S. 4 (d)**—*Construction and scope—Claim to have name entered in the village records either as owner in place of the existing one or alternatively as purchaser of shares along with the existing one—If cognizable in Civil Court.*

It is true that the Bombay Revenue Jurisdiction Act has to be construed strictly in favour of the right of suit; but that does not mean that it should be construed so technically as to make its provisions a dead letter. A person who claims to have his name entered in the village papers either in place of or associated with that of the superior holder is really in effect claiming to have his name entered as superior holder. Where a plaintiff in a suit prays that the name of the defendant entered in the records should be removed and that the name of the plaintiff should be entered instead as the owners of certain shares in the villages, or alternatively that the defendant's name may be retained nominally and the plaintiff's name entered as the purchaser of the shares, it is clear that the claim is obnoxious to S. 4 (*d*) of the Revenue Jurisdiction Act; that clause debars the Civil Courts from ordering that the entries should be changed. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839=12 R.B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.**

——**Ss. 4 (f) and 5 (a)**—*Scope* Saranjam *grant—Suit by* Saranjamdar *to recover from Government arrears of* ain chillar *deducted out of revenue payable to him—If barred.*

S. 4 (*f*) of the Revenue Jurisdiction Act cannot have been intended to bar a suit by an alienee of the land revenue to recover sums wrongly deducted from the land revenue payable to him; when it refers to claims against Government to receive payments payable out of the land revenue, it must mean payable out of the land revenue which is itself payable to Government. The *chillar* fund, though it may no doubt be payable out of the land revenue, is a fund, which according to the practice of a *Saranjam grant*, is to be administered by the *Saranjamdar*; and the practice of the *Saranjan* is the best index, of the meaning of the grant. Consequently a suit by a *Saranjamdar* to recover from the Government arrears of *ain chillar* which the Government have deducted from the revenue of the plaintiff's *Saranjam* villages is not barred by S. 4 (*f*) of the Act. S. 5 (*a*) also has no application to the case. (*Broomfield and Tyabji, JJ.*) THE SECRETARY OF STATE FOR INDIA *v.* NARAYANRAO. **168 I.C. 357=38 Bom. L.R. 1339=9 R.B. 367=A.I.R. 1937 Bom 109.**

——S. 4 (f)—*Applicability—Alienated village—Government having no interest in revenue—Effect.*

S. 4 (*f*) of the Bombay Revenue Jurisdiction Act can have no application to the case of an alienated village where Government has ceased to have any interest in the revenue at all. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839=12 R.B. 271=41 Bom. L.R. 882=A.I.R. 1939 Bom 513.**

——S. 4, Proviso—*Applicability—Dispute as to who is entitled to be holder of shares in village.*

The proviso to S. 4 of the Bombay Revenue Jurisdiction Act relates to cases where there is a dispute as to the nature of a holding, that is to say, as to whether it is exempt from the payment of land revenue or not. It does not relate to disputes as to who is entitled to be the holder. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839=12 R.B. 271=41 Bom L.R. 882=A.I.R. 1939 Bom 513.**

——S. 5 (b)—*Application—Suit comprising main reliefs against Crown.*

S. 5 (*b*) of the Bombay Revenue Jurisdiction Act has no application whatever to a case of a suit which is not a suit between private parties and in which some at any rate of the main reliefs are sought against the Crown. (*Broomfield and Macklin, JJ.*) DATTATRAYA *v.* SADASHIV. **185 I.C. 839=12 R B. 271=41 Bom.L.R. 882=A.I.R. 1939 Bom. 513.**

——S. 6—*Applicability—Illegal distraint by Mamlatdar—Suit for damages and compensation—If barred.*

Where a Mamlatdar issues a warrant of distraint against the property of a person in respect of arrears of land revenue due by some other person, the former being neither the occupant of the land nor in any sense a defaulter, the action of the Mamlatdar is *ab initio* illegal and *ultra vires*. No *bona fide* can be claimed in respect of such an act. Since it cannot be said that the Mamlatdar's act is *bona fide* in pursuance of the provisions of any law for the time being in force, his action is not protected by S. 6 of the Bombay Revenue Jurisdiction Act, and that section cannot be pleaded in defence to a suit for compensation and damages for illegal distress. (*Wassoodew, J.*) SHRIDHAR MAHADEO *v.* GODULAL JETHMAL **I.L R. (1939) Bom. 721=41 Bom L.R 1223=186 I.C. 509=12 R B. 343=A.I.R. 1940 Bom. 20**

BOMBAY SURVEY AND SETTLEMENT ACT (I OF 1865), S 38—*Kabuliyat taken by Government from managing khot—Effect—Right of khot to take faida in kind.*

Once Government have taken a kabuliyat in a particular form from the managing khot, he becomes entitled to recover the faida in accordance with the terms of the kabuliyat. If any occupant is dissatisfied with the terms of the kabuliyat, it is for him to take such steps as he may be advised against Government, or approach Government to get the kabuliyat charged but until that is done, the managing khot cannot go beyond the terms of the kabuliyat so long as it stands. If the kabulayat entitles the khot to recover faida in kind, he can take it in kind, and the tenant cannot resist the demand and insist on payment in cash. (*Rangnekar, J.*) PANDU NARAYAN *v* AMIRUDDIN SHEKH. **176 I.C. 245=11 R. B. 34=40 Bom.L R. 407=A.I.R. 1938 Bom. 329.**

BOMBAY TITLES TO RENT-FREE ESTATES ACT (XI OF 1852)—Inam Commissioner— Adjudication in disputes— Binding force of. *See* LIMITATION ACT, S. 10. **39 Bom. L.R. 572.**

BOMBAY (DISTRICT) TOBACCO ACT (II OF 1933), S. 17—*Scope—License in form A—Holder of—Right to sell outside place of business through agent—Agent of licensee selling wholesale to merchants outside place of business—Liability to conviction for offence under section.*

A wholesale dealer holding a license in Form A, for the wholesale sale of tobacco under the Bombay (District) Tobacco Act, is entitled to sell tobacco and its preparations personally or through agents and servants wholesale at any place in the Bombay Presidency and Sind with the exception of the City of Bombay; and he is entitled to conduct his business by means of travellers. A sale by the licensee's agent wholesale outside his own place of business is covered by the license, and the agent does not require a hawkers's license, since the license for wholesale sale is wide enough to cover wholesale hawking. Such an agent selling whole sale without a hawker's license cannot therefore be convicted under S. 17 of the Act. (*Barlee and Sen, JJ.*) EMPEROR *v.* BABURAO. **I.L.R. (1937) Bom. 931=172 I.C. 160 =10 R.B. 251=39 Cr L.J. 88=39 Bom.L.R, 832 =A.I.R. 1937 Bom. 480.**

BOMBAY TOWN TOBACCO DUTY ACT (IV OF 1857), S. 18—*Order of confiscation under—Discretion of Court—Notice to owner of vehicle—Necessity for—Omission to give notice—Effect on order.*

S. 18 of the Tobacco Duty (Town of Bombay) Act leaves it to the discretion of the Court to confiscate a vehicle used for the illegal transport of tobacco. The discretion has, however, to be judicially exercised. The Court before confiscating the vehicle, must be satisfied that the owner had consented or knew that the vehicle was used for the said illegal purpose. The discretion can only be properly exercised after hearing the owner. The omission to give notice to the owner and to hear him before making an order of confiscation is illegal and results in injustice and renders the order of confiscation liable to be set aside. (*Broomfield and Wassoodew, JJ.*) JAFFARBHAI MASAM, *In re*, **166 I.C. 562=9 R.B. 238=38 Cr.L.J. 224=38 Bom.L.R. 961=A.I.R. 1937 Bom. 10.**

BOMBAY WAGERS ACT (III OF 1865), S. 1—*Scope and effect of—Contract made through broker—Claim to brokerage, commission or losses etc.—Enforceability—If wager.*

BOUNDARIES.

S. 1 of the Bombay Wagers Act only means that contracts collateral to or in respect of wagering transactions cannot be enforced. But in order to bring the case within the section the transaction in respect of which the brokerage, commission or losses etc., in the case of a contract made through a broker are claimed, must amount to a wagering contract. The result of the Act is to put a contract collateral to an agreement by way of wager on the same footing as the agreement itself. Such a collateral contract is void in the Bombay Presidency though not in other provinces. (*Rangnekar and Macklin, JJ.*) Chimanlal *v.* Nyamatrai. **173 I.C. 205=10 R.B. 319=39 Bom.L.R. 1083=A.I.R. 1938 Bom. 44.**

BOUNDARIES—*Encroachment—Suit by owner of land against adjoining owner—Proof of disturbance of boundary marks—If essential—Measurements and area—If conclusive.*

In the case of persons owning or occupying adjoining plots of land, in order to determine whether there has been an encroachment by one of them upon the land of his neighbour, what has to be shown is that there has been a disturbance of the actual boundary marks on the site. In the absence of such disturbance of the actual boundary marks, an argument based on measurements is of little value; an argument based on area is of even less value, because there may have been an encroachment in any direction or in any part of the plot. The measurements of area in a record cannot be expected to be meticulously accurate; as the area is given only by way of description. (*Allsop, J.*) Ram Kisan *v* Pahlad. **172 I.C. 962=10 R.A. 450=1938 R.D. 71=1938 A.L.R. 56=1937 A.L.J. 1216=1937 A.W.R. 1078=A.I.R. 1938 All. 36.**

BROKER. *See* Principal and agent—Broker.

BUDDHIST LAW (Burmese).

- **Adoption.**
- **Advancement.**
- **Ancestral Property.**
- **Applicability.**
- **Divorce.**
- **Ecclesiastical law.**
- **Guardianship.**
- **Husband and wife.**
- **Inheritance.**
- **Law applicable.**
- **Maintenance.**
- **Marriage.**
- **Mortgage.**
- **Partition.**
- **Payin property.**
- **Succession.**

———(Chinese).

- **Divorce.**
- **Illegitimate son's right of inheritance.**
- **Letters of administrator.**
- **Marriage.**
- **Succession.**

———(Burmese)—*Adoption—Apatitha adoption—Rights of adoptee.*

Where it appears that there was only some kind of informal adoption resembling that called apatitha, the adoptee can have no right of inheritance from adoptive parents' estate where there are natural children living. (*Mosely and Mackney, JJ.*) Maung Mya Maung *v.* Ma Mya Sein. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

———(Burmese)—*Adoption—Apatitha child—Position of.*

An apatitha child is one who has been adopted casually and without any intention expressed on the part of the adoptive parent that it shall inherit. The intention either express or implied on the part of the adoptive parent that the adopted child shall or shall not inherit, forms the dividing line between a keittima child and an apatitha child. In other respects the position of an apatitha child is the same as that of keittima. A.I.R. 1914 P.C. 97; 5 L.B.R. 216 and 1920 L.B. 163, Diss. Where a widow had brought up a girl from her childhood who lived with her till her death, and it was proved that the widow gave her own jewels to the girl to wear, lent out moneys in the name of herself and the girl as mother and daughter, purchased some land in her name and in that of the girl, and described the girl as a joint donor with her of a tazaung.

Held, that the facts fell short of proving the girl as keittima, adopted daughter of the widow, but proved that the girl was apatitha child. (*Mosely and Ba U, JJ.*) Ma Than Nyun *v.* Daw Shwe Thit. **14 Rang. 557=164 I.C. 272=9 R.R. 73 (2)=A.I.R. 1936 Rang. 344.**

——— (Burmese)—*Adoption—Consent of all wives—If necessary.*

An adoption by a Burmese is not invalid merely because his other wives do not consent to it. Once a Burmese wife consents to her husband taking another wife—which amounts to misconduct on the part of husband and entitles the wife to divorce him—she must be held to have consented to adoption of a child by him. (*Mosely and Mackney, JJ.*) Maung Mya Maung *v.* Ma Mya Sein. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

———(Burmese)—*Adoption—Consent of natural parents—Natural mother acquiescing in adoption—Effect.*

Although the consent of natural parents is a legal condition for adoption, yet where it is established that although the natural mother of the adoptee did not give her express consent to the adoption, yet she acquiesced in it, it must be taken that she consented to it (*Mosely and Mackney, JJ.*) Maung Mya Maung *v.* Ma Mya Sein. **167 I.C. 362=9 R.R. 310=A.I.R. 1936 Rang. 518.**

———(Burmese)—*Adoption—Evidence of repute—What amounts to.*

Evidence of repute of status is distinguishable from what witnesses hear others say, which ordinarily amounts to mere hearsay, which is inadmissible in evidence. Evidence of the reputation which the person concerned gains among the people among whom he or she resides, reputation which is the result of the impressions of the people derived from their knowledge of the contract between the adopter or adopters and the alleged adoptee. (*Dunckley and Mya Bu, JJ.*) Ma Sein May *v.* Ma Saing. **165 I.C. 358=9 R.R. 206=A.I.R 1936 Rang. 459.**

———(Burmese)—*Adoption—Keittima adopted child—Right of inheritance—Estate of father of his adoptive father where latter having acquired status of auratha has died before death of former.*

A keittima adopted child succeeds not only to the estate of his adoptive parents but also to property left by the parents' relatives. An adoptive child is for all purposes in the footing of a natural born child except that the special rights of auratha child do not and cannot appertain to him because those rights arise not only from relationship but from the special claims of the natural born eldest child within the family of the parents by whom it has been begotten and conceived. Hence a child adopted in the keittima form according to Burmese Buddhist Law can claim a share of the estate of the father of his adoptive father where the latter having acquired the status of auratha has died before the death of the former; but the keittima adopted child cannot become auratha of his adoptive parent. His share is claimed by virtue not of personal representation of his adoptive father but of an independent right of inheritance given by Burmese Buddhist Customary Law. As an out of time grandchild, he shares equally with the younger brothers of his adoptive father, the latter being auratha according to the rules laid down in the law of Menoo, Vol. 10, page 277; but he has no claim, by virtue of his adoptive father having been an auratha child, to be considered as an auratha child himself. *(Roberts, C.J., Mya Bu and Mosely, JJ.)* Maung Thein *v.* U Tha Byaw. **1939 Rang.L.R. 341=182 I.C. 268=12 R.R. 2=A.I.R. 1939 Rang. 197 (F.B.).**

——**(Burmese)**—*Adoption—Keittima form—Onus.*

Though the initial burden of proving facts sufficient to establish keittima adoption undoubtedly lies on the keittima claimant, nevertheless, as in every other question of fact to be proved before the Court, that burden shifts from time to time during the trial as each point is reached at which if no more evidence were given, the one party or the other, as the case may be, would succeed and, in the long run when evidence is given on both sides, the Court is left with the evidence as a whole and the surrounding circumstances to judge from. *(Roberts, C.J. and Braund, J.)* Ma Pu Tu *v.* Maung Ba Sin. **178 I.C. 700 =11 R.R. 262=A.I.R. 1938 Rang. 369.**

——**(Burmese)**—*Adoption — Keittima form—Burden of proof.*

Where a girl claims to be an adopted daughter of certain persons, under a keittima form of adoption, the burden is on her to prove that there was an intention on the part of the adoptive parents that she should inherit from them, more so when it appears from the evidence, that the girl might have been treated as a daughter without there having been any intention that she should inherit. *(Mosely and Mackney, JJ.)* Maung Mya Maung *v.* Ma Mya Sein. **167 I.C. 362=9 R.R. 310=A.I.R 1936 Rang. 518.**

——**(Burmese)**—*Adoption — Keittima form—Proof of.*

When facts showing that the adoptee was adopted with a view to inherit are proved, then the adoption is in the keittima form and the mere fact that the catchword 'keittima' is not used in the evidence goes for nothing. After all, 'keittima' is merely a label, and if facts which would justify that label are proved, there is no need for the label to appear. *(Roberts, C.J. and Baguley, J.)* Daw It *v.* U Po Deve. **167 I.C. 90 =9 R.R. 291=A.I.R. 1937 Rang. 19.**

——**(Burmese)**—*Adoption—Keittima adoption—Proof required.*

In order to establish an adoption on the basis of one who will inherit to the entire exclusion of relatives by blood. The son or daughter should have been adopted with the intention publicly signified, of taking the adoptee as a son or daughter who will inherit. This intention may have been expressed at the time of the taking or later; or may be inferred from a long course of conduct making such intention public. Where there is a sole natural daughter, parents are old and the natural daughter actually resides with her parents with her husband to whom she is long married, the mere fact that a certain child was brought up as natural daughter does not necessarily indicate an intention that the child should inherit. Some stronger evidence than in an ordinary case in which alleged adoptive parents are childless is required to prove such intention and such intention should be clearly shown either by direct evidence or circumstances from which it may safely be inferred. *(Dunkley and Mya Bu, JJ.)* Ma Sein May *v.* Ma Saing. **165 I.C. 358=9 R.R. 206=A.I R. 1936 Rang. 459.**

——**(Burmese)**—*Adoption — Keittima—Requisites.*

A keittima child is the child of others taken and brought up to the knowledge of the public with the intention that the child shall inherit. No formal ceremony is necessary to constitute this adoption. The intention that the child shall inherit and the publicity of the intention of the person who takes the child of another in adoption that the child shall inherit are the principle requisites for keittima adoption *(Mosely and Ba U, JJ.)* Ma Than Nyun *v.* Daw Shwe Thit. **14 Rang 557=164 I.C. 272=9 R.R. 73 (2)=A. I.R 1936 Rang. 344.**

—— **(Burmese)**—*Adoption—Keittima adoption—Proof of—Test of adoption—Change of family.*

Keittima adoption may be proved either by evidence of a ceremony on a particular date of giving and taking in adoption, or by evidence of a course of conduct which cannot be explained on any other basis than that the children had been adopted with a view to inherit. The acid test of adoption is that the children should leave the family of their natural parents and join the family of their adoptive parents, and, consequently, in a case of a keittima adoption it is essential that the adoptive parents should, from the date of the adoption, make themselves responsible for the upbringing of the children. *(Roberts, C.J. and Dunkley, J.)* U Ba Thaung *v.* Daw Oo. **178 I.C. 830=11 R.R. 273=A.I.R. 1938 Rang. 381**

——**(Burmese)** — *Adoption — Keittima and apatitha forms—Distinction—Intention—Proof—Duty of a Judge.*

The dividing line between keittima adoption and apatitha adoption must be the question of intention to inherit: and it is clear that the intention must be given effect to in such a way as to secure a measure of public notoriety or attention. It cannot be said that no proof of keittima adoption should be considered satisfactory if established upon oral evidence alone. All that the Judge has to do is to see whether from oral, documentary or circumstantial evidence, from all the different elements at his disposal, he can infer that intention and that notoriety which the law demands as being consistent with keittima adoption and keittima adoption alone. (*Roberts, C. J and Braund, J.*) Ma Pu Tu *v.* Maung Ba Sin. **178 I C. 700=11 R.R. 262=A I R 1938 Rang 369.**

——**(Burmese)**—*Adoption—Living with adoptive parents—Rule as to—Extent to which applicable.*

Although it is by no means essential that, in these days at least, children should live with their adoptive parents or that if they do not do so the proof of adoption should be deemed incomplete, yet in the case of young children it is a normal characteristic of adoption that the upbringing of the children adopted should be undertaken by the adoptive parents and where this is not done, one must look carefully at the surrounding circumstances to see whether, when the normal characteristics have been departed from, there is still sufficient proof of the factum of adoption remaining. (*Roberts, C.J. and Dunkley, J.*) U Ba Thaung *v.* Daw Oo. **178 I.C. 830=11 R R.273=A I R 1938 Rang 381**

[Appeal from A I.R 1937 Rang 170.]

——**(Burmese)**—*Adoption—Proof required—Residence of adoptee with adoptive parents—Evidentiary value.*

According to the law of Burma, no formal ceremony is necessary to constitute valid adoption; what is to be proved is not only the fact of adoption but also the facts of the intention to adopt in the keittima form and of the public notoriety which are necessary to constitute valid adoption in this manner. Residence of adoptee with the adoptive parents is not one of the legal ingredients of a valid adoption but where other evidence is lacking, residence with the adoptive parents, though not essential, is at any rate most valuable as evidence. (*Braund, J.*) U Ba Thaung *v.* Dau U. **1938 Rang.L.R 323=169 I.C. 617=10 R R. 14=A.I.R. 1937 Rang. 170.**

——**(Burmese)** — *Adoption — Motive—Relevancy.*

In cases of adoption, as in other cases, although motive is not a necessary ingredient, it always forms a good index to the way in which the truth lies. (*Dunkley and Mya Bu, JJ.*) Ma Sein May *v.* Ma Saing. **165 I C. 358=9 R.R. 206=A.I.R. 1936 Rang 459.**

——**(Burmese)**—*Adoption — Proof—Keittima Daughter.*

A applied for letters of administration to the estate of *D* on the ground that *A* was the keittima adopted daughter of *D* and her sole heir. *D* and her husband were a childless couple. *A* was living at *D's* house since she was four years old, and so she was not able to give evidence of actual adoption but there was a good deal of evidence to show that she had been so adopted and had a reputation of an adopted daughter. *A* was married to the nephew of *D* and even after her divorce she lived with her children at the house of *D* and there was also evidence that her reputation as an adopted daughter still persisted. The opposite party contended that *A* lived at *D's* house not as an adopted daughter but as a servant girl.

Held, that the evidence was sufficient to establish the adoption as keittima daughter. The fact that *A* was married to the nephew of *D* and that she lived with her children at the house of *D* even after her divorce with him made it impossible that she had the position of a servant girl. As *D* and her husband had no child and *A* lived with them for many years, there was nothing surprising in their adopting *A* as keittima daughter. (*Baguley and Spargo, JJ.*) U Tun Pe *v.* Ma Aye Ki. **174 I C. 223=10 R R. 393=A I.R. 1938 Rang. 40.**

——**(Burmese)**—*Advancement — Presumption of—Applicability to Chinese Buddhist.*

The presumption of advancement for the benefit of the children arising in the case of a purchase of a Burman Buddhist of property in the name of his children is applicable to the case of Chinese Buddhists. 6 M I.A. 53 (P.C.). 13 M.I.A. 232 (P.C.) and A.I.R. 1921 P.C. 56, Appl. (*Mya Bu, J.*) Maung Kya Yan *v.* Maung Tha E. **161 I. C. 665=8 R.R. 503=A.I R. 1936 Rang. 121.**

——**(Burmese)**—*Ancestral property — Presumption as to jointness, if any.*

There is no presumption in Burmese Buddhist law that ancestral property remains undivided. (*Dunkley J.*) Maung Hla Pe *v.* Manika. **A.I. R. 1940 Rang. 141**

——**(Burmese)** — *Applicability — Marriage contracted between Chinese Buddhists in Burma.*

As regards validity of the marriage between Chinese Buddhists contracting marriage in Burma, the Burmese Buddhist law is applicable as the ***lex loci contractus***, but as regards inheritance or succession to the estates of Chinese Buddhists dying intestate in Burma the Chinese customary law is applicable as the customary law of the Chinese Buddhists. (*Mya Bu and Mosely, JJ.*) Ma Tin *v.* Ko Sein Hone **184 I.C. 665=12 R. R. 167=A.I.R. 1939 Rang. 291.**

——**(Burmese)**—*Aramika sanghika property—Nature of—Suit to recover such property by monk on behalf of Kyaundaik—Maintainability.*

Aramika sanghika property is only one kind of sanghika property. The right of use in such property vests in the monks residing in a particular locality but for the sake of convenience the power of control resides in a particular monk such as the presiding monk of that locality. A suit under O. 1, R. 8, C. P. Code, by a Burmese monk who is not the presiding monk of the kyaungdaik in which he resides, for the recovery of certain land on the ground that it is aramika sanghika property, on behalf of all the sanghas of the kyaundaik (and not on behalf of the general body of sanghas) is not maintainable, inasmuch as none of the sanghas or monks residing in the kyaungdaik is entitled individually to the control, management or possession of the property in addition to mere use and enjoyment. The property is the property of the sanghas in general and not the property of the sanghas of a particular locality. It is the presiding monk alone who is entitled to management, control and possession. The plaintiff in such a suit is also not entitled to a declaration that the lands in suit constitute aramika sanghika property for the enjoyment and benefit of the sanghas of the kyaungdaik, as that would convert the suit into one of entirely a different character. (*Mya Bu, Offg. C.J. and Mackney, J.*) U Zawtipala *v.* U Thatdama. **180 I.C. 210=11 R.R. 382 =A I R. 1939 Rang. 21.**

——**(Burmese)**—*"Auratha" child—Meaning.*

The "auratha" or "orasa" child literally means "child of the body" and is used in Burmese

Buddhist Law as meaning also "eldest born child." (*Roberts, C.J., Mya Bu and Mosely, JJ.*) Maung Thein *v.* U Tha Byaw. **1939 Rang L R. 341=182 I.C. 268=12 R.R. 2=A.I.R. 1939 Rang. 197 (F.B).**

——**(Burmese)**—*Dedication of property to nuns—Gifts—If exempted from operation of S. 123 of T. P. Act.*

Buddhist religious gifts are not excepted from the operation of S. 123, T. P. Act, since that Act has been enforced. Modern nuns are little more than lay devotees: they do not undergo any ordination and are not regarded as dying a civil death: they are under no disabilities with regard to money and property. Hence there could be no possible dedication to nuns as such and if it is to be a gift, then it must conform to the provisions of the Transfer of Property Act. (*Mackney, J.*) Daw Sein *v.* Ma Mai Ma. **178 I.C. 232=11 R. R. 219=A.I.R. 1938 Rang. 303.**

——**(Burmese)** — *Divorce — Divorce between Eindaunggyi couple on account of wife's adultery—Forfeiture of wife's rights.*

In the case of a divorce between Eindaunggyi couple on account of adultery by the wife, the wife loses all her rights in the Hnapazon property. And there is no difference in principle between the case of a Nge-lin-nge-maya and that of an Eindaunggyi regarding imposition of forfeiture on the guilty spouse. (*Ba U, J.*) S. A. S. Chettiar Firm *v* U Maung Gyi. **14 Rang 329 =163 I.C. 600=9 R.R. 36=A.I.R. 1936 Rang. 274.**

——**(Burmese)**—*Divorce—Dissolution—Desertion of husband by wife.*

In the case of Burman Buddhists, if the wife elopes with her paramour and deserts her husband the marriage is automatically dissolved at the end of one year from date of desertion and no further expressed act of volition on the part of the deserted party is necessary to effect such dissolution. (*Ba U. J*) S. A. S Chettiar Firm *v.* U Maung Gyi. **14 Rang. 329=163 I.C. 600=9 R R. 36=A.I R. 1936 Rang. 274.**

——**(Burmese)**—*Divorce—Dissolution by desertion—Allegation of adultery on part of wife—Wife, if forfeits her share in hnapazon property.*

Under Burmese Buddhist law divorce is essentially a personal action and the penalties for adultery can be only enforced by the husband. When a marriage is dissolved by the desertion of the wife she does not lose her interest in the joint property of the marriage, and even if there is an allegation of adultery against the wife, the joint property must be divided on the footing that the marriage has become dissolved by desertion, unless the husband has proved the adultery in a suit for divorce brought by him. Consequently in such circumstances the wife does not forfeit her share in the hnapazon property. (*Mosely and Dunkley, JJ*) Ma Dun Mai *v.* Maung San Tun. **1938 Rang L R 229=177 I.C. 492=11 R.R. 132 =A I.R. 1938 Rang 168.**

——**(Burmese)**—*Divorce—Wife deserting husband and staying away for one year—Divorce by operation of law.*

After the wife has departed from the house of her husband, there is a divorce by operation of law, where there has been no maintenance of the wife for the period of one year. But the contribution by the husband to the maintenance of the wife, who has left him will avoid the consequence that the marriage tie is dissolved by operation of law. (*Roberts, C.J. and Leach, J.*) Dwa Pwa May *v.* Ma Thin Mya. **171 I.C. 656=10 R.R. 176=A I R 1937 Rang. 255.**

——**(Burmese)**—*Ecclesiastical Law—Monkhood—Entry into order of* rahans—*Effect of—Divesting of property.*

A Burmese Buddhist who enters into the Buddhist order of *rahans* with the intention of remaining therein permanently automatically divests himself of all his interest in or title to property in his ownership or possession at the time of his ordination. (*Roberts, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) A.R.L P. Firm *v.* U Po Kyaing **1939 Rang.L.R. 311=183 I C. 673=12 R.R. 93=A I.R 1939 Rang. 305 (F B).**

——**(Burmese)**—*Ecclesiastical Law—Monkhood—Right of* rahan *to possess or acquire property—* Kappiya *system.*

The Buddhist monkhood is a mendicant order, and the only properties which a monk could originally possess were articles which fell within the category of the Four Requisites or Resources—food, clothing lodging and medicine, but the ancient texts recognise a vicarious possession on behalf of the *rahan* by a lay steward who is called *kappiya.* The *kappiya* may receive gifts offered to a monk after his ordination but he does not enter into possession of the property of a layman when the latter becomes a monk. When paddy land is given to a monk after ordination it is given for future requirements in order that the four requisites may be satisfied. A *rahan* becomes ineligible to receive an inheritance from his lay relatives. It is, however, inaccurate to describe him as civilly dead. (*Robert, C.J. Mya Bu, Baguley, Mosely and Ba U, JJ.*) A R.L.A. Firm *v.* U Po Kyaing. **1939 Rang.L.R. 311=183 I.C. 673=12 R R. 93=A I R 1939 Rang. 305 (F.B.).**

——**(Burmese)**—*Ecclesiastical law—Owner of poggalika conferring rights of appointing his successor upon other persons—Such persons not exercising right—Vesting of ownership in sangh.*

If the owner of a poggalika does not appoint his successor but confers the right of appointing successor upon certain persons then if those persons do not exercise that right, the ownership of the poggalika vests in the sangh at large. After the death of the owner the presiding monk is then to be elected by the sangh. The latter may elect such monk in any way they choose provided it is a real, valid and true election. The members of the sangh may nominate some of the senior members of them representing the whole body to elect the monk and the election of the monk by the members so nominated is a valid and proper election by the sangh as such. (*Roberts, C.J. and Dunkley, J.*) U Thiseitta *v.* U. Eindawuntha. **1940 Rang L.R. 97=185 I.C. 483=12 R.R. 196=A.I.R. 1939 Rang. 385.**

——**(Burmese)**—*Ecclesiastical law—Poggalika—Election of presiding monk by sangh.*

Although there may be some ceremonial contemplated at the time of installing a presiding monk of a poggalika the election of such a presiding monk by the sangh is not analogous to a ceremonial but is a mere question of fact depending upon the consideration of the question whether the members of the sangh are substantially in favour of the appointment of the proposed monk. (*Roberts, C.J. and Dunkley, J.*) U THISEITTA *v.* U EINDAWUNTHA. **1940 Rang. L.R. 97=185 I.C. 483=12 R.R. 196=A.I.R. 1939 Rang. 385.**

——**(Burmese)**—*Ecclesiastical law*—Poggalika *property—Devolution.*

On the death of a *poggalika* owner of a monastery or a monastic institution, the property becomes *Sanghika* property (that is property belonging to the *Sanga* in general). *Sanghika* property is either of the kind known as *Aramika Sanghika* or of the kind known as *Ganika Sanghika* (*Aramika Sanghika* meaning *Sanghika* property for the use of the *Sangha* dwelling in a particular locality and *Ganika Sanghika* meaning *Sanghika* property for the use of the *Sangha* of a particular sect). The right of use in such property vests in the monks residing in the particular locality or in the *Sangha* of the sect, but, for the sake of convenience, the power of control resides, in the case of *Aramika Sanghika* property, in a particular monk such as the presiding monk of the locality, or, in the case of *Ganika Sanghika* property, in the leading monks of the sect or one of them. (*Roberts, C.J. and Mya Bu, J.*) U ZAWTIKA *v.* U KALYANA. **14 Rang. 566=168 I.C. 967=9 R.R. 381=A.I.R. 1937 Rang. 76.**

——**(Burmese)**—*Family living in patriarchal state—All working and living together—Members seeking service and remaining separate—Returning after father's death and continuing father's business—Separate banking account—If separate property.*

Where a family kept together in a kind of patriarchal state all working for the father and after him for the mother, and none having any separate property of their own, only getting their boarding, clothing and pocket-money, and where one member went out and found work and remained apart, but came back on his father's death and continued his father's business and had a separate banking account of his own as distinct from that of the family, *prima facie* his banking account would be his personal property until the contrary is shown. (*Baguley and Shaw, JJ.*) DAW KYIN *v.* MA HLA YI. **176 I.C. 909=11 R. R. 89=A.I.R. 1938 Rang. 71.**

——**(Burmese)**—*Gift—Acceptance, if necessary.*

Dunkley, J.—It is nowhere stated in the Burmese Buddhist Law that a gift need not be accepted. (*Mya Bu, Offg. C.J. and Dunkley, J.*) BISSESSAR DAS *v.* MA YI. **179 I.C. 730=11 R.R. 346=A.I. R. 1939 Rang. 49.**

——**(Burmese)**—*Gift—Testamentary disposition in guise of gift—Validity.*

It is not only a death-bed gift which is void under the Burmese Buddhist Law but a gift in the nature of testamentary disposition, or in other words, a testamentary disposition in the guise of a gift is also void as contravening the fundamental principles of the Burmese Buddhist Law which recognizes no form of succession other than intestate succession. (*Mya Bu and Sharpe, JJ.*) MA LON *v.* MYA MAY. **179 I.C. 946=11 R.R. 363=A.I.R. 1939 Rang. 59.**

——**(Burmese)**—*Gift—Validity—Gift affecting inheritance.*

No Burman Buddhist can, under the guise of making a gift, be allowed to make a will. He cannot set at naught the provisions of his personal law as to the inheritance of his property after his death. Where therefore his act in making a gift, owing to the circumstances under which it is made or the conditions attached thereto are such as to affect the succession to, or inheritance of, his property after his death, Buddhist law must be resorted to, to arrive at a decision as to whether his action can be maintained or is invalid. The deed of gift, affecting inheritance will be a nullity, in spite of the fact that it was otherwise made in accordance with Ss. 122 and 123, T. P. Act. A.I.R. 1924 Rang. 13 and 3 Bur.L.T. 107, Rel. on. (*Mackney, J.*) MA YAR THEIN *v.* U TA TE. **176 I.C. 799=11 R.R. 84=A.I.R. 1938 Rang. 216.**

——**(Burmese)**—*Guardianship*—De facto *guardian—Right to alienate.*

Under Burmese law a *de facto* guardian cannot dispose of immovable property of the minor. Hence a mortgage executed by a person purporting to act as guardian of minors cannot affect the interests of the minors in the mortgaged property. (*Dunkley and Braund, JJ.*) R. M. A. R. M. CHETTYAR FIRM *v.* MG. SHWE HMUN. **180 I.C. 489=11 R.R. 404=A.I.R. 1938 Rang. 468.**

——**(Burmese)**—*Husband and wife—Atetpa and Lettetpwa property.*

So long as the corpus of paying or atetpa property is unchanged it will always remain payin or atetpa. The question as to whether there has been a change in the corpus of the property is one of fact. Where atetpa property originally brought by wife to her marriage changes its original character by reason of its having been entirely rebuilt during the coverture, the property becomes lettetpwa property of the marriage and the husband has half interest equally with the wife in such property. (*Roberts, C.J. and Dunkley, J.*) MAUNG BA U *v.* MA SHWE HMI. **186 I.C. 286=12 R.R. 256=A.I.R. 1939 Rang. 355.**

——**(Burmese)**—*Husband and wife—Joint property—Wife consenting to husband's mortgaging of—Effect.*

Where a Burmese Buddhist wife consents to her husband mortgaging the joint property as if it were his sole property, then clearly she is holding him out to the mortgagee as her agent, not only in respect of the execution of the mortgage but also in respect of all subsequent transactions in connection with the mortgage. (*Dunkley and Wright, JJ.*) U RAI GYAW THOO, LTD. *v.* MA HLA U PRU. **1940 Rang.L.R. 180=A.I.R. 1940 Rang 126.**

——**(Burmese)**—*Husband and wife—Mortgage deed by husband and wife jointly—Second mortgage deed as novation of first by husband alone—Liability of wife.*

Where a mortgage deed is jointly executed by Burmese husband and wife, but subsequently a second mortgage deed is executed as a novation of the first, but wife expressly withholding her consent to the new deed, then according to the doctrine of novation the original deed need not be performed and under the second deed the wife cannot be liable. The principle that a liability incurred by a Burmese Buddhist husband for the joint purpose of himself and his wife binds the wife based upon the presumption that the wife has consented to the incurring of such liability, cannot be availed of in face of wife's express dissent. (*Mya Bu and Dunkley, JJ.*) U San Ya *v.* P. R. M. P. S. P. L Firm. **165 I.C. 388=9 R. R. 213=A.I.R. 1936 Rang. 396.**

——**(Burmese)**—*Husband and wife—Mortgage by husband of joint property—When binds wife.*

If a Buddhist Burmese mortgages the property of himself and his wife, the mortgage binds the wife only if it is made with her full knowledge and consent. (*Baguley and Mosely, JJ.*) Daw May *v.* Maung Aung Kyaw. **163 I.C. 166=8 R.R. 512=A.I.R. 1936 Rang. 246.**

——**(Burmese)**—*Husband and wife—Property acquired during coverture—Burden of proof.*

Where a Burmese wife asserts that certain property was acquired by her husband during her coverture, the burden is on her of establishing satisfactorily that it was acquired after her marriage. (*Dunkley, J.*) S. P. L. A. Chettyar Firm *v.* Ma Pu. **163 I.C. 604=9 R.R. 33=A.I.R. 1936 Rang. 262.**

——**(Burmese)**—*Husband and wife—Property acquired during coverture—Mutual rights—Insurance policy in the name of husband—Extent of wife's right therein.*

The general rule of Burmese Buddhist Law with reference to the rights of husband and wife to property acquired during coverture is, that each shall have an equal interest in it. Where a husband took a life policy in his name during coverture and it was not known from what source the premia were paid, and became insolvent, it was held that the general rule as to the wife's equal right applied and that she was entitled to half of the amount recovered from the Insurance Company by the Official Receiver. It was further held that what was acquired during the coverture was, not the proceeds of the policy, but the right to obtain the proceeds of the policy—which was a right contingent on the death of one of the persons who jointly 'acquired' the right to the policy and that there could be no difference between the acquisition of the right to draw the proceeds at the death of the assured and the acquisition of other kinds of property during the life time of both husband and wife. (*Mya Bu, Off, J. C. J., Mosely and Ba U, JJ.*) Official Assignee *v.* Ma Hnin San. **1940 Rang.L.R. 208 (F.B.).**

——**(Burmese)**—*Husband and wife—Rights in jointly acquired property.*

The Burmese Buddhist husband and wife have equal rights in their hnapazon or jointly acquired property. (*Ba U and Mackney, JJ.*) U So Maung *v* Thom. **184 I C. 622=12 R R. 163=A.I.R. 1939 Rang. 287.**

——**(Burmese)**—*Husband and wife—Rights to atetpa property on separation.*

Where the husband and wife separate from each other by mutual consent, either is entitled to take his or her atetpa property. (*Ba U and Parker, JJ.*) U Thin *v.* Daw Hmu. **171 I.C. 702=10 R.R. 179=A.I.R. 1937 Rang. 142.**

——**(Burmese)**—*Inheritance—Share of children of first mortgage in* payin *property.*

Where a Burman Buddhist leaves surviving him his children by a former marriage and also his second wife and his children by her, the children of the first marriage are entitled to three-fourths of the *payin* property, brought by their parent to the second marriage, as against their step-mother on their father's death. (*Mosely and Dunkley, JJ.*) Ma E Nyun *v.* Daw Ma Get. **178 I.C. 200=11 R.R. 218=A.I.R. 1938 Rang. 293.**

——**(Burmese)** — *Law applicable — Duty of Courts.*

The task of the Courts of British Burma has been, and still is, to deduce from the *ad hoc* decisions compiled in the Dhammathats general principles of the common law of Burma which are in accordance with the habits and customs of the Burman of today. (*Roberts, C.J., Dunkley and Braund, JJ.*) Maung Thein *v.* Maung Nyo Sein. **1939 Rang.L.R. 160=178 I.C. 883=11 R. R. 284=A.I.R. 1938 Rang. 449 (S B.).**

——**(Burmese)**—*Maintenance—Suit by wife—Maintainability—Right to arrears.*

Under Buddhist Law there is a positive duty cast on the husband to maintain his wife or wives. Where by law, a person is under a duty towards another person, there is vested in that other a corresponding right to have that duty performed. Hence a suit for maintenance by Burmese Buddhist wife against her husband who is living separately from her, is maintainable. But a claim for arrears of maintenance cannot be sustained. (1872-92) L.B.R. 258 Rel. on (*Dunkley, J.*) Ma Saw Nwe *v.* U Aung Soe. **1939 Rang. L.R. 527=182 I.C. 799=12 R.R. 28=A.I.R. 1939 Rang. 223.**

——**(Burmese)** — *Marriage — Co-habitation accompanied by agreement to marry* in futuro—*If creates change of status.*

Co-habitation accompanied by an agreement to marry *in futuro* does not create a change of status, although in cases where parties to the agreement are competent to bind themselves by a contract to marry and the agreement is broken, the co-habitation in certain circumstances may affect the quantum of the damages that are awarded as compensation for the breach of the contract. (*Page, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) Maung Tun Aung *v.* Ma E Kyi. **14 Rang 215=162 I.C. 60=8 R.R. 574=A.I.R. 1936 Rang. 212 (F.B.)**

——**(Burmese)**—*Marriage—Co-habitation with intention of being husband and wife—Effect.*

If *P* and *N* were co-habiting with intention of being husband and wife, then they were husband and wife whatever other people may have thought of them. (*Baguley and Mosely, JJ.*) Ma Nyun *v.* Daw Hla Ohn. **163 I.C. 393=9 R.R. 11=A.I.R. 1936 Rang. 253.**

——**(Burmese)**—*Marriage—Denial of—Burden of proof.*

Where the plaintiff denies that he had ever married the defendant and proves that he had married another wife, and calls witnesses to say that that lady was the only person whom he had ever treated or who had ever been treated as such unless it could be shown in cross-examination that such evidence was unworthy of belief there would be a case to answer, and it would be for the defendant to adduce such evidence in rebuttal as would clearly point to the existence of a valid marriage, according to Burmese Buddhist law, between the parties. (*Roberts, C. J. and Dunkley, J.*) Maung Maung *v.* Ma Sein Kyi. **A I.R. 1940 Rang. 181.**

——**(Burmese)**—*Marriage—Essentials.*

A marriage between Burmese Buddhists is created by co-habitation coupled with intent to become husband and wife. There must also be publicity of the relationship. (*Dunkley and Wright, JJ.*) Maung Ba To *v.* Maung Nyun. **A.I.R. 1939 Rang. 442.**

——**(Burmese)**—*Marriage—Essentials to be proved to raise* prima facie *presumption.*

What must be proved to raise a *prima facie* presumption of marriage is that the acts of intercourse were not clandestine, but that there was an open avowal of the married state as distinct from the relationship between a man and his mistress. And if the parties made no open avowal their method of living must have been such as to induce members of the public, not to gossip about the relationship, but to show by their conduct that they were treating the pair as man and wife. (*Roberts, C.J. and Dunkley, J.*) Maung Maung *v.* Ma Sein Kyi. **A.I.R. 1940 Rang. 181.**

——**(Burmese)**—*Marriage--Evidence of--Reputation of marriage—How to be established—S.* 50, *Evidence Act, if affected by S.* 110, *Cr. P. Code.*

A reputation as regards marriage can only be established by means of admissible evidence under S. 50, Evidence Act. What people think may be expressed in words, or by conduct. If there is a rumour, or gossip, to the effect that two persons are married the existence of that rumour or gossip is inadmissible in evidence. On the other hand, the fact that they were usually received and treated by their friends as husband and wife is relevant. Hence, in such cases, the use of such phrases as "I learnt that they were living together as man and wife" or "they were man and wife" are not receivable as evidence. The witness must prove conduct on the part of the man and woman, or on the part of their friends and neighbours from which the Court can draw this conclusion. The general reputation of a man amongst the community may no doubt be evidence in inquiries under S. 110, Cr. P. Code. The nature of the section is such as to render admissible what persons who know him think of him. But this fact in no way nullifies the provisions of S. 50, Evidence Act, which lays down a clear rule as to the limits within which opinion may be evidence when a question of relationship has to be decided. (*Roberts, C.J. and Dunkley, J.*) Maung Maung *v.* Ma Sein Kyi. **A.I.R 1940 Rang. 181.**

——**(Burmese)**—*Marriage—Promise of marriage by young Burman below age of majority—Validity—Law applicable.*

The Burmese Buddhist Law does not form the rule of decision of the question as to the validity of a promise of marriage made by a Burmese Buddhist young man below the age of the majority fixed by the Majority Act and a Burman is not competent to enter into a valid or binding contract to marry *in futuro* until he has completed the age of 18 years. (*Page, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) Maung Tun Aung *v.* Ma E Kyi. **14 Rang. 215=162 I.C. 560 =8 R.R. 574=A.I.R. 1936 Rang. 212 (F.B.).**

——**(Burmese)**—*Marriage—Proof required.*

In order to establish a marriage under Burmese Buddhist Law, what is required is mutual agreement between the parties to become man and wife coupled with consummation. Neither ceremony nor open living together is necessary, but they are cogent evidence to prove the central fact that mutual agreement. Where the woman admits that the man already had a wife when she first associated with him and that they never went out in public together and never received any friends in the house as husband and wife, the mere fact that the man was visiting her daily for a space of 2 or 3 years and that she is living in a house built by the man cannot be taken as proof of a mutual agreement between them to become husband and wife. (*Spargo, J.*) Ma Kyin Mya *v.* Maung Sit Han. **1937 Rang. L.R. 103=170 I.C. 355=38 Cr.L.J. 895=10 R.R. 77=A.I.R. 1937 Rang. 245.**

——**(Burmese)**—*Marriage—Proof of.*

Among Burman Buddhist marriage is a contract entered into by mutual consent of the parties and no ceremony is necessary. In the absence of direct proof, consent may be inferred from the conduct of the parties or established by reputation. Generally in such circumstances, some open recognition of the wedded state is to be expected. Relatives and neighbours are usually asked to some form of entertainment in order to signify the occasion, and where this is dispensed with, evidence of the intention to enter into married life must be clear. Clandestine acts of sexual intercourse do not by themselves establish marital relationship and where there is no regular cohabitation under the same roof and the couple who resort to each other for purposes of intimacy are thought by some to be engaged and by others to be cousins or mere friends, proof of marriage has not been established by reputation. Moreover, as it takes two persons to make a contract, in order to prove marriage there must be evidence not merely of desire by one person to be considered as having married another, but of the consent of that other, express or implied, to the joint assumption of a status consistent only with the marriage bond. (*Roberts, C.J.*) U Tun Sein *v.* Ma San Myint. **175 I.C. 418=39 Cr.L.J. 571=10 R.R. 490=A.I.R. 1938 Rang. 115.**

——**(Burmese)** — *Marriage — Second wife—Share of—Jointly acquired property of first marriage.*

The share of a second wife in the jointly acquired property of the first marriage is one-sixth. (*Spargo, J.*) S.P.L.A.A. Chettiar Firm *v.* Ma Pu. **169 I.C. 693=10 R.R. 27=A.I.R. 1937 Rang. 138.**

——**(Burmese)**—*Marriage—Union of Chino-Burman Buddhist and Burmese Buddhist woman —Mutual consent—Sufficiency.*

The law that is applicable to the union of Chino-Burman Buddhist and a Burmese Buddhist woman is the same as is applicable to the case of Burmese Buddhist man and Burmese Buddhist woman. All that is required, so long as they are *sui juris*, is their mutual consent to live together as husband and wife. If such consent is proved then the woman would be deemed to be the legally married wife of the man. (*Ba U, J.*) Ma Mya Tin *v.* Maung Ah Lon. **183 I.C 477=40 Cr.L.J. 796=12 R.R. 77=A.I.R. 1939 Rang. 252.**

——**(Burmese)**—*Marriage—Validity — Hindu becoming Buddhist, marrying according to customs of Buddhists.*

Where a Hindu not only formally recites the five receipts after a pongyi, but builds and endows a kyaung and after selecting a koyin and getting him raised to the position of upazin accepts him in the position of private chaplain, he is going a long way further than any Hindu can be expected to go if he retains Hinduism. When this is coupled with his completely cutting himself off from his relations in India and settling down permanently in Burma in the Burmese Buddhist way, the only possible inference is that he has become a Buddhist. If such a person marries conforming with the customs of Buddhist in Burma, the marriage must be regarded as a legal marriage on the principle of *lex loci contractus*. (*Baguley and Sharpe, JJ.*) CHINNASWAMI PILLAI *v.* MA TOKE. **174 I.C. 558=10 R.R. 414=A.I.R. 1938 Rang. 51.**

——— **(Burmese)**—*Mortgage — Equitable mortgage by Burman—Burman's wife dying leaving son—Decree passed on mortgage—Burman marrying again—Suit by son for declaration that mortgage decree did not affect his mother's share—Second marriage, if affects mortgagee's rights.*

An equitable mortgage was created by a Burman. His wife died afterwards leaving a son. A mortgage decree was passed. The Burman afterwards married again and the execution of the mortgage decree was stayed pending the decision of a suit which was brought by the son for a declaration that the mortgage decree did not affect his mother's share of the property.

Held, that the second marriage of the mortgagor did not affect the rights of the mortgagee, the decree having been passed before the marriage and even if the first wife was not consenting party, on her death, her husband became absolute owner of the property subject to the mortgage he had created and his interest in property having increased, the increase enured to the benefit of the mortgagee. A.I.R. 1919 P C. 14 and A.I.R. 1927 Cal. 665, Rel. on. (*Leach, J.*) MAUNG CHIT KHIN *v.* U BA. **176 I.C. 929=11 R.R. 94=A.I.R, 1938 Rang. 108.**

——— **(Burmese)**—*Orasa daughter—Rights in parental estate—Limits of.*

Under the Buddhist law of inheritance an eldest born daughter having all the qualities of an orasa child has no right whatever of claiming a quarter share from her father when her mother has predeceased her. She can have such a right, against the mother if the father dies before her mother. The only circumstances under which the daughter as the orasa child can acquire a vested interest in the parental estate is where the father remarries before the death of her mother. (*Mya Bu and Mosely. JJ*) U MAUNG MAUNG *v.* MA TIN. **A.I.R. 1940 Rang. 139.**

——— **(Burmese)**—*Partition—Suit for on re-marriage of surviving parent—Property liable to partition.*

In a suit by a person for partition of the estate of his parents on re-marriage by his surviving parent, the estate subject to partition is the estate held by the surviving parent at the date of the re-marriage and not such estate to which the surviving parent might be legally entitled. (*Page, C.J. and Mya Bu, J.*) MAUNG SEIN BA *v.* MAUNG KYWE. **161 I.C. 584=8 R.R. 489=A.I.R. 1936 Rang. 107.**

——— **(Burmese)**—*Partition—Heir seeking to obtain his share of inheritance—Proper remedy.*

Per *Dunkley, J.*—Strictly there is no such thing as a suit for partition among Burmese Buddhist heirs because they are tenants-in-common and not joint tenants of the inheritance. The only way in which one heir can obtain his share of inheritance from another heir or heirs in possession thereof is by an administration suit and the whole of the property belonging to the estate must be brought to account. Consequently if an heir is to get a share of an inheritance, then a suit for a share of one property out of the inheritance will not lie. (*Dunkley, J., on difference between Leach and Spargo, JJ.*) MA PWA SHIN *v* U PO SIN. **170 I.C. 946=10 R.R 117=A.I.R. 1937 Rang. 324.**

——— **(Burmese)**—Payin *property—House built on* payin *site with* lettetpwa *funds—House becomes* payin.

The more valuable part of a house and site is ordinarily the site, and so long as the corpus of site is unchanged, it will always remain the same. Hence where a house is built on *payin* land with *lettetpwa* funds, the house becomes *payin.* 10 Bur. L.R. 49, Ref. (*Dunkley, J.*) S P. L. S. CHETTYAR FIRM *v.* MA TU. **14 Rang. 697=9 R.R. 186=164 I.C. 1023=A.I.R. 1936 Rang. 417.**

——— **(Burmese)**—*Sayadaw—Right to evict monk—Grounds.*

A Sayadaw or presiding monk of a kyaungtaik which is sanghika and not poggalika property is not entitled to evict a monk merely on the ground that the latter challenges the position of the plaintiff to be the poggalika owner of the property, in absence of proof of any misconduct on his part or of such behaviour as would render his eviction from the kyaungtaik desirable. The sanghika property does not belong to any particular person or group or section. It partakes of the nature of public religious property. When a kyaung becomes vacant, there is nothing wrong in a monk who comes peaceably in to dwell in the kyaung. (*Roberts, C.J. and Dunkley, J.*) U EINDAWBATHA *v.* U ZANEENDA. **178 I.C. 566=11 R.R. 247=A.I.R. 1938 Rang. 396.**

——— **(Burmese)**—*Succession—Apatitha child—Right to share when one parent is surviving.*

In the absence of keittima or natural children, the apatitha child is entitled to inherit in the estate of his adoptive parents when both parents are dead; but he has no right to share in the estate of the deceased parent when the other survivor parent is living. (*Mya Bu and Mackney, JJ.*) MA SINT *v.* MA MA GALE. **1939 Rang L. R. 378=179 I.C. 43=11 R.R. 295=A.I.R. 1938 Rang. 451.**

——— **(Burmese)**—*Succession — Apatitha child living apart from its parents—Right of—Keittima child—Distinction.*

An apatitha child who lives apart from his parents is not entitled to inherit from them. A keittima child gets his right of inheritance from the intention of the adoptive parents that he shall inherit. An apatitha child does not get any right to inherit from the intention of the person who adopts, because the person who adopts has no intention to give him any such right. (*Baguley and Mosely. JJ.*) KO PE KYAI *v.* MA THEIN KHA. **1937 Rang. L.R. 426=173 I.C. 238=10 R.R. 327=A.I.R. 1937 Rang. 455.**

——— **(Burmese)**—*Succession — Burmese male marrying twice—Both wives living simultaneously—Child from former marriage—Right to inherit to step-mother.*

When a Burmese Buddhist male had contracted two marriages and both wives had been alive at the same time, the children of the first marriage in point of time whose parents both predeceased their step-mother, are heirs of their step-mother in respect of her separate property, when there are no children or direct descendants of the second wife. (*Roberts, C.J. Dunkley and Braund, JJ.*) Maung Thein v Maung Nyo Sein. **1939 Rang. L.R. 160=178 I.C. 883=11 R.R. 284=A.I.R. 1938 Rang. 449 (S.B.).**

———**(Burmese)**—*Succession—Child whose property was in possession of parent and who lived with parent dying issueless—Who inherits.*

As between the parent and the surviving spouse of a child who dies leaving no issue but who lived with his or her parent and whose property is in the possession or keeping of the parent, the parent is entitled to inherit such property under the Burmese Buddhist law. But the rule will not affect the vested interest of the son-in-law or daughter-in-law in the payin property brought to the marriage by the daughter and son. (*Robert, C.J. Mosely and Mackney, JJ.*) Ma Aye Tin v. Daw Thant. **A.I.R. 1940 Rang. 120 (F.B.).**

———**(Burmese)**—*Succession—Death of one parent and re-marriage of the other—Rights of children taking a share—If they retain further claim in respect of future property—Widow and widower having children remarrying—One of the sons of widow taking his share—Right of the other son to share in the lettetpwa or hnapazon property.*

Under the Burmese Buddhist Law a child who takes his share in the estate of his parents after the death of one parent and upon the remarriage of the surviving parent ceases to have any further claim in the remainder of such estate and in the property acquired subsequent to the remarriage of the surviving parent except probably in the event of the surviving parent dying without leaving a widow or widower or descendants. One *U*, a widower, married *D*, a widow. They had children of their respective previous marriages and also some *payin* property. *D's* children were her two sons, *S* and *M*. Shortly after the marriage of *D* and *U*, *S* died leaving a widow who demanded and received the share to which her husband was entitled in *D's* atetpa property (*i.e.* property which *D* brought from her previous marriage) on account of her marriage with *U*. *S's* share was one half of the half-share to which two sons, *S* and *M* were entitled to the estate of their parents on account of *D's* re-marriage after the death of their father. After *D's* death the representatives of *M* brought a suit for half of the lettetpwa or hnapazon property of *U* and *D*.

Held, that it was not logical that, because *S* or his representatives had taken away his share in the property of *D's* previous marriage and *S* thus dropped out of the new family, the share to which *M* or his representative were entitled in the property acquired subsequent to *D's* marriage with *U* should be reduced by the share which *S* would have had in it if he or his representatives had not taken away the share in the atetpa property upon the remarriage of *D*. Hence *M's* representatives were entitled to the entire half-share in the lettetpwa or hnapazon property of *U* and *D*. (*Mackney, Mya Bu and Spargo, JJ.*)

Maung Po Zaw v. Maung An. **1939 Rang. L.R. 83=179 I.C. 6=11 R.R. 303=A.I.R. 1938 Rang. 376.**

———**(Burmese)**—*Succession— Dhammathats—Former marriage—Meaning.*

Two contemporaneous or overlapping marriages, may be described as 'former' and latter, the 'former' being that which was contracted earlier and the latter being that which was contracted later, where the two marriages subsist for some time side by side. (*Roberts, C.J, Dunkley and Braund, JJ.*) Maung Thein v. Maung Nyo Sein. **1939 Rang. L.R. 160=178 I. C. 883=11 R.R. 284=A.I R. 1938 Rang. 449 (S.B.).**

———**(Burmese)**— *Succession — Full and half blood—Preference—Limits of rule that inheritance should not ascend when it can descend.*

Among relations of the same degree of relationship to the deceased, the full blood relations should be preferred to the half blood relation. It cannot be said that the rule that inheritance should not ascend when it can descend, still operates in competition between relations of full blood and those of the half blood of the same degree of relationship to the deceased. (*Mya Bu, Offg. C.J. and Mackney, J.*) Mrs. Kirkwood v. Maung Sin. **174 I.C. 603=10 R.R. 412=A.I. R. 1938 Rang. 74.**

———**(Burmese)**—*Succession* — Lettetpwa *property.*

The share of two wives jointly in *lettetpwa* property of both marriages is the same as the share of one wife where there is a single wife. Hence the share of the wife by the second marriage is one-fourth in such property. A.I.R. 1925 Rang 329 and A.I R. 1928 Rang 125, Rel. on. (*Dunkley, J.*) S.P.L.S Chettyar Firm v. Ma Pu. **14 Rang. 697=164 I.C. 1023=9 R.R. 186=A I.R. 1936 Rang. 417.**

———**(Burmese)** — *Succession—Lettetpwa property.*

Land obtained by mother from her father on his second marriage as being her share of the joint property of the first marriage, becomes the lettetpwa property of the mother's first marriage and as such her children by the first marriage obtain vested interest upon the second marriage of the mother. A.I.R. 1929 Rang. 155, Ref. (*Dunkley, J.*) Kyi Maung v. S N.V.R. Chettyar Firm. **164 I.C. 392=9 R.R. 90=A.I.R. 1936 Rang. 336.**

———**(Burmese)**—*Succession — Share of orasa son by first wife on father's remarriage.*

Where after the death of his wife the widower marries a second wife, his orasa son by the first wife is entitled to his share in the estate as it existed at the time of re-marriage. (*Baguley and Mosely, JJ.*) A.L.A. Chettyar Firm v. Maung Po Taw. **1938 Rang. L.R 583=177 I.C. 435=11 R.R. 128=A.I.R. 1938 Rang 250.**

——— **Burmese)** — *Succession — Orasa child—Death of one parent leaving only one child—Surviving parent re-marrying—Claim of child of first marriage to one quarter share as orasa child—If receives fresh period of limitation beginning from remarriage—That child's right to one half of estate brought to re-marriage by its father.*

It is quite contrary to the ordinary notions current amongst the Burmese to hold that an orasa child, who does not claim his share on the death of his parent nevertheless must be regarded as having taken it, with the further consequence that he falls out of the family. By Burmese law, when after the death of one parent leaving only child the surviving parent remarries, the only child of former marriage is entitled to claim partition. The child's claim to a one-quarter share as orasa child must be deemed to have received a fresh period of limitation beginning from the re-marriage of its father and it is entitled to one half of the estate brought to the re-marriage by its father. (*Mya Bu and Mackney, JJ.*) U Tauk Ta *v.* Ma Ohn Yin. **1939 Rang. L.R. 217=182 I.C. 403=12 R.R. 14=A.I.R. 1939 Rang. 167.**

——(**Burmese**) — *Succession — Out-of-time grandchildren.*

Under the Burmese Buddhist Law, an out-of-time grandchild or out-of-time grandchildren who are entitled to an equal share with an uncle or aunt in the division of the estate of the grandparents are the child or children of the eldest child of the grandparents. It is not essential to the success of their claim to such a share that their parent who predeceased either one or both of the grandparents was the *orasa* child, and all that is necessary to show is that their parent was the eldest child of the grandparents. (*Mya Bu and Mosely. JJ.*) Ma Hnin Yi *v.* Maung Thin. **(1940) Rang.L.R. 32.**

——(**Burmese**) — *Succession — Out-of-time grandson.*

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——(**Burmese**)—*Succession—Second wife inheriting property of husband's first wife—Liability for her debts.*

A Burmese heir to an estate takes the property of his ancestor subject to the ancestor's debts. Where a second wife of a Burmese takes by inheritance the property belonging to his first wife, such property is subject to attachment and sale in satisfaction of the debts of the first wife. (*Dunkley, J.*) S.P L.A. Chettyar Firm *v.* Ma Pu. **163 I.C. 604=9 R.R. 33=A.I.R. 1936 Rang. 262.**

——(**Burmese**) — *Succession — Second wife's interest in lettetpwa property of husband's first marriage.*

The second wife must acquire by marriage a one-third interest in the property brought by her husband to the marriage. Where, therefore, the share of the husband before his second marriage. in lettetpwa property of his first marriage is one half, his second wife acquires one sixth interest in the property. (*Dunkley, J.*) S.P.L.A. Chettiar Firm *v.* Ma Pu. **163 I.C. 604=9 R.R. 33=A.I.R 1936 Rang. 262.**

——(**Burmese**)—*Succession—Shares—Rules of division of joint property on divorce—Applicability to partition on inheritance—Share of second wife.*

The rule of division of property between a husband and his two wives on a divorce is that the second wife gets one sixth of the property jointly acquired in the first coverture and one-third of the property acquired in the second or double coverture. The husband gets two-sixths of the property jointly acquired in the first coverture and one third of that acquired in the second coverture. This rule as to division of joint property on divorce can be extended to partition of it on inheritance. In this latter case, on the applicability of the rule, the second wife being an equal heir with the first wife to the husband, she gets one-third of the property jointly acquired in the first coverture and half of that jointly acquired in the second coverture. (*Baguley and Mosely, JJ.*) Daw Hla Ohn *v.* Ma Nyan. **1937 Rang. L.R. 410=172 I.C. 734=10 R.R. 275=A.I.R. 1937 Rang. 453.**

——(**Burmese**) —*Succession—Step-daughter.*

A step daughter suing her step-father for a share in the estate acquired by her mother and him jointly must show not only that her mother was a Burman Buddhist at the time of her death but that her step-father was also a Burman Buddhist. For if he is a Mahomedan then the presumption will be that her mother embraced the Mahomedan faith at the time of her marriage with the step-father in which case her estate would not got to her step-daughter but to her husband. (*Mosely and Ba U, JJ.*) Ma Pwa *v.* Tasudat. **164 I.C. 556=9 R.R. 123=A.I.R. 1936 Rang. 388.**

——(**Burmese**)—*Succession—Wife—Share of second wife in property inherited by husband from his first wife.*

A second wife becomes entitled to one-third share in property inherited by her husband from his first wife. (*Dunkley, J.*) S.P.L.S. Chettyar Firm *v.* Ma Pu. **14 Rang. 697=164 I.C. 1023=9 R.R. 186=A.I.R. 1936 Rang 417.**

——(**Burmese**)—*Sucession—Wife— Wifehood —Proof.*

Amongst the Burmese the term "wife" may be very loosely used. Where a woman other than the undisputed wife of a person claims a share in his estate on his death on the ground that she was also his wife, there must be a clear and unequivocal recognition of her status as such to establish wifehood in the legal sense of the term. Where from the evidence it appears that the claimant was not a wife but only mistress, she cannot succeed. 4 L.B.R. 175 (P.C.), Rel. on. (*Ba U and Parker, J*) Ma Hla Min *v.* Maung Hla U. **166 I.C. 413=9 R.R. 256=A.I.R. 1936 Rang 464.**

——(**Chinese**)—*Divorce — Wife's right to jewellery and wearing apparel.*

Under the Chinese customary law the wife upon divorce is entitled to take away her jewellery and her wearing apparel with her. (*Mya Bu and Mosely, JJ.*) Ma Tin *v.* Ko Sein Hone. **184 I.C. 665=12 R.R. 167=A.I.R. 1939 Rang. 291.**

——**(Chinese)**—*Illegitimate son—Rights of inheritance.*

An illegitimate son of a husband would be entitled to inherit only if the latter dies without leaving any other heir, but an illegitimate son is entitled to a half share or to an equal share with a legitimate son only if the deceased father had recognized his paternity and had also made himself responsible for his upbringing. Responsibilities for the upbringing must be something analogous to the responsibilities that a man would assume for his own legitimate children, and mere compliance with a statutory obligation for the maintenance of a child, for example a casual contribution towards the expenses of a religious ceremony, cannot be regarded as denoting the assumption of responsibilities by the father for his illegitimate son's upbringing. (*Mya Bu and Mackney, JJ.*) DAW E THIN *v.* MAUNG SAN THEIN. **1939 Rang.L.R. 258=180 I.C. 943=11 R.R 446=A.I.R. 1939 Rang. 154.**

——**(Chinese)** —*Letters of administration—Estate of deceased Chinaman—Right of his widow to obtain.*

So far as contested applications for letters of administration to the estate of a deceased Chinaman are concerned, when the applicants are a widow and a son, it does not matter whether the deceased was a Buddhist or a non-Buddhist, that is, whether the succession to his estate is governed by the Chinese Customary Law or by the Succession Act, for in either case the proper person to obtain letters of administration to his estate is his widow, and other persons having claims to the estate must, if necessary, prosecute those claims in the form of a separate suit against the widow, either for their share or for the administration of the estate by the Court. (*Mosely and Dunkley, JJ.*) SHWE KHOON *v.* MA SEIN NU. **1938 Rang.L.R. 249=177 I.C. 628=11 R R. 153=A.I.R. 1938 Rang. 321.**

——**(Chinese)**—*Letters of administration—Right of widow of intestate Chinese Buddhist.*

According to the Chinese Customary law, the widow's sole right in the estate in the presence of children is the right to maintenance and ultimately to funeral expenses. A right to maintenance out of the estate of the deceased is not a right to any share of the estate, it is not even a charge on the estate. She does not therefore fall within the provisions of S. 218 (1), Succession Act. Hence the widow of an intestate Chinese Buddhist deceased in Burma, succession to whose estate is governed by the Chinese Customary law, is not entitled to the grant of letters of administration to that estate as against the son of the deceased. A.I.R. 1938 Rang. 321, Overr. (*Mya Bu, Offg. C. J., Ba U and Dunkley, JJ.*) MA PWA TIN *v.* YEO SEIN MAUNG. **1939 Rang.L.R. 170=179 I.C. 599=11 R.R. 334=A.I.R. 1939 Rang. 74 (F.B.).**

——**(Chinese)**—*Marriage — Validity—Conditions.*

In a case of a marriage between a Chinese Buddhist man and a Chinese Buddhist woman, where the question of status of a chief or first wife is not involved, what constitutes a valid marriage is the consent of the parties concerned to live together as husband and wife. They must however give sufficient publicity to the relationship. This being the legal position the result is the same whether the Burmese Buddhist law or Chinese Customary law applies to a marriage between a Chinese Buddhist man and Chinese Buddhist woman. 8 L.B.R. 222. Foll. (*Ba U, J.*) MA KYIN HLAING *v.* MAUNG KYIN SWI. **1937 Rang.L.R. 90=166 I.C. 577=9 R.R. 270=38 Cr. L.J. 274=A.I.R. 1937 Rang. 29.**

——**(Chinese)**—*Succession—Chinese Buddhist domiciled in Burma—Chinese customary law applies.*

Succession to the estate of a Chinese Buddhist domiciled in Burma is governed by Chinese customary law. Therefore in a case of a marriage of a Burmese Buddhist wife to a Chinese Buddhist husband, the wife does not own half the husband's property during the continuance of the coverture. (*Mosely, J.*) AL PEIN *v.* M. C. DEVA. **A.I.R. 1937 Rang. 543.**

——**(Chinese)**—*Succession—Nephew.*

In Chinese law, failing sons, a legitimate heir is adopted because it is of paramount importance that the line should not be allowed to die out. If a sonless father fails to adopt, the senior agnates will adopt one for him. Where a person dies intestate and elders fail to adopt for him, the Chinese law contemplates succession of an agnate in the next generation. Among brothers, if the eldest has no son, the eldest son of the second brother succeeds. The widow of the deceased has practical control of the inheritance during the life-time of her sons and the same rule applies in the case of a nephew who ought to be adopted in default of direct issue. As the estate is not deliverable to the nephew during lifetime of the widow of the deceased, limitation for a suit by nephew under Art. 123, Limitation Act, would begin to run from the death of the widow. (*Roberts, C.J. and Leach, J.*) KHOO SOO CHENG *v.* TA MA SHWE ZIN. **172 I.C. 550=10 R.R. 257=A.I.R. 1937 Rang. 354.**

——**(Chinese)**—*Succession—Right of son to exclusion of daughter.*

The succession to the estate of a Chinese Buddhist in Burma is governed by the Chinese Customary law. Under this law the son is entitled to the whole of the deceased's estate to the exclusion of daughter. (*Mosely and Dunkley, JJ.*) OON CHAN *v.* KHOO ZUN. **177 I.C. 501=11 R.R. 134=A.I.R. 1938 Rang. 254.**

BUILDINGS—*Building on another's land—Right of parties.*

There are rulings to the effect that where a trespasser *bona fide* believing that he has title is allowed to construct buildings, etc., on a piece of land not belonging to him and the owner allows this to proceed without taking steps to stop him from building, then in equity the Courts should allow compensation for the land encroached upon rather than order demolition of buildings. But these rulings cannot possibly apply where there could have been no possibility of a *bona fide* belief as to title. (*Dalip Singh and Sale, JJ.*) AHSAN ALI SHAH *v.* BRIJ BHUSHAN LAL. **42 P. L.R. 324.**

——Husband building on wife's land—Wife's right to. *See* HUSBAND AND WIFE **44 C.W.N. 247.**

BUNDELKHAND LAND ALIENATION ACT (II OF 1903), S. 3—*Scope—Agriculturist debtor—Insolvency of—Property—If vests in Receiver—Provincial Insolvency Act, S. 28.*

Under S. 3 of the Bundelkhand Land Alienation Act the property of an agriculturist debtor is not transferable, and hence such property will not vest in the Official Receiver in insolvency under S. 28 of the Provincial Insolvency Act. (*Sulaiman, C. J. and Bennet, J.*) BASORE SINGH *v.* SANT KUMAR. **171 I.C. 903=10 R.A 338=1937 A W. R. 686=1937 A.L.J. 801=1937 R.D. 422=1937 A.L.R. 905=A.I.R. 1937 A. 699.**

——Ss. 3 and 16 A—*Position in regard to purchase of Bundelkhand land.*

Members of an agricultural tribe may purchase and pre-empt Bundelkhand land without the sanction of the Collector. Non-agriculturists may purchase and pre-empt Bundelkhand land provided they have obtained the sanction of the Collector to bring a suit or proceeding to enforce a right of pre-emption. (*Thom C. J., Allsop and Ganga Nath, JJ.*) ZAMAN KHAN *v.* BAHADUR SINGH. **1940 A.L.J. 434=1940 A.W.R. (H.C.) 359=A I.R. 1940 A. 371 (F.B.).**

——Ss. 6 (b) and 9 (1)—*Scope—Mortgage by agriculturist not in proper form—Application to enforce—Procedure—Duty of Collector.*

When a mortgagee, holding a mortgage from a member of an agricultural tribe, which is not in a form permitted by the Act, applies to the Collector to enforce the terms of his mortgage, the Collector should, in exercise of his powers under S. 9 (1) of the Bundelkhand Land Alienation Act, revise the terms of the mortgage so as to bring it into conformity with the provisions of S. 6 (*b*) of the Act, and then tell the mortgagee-applicant to apply to him formally to be placed in possession for such period as he considered equitable. (*Drake Brockman, S.M. and Knox, J.M.*) BINDRABAN *v.* CHOKHEY LAL. **1936 R.D. 352.**

——S. 16, Proviso—*Mortgage decree—Order by executing Court disallowing sale—Subsequent enactment of proviso—Effect of—Decree, if can be executed by sale of property.*

The proviso to S. 16 of the Bundelkhand Land Alienation Act added by the Amending Act, VII of 1929, permitting sale of property in execution of mortgage decree under certain special circumstances, does not have the effect of nullifying a previous order of the Executing Court passed *inter partes*. Where prior to the enactment of that proviso, the Executing Court passed an order disallowing the decree-holder's application for the sale of the property under his mortgage decree, on the ground that the property was not saleable under the law as it then stood, the proviso enacted subsequently cannot deprive the judgment-debtor of his right which he had acquired under that order which had become final, and make the property available afresh to the decree-holder in spite of that order. (*Sulaiman, C. J., and Ganga Nath, J.*) SUNDER *v.* SHEO DAT SINGH. **167 I.C. 120=9 R. A. 492=1936 A. L. J. 1363=1937 A. L. R. 141=1936 A. W. R. 1157=AI.R. 1937 A. 48.**

BURDEN OF PROOF. *See also* EVIDENCE ACT, Ss. 101-105.

——Bar of civil suit. *See* C. P. CODE, S. 9. **A.I.R. 1936 Mad. 522.**

——Cess levied by Government under S. 78, Madras Local Boards Act—Suit to recover cess as illegally collected—Onus. *See* MADRAS LOCAL BOARDS ACT, S. 78. **A.I.R. 1939 Mad. 651 =(1939) 1 M.L.J. 780.**

——Claim based on adoption varying natural course of succession—Burden of proving adoption. *See* ADOPTION — BURDEN OF PROOF. **20 N.L.J. 191.**

——Deed—Recitals in—Onus of proving incorrectness. *See* DEED—RECITALS. **19 N.L.J. 179.**

——Damages—Injury caused by motor car negligently driven—Suit for damages—Ownership of car and control of car at time of accident —Onus – Presumption. *See* TORT— NEGLIGENCE. **39 Bom.L.R 44=A.I.R. 1937 Bom. 155.**

——*Ejectment of sub-tenant—Suit for—Denial of sub-tenancy—Onus—Failure of defendant to prove case pleaded—If entitles plaintiff to decree.*

In a suit to eject a sub-tenant, where the defendant denies that he is a sub-tenant, the burden is on the plaintiff to prove that there was a contract of sub-tenancy. The fact that the entries in the papers support the plaintiff or that the defendant fails to prove the plea set up by him is insufficient to entitle the plaintiff to a decree. (*Drake Brockman, S.M. and Knox, J.M.*) RAJ BIR *v.* RAGHUNANDAN. **1936 R.D. 163.**

See also KAMLESHAR AHIR *v.* SARJU KOHAR. **1936 R.D. 178.**

——*Ejectment suit—Plea of tenancy by defendant—Admission that lands situate within plaintiff's zamindari—Onus.*

In a suit for ejectment, if the defendant admits that the lands are within the ambit of the plaintiff's zemindari but pleads that he is a tenant not liable to ejectment, the onus is on him to prove his tenancy. (*Fazl Ali and Manohar Lall, JJ.*) MAHABIR DAS *v.* UDIT NARAIN VARMA. **17 Pat. 594=19 Pat.L.T. 570=178 I.C. 849=11 R.P. 306=5 B.R. 149=A.I.R. 1938 Pat. 613.**

——*Ejectment suit—Proof of title — Rule—Defendant admitting plaintiff's prior possession and claiming under transfer from plaintiff—Onus.*

In an ejectment suit the ordinary rule is that plaintiff must prove a title to possession subsisting at the date of the suit. But where defendants admit that plaintiff and his joint brother were in possession of it less than 12 years before the institution of the suit and base their own title upon a transfer by plaintiff's brother, the onus is upon the defendants to establish the validity of their transfer. (*Gruer, J.*) KHULWA SUKHRA RAO *v.* LAHARSAI. **165 I.C. 957=9 R.N. 113=A.I.R. 1936 Nag. 254.**

——Encroachment—Suit for—Proof of disturbance of boundary marks—If essential—Measurements and area—If conclusive. *See* BOUNDARIES. **1937 A.L.J. 1216=A.I.R. 1938 All. 36.**

——Gift by old lady to medical attendant—Presumption of influence—Validity of gift—Onus. *See* DEED—SETTING ASIDE. **1937 A.L.J. 1027 (P.C.).**

——Hindu Law—Partition—Separation—Onus of proof—Proof of cessor of commensality—If shifts onus. *See* HINDU LAW — PARTITION SEPARATION—ONUS OF PROOF. **A.I.R. 1937 Nag. 230.**

——Marriage—Denial of. *See* BUDDHIST LAW (BURMESE)—MARRIAGE. **A.I.R. 1940 Rang. 181.**

——Marriage—Parties living as husband and wife for 18 or 20 years—Allegation that parties not properly married—Onus. *See* AGRA TENANCY ACT (1926), S. 44. **1936 R.D. 110 (1).**

——Mortgage — Consideration — Onus. *See* MORTGAGE—CONSIDERATION. **38 Bom.L.R. 526.**

——*Mortgage suit—Plea by defendant that he was a minor on date of mortgage—Onus.*

A defendant pleading that he was a minor on the date of execution of a mortgage deed on which a suit is brought has the onus upon him to prove the same. (*Leach, C.J. and Varadachariar, J.*) Dhanapala Chetti *v.* Goverchand Sowcar. **182 I C. 312=12 R.M. 48=1938 M.W.N. 938=A.I.R. 1938 Mad. 959=(1938) 2 M.L.J. 775.**

——Onus wrongly cast—If ground of reversal of decree in appeal. *See* Provincial Insolvency Act, S. 53. **40 C.W.N. 731.**

——*Onus wrongly cast—Interference by High Court.*

In the first place it is for the plaintiff to substantiate his allegations. It is then for the defendant to rebut them, When the parties lead evidence on both sides the question of burden of proof loses much of its importance. But where in a case the plaintiff's evidence does not satisfy the Court and the Court proceeds to decide the issues on presumptions raised against the defendant because of non-production of certain documents, it is the duty of the High Court to interfere. (*Ismail, J.*) Municipal Board, Jalesar *v.* Hoti Lal. **1938 A.L.J. 686=177 I.C. 663=1938 A L R. 768=11 R.A. 211=1938 A.W.R. (H.C.) 458=A.I.R. 1938 All. 520.**

——Promissory note—Denial of execution and consideration by defendant—Plaintiff proving execution—Effect — Further proof of consideration by plaintiff — Necessity *See* Negotiable Instruments Act, S. 118. **1938 P.W.N. 634.**

——*Question of — Materiality — Both sides adducing evidence and decision on balance of evidence.*

When both sides have adduced evidence and the case is decided on the balance of evidence, the question of onus of proof is not important and does not really arise. (*Khaja Mohammad Noor and Madan, JJ.*) Surpat Singh *v.* Bhupendra Narayan Singh. **16 Pat. 105=166 I.C. 123=9 R.P. 256=3 B.R. 127=17 Pat. L.T. 824=1936 P.W.N. 817=A.I.R. 1937 Pat. 165.**

——*Receipt executed by illerate woman—Plea of ignorance of contents—Onus.*

Where an illiterate woman who usually conducts her own business pleads that a receipt to which she had affixed her thumb impression, contained terms of which she was not aware, the onus is on her to show that it was executed under fraud or misrepresentation. (*Yorke, J.*) Mahdei *v.* Ishwari. **174 I.C. 843=10 R.O. 278=1938 O.W.N 531=1938 O.L.R. 228=1938 O.A. 393=A.I.R. 1938 Oudh 152.**

——*Rule as to—Duty of plaintiff — Onus—When shifts.*

The onus is upon the plaintiff and nonetheless so even when he has adduced some kind of evidence. The onus will shift on to the defendant only if the evidence adduced by the plaintiff is held to be sufficient to establish a *prima facie* case. It is not merely a question of weighing feathers on one side or the other and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour if there is no other evidence given. (*Courtney-Terrell, C.J. and Manohar Lal, J.*) Nirmal Kumar *v.* Sant Lal Mahto. **16 Pat. 622=171 I.C. 715=10 R.P. 239=1938 P.W.N. 101=4 B. R. 58=A.I R. 1937 Pat. 563.**

——*Special plea—Pardanashin—Plea that she did not understand nature of transaction entered into by her—Onus.*

Where in a suit on a mortgage executed by a husband and wife, the wife, a pardanashin lady, alleges that she did not understand what she was doing and that she signed the document on being asked by her husband to do so, the pleas raised by the wife are in the nature of special pleas resting on facts within her knowledge and the burden is on the wife to establish her case founded on the special pleas. (*Guha and Bartley, JJ.*) Suresh Chandra Sen *v.* Marani Dassi. **166 I.C. 842=9 R.C. 592=A.I.R. 1936 Cal. 378.**

——*Suit on handnote — Plea that defendant handed blank signed paper to another intending it as collateral security for a loan due to that other —Onus.*

Where in a suit on a handnote by the payee thereof, the defendant pleads that he made an endorsement or signature on a blank paper which was intended to operate as a collateral security for a loan advanced by a third person to whom he delivered the paper, and that the latter had unauthorisedly inserted the name of the plaintiff as payee, the burden is on him to explain how the handnote bearing his signature came into existence. (*Agarwala and Rowland, JJ.*) Hriday Singh *v* Kailash Singh. **19 Pat. 404=186 I.C. 809=12 R.P. 532=6 B.R. 398=A.I.R. 1940 Pat. 377.**

——*Suit on mortgage—Plea of inalienability of rights in question.*

Where the plaintiff represents that he holds muafi rights in certain villages which he is entitled to mortgage and which in fact he mortgages, the onus in a suit challenging the mortgage is upon the plaintiff to prove that these rights are inalienable. (*Thom, C J., Collister, Allsop, Ganga Nath and Braund, JJ.*) Saadat Huissain *v.* Ram Kishan Das. **1940 A.L J. 420=1940 A.W.R. (H. C.) 397=A.I.R. 1940 All. 373 (F.B.).**

——*Suit for possession—"Possession following title"—Applicability.*

The maxim that possession follows title like all other legal maxims is only a means of gathering a number of legal rules together under a convenient heading and must in every case be read subject to the limitations imposed by the actual rules themselves. It is applicable in cases where proof of actual physical possession cannot reasonably be expected, as for instance, in the case of waste lands. It can be invoked also when nothing is known about possession one way or the other. The ordinary presumption that the owner is in possession then applies. The rules for determining actual physical possession in difficult and doubtful circumstances are not meant to relieve a party of the burden of proving possession by ordinary means in cases where the property is capable of actual physical possession and there is either an admission or proof of dispossession. (*Bose, J*) Shankarasa Ganpatsa *v.* Punamchand. **I. L.R. (1937) Nag. 254=171 I.C. 271=10 R.N. 105=A.I.R. 1937 Nag. 129.**

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——Suit for arrears of produce rent. *See* LANDLORD AND TENANT—RENT. **19 Pat.L.T. 4 (S.B.).**

—— Workmen's Compensation Act providing for compensation for workman contracting disease other than disease caused by silica dust—Disease caused by silica dust—Onus of proof. *See* WORKMEN'S COMPENSATION ACT. **A.I.R. 1936 P. C. 158 (P.C.).**

BURMA ACTS.

- **Co-operative Societies Act (VI of 1927).**
- **Courts Act (XI of 1922).**
- **Courts Manual.**
- **(Frontier Districts) Criminal Justice Regulation (I of 1925).**
- **Expulsion of Offenders Act (I of 1926).**
- **Ferries Act (II of 1898).**
- **Fisheries Act (III of 1905).**
- **Gambling Act (I of 1899).**
- **General Clauses Act.**
- **Hired Motor Vehicles Rules.**
- **Income-Tax Act (XI of 1922).**
- **(Lower) Land and Revenue Act (II of 1876).**
- **Laws Act (XIII of 1898).**
- **Municipal Act (III of 1898).**
- **Prevention of Crime (Young Offenders) Act (III of 1930).**
- **Rural Self-Government Act (IV of 1921).**
- **Suppression of Brothels Act (II of 1921).**
- **Village Act (IV of 1907).**

BURMA ADAPTATION OF LAWS ORDER (1937), Cl. 10—*Effect on S. 8, proviso 2, Burma Income-tax Act.*

Cl. 10 declares in the plainest terms, that a right, which has already accrued prior to the Government of Burma Act coming into force, is not affected by any amendment made by the Adaptation of Laws Order. The right to have interest on securities income-tax free is a right which is attached to the securities themselves and is not merely the personal right of the particular person who happens to be the holder of the securities at any one time. Therefore the question as to when the purchaser became possessed of the securities does not arise. The interest on securities issued before the Government of Burma Act came into force cannot be made liable to income-tax in Burma throughout the currency of those securities. (*Robert, C.J., Dunkley and Mackney, JJ.*) COMMISSIONER OF INCOME-TAX, BURMA *v.* CENTRAL BANK OF INDIA, LTD. **1940 I. T.R. 264=A.I.R. 1940 Rang. 123 (S.B.).**

BURMA CO-OPERATIVE SOCIETIES ACT (VI OF 1927), S. 49—*Liquidator selling property conveyed to him—Suit by purchaser for possession—Civil Court, if precluded from questioning validity of transfer.*

A liquidator of Co-operative Society purported to sell certain property, conveyed to it, to a person who had nothing to do with the Society. The purchaser brought a suit to obtain possession.

Held, that the question which the Court had to decide was whether the purchaser acquired good title to the property from the liquidator. This was not a matter connected with the dissolution or winding up of a co-operative society and so the Court was not precluded from questioning the validity of the transfer by S. 49. (*Leach, J.*) MAUNG BA HNIT *v.* U SEIN. **168 I.C. 910=9 R. R. 377=A.I.R. 1937 Rang. 98.**

BUR. CO-OP. SOCIETIES ACT (1927), S. 50.

——**S. 50, Rules under (1931), R. 15**—*Award by arbitrator, contrary to law of limitation—Civil Court, if can set aside award.*

A statutory arbitration is not unlike a reference by consent out of Court. Even in the case of arbitrator appointed by statutory rule, the arbitrator should not be permitted to ignore the operation of the laws applicable in matters which come before him and should not be permitted to give his decision according to his mere caprice. Hence, where an award made by an arbitrator appointed under R. 15 of the Burma Co-operative Societies Rules has ignored the law of limitation, Civil Court has jurisdiction to set aside such award. (*Mackney, J.*) U KYAW THA *v.* CO-OPERATIVE TOWN BANK, HENZADA. **A.I.R. 1940 Rang. 157.**

——**S. 50**—*Rules under, R. 15—Jurisdiction of Civil Courts in relation to proceedings of Registrar or arbitrators—If barred.*

There is no provision in R. 15 framed under S. 50, Burma Co-operative Societies Act, expressly barring the jurisdiction of Civil Courts in relation to proceedings of the Registrar or of arbitrators in the same way as the jurisdiction of Civil Court is barred with respect to matters connected with the liquidation of a society. (*Mosely, J.*) MAUNG KYAW THA *v.* CO-OPERATIVE TOWN BANK, HENZADA. **1937 Rang.L R. 399=173 I.C. 377=10 R R. 343=A I.R. 1937 Rang. 363.**

——**S. 50**—*Rules under, R. 15 (4)—Execution of award—Legality of award—If can be attacked on ground of limitation.*

Though it is not the intention of the Legislature that the arbitrator should arrogate to himself the right to ignore the law of limitation, yet the award, under R. 15 (4) framed under S. 50, Burma Co-operative Societies Act, which is to be executed as a decree, cannot be attacked in execution proceedings merely on the ground that it has ignored the law of limitation. The arbitrator has jurisdiction to commit errors in law and hence the legality of the award cannot be questioned in execution proceedings. (*Mosely, J.*) MAUNG KYAW THA *v.* CO-OPERATIVE TOWN BANK, HENZADA. **1937 Rang.L R 399=173 I.C. 377=10 R.R. 343=A.I.R. 1937 Rang. 363.**

——**S. 50**—*Rules under, R. 22 (g)—Nominee—Power to deal with property mortgaged by member.*

A Mahomedan, a member of Co-operative Credit Society, mortgaged his property to the Society to secure a loan obtained from the Society. According to the rules he nominated his eldest son as the person who could receive his interest in the Society after his death. The son, after his father's death, purported to transfer the property to the liquidator of the Society which was then being wound up. The Mahomedan was survived by the nominee-son and other brothers and sister.

Held, that the nominee-son had no authority to transfer to the liquidator the interest of his brothers and sister in the equity of redemption of the mortgaged property. The fact that his father had nominated his son as the person who should receive his interest in the property after his death did not and could not operate to transfer to him the right of his brothers and sister.

BUR. CO-OP. SOCIETIES ACT (1927), S.50.

The object of the rule in nomination was merely to facilitate the granting of a valid receipt to the Society. (*Leach, J.*) MAUNG BA HNIT *v.* U SEIN. 168 I.C. 910=9 R R. 377=A.I.R. 1937 Rang. 98

———S. 50 (2) (f)—*Rules made under—R.* 15—*Jurisdiction of Civil Courts, if taken away.*

The rules made under the Burma Co-operative Societies Act take away by implication the jurisdiction of the Courts in respect of disputes contemplated under R. 15 (*Roberts, C.J., Dunkley and Braund, JJ.*) H. C. DEY *v.* BANGALEE YOUNGMEN'S CO-OPERATIVE CREDIT SOCIETY, LTD. **1939 Rang.L.R. 50=178 I.C. 674=11 R.R. 259=A.I. R. 1938 Rang. 392 (F.B.).**

———**S. 51**—Recovery of sum due by a member of Co-operative Society—Availability of Ss. 46 and 47 of the Land and Revenue Act. *See* BURMA LAND AND REVENUE ACT, SS. 46 AND 47 AND BURMA CO-OPERATIVE SOCIETIES ACT, S. 51. **1940 Rang.L.R. 230.**

BURMA CO-OPERATIVE SOCIETIES RULES (1931), R. 15—*Society registered after granting loan—Debtor making payments both before and after registration—Inference and effect—Jurisdiction of Civil Courts in respect of the transaction.*

Where an unregistered society lent money to a person and was subsequently registered under the Burma Co-operative Societies Act and the debtor made no objection when the society was registered and in fact acquiesced to its registration and thereafter also, made payments towards the principal and interest, it must be inferred that the debtor agreed that the transaction entered into by him with the society before its registration, should be binding upon him and the society after its registration. Hence the registered society could sue for the balance of a loan advanced by it when it was not registered. R. 15 of the Burma Co-operative Societies Rules does not bar the jurisdiction of the Civil Court to entertain such a suit. (*Ba U, J.*) BENGAL NATH CO-OPERATIVE SOCIETY. LTD. *v.* KALI KUMAR NATH. **1940 Rang. L.R. 77=A.I R. 1940 Rang. 145.**

BURMA COURTS ACT (XI OF 1922), S. 11—*Concurrent findings of fact—Interference in second appeal—Practice.*

High Court in second appeal is entitled to interfere on a finding of fact, concurrent or otherwise. A concurrent finding of fact however should not be upset unless it is very clearly wrong. (*Baguley, J.*) E. HOE CHAN CO. *v.* BABOO CHOTALAL. **1939 Rang.L R 622=181 I.C. 846=11 R.R. 501=A.I. R. 1939 Rang. 139.**

———S. 11—*Order on appeal from dismissal of application under O.* 21, *R.* 89, *C. P. Code—Second appeal.*

S. 11, Burma Courts Act, may be regarded as modifying S. 100, C. P. Code, but there is no section of the Burma Courts Act which modifies S. 104 (*2*), C. P. Code, and therefore no second appeal lies from an order of the Appellate Court on appeal from the dismissal of an application under O. 21, R. 89, C. P. Code, to set aside a sale. (*Spargo, J.*) MA BI BI *v.* SAYA HATTIE. **174 I.C. 691=10 R.R. 418=A I R. 1937 Rang. 537.**

———**S. 11**—*Powers of High Court acting under—Interference with concurrent findings of fact on remanded issue.*

BURMA EXCISE ACT (1917), S. 30.

It would be anomalous to hold that, whereas the Court could consider any finding of fact, whether concurrent or not, by the lower Courts, occurring in their original judgments, it is precluded from considering their finding on questions of fact which it has itself found necessary to raise because the lower Courts have failed to frame an issue which was necessary for the right decision of the case. More especially is this so because the findings of the lower Courts are not decisions. Hence, High Court acting under S. 11 of the Burma Courts Act can interfere with the concurrent findings of fact on a remanded issue. But it would not be proper, where the lower Courts have come to a concurrent finding, to dissent from this finding without very strong reasons. (*Mackney, J.*) E. HOE CHAN CO. *v.* CHOTALAL UJAMSI. **A. I.R. 1940 Rang. 177.**

———**S. 11**—*Suit for agricultural rent— Value less than Rs.* 500—*Second appeal—C. P. Code, S.* 100.

A suit for rent of agricultural land is not cognizable by a Court of Small Causes, and if it is not of a value more than Rs. 500, a second appeal lies under S. 100, C. P. Code, and not under S. 11 of the Burma Courts Act. (*Baguley, J.*) KO PO SET *v.* MA SAW YIN. **1939 Rang.L.R. 472=184 I.C. 492=12 R.R. 146=A.I.R. 1939 Rang. 350.**

BURMA COURTS MANUAL, Para. 664-A—*Applicability—Cognizable warrant case.*

Paragraph 664-A, Burma Courts Manual, relating to the deposit of witness expenses relates to orders under Ss. 244 and 245, Cr. P. Code, which relate to the trial of summons case and does not apply to a cognizable warrant case. It is only from the defence, that the Magistrate can under certain circumstances require the deposit of witness expenses: *vide* S. 257 (2), Cr. P. Code. (*Parker, J.*) CHIN HONE ON *v.* AH FOO. **A.I.R. 1937 Rang. 35.**

———**Para. 791**—*Fixing of date of birth—Option of Court.*

Where there is evidence only of the year of birth it is at the option of the Court to fix the date other than 1st January under Para. 791 of Burma Courts Manual. (*Mosely, J.*) THE KING *v.* UNOOSE. **176 I.C. 217=39 Cr.L.J. 697=11 R. R. 36=A.I.R. 1938 Rang. 228**

BURMA (FRONTIER DISTRICTS) CRIMINAL JUSTICE REGULATION (I OF 1925), Sch., Cl. (ii)—*Transfer of cases—Powers of High Court—Cr. P. Code, S.* 526.

The third proviso to Cl. (ii) of the Schedule in the Burma (Frontier Districts) Criminal Justice Regulation, confers upon the High Court a power to reverse or vary an order made by a Court of Session under S. 526, Cr. P. Code. But it does not take away the power from the High Court to transfer cases under S. 526, Cr. P. Code. (*Ba U and Spargo, JJ.*) MAUNG BA KU *v.* DEPUTY COMMISSIONER, BHAMO. **1939 Rang.L.R 614.**

BURMA EXCISE ACT (V OF 1917), Ss. 30, 37 and 44—*Charges under Ss* 30 (a) *and* 37—*Presumption under S.* 44, *if available.*

S. 44 of the Burma Excise Act which says that in prosecution under Ss. 30 and 37 and some other sections the Court may presume until the contrary is proved, that the accused person has committed an offence under the section under which he is charged in respect of excisable articles and materials for the possession of which he is unable to account satisfactorily does not appear to have any application to the common case under S. 30 (*a*) where the charge is one of possession of a larger quantity of an excisable article than is allowed under the Act. In prosecutions under S. 30 (*a*) it is necessary to prove such possession, and there is no room, or need for any presumption. In prosecutions for possession of an excisable article under S. 37 it is necessary either to prove that the accused person knew or had reason to believe that the excisable article was unlawfully manufactured, or to set up circumstances from which a presumption of such knowledge or belief may be presumed. Such a presumption could ordinarily be drawn under S. 114 of the Evidence Act but S. 44 of the Excise Act may be of useful application and allow the prosecution to be drawn in rarer cases. (*Mosely, J.*) THE KING *v.* MI NGE SO. **1940 Rang. L.R. 219=188 I.C. 72 =12 R.R. 363=41 Cr.L.J. 541=A.I.R. 1940 Rang. 109.**

——**S. 44**—Presumption under—If available in cases charged under Ss. 30 (*a*) and 37. *See* BURMA EXCISE ACT, Ss. 30, 37 AND 44. **1940 Rang.L. R. 219.**

BURMA EXPULSION OF OFFENDERS ACT (I OF 1926), Ss. 2 (A), (B) and 3—*Accused brought to Burma from India by his parents when only a child—No proof of how he acquired domicile in Burma—Liability to expulsion.*

Where it appears that the accused was brought to Burma from India by his parents when he was only a few years old, and there is nothing to show how he acquired his domicile in Burma or that he has no intention to return to India when he is in a position to do so, the accused is a non-Burman within the meaning of S. 2 (A) and an offender within the meaning of S. 2 (B) and is liable to expulsion under S. 3. (*Mya Bu, J.*) EMPEROR *v.* RANGASWAMY. **167 I.C. 589=9 R.R. 324=38 Cr. L J. 432 (2)=A.I R. 1937 Rang. 54.**

BURMA FERRIES ACT (II OF 1898), S. 12 —*Rules under R. 4-A—If* ultra vires.

R. 4-A of the rules as framed under S. 12 of the Burma Ferries Act is *ultra vires*. It cannot be said that the rule is one consistent with the Act, framed for carrying out its purposes and objects. (*Baguley and Mosely, JJ.*) SHWE PHONE *v.* CHAIRMAN, DISTRICT COUNCIL, MERGUI. **1938 Rang.L R. 573=178 I C. 445=11 R.R. 237=40 Cr.L.J. 77=A.I.R. 1938 Rang. 384.**

——**S. 15**—*Ply for hire—Meaning—Test.*

A person is said to ply for hire a ferry when he waits or attends on the bank or in the stream regularly (that is to say not uninterruptedly, for it might be done periodically, but regularly in the sense of repeatedly, making a business of it), for hire by the public or by any body who chooses to employ him to cross the river or convey goods across the river. (*Baguley and Mosely, JJ.*) SHWE PHONE *v* CHAIRMAN, DISTRICT COUNCIL, MERGUI **1938 Rang.L R. 573=178 I.C 445=11 R.R 237=40 Cr L.J. 77=A.I.R. 1938 Rang. 384.**

——**Rules Framed Under, R. 4**—*'Plying for hire'—Meaning of.*

It is necessary before a person can be said to be plying for hire as required by R. 4 of Rules framed under Burma Ferries Act that he waits or attends at a certain place for hire by anybody who chooses to employ him or requires his services. A person crossing the river with parcels once each way on the arrival and departure of the trains at and from a certain place cannot be deemed to be 'plying for hire.' (*Spargo, J.*) LIM TWA KEE *v.* M. ISMAIL **170 I C. 236=10 R. R. 68=38 Cr.L.J. 872=A.I.R. 1937 Rang. 275.**

BURMA FISHERIES ACT (III OF 1905), Preamble—*Lease of fishery—Position and rights of lessee.*

Under the Preamble of the Burma Fisheries Act the Government merely claims to dispose of the right to fish when a person takes the lease of a fishery; he does not thereby buy the fish to be found therein from Government, nor does Government transfer the property in the fish to him. The fish come into the lessee's possession only when he catches them. It matters not that for his own convenience of catching them the lessee dams up the pond so that the fish cannot escape out of it. This operation is merely preliminary to catching the fish. Even after that has been done any member of the public may come to the fishery and, provided that he uses not more than four rods and lines, may catch fish therefrom without committing any offence of criminal trespass or theft. (*Mackney, J.*) MOHAMMAD CASSIM *v.* THE KING. **176 I C. 150=11 R.R. 31 (2)= 39 Cr.L.J. 692=A.I.R. 1938 Rang. 220.**

——*Rules under—R. 45—Meaning of.*

The meaning of R. 45 of rules framed under Burma Fisheries Act is that baling is not allowed. The bar placed by the rule upon baling may be lifted at any moment by the Deputy Commissioner with the Commissioner's sanction and baling thereafter, so long as it has been continuously permitted, can be practiced without infringement of the law until the Deputy Commissioner again prohibits it. (*Roberts, C. J.*) MAUNG MON BIN *v.* THE KING. **174 I.C. 931=10 R.R. 444=39 Cr. L.J. 499=A.I.R. 1938 Rang. 104.**

BURMA GAMBLING ACT (I OF 1899), S. 6 —*Money found in purse or longyi of gambler—If intended for purpose of gaming—Presumption.*

It is usual way for Burmans to carry their money wrapped up in their longyis. No presumption can safely be drawn that money found in the purse or in the longyi of a gambler was intended to be used for the purpose of gaming. (*Spargo, J.*) MAUNG THA ZAN *v.* EMPEROR. **170 I.C. 818=38 Cr.L.J. 976=10 R.R. 108=A.I.R. 1937 Rang. 317.**

——**Ss. 6 (1) and 7**—*Warrant issued on mere information without stamp of credibility—Presumption under S. 7—If justified.*

The provisions of sub-S. (1), S. 6, are all important and unless those provisions are strictly carried out, a house or place cannot be said to have been entered under the provisions of that section and consequently the presumption specified in S. 7 cannot be made. The mere recording of the information that illegal gambling is going on at a certain place and bearing no stamp of credibility is not sufficient to meet the requirements of the law and consequently the result of the raid or the search made under such warrant does not constitute a legal basis of the presumption under S. 7. (*Mya Bu, J.*) AH SEIN *v.* THE KING. **1939 Rang.L.R. 447=181 I.C. 112=11 R.R. 452=40 Cr.L.J. 529=A.I.R. 1939 Rang. 120.**

BURMA GENERAL CLAUSES ACT, S. 16—Scope and effect of. *See* C. P. Code, O. 40, R. 1 and O. 43, R. 1 (*s*). **A.I.R. 1938 Rang. 387.**

BURMA HIRED MOTOR VEHICLES RULES, R. 7—*Child under 7 registered as owner of motor vehicle—Such vehicle plying for hire without licence—Liability of child to conviction—Penal Code, S.* 82.

In Burma, although no person under the age of 18 years is allowed to drive, there seems to be no provision against children, however young, being registered owners of motor vehicles, even of hired motor vehicles. But a child under the age of seven, who is a registered owner of a motor vehicle, cannot be convicted of the offence of plying it for hire without a licence, in view of S. 82 of the Penal Code which applies not only to offences under the Code but also to offences under any special or local law, in the absence of special provisions to the contrary in such law. (*Baguley, J.*) The King *v.* Ba Ba Sein. **1938 Rang.L.R. 227=178 I.C. 508=11 R.R. 239=40 Cr.L J. 80=A.I.R. 1938 Rang. 400.**

BURMA INCOME-TAX ACT (XI OF 1922), S. 3—"*Association of individual"—Meaning of—Co-heirs under Mahomedan Law inheriting shares in properties of father and mother—Status of—Appointment of one as agent of all to realise rents—Effect of.*

The words "association of individuals" in S. 3 of the Income-tax Act should not be construed with reference to the word "firm" only preceding, but should be construed *ejusdem generis* with all other groups of persons mentioned, namely, Hindu undivided family company, as well as firm. When there is a combination of persons formed for the promotion of a joint enterprise, banded together as co-adventurers, those persons to constitute an association of individuals within the meaning of Ss 3 and 55 of the Act. Where an individual, such as an heir under the Mahomedan Law, inherits a share in property he has an opportunity of deciding whether he will, by reason of having inherited it, form an association of individuals or renounce such relationship; if there be evidence that he has chosen the former alternative, that may be taken as the basis of the ultimate decision. By merely inheriting a share of property, however, no person can become a member of an association of individuals unless there is some forbearance or act on his part to show that his intention and will accompanied the new status which he has been asked to receive. The appointment of one of the co-heirs under Mahomedan law as the agent of all the co-heirs to realise the shares of the property left to them by their deceased father and mother is sufficient to constitute them an association of individuals. In each case the question is one of fact. (*Roberts, C.J., Baguley and Sharpe, JJ.*) Commissioner of Income-tax, Burma *v.* M.A. Baporia. **1939 Rang.L.R. 631=183 I.C 261=12 R.R. 66=1939 I.T.R. 225=A.I.R. 1939 Rang. 258.**

———**S. 3**—*Estate of father derived by his only son—Income from it—If should be taxed as income of Hindu undivided family.*

According to the law of Mitakshara the property which a man obtains from his father cannot be said to belong to a Hindu undivided family. Hence, where an estate belonging to father is after his death derived by his only son, income from such estate should be treated and taxed as

part of son's personal income and not as income of Hindu undivided family even if he has a mother and sister still alive. (*Roberts. C.J., Mya Bu and Dunkley, JJ*) Commissioner of Income-tax, Burma *v.* Vednath Singh. **186 I.C. 807=1940 I.T.R. 222=12 R.R. 290=A.I.R. 1940 Rang. 65 (S.B.).**

———**S. 10 (2) (ix)**—*Applicability—Partnership—Criminal charges against partners and manager—Expenses incurred in defending same successfully—Claim to deduct as business expenditure or business loss—Maintainability—Firm—If different entity from partners—Nature of liability.*

It cannot be said that when expenditure has been undertaken by persons to protect their good name and they have succeeded, they can be said to have suffered loss. A firm of a partners in Burma, which for a number of years had imported certain brands of whisky and brandy from a company in Calcutta, became involved in very serious charge under the Bengal Excise Act and the Indian Penal Code, and they incurred expenses in defending the individual partners and the manager of the liquor department against criminal charges of conspiracy to commit offences against the Excise Act, brought against them in Calcutta. All the charges were finally dismissed. The partners claimed that the expenses so incurred ought to be deducted against their Income-tax assessment either as expenditure under S. 10 (2) (ix) of the Income-tax Act or as a business loss.

Held, (1) that the object of the expenditure was to save the individual partners from the possible adverse consequences of a criminal conviction and the expenses did not fall within the ambit of S. 10 (2) (ix) of the Income-tax Act; (2) that the expenditure was voluntary expenditure which was not unsuccessful, and the sum could not also be deducted as business loss.

Held, further, that it was erroneous to regard the partnership as though it were an entity apart from the entities of its individual partners, the word 'firm" being merely a collective name for the different members of it. The liability which existed between the partner was a liability existing between themselves and the firm had no separate personality. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) Commissioner of Income-tax, Burma *v.* Gasperr & Co. **1940 I.T.R. 100.**

———**Ss. 33 and 34** —*Assessment of income alleged to have partially escaped assessment—Power of Commissioner.*

Once a final assessment has been made under Ss. 23 and 29 of the Act it cannot be reopened except in the circumstances detailed in Ss. 34 and 35 and within the time mentioned in those sections. The Commissioner of Income-tax cannot in law, in exercise of his power of revision unner S. 33, Burma Income-tax Act, assess to income-tax income alleged to have partially escaped assessment without causing proceedings to be initiated by the proper authority under S. 34 of the Act. A.I.R. 1938 P.C. 175, Rel. on. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) Commissioner of Income-tax, Burma *v.* Vednath Singh. **186 I.C. 807=12 R.R. 290=1940 I.T.R. 222=A.I.R. 1940 Rang. 65 (S.B.)**

——**Ss. 33 and 66 (2)**—*Refusal to review under S. 33—Reference under S. 66 (2), if lies.*

S. 33 makes no mention of the right of an assessee to move the Commissioner to take action but as the Commissioner may take action of his own motion the assessee must have the right of calling his attention to a prejudicial order and of asking that action be taken. Where the Commissioner there being no material on which he could proceed satisfactorily had declined to exercise his powers of review under S. 33, Income-tax Act, and has in no way altered the position as it existed before he chose to review the case and the original order is not proved to be prejudicial to the assessee, there is no ground for a reference under S. 66 (2). (*Roberts, C. J. Dunkley and Blagden, JJ.*) Amulakharai *v.* Commissioner of Income-tax, Burma. **1940 I.T.R. 382=A.I.R. 1940 Rang 175 (S.B).**

——**S. 34**—*"Escaped assessment"—Meaning.*

Income has "escaped assessment" within the meaning of S. 34, when it has not been assessed in the assessment under consideration; it is immaterial that it has been assessed in some other assessment. (*Roberts, C. J., Mya Bu and Dunkley, JJ.*) Commissioner of Income-tax, Burma *v.* Vednath Singh. **186 I.C. 807=12 R.R. 290=1940 I.T.R. 222=A.I.R. 1940 Rang. 65 (S.B.).**

——**S. 66 (2)**—Reference, if lies, on refusal to review under S. 33. *See* Burma Income-tax Act, Ss. 33 and 66 (2). **A.I.R. 1940 Rang. 175 (S.B).**

BURMA (LOWER) LAND AND REVENUE ACT (II OF 1876), S. 8—*Rules framed under R.52—Applicability—"Occupying available land"—Meaning of—Persons entering available land—Land subsequently made subject of grant—Application of rule.*

"Occupying available land" is not the same thing as "entering upon available land". It is not persons who enter upon available land who are subject to eviction but persons who are actually occupying available land. R. 92 applies to a person to whom a grant has been made but whose grant has been subsequently cancelled and who remains in occupation of such land even after such cancellation. The rule refers to present occupation and the present status of the land. Where certain persons enter upon land which is available at the time of their entry but subsequently such land is made the subject of a grant, such persons cannot be proceeded against under R. 52 (2) on their failure to comply with a notice under R. 52 (1) as they cannot be deemed to have occupied available land. (*Mackney, J.*) Ma Ngwe Yon *v.* Emperor. **172 I.C. 413=10 R.R. 247=39 Cr L.J. 140=A.I.R. 1937 Rang. 452**

——**Ss. 44 and 45**—*Notice of demand addressed to deceased owner, served on care-taker of property—Validity of sale.*

Where a notice of demand under S. 44 of the Burma Land and Revenue Act for Municipal taxes, which was addressed to an owner of property who had been dead was served on the care-taker of the property, there was no valid service of the notice upon any person liable to pay within the meaning of that section. The care-taker cannot be regarded as an agent of the deceased owner. A sale of the property is, therefore, invalid and a nullity. (*Roberts, C. J. and Dunkley, J.*) Maung Thaung *v.* Shaik Abdul Gani. **1938 Rang. L.R. 603=180 I.C 234=11 R.R. 385=A.I.R. 1939 Rang. 30**

——**S.45**—*Sale certificate—If document of title.*

It is not the owner that signs a sale certificate; a revenue officer signs it and he signs it to give effect to the sale that has taken place; and the power of selling property belonging to other people is strictly limited by law. Hence a sale certificate is not a document of title. (*Mya Bu, Offg. C.J. and Baguley, J.*) Saw Yu Hlaing *v.* Chettyar Firm. **174 I.C. 260=10 R.R. 398=A.I.R. 1938 Rang. 55.**

——**S. 45**—*Sale under—What passes—Revenue officer signing sale certificate in wrong form—Effect of.*

Where the attachment for sale is under S. 45 and the sale proclamation is also under S. 45, the sale must be under that section, and it would transfer only the right, title and interest of the owner. The mere fact that after some months the revenue officer signs the sale certificate in the wrong form cannot alter what is actually sold. (*Mya Bu, Offg. C.J. and Baguley, J.*) Saw Yu Hlaing *v.* Chettyar Firm. **174 I.C. 260=10 R.R. 398=A.I.R. 1938 Rang. 55.**

——**Ss. 46 and 47 and Burma Co-operative Societies Act (V of 1927), S. 51**—*Conditions under which Ss. 46 and 47 of the Land and Revenue Act are available—Sale to realise sum due from member of Co-operative Society—Availability of Ss. 46 and 47 of the Land and Revenue Act.*

The provisions of S. 46 following of the Burma Land and Revenue Act are available only when the Revenue Officer is seeking to recover arrears of land revenue accruing in respect of the land against which he is proceeding under those sections; that is to say, when he sells land under S. 47 of the Act he can do so only in the attempt to recover arrears of land revenue accruing from that very land. In a case where sums due to a Co-operative Society which according to S. 51 of the Co-operative Societies Act shall be recovered in the same manner as arrears of land revenue, the Revenue Officer cannot apply S. 46 following of the Land and Revenue Act in selling any land belonging to the defaulter, for the amount due from him is not due on account of the land against which he is proceeding. (*Mackney, J.*) Maung Mya Din *v.* K. P. A. P. Chettyar Firm. **1940 Rang.L.R. 230.**

——**Ss. 55 and 56**—*Bar of jurisdiction of Civil Court—Question as to existence of legal authority for the Revenue Officer to act.*

Where the question to be decided is whether a Revenue Officer had any legal authority to act as he did, and no question arises as to the legality of any process issued under S. 45 of the Burma Land and Revenue Act, the jurisdiction of the Civil Court is not barred by Ss. 55 and 56 of the Act. (*Mackney, J.*) Maung Mya Din *v.* K. P. A. P. Chettyar Firm. **1940 Rang.L.R. 230.**

——**S. 56**—*Scope—Jurisdiction of Civil Courts.*

The prohibition under S. 56 of Act II of 1876 to the jurisdiction of the Civil Courts extends to disputes to which Government is a party and not to disputes regarding the right to occupy land between private individuals. (*Roberts, C.J. and*

Dunkley, J.) Maung Thaung *v.* Shaik Abdul Gani. **1938 Rang.L.R. 603=180 I C. 234=11 R.R. 385=A I R. 1939 Rang. 30.**

BURMA LAWS ACT (XIII OF 1898), S. 12 —*Shan States—Power of Shan Court to carry out orders of other Courts in other places.*

The mere fact that a simplified procedure has been prescribed for a backward area like the Shan States does not affect the power of the Court there to carry out the orders of other Courts in other places. That is a matter of the comity of Courts. Similarly, there is nothing to prevent the Court at Mandalay from issuing orders to a Court in the Shan States, provided that the order will be carried out; for Courts will not issue orders that cannot be carried out any more than Courts will entertain actions to try matters where they have no power to enforce their decisions. (*Mosely, J*) Desraj Chanan Lal *v.* Ramjasher Madanchand. **1937 Rang.L. R. 249=171 I.C. 806=10 R.R. 190=A.I.R. 1937 Rang. 367.**

——S. 13—*'Buddhist'—Chinese Buddhist.*

A Chinese Buddhist is a Buddhist within the meaning of that term both in S. 13, Burma Laws Act, and in the Succession Act. (*Mya Bu and Mosely, JJ.*) Ma Tin *v.* Ko Sein Hone. **184 I. C. 665=12 R R. 167=A.I.R. 1939 Rang 291.**

——S. 13—*Entry by Burman Buddhist into monkhood—Effect on his property—Law applicable.*

The effect of the entry by Burman Buddhist into the Buddhist monkhood upon properties in his ownership or possession at the time of such entry, is a question of religious usage which must be decided according to the Buddhist Law under S. 13 of the Burma Laws Act. The law pertaining to religious usages among Burman Buddhists is to be found in the *Vinaya*. (*Roberts, C.J., Mya Bu, Baguley, Mosely and Ba U, JJ.*) A. R. L. P. Firm *v.* U Po Kyaing. **1939 Rang.L.R. 311=183 I.C. 673=12 R.R. 93=A.I.R. 1939 Rang. 305 (F.B.).**

——S. 13—*Gift—Mahomedan parties — Law applicable—Delivery of possession—If necessary.*

Sub-S. (1), S. 13, Burma Laws Act, specifically requires Mahomedan Law to be applied in cases where the parties are Mahomedans and the question at issue affects succession, inheritance, marriage or caste or any religious usage or institution. No reference is made to gifts, and Mahomedan Law on this subject is, therefore, not made applicable by this sub-section. Sub-S. (3) provides that in cases not within either sub-S (1) or sub-S. (2) or governed by any other enactment, the decision shall be in accordance with justice, equity and good conscience. Therefore sub-S. (3) and S. 129, T. P. Act, leave it open to the Court to apply the Mahomedan Law of gifts on the grounds of justice, equity and good conscience and a gift without giving delivery of possession is invalid even though the donor has executed and registered a written instrument. (*Leach and Spargo, JJ.*) Maung Gyi *v.* Maung Saung. **171 I.C. 752=10 R.R. 184=A I R 1937 Rang. 240.**

——S. 13 (1) and (2)—Gift between Mahomedans—Registered instrument—If necessary—Law in Burma. *See* T. P. Act, Ss. 123 and 129. **14 Rang. 485.**

——S. 13 (1) (a) and (3)—*Marriage between Confucian and Buddhist—Law applicable.*

Where one of the parties to a marriage in Burma is a Confucian and the other a Buddhist, S. 13 (1) (*a*) of the Burma Laws Act does not apply, nor does S 2 of the Special Marriage Act. As no other enactment is applicable to such a marriage, under S. 13 (3) of the Burma Laws Act the decision must be according to equity, justice and good conscience ascertained not by reference to English Law but by reference to Burmese Buddhist Law which is applicable as the *lex loci contractus*. (*Spargo, J.*) Ma Kyin Mya *v.* Maung Sit Han. **1937 Rang.L.R. 103=170 I C. 355=38 Cr.L.J. 895=10 R.R. 77=A.I.R. 1937 Rang. 245.**

——S. 13 (1) — *Succession to property of Chinese Buddhist domiciled in Burma—Law applicable.*

Burmese Buddhist Law governs the succession to the property in Burma of a Chinaman who was a Buddhist and who was domiciled in Burma at the date of his death, unless it is proved that Chinese customary law is applicable. A Chinaman who is a Buddhist comes within the term "Buddhists" in S. 13 (1) (*a*) of the Burma Laws Act, and cannot be excluded therefrom either on the ground that he is not a Burmese Buddhist or because the law which governs him in China is not a specifically Buddhist or even a religious law. The same is true of the word 'Buddhist' in the Succession Act. It follows from this view that S. 13 (1) must be applied to such a case as the present. The Court would not be justified in applying as Buddhist Law, a law which is not Buddhist at all, merely because it is applied generally in China to Chinamen without any special exception for Buddhists. The law which is described in the statute as "the Buddhist Law" is like the Hindu and Mahomedan Law intended to be applied by the Court as a law known to the Court, and administered by the Court of its own skill and competence. (*Sir George Rankin.*) Tan Ma Shwe Zin *v.* Koo Soo Chong. **1939 A.C. 527=1939 Rang.L R. 548=1939 O.L R. 491=12 R.P. C. 52=70 C L J. 341=5 B.R. 908=182 I.C. 993=A.I.R 1939 P.C. 228=('939) 2 M.L.J. 731 (P.C.).**

——S. 13 (3)—*Marriage between — Chinese Buddhist husband and Burmese Buddhist wife—Claim for partition of property on divorce—Law applicable.*

There is no *prima facie* ground for applying the personal law of the man and disregarding personal law of the woman in a case where Burmese Buddhist wife demands a partition of property on divorce from her Chinese Buddhist husband. It is the community or religious denomination to which the parties belong by which the personal law which forms the rule of decision in such a case has to be ascertained. But the personal law of the husband is not *ad idem* with the personal law of the wife. In absence of any sufficient authority either judicial or legislative to show that either the Chinese customary law or the Burmese Buddhist law should govern the question as to the respective interests of the Chinese Buddhist husband and the Burmese Buddhist wife in the property held by either or both, the question as to the division of property between the parties upon divorce should be decided according to justice, equity and good conscience under S. 13 (3), Burma Laws Act. (*Mya Bu and Mosely, JJ.*)

MA TIN *v.* KO SEIN HONE. **184 I.C. 665=12 R.R. 167=A.I.R. 1939 Rang. 291.**

BURMA MUNICIPAL ACT (III OF 1898), S. 8—*Rules under R. 68—Election not properly held—Powers of Government.*

One of the candidates to a Municipal election brought a petition against four others who were thought successful, on several grounds of irregularities, with the result that it came to the notice of Government that the proceedings of the faulty election were a farce and a fiasco; and consequently they proceeded under R. 68 made under S. 8 for the preparation and publication of the electoral roll for holding a proper election. The Judge who decided the petition however held that the objections raised were valid and all criticisms were correct and that next four persons who were on the list of candidates ought to be elected. The candidates so declared elected sued for a declaration that the order of the Government and the electoral authority were *ultra vires* and that they were duly elected members of the Municipal Committee.

Held, that once an election took place the Government could not declare it void and hold a new one. But the authorities must make a decision upon the facts as represented to them and must make their decision in good faith; and no proper election having been held the candidates could not be declared elected, and that the orders of the Government and the electoral authority were within their powers. (*Roberts, C.J. and Dunkley, J.*) GOVERNMENT OF BURMA *v.* ARUNACHALLAM. **185 I.C. 526=12 R.R. 203=A.I.R. 1939 Rang. 408.**

——S. 43—*Municipal Councillor—Position of—Loss of municipal fund due to neglect of his duty—Liability for.*

The position of Councillors with regard to municipal fund is in law that of trustees. As trustees they would be bound to exercise over trust properties the same degree of caution and care as a man of ordinary prudence would exercise in case of his own property. They would be liable for any loss of the trust fund which was facilitated by the gross neglect of their own duties by their own acts or by any other agency. The President of a Municipal Committee appointed a tax-collector even though he had no authority to do so without taking any security from him; though many reports against such person were made by the secretary he did not take any steps and the Municipality was thereby put to a loss by the embezzlement of the tax-collector.

Held, that the President was guilty of acts of malfeasance and was liable to make good the loss under S. 43. (*Dunkley, J.*) U. WIN TSU *v* SECRETARY OF STATE. **1940 Rang.L.R. 172=187 I.C. 212=12 R.R. 317=A.I.R. 1940 Rang. 8.**

——S. 59—*Member of Committee guilty of non-feasance—Right of action—Limitation.*

There can be no right of action against a member of an elected Committee, arising out of the results of an act amounting to a mere non-feasance. If the Committee has a remedy against the member that remedy must be by the creation of statute. The ward headmen of a Municipality had executed a mutual security bond for collection and credit by them of the Municipal revenue.

The effect of the bond was that all the others of them guaranteed the due collection of the revenue by each. Later on, an application was presented to *A*, the President by the other wardmen that they did not want to stand guarantee for one of their number *M*, as they had had to make good the deficiency in his collection. No enquiry was made into the allegation and no action was taken on the petition. It was subsequently discovered that *M* had embezzled a certain sum out of the year's revenue. On the Municipal Committee calling upon the wardmen to show cause why they should not make good the amount, the wardmen relied on their petition to *A*, and asked to be discharged from their bond. The Committee ordered them to make good the deficiency. The headmen appealed against the order to the Commissioner who held that the petition of the headmen to *A* had discharged them, from all liability on their bond and decided that the responsibility for the loss fell on *A* for not taking any action on the petition. The Municipal Committee thereupon had to institute a suit against *A* for recovery of the amount defaulted.

Held, that the act of *A* in taking no action on the petition of headmen was a non-feasance only. That the case was governed by S. 59, Burma Municipal Act, and the loss occurring to the Municipality was not the direct consequence of the failure by *A* to take action on the petition of the headmen as the mutual security bond of the headmen was not rendered automatically void and of no effect by the presentation of the petition.

Held, further, that the loss of the Municipal Committee was the direct result of the order of the Commissioner and not of the non-feasance of *A*.

Held also, that the case was governed by Art. 36, Limitation Act. The time began to run from the date of non-feasance by *A* and the suit not having been filed within two years of non-feasance by *A* was barred. (*Dunkley, J.*) TAVOY MUNICIPAL COMMITTEE *v.* U KHOO ZUN NEE. **164 I.C. 410=9 R.R. 87=A.I.R. 1936 Rang. 310.**

——S. 62—*Municipal assessment—Annual value of building—Computation—Methods—Safeguards to be observed.*

The only proper basis of assessment is that which enables the gross annual rent, for which the buildings and lands liable to taxation may reasonably be expected to let, to be discovered; in other words, neither the contractor's test, nor the revenue principle, is a principle of assessment. They may be useful as a method to find out what the hypothetical rent may be. A test based upon the actual figures of profits can only be applied where a hereditament itself has an exclusive profit-making characteristic, enabling one to single it out from other classes of hereditaments. In order to arrive at the rent which a hypothetical tenant would pay, the contractor's test may be taken as a rough test, but care must be taken to examine the actual return which the contractor would reasonably expect to receive on his outlay. (*Roberts, C J., Mya Bu and Dunkley, JJ.*) DYER MEAKIN (BURMA), LTD. *v.* CHIEF EXECUTIVE OFFICER, MANDALAY MUNICIPALITY. **1938 Rang. L.R 336=177 I C. 803=11 R.R. 172=A.I.R. 1938 Rang. 345 (S.B.).**

——**Ss. 84 and 93**—*Premises and hereditaments belonging to Electric Supply Co.—Mode of assessment.*

Where the premises and hereditaments belonging to an Electric Supply Co. are sought to be assessed by the Municipal Committee, the assessment should be made without taking into account any value in respect of the overhead mains, cables or wires. The overhead mains are not assessable under the Act at all. (*Roberts, C.J., Leach and Dunkley, JJ.*) Akyab Electric Supply Co. *v.* Akyab Municipal Assessment Sub-Committee. **14 Rang. 649=166 I.C. 512=9 R.R. 266 (1)=A.I.R. 1937 Rang. 1 (S.B.).**

——**S. 229 (g) and Burma Municipal Rules (1934), Ch. 6, R 24**—*Rule if directory or mandatory—Contract in violation of rule—Validity.*

Per *Roberts, C. J.*—Rule 24 of Ch. 6 of the Burma Municipal Rules framed under S. 229 (*g*), Burma Municipal Act, was made generally for guidance of committees and public officers in all matters connected with the carrying out of the Act, and so it has a directory and not a mandatory significance. Hence a breach of this rule does not make a contract void.

Per *Sharpe, J.*—The rule was either under S. 71 and beyond the powers of the Local Government to make or at least it was only directory if made under S. 229 (*g*) and it could not in any way interfere with the right acquired by third persons under any contract entered into with the Municipality, even though it had been entered into it otherwise than in accordance with the directions given in the rule. (*Roberts, C. J. and Sharpe, J.*) Municipal Committee, Myaung Mya *v.* Paw Haing. **1938 Rang.L R. 704=178 I.C. 817=11 R.R. 269=A.I.R. 1938 Rang. 404.**

BURMA PREVENTION OF CRIME (YOUNG OFFENDERS) ACT (III OF 1930),

Ss. 13 and 25—*Order of detention in Borstal School—Appeal—Forum.*

It is plain from S. 13 of the Prevention of Crime (Young Offenders) Act that in respect of any order of detention in a Borstal School for any period, passed by a Magistrate, there is a right of appeal to the local Court of Session, and the only circumstance in which the appeal against such an order will lie to the High Court is when a co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years. In such a case, the appeal will lie to the High Court under the provisions of S. 408, proviso (*b*), Cr. P. Code. (*Dunkley, J.*) Nga Tha E *v.* Emperor. **14 Rang. 143=163 I.C. 144=8 R.R. 611=37 Cr.L.J. 793=1936 Cr.C. 513=A.I.R. 1936 Rang. 229.**

——**S. 14**—*Finding of trial Court as to age of accused—High Court, if can re-consider, in determining sentence.*

According to S. 14, it is not open to a Court of appeal to re-consider a finding arrived at by the trial Court as to the age of an accused so far as the question as to the applicability of S. 15 is concerned. Still the discretion of the High Court is not fettered in considering whether the accussed has really reached the age arrived at by the trial Court in determining the general question as to the appropriate sentence to be passed. (*Mya Bu and Mackney, JJ.*) Nga Saw Htun *v.* Emperor. **171 I C. 125=38 Cr.L.J. 1022=10 R.R. 131=A.I.R. 1937 Rang. 121.**

——**S. 15**—*Age of accused—Time with reference to which it should be ascertained.*

While for the purpose of S. 15, Burma Prevention of Crime (Young Offenders) Act, the age must be ascertained with reference to the time when the sentence is to be passed, the age with reference to the general question as to the capacity to exercise reason and self-control must be with reference to the time of the commission of the offence. (*Mya Bu and Mackney, JJ*) Nga Saw Htun *v.* Emperor. **171 I.C. 125=38 Cr.L.J. 1022=10 R.R. 131=A.I.R. 1937 Rang. 121.**

——**S. 16 (e)**—*Isolated crime—Detention in Borstal School—Necessity for.*

The Borstal Schools in Burma are introduced for training and care of young persons who are by their circumstances likely to enter upon a life of crime. Where it appears that the crime which a juvenile has committed is an isolated one, due to his losing self-control in a set of special circumstances and where the juvenile is not shown to be subjected in his normal life to undesirable influences it is not necessary that he should be detained in a Borstal School. (*Mackney, J.*) Maung Tin Hlaing *v.* The King. **184 I.C. 464=12 R.R. 147=41 Cr.L.J. 22=A.I.R. 1939 Rang. 383.**

——**Ss. 16 (e) and 24 (b) (ii)**—*Offender between 15 and 16 years—Order detaining him in Training School for 4 years—Legality.*

Where an offender of between 15 and 16 years is ordered to be detained in the Training School under S. 16 (*e*), Burma Prevention of Crime (Young Offenders) Act, for a period of 4 years, the order is illegal as the offender will have passed his 19th birthday by the time the period of 4 years expires. The proper order therefore in such a case is to detain him in the Training School, till he attains his 19th birthday. (*Mosely, J.*) The King *v.* Unoose. **39 Cr L.J. 697=176 I.C. 217=11 R.R. 36=A.I.R. 1938 Rang. 228.**

——**S. 24 (b)**—*"Beyond age of 18"—Meaning of.*

The expression "beyond the age of 18" in Cl. (*b*), S. 24 means and includes the period up to the nineteenth birthday of the person. Hence a person who is just under 16 years of age at the time of passing the order can be ordered to be detained for a period of three years under S. 24 (*b*). (*Dunkley, J.*) Emperor *v.* Nga Bala. **14 Rang. 327=163 I C 1008=37 Cr.L.J. 869=9 R. R. 55=A I R 1936 Rang. 297.**

——**S. 24 (b)**—*"Beyond the age of 18"—Meaning of—Duty of Magistrate.*

The expression "beyond the age of 18" in S. 24 (*b*) of the Prevention of Crime (Young Offenders) Act means and includes the period up to the 19th birthday of the person concerned. The duty of the Magistrate is to fix the age of the accused person as nearly as he can from evidence, and his order for detention should be accompanied by a reference to the date upon which the 19th birthday occurs in order that the school authorities may with certitude carry out the duties entrusted to them 14 Rang. 327, Foll. (*Roberts, C.J., Leach and Dunkley, JJ.*) Emperor *v.* Ismail. **14 Rang. 625=165 I.C. 575=9 R.R.**

215=38 Cr.L.J. 33=1936 Cr.C. 976=A.I.R. 1936 Rang. 485 (F.B.).

——S 25—*Offence under S. 380, I. P. Code—Order of detention in Borstal School passed by Magistrate—Substitution of sentence of whipping on appeal—Legality—Whipping Act S. 3.*

In the case of a juvenile offender committing an offence under S. 380, I. P. Code, the Magistrate has two alternatives before him. He may send the offender to prison or, in lieu thereof, he may either cause him to be whipped or send him to Borstal. If the Magistrate orders him to be detained in the Borstal School, the Sessions Judge on appeal cannot pass a sentence of whipping in lieu of the order of detention, as he would he enhancing the sentence. Under S. 3 of the Whipping Act, he can only pass a sentence of whipping in lieu of any punishment to which the offender might be liable under the Penal Code, that is to say, he can only pass a sentence of whipping in lieu of imprisonment. (*Roberts, C J. and Dunkley, J.*) THE KING *v* KYAW AYE. **1939 Rang L.R. 744=12 R.R. 332=187 I.C. 405 =41 Cr.L.J. 455=A I.R. 1940 Rang. 81.**

——S. 25 (1)—*Order directing accused, guilty under Ss. 302 and 307, I. P. Code, to be sent to Borstal School—Legality*

S. 25 (1), Prevention of Crimes (Young Offenders) Act, only allows an order directing accused to be sent to a Borstal School in a trial against a person between 16 and 19 where a sentence of imprisonment would ordinarily be passed. An offence under S. 302, Penal Code, is not punishable with imprisonment but with death or transportation for life. An order under S. 25 (1) directing accused aged 16 found guilty under Ss. 302 and 307, Penal Code, to be sent to a Borstal School for seven years is illegal. (*Mosely, J*) EMPEROR *v.* NGA U. **163 I.C. 118=8 R.R. 610=37 Cr.L.J. 791=1936 Cr.C. 518=A.I.R. 1936 Rang. 234.**

BURMA RURAL SELF-GOVERNMENT ACT (IV OF 1921), Rules under R. 55—*District Judge acting under*—Persona designata—*Right to appeal against his decisions.*

In performing the functions laid upon him by the rules the District Judge does not act as a Court and his proceedings are not subject to appeal or revision by the High Court because he acts as a *persona designata.* (*Mackney, J.*) U AUNG MYIN *v.* DISTRICT AND SESSIONS JUDGE, HENZADA. **A.I.R. 1940 Rang. 148.**

——**S. 2 (h) (ii)**—*"Public market"—Meaning of.*

"Public market" within the meaning of S. 2 (*h*) (ii) means any place belonging to a District Council or constructed, repaired or maintained out of a District Fund, where persons periodically assemble for the sale of goods, livestock or articles of food. To be a "public market" a market need not necessarily be a building constructed, repaired or maintained out of a District Fund It is sufficient if the place where persons periodically assemble for the sale of goods, livestock or articles of food belongs to the District Council. (*Mya Bu, J*) AH SU *v* TARAWAY KAKA. **181 I.C. 986=11 R R. 508=A.I.R. 1939 Rang. 162.**

See also JAHOO GANI *v.* U PO THET. **164 I.C. 141=9 R.R. 62=A.I.R. 1936 Rang. 331.**

——**S. 28 (1) (a)**—*Fee levied under—Nature of.*

The fee leviable under S. 28 (1) (*a*) is not rent charged for the use or occupation of a place or a building or a stall in a public market. The fee is levied for the right to expose goods or livestock for sale in the public market. (*Mya Bu, J.*) AH SU *v* TARAWAY KAKA. **181 I.C. 986=11 R. R. 508=A.I.R 1939 Rang. 162.**

——**S. 28 (1) (c)**—*Applicability—Shop in private house.*

Only temporary stall established on a road or street itself comes within purview of S. 28 (*c*), and shops established in buildings built on private property, but abutting on to a road or street do not come within the clause. (*Dunkley, J.*) JAHOO GANI *v.* U PO THET **14 Rang. 701=164 I.C. 141=9 R.R. 62=A.I.R. 1936 Rang. 331.**

——**S. 58 (3)**—*Contract not executed in manner prescribed—Right of suit for breach of contract.*

Where a contract which must be executed in a particular form prescribed by law has not been so executed, a party who acts upon it has no right to sue for the breach of such contract. 30 M. 290 and 27 A. 592, Foll. (*Mosely, J*) M. M. SHERAZEE *v* DISTRICT COUNCIL, KYAUKSE. **173 I.C. 345=10 R.R. 339=A.I.R. 1937 Rang. 378.**

——**S. 77**—*Scope.*

S. 77, Burma Rural Self-Government Act, does not limit contracts intended to be covered by its penal provision only to such contracts as may be related to the matters mentioned in Ss. 48, 50 and 56 of the Act. Where a clerk of the Circle Board rents his house to the Circle Board for use as its office without the permission in writing of the Commissioner as required by S. 77, Burma Rural Self-Government Act, he commits an offence under S. 168, I. P. Code, read with S. 77, Burma Rural Self-Government Act, as he is interested in the contract made with the Board. (*Shaw, J.*) THE KING *v* MAUNG SAW HAN. **179 I.C. 716=40 Cr.L.J. 248=11 R.R. 343=A.I.R. 1939 Rang. 69.**

——**Ss. 78 and 79**—*Rules—Chap. 1, R. 34—Application disputing election of Chairman—Maintainability.*

The rules framed for the election of a Chairman of the District Council framed under S. 79 (1) (*e*) of the Act, do not provide for any questioning of the election of a Chairman by petition to Court. An application purporting to be made under R. 34, Chap. 1 of the rules framed under Burma Rural Self-Government Act of 1921 for declaring the election of a Chairman of the District Council void, does not lie. (*Mosely and Ba U, JJ*) GOVERNMENT ADVOCATE, BURMA *v* U PO SHWE. **161 I.C. 335=8 R R. 469=A.I R. 1936 Rang. 110.**

——**Sch. II, O. 1, Cl 1 (1) (b)**—*Words "have been assessed"—Meaning of.*

The words "have been assessed" in Sch. II, O 1, Cl. 1 (1) (*b*), Burma Rural Self-Government Act, do not merely mean "have paid" land revenue but that the person's name actually appears in the assessment rolls as assessee. To prove that an elector has a qualification under Sch. II, O. 1, Cl 1 (1) (*b*), the only method is to produce extracts from relevant assessment rolls. (*Mackney J.*) MAUNG TUN GAUNG *v.* EMPEROR. **171 I.C 86=38 Cr.L.J. 1015=10 R.R. 128=A.I. R. 1937 Rang. 318.**

BURMA SUPPRESSION OF BROTHELS ACT (II OF 1921), S. 11 (a)—*Proper sentence.*

Where a person is convicted of an offence of managing a brothel under S. 11 (*a*) of Burma Suppression of Brothels Act, a sentence of fine or in default imprisonment is entirely inadequate in such a case. To stamp out an offence of this kind it is proper that the offender should be sent to prison. (*Roberts, C.J.*) M ULLA *v.* THE KING. **174 I.C. 885=39 Cr.L.J. 494=10 R.R. 439=A.I.R. 1938 Rang. 107.**

BURMA TENANCY ACT (X OF 1939), Ss. 14 and 15—*Duty of Rent Settlement Officer.*

The Act does not say that the Rent Settlement Officer must strike an average, and then, tinker with the results lest they appear ridiculous; it enjoins an inquiry into each tenancy and the determination of a proper figure by certain specified means. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C. 422=12 R.R. 365 =A.I.R 1940 Rang. 84 (S.B.).**

——**S. 15**—*"Such other factors as may seem relevant"—Matters falling within.*

The situation of the land, nearness to or remoteness from a village, a railway station, a waterway, a mill, or a road, accessibility of the land, are clearly necessary considerations in determining a fair rent as falling within the phrase "such other factors as may seem relevant." (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C 422=12 R.R. 365=A.I.R 1940 Rang. 84 (S.B.).**

——**S. 40**—*Powers of High Court.*

The provisions of S. 40 do not in any way affect the power of High Court to bring into High Court the proceedings of Revenue Officers in order to ascertain whether they have been conducted in due compliance with the statute. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG PYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C 422=12 R.R. 365=A.I.R. 1940 Rang. 84 (S.B.).**

BURMA VILLAGE ACT (IV OF 1907), Ss. 8, 11 (d) and 12 (ii)—*Refusing to help headman to despatch injured person to hospital—Conviction—Sustainability.*

The public duties of a headman are enumerated in S. 8 of the Act, and it is not the public duty of a headman to despatch an injured person to hospital. Hence refusal of a villager to help the headman to carry an injured person to hospital is not an offence within the meaning of S 12 (*ii*) read with S. 11 (*d*) even though such injured person is a Government officer and a conviction for such refusal is unsustainable. (*Mosely, J.*) EMPEROR *v.* MAUNG THA DIN. **161 I.C 604=8 R.R 496=37 Cr.L.J. 468=1936 Cr.C. 195=A.I.R. 1936 Rang. 120.**

——**S. 10**—*'Abuse of power', meaning of.*

An abuse of power means that, when a person has power to do a certain thing, he exercises that power in a manner in which authority is not given to him to exercise it. (*Dunkley, J.*) MAUNG BA SHIN *v.* EMPEROR. **160 I.C. 477=8 R R. 386 =37 Cr L.J. 295=1936 Cr.C. 4=A.I.R. 1936 Rang. 11.**

——**Ss. 10 and 28**—*Complaint against headman—Act punishable departmentally—Previous sanction of Deputy Commissioner.* **CAL. HACKNEY CARRIAGE ACT (1919), S. 60.**

S. 28 refers to a complaint of an act which constitutes an offence under the Penal Code or any other law if such act is also punishable departmentally under S. 10 of the Act. Where the Act of which the person is complaining is also punishable departmentally by the Deputy Commissioner under S. 10 of the Act, then the sanction of the Deputy Commissioner to the prosecution of the applicant is necessary. 1 L.B.R. 336, 1923 Rang. 27 and 1931 Rang. 87, Rel. on. (*Dunkley, J.*) MAUNG BA SHIN *v.* EMPEROR. **160 I. C. 477=8 R.R. 386=37 Cr.L.J. 295=1936 Cr C. 4=A.I.R 1936 Rang. 11.**

——**S 12**—*Offence under—Villager not paying thathameda-tax—Order to him by headman to appear at Township office—Disobedience of order—If offence.*

The payment of *thathameda-tax* is not a public duty imposed on a villager by the Village Act. Therefore, if a villager who has not paid his *thathameda-tax* is directed by his headman to appear at a Township office but fails to do so, he does not commit any offence punishable under S. 12 of that Act. (*Mackney, J.*) THE KING *v.* MAUNG KAN TUN. **1938 Rang.L.R. 119=175 I. C. 512=10 R.R. 505 (1)=39 Cr.L.J. 626=A.I.R. 1938 Rang 180.**

CALCUTTA ACTS, Etc.

Hackney Carriage Act (I of 1919).
High Court Civil Rules and Orders.
High Court General Rules and Orders.
High Court Insolvency Rules (1910).
High Court Rules (Appellate Side).
High Court Rules (Original Side) (1933).
Improvement Act (V of 1911).
Municipal Act (III of 1923).
Police Act (IV of 1866).
Port Act (III of 1890).
Survey Act (I of 1887).

CALCUTTA HACKNEY CARRIAGE ACT (I OF 1919), S. 60—*Scope and effect—Act of 1891 extended to Pabna in 1913—Act I of 1919 not extended—Hackney carriage stand established in 1918—Nuisance caused in 1933—Suit against Municipality for, injunction and damages—Maintainability—Municipality—If exempted from liability by S. 60 of Act I of 1919, Bengal General Clauses Act, S. 25—Applicability—Bad and offensive smell emitted by accumulated urine of horses—Injunction—Grant of—Continuing nuisance—Proper remedy.*

The authority to appoint stands for hackney carriages conferred on a municipality by S. 60 of the Act is absolute; and the Municipal Commissioner will therefore not be liable in respect of a stand established under that section, even if the stand so erected is a source of nuisance to the neighbours. But, where a stand for hackney carriages is erected in 1918 in Pabna, under the Act of 1891, which was extended to Pabna by a notification in 1913, but the Act of 1919, which repealed the Act of 1891, is not so extended to Pabna, the effect is that the Hackney Carriage Act of 1891 is not in existence in Pabna since 1919; and the Municipal Commissioners would have no authority under the law to appoint or maintain a carriage stand since 1919. If, therefore, in 1933, the Pabna Municipality have the stand erected in 1918 or do anything else which results in nuisance, it will be liable to be sued in

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respect of that Act. Neither S. 25 of the Bengal General Clauses Act nor S. 3 (2) of the Hackney Carriage Act of 1919 would be of any assistance so as to protect the Municipal Commissioners against the suit. When the smell emitted from the stand, though bad, is not more noxious or disagreeable than the smell emitted from the streets of the place generally, no action for nuisance would lie. But where it is found that there is no proper drain or channel to drain off the urine of the horses, with the result that offensive matter drains into and accumulates in a long strip of land between the stand and the plaintiff's land, the plaintiff has a cause of action and is entitled to relief by way of an injunction and not merely to nominal damages. In the case of continuing nuisances, an injunction is the usual and proper remedy, and ought to be granted unless the injury complained of is trivial. (*R.C. Mitter, J.*) NIRMAL CHANDRA SANYAL *v.* MUNICIPAL COMMISSIONER OF PABNA TOWN. **I.L.R. (1937) 1 Cal. 407=167 I.C 254=9 R.C. 665=40 C.W.N. 1353=A.I.R. 1936 Cal. 707.**

CALCUTTA HIGH COURT CIVIL RULES AND ORDERS, R. 760—*Duty of Sheristadar—Short deposit accepted by him—Party, if can be penalised.*

Under R. 760 of the High Court Civil Rules and Orders, it is the duty of the Sheristadar to ascertain that the amount tendered is correct. If a judgment-debtor seeking to set aside a sale of his property effected in execution of a rent decree, makes a short deposit of the decretal amount which is accepted by mistake by the Sheristadar as sufficient, he cannot be penalised if he pays the deficit when the mistake is found out, as the short deposit is due to an omission of duty on the part of a Court official. The sale should, therefore, be set aside. (*M.C. Ghose, J.*) SURESH CHANDRA SINGH *v.* JNANENDRA NATH SINGH. **68 C.L.J. 273.**

CALCUTTA HIGH COURT GENERAL RULES AND ORDERS (CIVIL) (1934), R. 951—*"Business"—Pleader taking up appointment as Assistant Secretary of Loan Office—If commits breach of rule—Liability to suspension from practice.*

"Business" in R. 951 of the High Court General Rules and Orders (Civil) is quite a comprehensive word. The rule does not speak of a business carried on for the benefit of the pleader himself. A pleader who accepts an appointment as Assistant Secretary of a Loan Office and accepts an office as Director thereof must be said to engage himself in "business" within the meaning of R. 951, and when he does so without previously intimating his intention to the High Court, he commits a breach of the rule. But the pleader's connection with the business as Director and Assistant Secretary is neither derogatory to the dignity of a practising lawyer nor likely to interfere with his duties as such to any appreciable extent so as to make him liable to suspension from practice. (*Mukerji, A.C.J., Lort Williams and S.K. Ghose, JJ.*) *In re* RAMESH CHANDRA SEN GUPTA. **63 Cal. 855=162 I.C. 517=8 R.C. 605=37 Cr.L.J. 590=40 C.W.N. 377=63 C.L.J. 127=1936 Cr.C. 350=A.I.R. 1936 Cal. 205.**

——Rr. 951 and 953—*Scope—If* ultra vires.

R. 951 of the General Rules and Circular Orders (Civil) framed by the High Court in 1934, which requires that a pleader or muktear intending to accept an engagement, etc., shall give prior notice thereof to the High Court is entirely within the competence of the High Court to make and is perfectly consistent with the Legal Practitioners Act and not *ultra vires*. The provision as regards previous notice is evidence for the benefit of the pleader or muktear. But R. 953, in so far as it provides for and prescribes a fine for breach of Rr. 950 and 951, is clearly *ultra vires*, because it provides for a misconduct and penalty unknown to the Legal Practitioners Act besides being unjustifiable and unreasonable and also because the enforcement of the rule is impossible in view of the provisions of the Legal Practitioners Act. (*Mukerji, A.C.J., Lort Williams and S.K. Ghose, JJ.*) *In re* RAMESH CHANDRA SEN GUPTA. **63 Cal. 855=162 I.C. 517=8 R.C. 605=37 Cr.L.J. 590=40 C.W.N. 377=63 C.L.J. 127=1936 Cr.C. 350=A.I.R. 1936 Cal. 205.**

CALCUTTA HIGH COURT INSOLVENCY RULES (1910), R. 79—*Affidavit of debtor purporting to be notice—Rejection of as out of time—Debtor, if can tender evidence at the hearing.*

The rejection of an affidavit of the debtor which purported to be a notice under R. 79 of the Calcutta Insolvency Rules on the ground that it was filed out of time, does not amount to the shutting out of evidence or the preventing of the debtor from giving any further evidence at the hearing in rebuttal of the case put forward by the petitioning creditor. (*Costello, A.C.J. and Edgley, J.*) AHMAD MAHOMED PARUK *v.* PRAPHULLA NATH TAGORE. **I.L.R. (1938) 1 Cal. 13=181 I.C. 251=11 R.C. 795=A.I.R. 1939 Cal. 35.**

CALCUTTA HIGH COURT RULES (Appellate Side), Ch. VI, Rr. 7 and 9—*Revision petition—Affidavit—If necessary—Facts relied upon supported by certified copy of order attached to petition.*

Where a petition to the High Court states facts which are all matters of record and which are all supported by certified copies of the order passed by the Court below attached to the petition, such a petition need not be supported by an affidavit. (*R.C. Mitter, J.*) RAJBALLAV MANDAL *v.* RAJENDRA NARAIN MANDAL. **40 C.W.N. 1408.**

CALCUTTA HIGH COURT RULES AND ORDERS (Original Side) (1933), Ch. VIII, R. 20-A—Applicability—Suit against firm—Person not served with writ and denying to be partner but interested in firm—Joinder of—Power of Court—Procedure. *See* C. P. CODE, O. 1, R. 10 AND O. 30, RR. 3 AND 8. **40 C.W.N. 677.**

——Ch. IX, R. 4—*Applicability.*

R. 4 of Ch. IX is intended to apply not to a case of non-entry of appearance but simply to a case of failure to file written statement. (*Ameer Ali, J.*) RAMDEO KEDIA *v.* BALVADRA KEZRIVAL. **41 C.W.N. 561.**

——Ch. IX, R. 11—*Paper Book in First Appeal—Papers compulsorily inclusible—Permission to exclude when granted.*

Papers enumerated in R. 11 of Chap. IX of the High Court (Appellate Side Rules), as compul-

sorily inclusible in the Paper Book of a First Appeal can, on application by the appellant, be excluded therefrom, on condition that the appellant undertakes not to question the findings of the trial Court which are dependent on the papers sought to be excluded. The appellant in that case cannot be permitted to question those findings. (*D. N. Mitter and Patterson, JJ.*) PROKASH CHANDRA NAG *v.* SUBODH CHANDRA NAG. **40 C.W.N. 383.**

——**Ch. X, R. 25 and Ch. VIII, R. 16**—*One alone of several defendants entering appearance—Allegation by him in written statement that one among them is a minor—Transfer of suit to undefended list as against major defendants who have failed to appear—Practice.*

Where one alone of several defendants enters appearance and files a written statement alleging that one among the defendants is a minor, the practice is to transfer the suit to the undefended list as against those defendants who have not appeared and who are not alleged to be minors. (*Ameer Ali, J.*) RAMDEO KEDIA *v.* BALVADRA KEZRIVAL. **41 C.W.N. 561.**

——**Ch. X, R 30 (c)**—*Omission to give notice—Effect of.*

Rule 30 (*c*) of Chapter X of the Original Side Rules is clear that when the report of the referee is set down for confirmation, notice in writing should be given by the party applying to the other party or parties. If no such notice is given and the report is confirmed, the principle embodied in O. 9, R. 13 should be applied. (*Derbyshire, C.J. and Lort Williams, J.*) ATINDRA NATH DAS *v.* DHIRENDRA NATH DAS. **43 C.W.N. 393.**

——**Ch. X, R. 36**—*Discretion of Court—Exercise of.*

R. 36 is mainly conceived in the public interest, as the defendants will usually be able to force progress under R 7. Every litigant has the right to have his case heard and disposed of, but that right must not be abused, even though the defendant, for reasons of his own, is not anxious to complain of the plaintiff's delay. But the Court is not entitled to deprive the litigant of his right, except on clearly ascertained grounds, and to the exclusion of grounds which rest on suspicion. (*Lord Thankerton*) SRINIVAS PRASAD SINGH *v.* KESHAVA PRASAD SINGH **63 I.A. 12=63 Cal. 662=1936 M.W.N. 327=1936 A.L.J. 101=43 L.W. 228=1936 A.W.R. 202=38 Bom L.R. 146=8 R P.C. 82=159 I.C. 549=40 C.W.N. 321=1935 O.L.R. 721=1936 A.L.R 6=A.I.R. 1936 P.C. 9=70 M.L.J. 94 (P.C.).**

——**Ch. X, R. 36**—*Interpretation of.*

Under R. 36, the material time at which the failure to appear in the prospective list is to be looked for is when the suit is placed before the Judge in chambers. The six months provides a minimum period, on the lapse of which action may be taken under the rule. The failure to appear in prospective list must be still continuing at the date of such action and the default in respect of which the suit is liable to dismissal is such continuing failure The conduct of the suit as from its institution up to the date of the action under the rule, is proper matter for the consideration of the Judge. 58 Cal. 736, Appr. (*Lord Thankerton.*) SRINIVAS PRASAD SINGH *v.* KESHAVA PRASAD SINGH. **63 I.A. 12=63 Cal. 662=1936 M.W.N. 327=1936 A L.J 101=43 L.W. 228=1936 A.W.R. 202=38 Bom.L.R. 146=8 R. P.C. 82=40 C.W.N 321=159 I.C. 549=A.I.R. 1936 P C. 9=70 M.L.J. 94 (P.C.).**

——**Ch. XII, R. 6**—*Process-fees—Right of Sheriff to levy charge for conveyance of officer serving notice from Court to place of person to be served and back—Right to call on party to attend office to identify person to be served—Procedure.*

There is no rule in the Rules of the High Court either on the original or on the appellate side of the Court, which authorises the Sheriff to levy charges for conveyance for his officer from his office to the place of the person to be served and back from that place to the Court premises. A party at whose instance the notice of process was to be served cannot therefore be compelled to pay those charges to the Sheriff's officer serving the notice; nor is it necessary for that party to attend at the office of the Sheriff to accompany or take the Sheriff's officer to the place of the person to be served in cases where no identification of the person to be served is necessary. The Court will not endorse the proposition that a process-server is not expected by any Court to walk for the purpose of serving notices and processes. If the Sheriff insists on the payment of conveyance charges and refuses to serve the notice without them the Court will not compel the party to pay them, but will direct service of notice by registered post. (*Mukherji and Jack, JJ.*) BRAHMA NIRANJAN CHAKRAVARTI *v.* JAGADAMBA LOAN CO., LTD. **I.L.R. (1937) 1 Cal. 322=40 C.W.N. 1295.**

——**Ch XIII**—*Originating summons—Jurisdiction of High Court—Letters Patent, Cl. 12.*

It is now settled that Chap. XIII of the Rules and Orders of the Original Side, which governs the procedure with regard to originating summons, must be read subject to the provisions of Cl. 12 of the Letters Patent, and it follows that the Court has no jurisdiction to entertain an originating summons unless it would have jurisdiction to make an administration decree with regard to the estate in respect of which relief by originating summons is sought. An originating summons asking for the decision of the Court on certain questions arising out of a will cannot, therefore, be maintained if no leave of the Court has been obtained under Cl. 12 of the Letters Patent, where the will was executed outside its jurisdiction and the assumption by the executors was registered at Edinburgh. (*Panckridge, J.*) MACDONALD *v.* WILSON. **I L.R. (1940) 1 Cal. 102=A.I.R. 1940 Cal. 354.**

——**Ch. XIII**—*Originating summons—Maintainability—Relief claimed by beneficiary or trustee against agents of trustee.*

Any relief claimed by a beneficiary or trustee against the agents of trustees cannot be determined by means of an originating summons. (*Panckridge, J.*) MACDONALD *v.* WILSON. **I.L.R. (1940) 1 Cal. 102=A.I R. 1940 Cal. 354.**

——**Chap. XIII-A**—*Application in suit on promissory note—Oral agreement postponing obligation till adjustment of partnership accounts—Defendant, if can set up.*

In an application under Ch. XIII-A of the Calcutta High Court Rules for summary judgment in a suit on a promissory note, it is not permissible for the defendant to set up an oral agreement between him and the plaintiff that the promissory note created no liability or obligation till their partnership accounts were adjusted. (*McNair, J.*) GOPIRAM BHOTICA *v.* BALMUKUND BANSHIDHAR. **44 C W N. 811**

——**Chap. XIII-A, R. 5 (b)**—*Form of affidavit.*

Under R. 5 (*b*) of Chap. XIII-A of the Calcutta High Court Rules, the affidavit of the defendant should be either on oath or solemn affirmation. (*McNair, J.*) MAHADEOLAL *v.* BISSESWARLAL. **44 C.W.N. 808**

——**Chap. XIII-A, Rr. 6 and 9**—*Leave to defend—Grant of—Merits of defence—Duty of Judge to consider.*

A Judge who is hearing an application under Chap. XIII-A of the Rules of the Calcutta High Court, should consider all the facts which are brought before him in the affidavits and direct his attention as to whether the defence is or is not a good defence and after such consideration decide whether leave should be given to defend unconditionally or subject to terms which may include the furnishing of security. (*McNair, J.*) MAHADEOLAL *v.* BISSESWARLAL. **44 C.W.N. 808.**

——**Ch. XVI R. 27**—Effect of—Application by defendant for review of judgment—Limitation—Computation—Period between date of decree and date of filing of decree—Right to exclude. *See* LIMITATION ACT, S. 12 (2). **41 C.W.N. 129.**

——**Ch. XVII, Rr. 37 and 38**—Ex parte *application for payment out—When may be made—Registrar's certificate showing prior applications for attachment—Procedure — Decree transferred to another Court—If remains subsisting application for attachment.*

An application for payment out may be made under Ch. XVII, R. 37 and *ex parte* only where the Registrar's certificate properly so called shows no prior applications for attachment. If it shows such prior applications, the applicant must apply for rateable distribution under R. 38. In such case notice, unless dispensed with by the Court, must be given to all persons whose names appear in the Registrar's certificate. The fact that there has been a particular decree which has been transferred to another Court does not affect the matter for the purpose of the certificate, and for purpose of rateable distribution it remains a subsisting application for attachment. (*Ameer Ali, J.*) HONGKONG AND SHANGHAI BANKING CORPORATION *v.* PARESH LAL ROY. **I.L.R. (1939) 1 Cal. 40=183 I.C. 444=12 R.C. 158=43 C.W.N 169=A.I.R 1939 Cal. 485.**

——**Ch. XIX, Rr. 1 and 2**—*Effect of—Suit filed by certificated guardian of lunatic without affidavit of competency—Jurisdiction of Court to entertain suit—Subsequent filing of such affidavit—Effect of.*

The effect of R. 2 read with R. 1 of Chapter XIX of the Original Side Rules is to require that the next friend of a person of unsound mind, in whose name the suit is instituted, shall make an affidavit to be presented with the plaint that he has no interest directly or indirectly adverse to that of the lunatic. But where a suit is instituted by a certificated guardian of the lunatic, who alone is competent to act as his next friend under O. 32, R. 4 read with O. 32, R. 15, C. P. Code, the

failure to present an affidavit of competency by him along with the plaint does not oust the jurisdiction of the Court to entertain the suit. It is no more than a defect of procedure which the Court itself has power and discretion to cure. When the defect is subsequently cured by the filing of an affidavit of competency, the filing of such affidavit relates back to the date when the plaint was presented to the Court and admitted by it. (*Khundkar, J.*) RABINDRA NATH MITTER *v.* PURNA CH. SINHA. **I.L.R. (193 1 Cal. 531 =42 C.W.N. 422.**

——**Ch XX, Rr. 3, 4 and 9**—Notice of motion —Grounds of exception—If must be served with notice. *See* CALCUTTA HIGH COURT RULES (ORIGINAL SIDE), CH XXVI, R. 89. **41 C.W.N. 425.**

——**Ch. XX, R. 13**—*Scope and implication—Order for commission to examine witness—Direction that costs of application to be costs in the cause—Dismissal of suit with costs as against one defendant—Right of latter to costs of commission.*

On an application by one of the defendants for a commission to examine a party, an order was made directing such examination and that "the costs of and incidental to the application including the fee to counsel will be costs in the cause." But there was no direction given as to how the costs of the commission were to be dealt with. Subsequently the plaintiff having failed to furnish security for costs ordered by the Court, the suit was dismissed with costs against a particular defendant. The latter applied to have his bill of costs taxed and claimed the commission costs as against the plaintiff.

Held, (1) having regard to the terms of the application for commission and the order thereon, it must be held in accordance with the practice of the Calcutta High Court that the costs of the commission must be borne by the several parties; (2) that the costs which the plaintiff was ordered to pay by the order dismissing the suit must be held to be costs of the suit exclusive of the costs of the commission.

Held, further, that the Court had to construe the orders as they stood and was precluded from investigating the circumstances in which the commission was granted and the conduct of the various parties with regard to it. (*Panckridge, J.*) EASTERN TAVOY MINERALS CORPORATION, LTD. *v.* CLARKE RAWLINS KER & CO. **40 C.W.N. 1068.**

——**Ch. XXI, R. 17**—*Application for passing of accounts by previous receiver—Objection by subsequent receiver on basis of wilful neglect—Latter, if should be relegated to suit.*

Although as a general rule, the Court would direct the person objecting to a receiver's account on the basis of wilful neglect to bring a suit, if he is so advised, rather than deal with the matter on an application for the passing of accounts, it does not follow that in every case that procedure should be adopted. Where a subsequent receiver is calling in question the accounts, of the former receiver and a *prima facie* case of neglect and default on the part of the latter has been made out on the affidavits, it would be undesirable if not impossible, to force the subsequent receiver to bring a suit for accounts on the basis of wilful default. (*McNair, J.*) RADHA PROSAD DHUR *v.* ASHUTOSH DHUR. **43 C.W.N. 488.**

——Ch. XXVI—*Registrar's report—Confirmation of—Part of it not on point referred to him.*

Where the Registrar has in making his report regarding the payment of alimony *pendente lite* made certain suggestions regarding the amount of maintenance which should be paid for the children, latter part of the report cannot be confirmed if there was no reference to the Registrar on that point. (*Sen, J.*) LOBO *v.* LOBO. **187 I.C. 252=12 R.C. 554=A.I.R. 1939 Cal. 753.**

——**Ch. XXVI, Rr. 4 and 8**—*Applicability.*

P obtained a decree in 1920 for a certain amount less one definite sum and less an unascertained amount. The suit was referred to the Assistant Referee to take the accounts and the further hearing of the suit was adjourned until after the reference. *P* appealed from the decree. The suit was remanded to the trial Court for a finding on certain facts and there was a finding by the Court. Nothing however was done for about nine years, when *P's* appeal appeared in the peremptory list. *P* did not appear and his appeal was dismissed as also an application by him for restoration of his appeal. The reference was never in fact proceeded with and nothing of any consequence was done by *P* for a space of five years. After five years, in 1934, a summons was taken out by the defendant *D* asking for an order that the suit be dismissed with costs for want of prosecution. *P* secured an adjournment and was directed to file an affidavit. Nothing was done by *P*. He again sought an adjournment on the next date, it was refused and *P's* suit was dismissed for want of prosecution.

Held, that the matter was governed by the provisions of Rr. 4 and 8, Ch. 26, Reference Rules. It was *P's* duty and not that of the defendant *D* to file the decree in the Account Department of the Registrar's Office and that was not done and therefore the lower Court was justified in coming to the conclusion that *D* could apply under R. 8 for dismissal of the suit for want of prosecution; even if *D* were held to be the party having the carriage of reference it was open to *P*, on *D* not having taken any steps within 30 days, to ask under 2nd part of R. 8 to have all proceedings under the reference stayed and to obtain a final decree in the suit which he could execute. After the lapse of 30 days *P* had a present right to enforce the decree as he could have applied to have the reference stayed and a final decree made *P's* position was analogous to that of a mortgagee who obtained a preliminary decree and then did nothing towards putting himself into the position of being able to obtain a final decree before the lapse of 12 years from the date of the preliminary decree. (*Derbyshire, C.J. and Costello, J.*) RAMPROSAD SURAJMALL *v.* MOTILAL. **63 Cal. 612=A.I.R. 1936 Cal. 53.**

——**Ch. XXVI, R. 50**—*Construction and scope—Powers of Registrar and of Court.*

All that R. 50 of Ch. 26 of the Original Side Rules of the Calcutta High Court does is to authorise the Registrar taking the reference to apply for the opinion of the Court on a question arising in the reference. On that application the Court or Judge may give his opinion in the form that is contemplated by the rule itself. Nowhere in the Rule is any authority given to the Judge to pronounce a "judgment". (*Derbyshire, C. J. and Costello, J.*) GANGADHAR BAGLA *v.* KANTI CHUNDER MUKHERJEE. **(1937) 1 Cal. 149=40 C.W.N. 1264.**

——**Ch. XXVI, R. 50**—Reference under—Scope—Ruling of Judge on—Nature of—If "judgment"—Appeal *See* LETTERS PATENT (CAL.), CL. 13. **40 C.W.N. 1264.**

——**Ch. XXVI, R. 89 and Ch. XX, Rr. 3, 4 and 9**—*Notice of motion to vary Registrar's report—Grounds of exceptions——If must be served with notice.*

In the case of notice of motion, it is not necessary nor is it right for the applicant to serve his notice accompanied by copies of the grounds to be used in support. What the provisions of Chapter XX which deals with motions contemplate is that the notice of motion should apprise the opposite party of the materials which the applicant intends to use, and then if the opposite party so wishes, he can obtain a copy of those materials under R 9 by asking the applicant to supply it on payment of the usual charges. It follows, therefore, that a notice of motion to vary a report of the Registrar under Chap. XXVI, R. 89 need not be accompanied with the grounds of exceptions relied on by the party objecting to the report. Even if the proper practice were for the grounds of exceptions to accompany the notice, it does not necessarily follow that failure to serve the grounds with the notice would involve the dismissal of the application 62 Cal. 369, Over. (*Costello and Panckridge, JJ.*) RENUBALA *v.* MAHAMAYA DASSI. **I.L.R. (1937) 1 Cal. 293=41 C.W.N 425.**

——**Ch. XXVII, R. 10**—Execution—Attachment before judgment—Order for continuance by Court at time of decree—If one in execution—Application by plaintiff under O. 39, R. 6 for sale of goods attached before judgment—If one for execution of decree. *See* C. P. CODE, O. 21, R. 11. **40 C.W.N. 1317.**

——**Ch. XXVII, R. 15**—*Condition of sale requiring purchaser to assume certain facts owing to inability of vendor to obtain necessary title deeds or documents—Effect of.*

A condition of sale requiring the purchaser to assume certain facts, specifically added, owing to the inability of the vendor to obtain particular title deeds or documents, is not misleading if the vendor believes the facts, to be true, even though the condition is intended to cover a flaw which goes to the root of the title. The conditions of sale settled under R. 15 were in the form set out in rules and orders, as far as condition 14 is concerned, condition 15 was specifically added to the effect that the purchaser shall accept the recitals in the abstract of title, owing to the inability of the decree-holder to obtain the necessary title deeds and documents. Where the formalities of Rr. 15 and 20, Ch. 27 of the Calcutta High Court (Original Side) Rules, are complied with, and the purchaser signs the bidding paper and purchases the property, he cannot subsequently be allowed to impeach the sale on the ground of want or defect in title. (*McNair, J.*) SAGOREMULL *v.* GAJADHAR MANSINGHA. **168 I.C. 244=9 R.C. 797=A.I.R 1936 Cal. 703**

——**Ch. XXVII, R. 36**—*Scope and effect.*

R. 36 of Ch. 27 of the Calcutta High Court Rules and Circular Orders deals only with costs

of inquiry and cannot, by implication, deprive the purchaser of any rights that he may have *aliunde*. (*McNair, J.*) Janaki Nath Roy *v.* Akshoy Ch. Bose. **173 I.C. 404=10 R C. 514=A.I.R. 1937 Cal. 417.**

——**Ch. XXVII, R. 38**—*Time to complete purchase extended –Result of inquiry showing that purchaser was justified in objecting to title—Purchaser also waiving right to rent—Purchaser, if can be called upon to pay interest*

The latter part of R. 38 of Ch. 27, Calcutta High Court Rules and Circular Orders, leaves the Judge an ample discretion as to the terms which may be imposed on the purchaser as to the payment of interest or waiving his right to the rent up to the time when the question of title is determined. In an auction-sale, there being dispute as to the title to the property and the consequent inquiry, the time for the purchaser to complete the purchase was extended by one month from the date of the completion of the enquiry. The result of the enquiry showed that the purchaser was justified in objecting to the title. He also waived his right to the rents.

Held, that in these circumstances it would be inequitable that the purchaser should pay interest. (*McNair, J.*) Janaki Nath Roy *v.* Akshoy Ch. Bose. **173 I.C. 404=10 R.C. 514=A.I R. 1937 Cal. 417.**

——**Ch. XXVII, R 57**—"*Encumbrancer*".

The word "encumbrancer" in R. 57 of Ch. 27 of the High Court (Original Side) Rules should not be restricted to a prior encumbrancer. (*McNair, J*) Annapurna Roy *v.* Ram Ranjan Mullick. **40 C.W.N. 1173.**

——**Ch. XXXII, Rr. 2, 3 and 34**—Application for review—When made—Date of presentation of memorandum of review or date of being dealt with by Court *See* C. P. Code, O. 47, R 1 (1) (*a*). **41 C.W.N. 129.**

——**Ch XXXV, R. 29**—*Caveat—Notice by caveator that he merely insists on will being proved in solemn form—Plea of undue influence—Propriety.*

Obiter.—A notice by a person entering a caveat in probate proceedings stating that he merely insists on the will being proved in solemn form of law and that he intends only to cross-examine the witnesses produced in support of the will, does not fall within the terms of R. 29 of Ch. 35 of the High Court Rules (O.S.) when the plea raised is that the will is not a genuine will and has been obtained by undue influence. A plea of undue influence or fraud is inconsistent with such a notice. (*Derbyshire, C. J. and Costello, J.*) Mahi Tosh Ghosh *v.* Malin Bihari Datta. **63 Cal. 914=170 I C. 888=10 R.C. 220=A.I.R. 1937 Cal. 163.**

——**Ch. XXXVI, R. 77, Item 22**—*Attachment by sheriff under precept—Subsequent compromise of claim—Sheriff's right to poundage—C. P. Code, S.* 46.

A precept issued by a Court at Benares under S. 46, C. P. Code, to the Registrar of the High Court in Calcutta for attachment of a certain property in Calcutta, is a step in execution proceedings. If consequent upon that precept the sheriff attaches the property concerned and the claim is compromised thereafter, the sheriff is entitled to poundage under the second part of

Item No. 22, R. 77 of Chapter XXXVI of the Rules of the Original Side of the Calcutta High Court. (*Derbyshire, C. J. and Lort Williams, J.*) Fazal Ellahi *v.* Sree Krishna Makkar. **I.L.R. (1940) 1 Cal. 309=44 C.W.N. 273=A.I.R. 1940 Cal. 369.**

——**Ch. XXXVI,R 77 (22)**—"*Levy*"—*Meaning of—Attachment before judgment followed by decree—Application by plaintiff for sale—Insolvency of judgment-debtor and claim by Official Assignee for delivery of goods—Duty of Sheriff to draw over goods attached—Right to poundage —Presidency Towns Insolvency Act, S.* 54.

The word "levy" has been defined as being the turning of the goods into money, and when there has been no levy in that sense, no poundage can be said to have been earned by the Sheriff under sub-R. 22 of R. 77 of Ch. 36 of the High Court (Original Side) Rules. It is perfectly clear that when the bankruptcy of a judgment-debtor supervenes after seizure of the goods but before sale by the Sheriff, the latter must hand over the property to the Official Assignee under S. 54 of the Presidency Towns Insolvency Act, and he is not entitled to any poundage under R. 77 (22). The mere fact that the Court attaching goods before judgment passes an order at the time of the decree that the attachment should continue or that the plaintiff applies for sale of the attached goods prior to the order adjudicating the judgment-debtor an insolvent cannot make any difference and cannot confer on the Sheriff a right to claim poundage. (*McNair, J.*) Graham Trading Co. (India), Ltd. *v.* Narottamdas Harjeebandas. **I.L.R. (1937) 2 Cal. 1=40 C.W.N. 1317.**

——**Ch. XXXVI, R. 77 (22)**—*Sheriff's poundage—Calculation—Basis—Decree amount or sale proceeds.*

The practice of charging sheriff's poundage on the amount realized by the sale is wrong. The sheriff is entitled to poundage, not on the amount realized by the sale, but upon the sum payable to or received by the execution creditor as the result of the levy, and it must be calculated on that basis. (*McNair, J.*) Shushamabala Dasee *v.* Poornachandra De **63 Cal. 621.**

——**Ch. XXXVI, R 77 (22)**—*Sheriff's right to poundage—Compromise after attachment by him under precept—C. P. Code, S.* 46.

Under R. 77 of Ch. XXXVI of the Rules of the Original Side of the Calcutta High Court, there are two sets of circumstances under which the sheriff can get poundage: (*a*) where the sheriff levies a sum in execution and (*b*) where the claim in respect of which the sheriff has taken steps to levy a sum in execution is satisfied, compromised or settled. It is clear that the alternative portion of the rule is not independent of the first portion; the sheriff is not entitled to poundage under the second portion of the rule unless he has taken steps under the first portion of the rule with a view to levying a sum in execution. An attachment by the sheriff pursuant to a precept under S. 46, C. P. Code, is merely a step taken to facilitate execution, it is not a step taken in the proceedings in execution. If, therefore, subsequent to such attachment and before an application for execution is made, the decree is satisfied under a compromise between the parties, the sheriff is not entitled to any poundage. (*Sen, J.*) Rai Kissenji *v.* Sri Kissen Makkar. **I.L.R. (1939) 2 Cal. 370=185 I C. 811 =12 R.C. 415=A.I.R 1940 Cal. 26.**

——**Ch XXXVI, R 82**—*Special Referee's fees —Taxation—Effectual meeting—Computation.*

For the purpose of taxation of fees of a Special Referee, every four hours' engagement should be taken to be an effectual meeting and the Referee's fees must be taxed on that basis. (*Derbyshire, C. J. and Costello, J.*) Manmatha Nath Chatterjee *v.* Sarat Chandra Mullick. **40 C.W.N. 1133.**

——**Ch. XXXVI, 1st Sch., Item 58**—*Money paid to sheriff—Right of Accountant-General to commission*

Ch. XXXVI, 1st Sch.. Item 58 of the Rules and Orders of the Calcutta High Court entitles the Accountant-General to commission only upon monies actually paid into Court. Payment to sheriff is not payment into Court. (*McNair, J.*) Co-operative Hindustan Bank, Ltd. *v.* Tarinibala Dassee. **43 C.W.N. 600.**

——**Ch. XXXVI, 4th Sch., R. 77, Item 22**—*Settlement of claim—Sheriff's right to poundage.*

Under Ch. XXXVI, 4th Sch., R. 77, Item 22 of the Original Side Rules, the sheriff is entitled to poundage only on the claim of the execution creditor as settled. The rule does not give him a commission upon the settlement of every man's claim or even upon the settlement of every claim made in the suit The word 'claim' in item 22 means claim of the execution creditor. (*McNair, J.*) Co operative Hindustan Bank, Ltd. *v.* Tarinibala Dassee. **43 C W.N. 600.**

——**Ch. XXXVI, Item 5**—*Suit for infringement of patent—Counter-claim for its revocation —Permissibility.*

In England it is quite usual and proper to add to the defence in an action for infringement a counter-claim for revocation of the Letters Patent alleged to have been infringed. But in this country although S. 128, C P Code, gives power to a High Court to make rules for procedure in suits by way of counter-claims, no appropriate rules of procedure by way of counter-claim have as yet been made by the Calcutta High Court and, therefore, it must be taken that it is not possible for the defendant in the infringement suit to set up a counter-claim for revocation. He must for the purpose of obtaining revocation take separate proceedings. It is, however, just and convenient that procedure by way of counter-claims—analogous to that which obtains in England—should be provided for and made permissible in all suits for infringement of patents. (*Costello and Panckridge, JJ.*) Ernest Bruno Nier *v.* George Reinhart. **43 C.W N. 697.**

——**Ch. XXXVIII, R 33**—*"Time appointed by the rules"—Time, fixed by Registrar under Ch. VIII, R. 4.*

The time fixed by the Registrar in any particular case, acting under Chap. VIII, R. 4, is "time appointed by the rules" within the meaning of Chap. XXXVIII, R. 33. (*Panckridge, J.*) Moni Sethani *v* Radha Kissen. **42 C W.N. 601.**

——**Ch. XXXVIII, R. 33**—*Time for filing written statement—Power of Court to extend—Defendant not asking for extension within period fixed by summons.*

R. 33 of Chap. XXXVIII of the Original Side Rules gives the Court power to extend the time for filing a written statement in cases where the defendant has neglected to take out any summons asking for extension within the period fixed by the writ of summons for filing the written statement. R. 2 of Chap. IX as amended was not intended to exclude Chap. IX from the purview of Chap. XXXVIII, R. 33. (*Panckridge, J.*) Moni Sethani *v.* Radha Kissen. **42 C.W N. 601.**

CALCUTTA IMPROVEMENT ACT (V OF 1911), Preamble—*Acquisition made by Improvement Trust—If acquisition for Government.*

Acquisition of land made by the Calcutta Improvement Trust under the Calcutta Improvement Act amounts to acquisition made by or on behalf of the Government. (*D. N. Mitter and Patterson, JJ.*) Radha Nath Maity *v.* Krishna Chandra Mukerjee. **165 I.C. 682=9 R.C. 445 =63 C.L.J. 72=40 C.W.N. 722=A.I.R. 1936 Cal. 249.**

——**Preamble**—*'Award'—Order of Tribunal rejecting reference under S. 49 (1) of Land Acquisition Act—Appealability.*

A decision on or a determination by the tribunal of any matter which has no reference to compensation in some form or other does not come under the definition of "award". No appeal, therefore, lies from an order of the tribunal rejecting a reference made to it under S. 49 (1) of the Land Acquisition Act. (*Mukherjea and Roxburgh, JJ.*) Mahesh Missir *v.* Province of Bengal. **I.L.R. (1939) 2 Cal. 349=187 I C. 872=12 R.C. 623= 70 C.L J. 81=A.I.R. 1939 Cal. 733.**

——**S. 3**—*Appeal under—Finding of tribunal—When can be attacked.*

A finding of fact arrived at by the tribunal which is not supported by any evidence can be attacked in an appeal filed under the provisions of S. 3 of the Act. (*D. N. Mitter and Patterson, JJ.*) Secretary of State *v.* Mahip Sha. **41 C. W.N. 437.**

——**Ss. 24 and 78**—*Abandonment of acquisition —Powers of Board.*

There is nothing in the Land Acquisition Act or the Calcutta Improvement Act which prevents the acquiring authority from abandoning a portion of the land in respect of which proceedings under the Act have been taken. S 78 of the Calcutta Improvement Act lays down only one particular method of abandoning acquisition. Under S 24 of that Act very comprehensive powers are given to the Board of Trustees and they can enter into and perform any contract which they might consider necessary for carrying out the purposes of the agreement. The Board is not, therefore, prevented from abandoning any portion of the land intended to be acquired in pursuance of a contract entered into under the provisions of S. 24 of the Act. (*Mukherjea and Roxburgh, JJ.*) Mahesh Missir *v* Province of Bengal. **I L R. (1939) 2 Cal. 349=187 I.C. 872 =12 R.C. 623=70 C.L.J. 81=A.I.R. 1939 Cal. 733.**

——**S. 31 (b)**—*Rules under.*

Rules contained in the Calcutta Improvements Trust Accounts Manual (1933) are only directions and would not be operative if they are in conflict with the fundamental rules made under S. 31 (*b*) of the Calcutta Improvement Act. (*McNair, J.*)

Noni Gopal Ganguly *v.* Calcutta Improvement Trust. **174 I.C. 756=10 R C. 712=A.I.R. 1938 Cal. 43.**

——**Ss. 35, 154 and 160** (*e*)—*Chairman's power to institute legal proceedings—Delegation of—Legality.*

The delegation by the Chairman of his power under S 154 of the Calcutta Improvement Act to institute legal proceedings is a direct contravention of the provisions of S. 35 of that Act, and it cannot be treated as a mere omission defect or irregularity within the meaning of S. 160 (*e*) of the Act. (*Bartley and Khundkar, JJ.*) Amarendra Nath Shaw *v.* Satya Prakas Sarkar. **I.L. R. (1938) 2 Cal. 546=177 I.C 885=11 R C. 288 =42 C W.N. 894=39 Cr.L.J. 962=A.I.R. 1938 Cal. 692.**

——**S. 68**—Improvement Trust entering into contract with owner as to price of land to be acquired—Power of Collector to make award on basis of such contract—Owner, if precluded from leading evidence relating to market value before Improvement Tribunal *See* Land Acquisition Act, Ss. 11 and 18. **41 C.W N. 1291.**

——**Ss. 78 and 24**—Abandonment of acquisition —Powers of Board. *See* Calcutta Improvement Act, Ss. 24 and 78. **70 C L.J. 81.**

——**S. 78**—*Power of trustees to abandon portion of land from acquisition—Owner agreeing to such abandonment—Monthly tenant, if entitled to compensation for machinery lying on exempted portion—Land Acquisition Act, S.* 48.

It is permissible to the Board of trustees of the Calcutta Improvement Trust to abandon a portion of the land in respect of which notice under S. 9 of the Land Acquisition Act was given from acquisition. There is nothing in either S. 78 of the Calcutta Improvement Act or in S. 48 of the Land Acquisition Act preventing such piecemeal acquisition. Where such abandonment is by agreement with the owner of the land, a monthly tenant cannot claim compensation for the machineries which lie on the exempted portion of the land. (*D N. Mitter and Patterson JJ.*) Secretary of State *v.* Mahip Sha. **41 C.W.N. 437.**

——**S. 171**—*Construction—Conviction of several persons to fine—Total fine exceeding Rs.* 500—*Legality.*

Under S 171 of the Calcutta Improvement Act where more persons than one join in erecting a building, each of them is clearly liable to a fine extending to Rs. 500. The fact that the total fine imposed on all the accused together amounts to more than Rs 500 does not render the fine illegal. (*Jack, J.*) Aditendra Nath Mitter *v.* Bhupathi Bhushan Sen. **166 I.C 457=9 R.C. 531=38 Cr. L.J. 219=63 C L.J. 582=40 C.W.N. 799=1936 Cr.C. 646=A.I.R. 1936 Cal. 373.**

——**S. 171**—*"Re-erect"—Meaning of.*

The word "re-erect" in S. 171 of the Calcutta Improvement Act must be given its ordinary meaning only, and not the meaning of that word as defined in the Calcutta Municipal Act. (*Jack, J.*) Aditendra Nath Mitter *v.* Bhupathi Bhushan Sen. **166 I.C. 457=9 R.C. 531=38 Cr.L.J. 219=63 C.L.J. 582=40 C.W.N. 799=1936 Cr.C. 646=A.I.R. 1936 Cal. 373.**

CALCUTTA MUNICIPAL ACT (III OF 1899), S. 461—*Right to swim in public tanks—Repeal of this section—Effect of—Bengal General Clauses Act (I of* 1899), *S.* 8.

The Calcutta Municipal Act, 1899, by virtue of the provisions contained in S. 461, operated to take away the "right to swim" in the public tanks at Calcutta which every citizen originally had before the passing of the Act. S. 8, Bengal General Clauses Act, 1899, has this effect that the repeal of the Calcutta Municipal Act of 1899 by Act of 1923 does not occasion a revival of a right which had been taken away by that Act. (*Costello and Panckridge, JJ.*) Anil Kumar Bhattacharya *v.* Corporation of Calcutta. **I.L.R. (1937) 2 Cal 397=A.I.R 1937 Cal. 603.**

——**S. 538**—*Suit against Corporation for damages for nuisance—Limitation — Limitation Act, S.* 23 *and Art.* 36.

Plaintiff filed a suit in 1938 against the Corporation for damages for nuisance alleging that his house remained untenanted since 1933 due entirely to the nuisance. The nuisance continued *de die in diem.*

Held, (*i*) that the cause of action arose from day to day, as the injuries arose from day to day; (*ii*) that if under Art. 36 or S. 23 of the Limitation Act, a claim to damages was barred before the period of limitation fixed in that Act, it was equally barred on the lapse of the period prescribed in the special Act (*i.e.*) S. 538 of the Calcutta Municipal Act, in other words, the position on the Limitation Act must be ascertained with the special section read into it; (*iii*) that, therefore, the *terminus a quo* for damages was four months prior to the date of the suit; (*iv*) that in India there was no provision under which the Court could grant damages for a period after the filing of the suit except in the special case provided for by O. 20, R. 12, C. P. Code. (*Ameer Ali, J.*) Basil *v.* Corporation of Calcutta. **71 C.L.J. 403.**

——**(III of 1923).** *Assessment and Collection Manual—Rules in—If have the force of law.*

The rules in "The Assessment and Collection Manual of the Corporation of Calcutta" published in 1917 cannot be described as statutory rules. These rules have not the force of law and may be ignored if inconsistent with the provisions of the Act, *i e.*, the Calcutta Municipal Act. (*S. K. Ghose and Guha, JJ.*) Corporation of Calcutta *v.* Moti Chand Chowdhury. **63 Cal. 1215=40 C W.N. 818.**

——**Ss. 24 (3), 26 and 46 (b). Proviso**—*Scope —Voter entered in electoral roll more than once under different numbers—Right to vote more than once—Voting several times—If offence.*

It cannot be held that Proviso (*b*) to S. 46 of the Calcutta Municipal Act does not justify the exercise of a second vote by a voter, even though it is wrongly recorded in the electoral roll. When a person's name is entered more than once in the electoral roll, in different capacities, such as, first as *mutwalli*, secondly as executor, and again in his personal capacity, each entry suggests a different capacity, although that person does not come within the category of the exceptions in the proviso to S. 24 (3) of the Municipal Act. An elector entered more than once in the electoral roll under different numbers does not commit any offence if he exercises the right of voting under the different numbers as he is entitled to do so under S. 26 of the Act. (*McNair, J.*) Nasiruddin Ahmed *v.* Haji Mahammad Yusuf. **63 Cal. 825=165 I.C. 489=9 R.C. 404=40 C. W.N. 741.**

———S. 46—*Construction—Election petition filed within eight days—Addition of further particulars of corrupt practices after such time—If barred.*

All that is intended by S. 46 of the Calcutta Municipal Act is that the application to have an election set aside should be filed at an early date (*i.e.*, within eight days of the publication of the result of the election in the Gazette), so that the person charged should be in a position to meet the charge at once, and to enable the matter to be enquired into, so that if the charges are upheld there may be a fresh election without delay. The application should, no doubt, set out the grounds on which the validity of the election is challenged; but there is nothing in the section which prevents the applicant after eight days from giving further particulars of corrupt practices, by adding other incidents of personation, etc. The guiding principle in ordinary particulars to prevent the defence from being embarrassed, and to insure a fair and effectual trial, has also to be followed in election petitions under the Act. There is nothing in the Act to show a departure from that principle. (*McNair, J.*) Nasiruddin Ahmed *v.* Haji Mahammad Yusuf. **63 Cal. 825=165 I.C. 489=9 R.C 404=40 C W.N. 741.**

———S. 46—*Election petition—Law applicable.*

In dealing with election petitions under the Calcutta Municipal Act, the Court is concerned solely with the provisions of that Act and the rules which have been framed thereunder. It may be that with regard to question of procedure, that the provisions of C. P. Code are applicable. (*McNair, J.*) Champalal Gupta *v.* Mohanlal Makkar. **41 C.W.N. 488.**

———S. 46—*Election petition—Limitation—Days on which offices of Court are open but Court does not sit—Court, if closed on such days.*

The names of successful candidates in the municipal elections were published in the Calcutta Gazette on 9th April, 1936. The High Court was closed for the Easter vacation from the10th to 17th April inclusive The following day was Saturday on which the offices of the Court were open, but the Court did not in fact sit. On an application filed in the High Court under S. 46 of the Calcutta Municipal Act more than eight days after the publication of the Gazette,

Held, that as that section provided for an application to be made to the Court, that application must be made to a Judge in open Court and if the Judges of the Court were not sitting in open Court, as in the present case, on the Saturday immediately after the vacation, the application might be legally made on the first day on which the Judges were so sitting. (*McNair, J.*) K. P. Sinha *v.* Jatindra Nath Biswas. **169 I.C. 921=10 R.C. 58=41 C.W.N. 492.**

———S. 46—*Election petition—Particulars withheld from petition but set out in affidavit in reply—If to be excluded.*

Particulars which were deliberately withheld from the election petition but set out in the affidavit in reply should not be excluded at the time of the trial. The respondent is, however, entitled to an adjournment and to costs of the day as of a hearing. (*McNair, J.*) K. P. Sinha *v.* Jatindra Nath Biswas. **169 I.C. 921=10 R.C. 58=41 C.W N. 492.**

———S. 46—*Election petition—Who can file.*

It is only a person enrolled in the electoral roll of the constituency in which the validity of the election is questioned who is entitled to make an application under S 46 of the Calcutta Municipal Act. (*McNair, J.*) Champalal Gupta *v.* Mohanlal Makkar. **41 C.W.N. 488.**

———S 46—*Election petition dismissed on withdrawal by petitioner—Subsequent application by another person for substitution of his name for original petitioner—Maintainability.*

After the dismissal of an election petition on the petitioner withdrawing the same, an application by another person for substitution of his name in place of the petitioner who has withdrawn is not maintainable, as there is no application on the record in which the applicant's name could be substituted. Further, where the applicant, who is a defeated candidate, was a respondent in the original petition and had every opportunity of knowing what had taken place and of making any application within time, there is no justification for the substitution being made. (*McNair, J.*) Champalal Gupta *v.* MohanlalMakkar. **41 C.W.N. 488.**

———Ss. 71, 72 and 74—*Resolutions passed by District Committee with regard to matters not delegated—Validity.*

The provisions of S. 71 read with S. 72, Calcutta Municipal Act, show that a District Committee is a Standing Committee, a particular kind of Standing Committee of the Corporation and therefore can only deal with such matters as have been each year, that is to say year by year, delegated to them by the Corporation. They cannot deal with any matter which has not been properly delegated to them under one or other of those sections. The District Committee can only deal with such matters as are delegated to them under the provisions of S. 72. Even then the proceedings of a District Committee are subject to confirmation or revision of the Corporation itself unless, as indicated in the Proviso to S. 71, at the time of the delegation the Corporation has directed that the decision of the District Committee shall be final. The resolutions therefore with regard to matters not delegated to the District Committee by the Corporation, if passed by the District Committee and also those passed by its Sub-Committee, and confirmed by the District Committee, are void and inoperative. (*Costello and Panckridge, JJ.*) Anil Kumar Bhattacharya *v* Corporation of Calcutta. **I. L.R. (1937) 2 Cal. 397=174 I.C. 91=10 R.C. 618=A.I.R 1937 Cal. 603.**

———S. 127—*Letting value of land—Evidence afforded by return or assessment of neighbouring premises—Admissibility—Evidence Act, S. 9.*

In arriving at the letting value of a building the evidence afforded by the return or by the accepted assessment of the neighbouring premises is admissible in evidence. Those are relevant facts and admissible under S. 9, Evidence Act. (*R. C. Mitter and Mahamad Akram, JJ.*) Corporation of Calcutta *v.* Province of Bengal. **I.L.**

R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal. 47.

——**S. 127**—*Part of building ordinarily let and another part not ordinarily let—Method of valuation.*

S. 127 of the Calcutta Municipal Act classifies all buildings as falling within one or other of two mutually exclusive categories. Each building is treated as a unit of valuation and its value must be ascertained in conformity with one or other of the two prescribed methods. It cannot be valued as to one part under paragraph (*a*) of S. 127 as being ordinarily let and as to another part under paragraph (*b*) as not being ordinarily let. The only provision for dividing a building is in S. 135 which authorises the executive officer "in his discretion" to assess any portion of a building separately from the other portions of such building, whereupon the portion so separately assessed is to be deemed a separate building. Where the executive officer has not adopted this course, the entire building must be treated as a single building forming a unit of assessment. Of a building as to one half ordinarily let and as to one half not ordinarily let it cannot be predicated that it is ordinarily let, for only a part of it is ordinarily let. But it can be predicated of it that it is not ordinarily let if only a part of it is ordinarily let, for the whole of it is not ordinarily let. The test must be applied to every building as a whole and one or other method of valuation must be applied to it as a whole. There may possibly be cases where the portion ordinarily let or the portion not ordinarily let is so negligible in proportion to the whole of the building that the building might on the principle of *de minimis* be reasonably held as a matter of fact to be not ordinarily let or ordinarily let as the case may be. (*Lord Macmillan.*) CORPORATION OF CALCUTTA *v.* MOTI CHAND. **66 I.A. 42=I.L.R. (1939) 1 Cal. 277=11 R.P.C. 129=69 C.L.J. 249=I.L.R. (1939) Kar. 73 (P.C.)=1939 M.W.N. 998=50 L.W. 766=179 I.C. 324=20 P.L.T. 121=43 C.W.N. 314=A.I.R. 1939 P.C. 20=(1939) 1 M.L.J. 396 (P.C.).**

[On appeal from 40 C.W.N. 818.]

——**S. 127 (a) and (b)**—*Small portion of building let out and rest in direct occupation of owner—Method of assessment.*

Where a small portion of a building is let out to tenants and the rest is in direct occupation of the owner himself assessment cannot be made partly under S. 127 (*a*) and partly under S. 127 (*b*). The assessment must be made under S. 127 (*b*) only. A.I.R. 1939 P.C. 20, Foll. (*R. C Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. **I.L R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal. 47.**

——**S. 127 (a) and (b)**—*Construction and scope—Lands and buildings—Separate valuation—Necessity for.*

For the purpose of meeting the requirements of S. 127 (*b*), the value of the land appertaining to the premises to be assessed has to be separated and kept distinct from the value of the building standing on the land. The law requires that the valuation is to be on a basis other than the rental basis as indicated in S. 127 (*a*), and the rough and ready method of taking value of the land and building together on a rental basis, and then giving a deduction of the value of the building, is not a method contemplated by law, in view of the definite provisions laying down rules for determining the value of different classes of property for the purpose of assessment to rates and taxes as stated in the different and separate Cls. (*a*) and (*b*), S 127. (*Guha and Nasim Ali, JJ.*) CORPORATION OF CALCUTTA *v.* JARDINE SKINNER & CO. **I.L R. (1937) 1 Cal. 576=169 I.C. 811=10 R.C. 34=41 C.W.N. 200=A.I.R. 1937 Cal. 14.**

——**S. 127 (b)**—*Beneficial occupation—Method of assessment.*

It is not right to say that beneficial occupation is the sole consideration and that it is the beneficial occupier and the value of his occupation that has to be considered in all cases of assessment under the Calcutta Muncipal Act. The Calcutta Municipal Act provides in S. 127 (*b*) an independent method, a method independent of the method prescribed in Cl. (*a*) of that section. Beneficial occupation determined in terms of letting value is not the principle adopted by the Legislature in Cl. (*b*). In cases coming under Cl. (*b*) it would not therefore be legitimate to hold that the word "value" in that clause does not mean "sale value" and excludes the same. For finding the "estimated present value of land" the assessor is not bound to find out the reasonable hypothetical rent of the whole premises. Observations of *Roy, J*, in A.I.R. 1927 Cal 659, Disappr. (*R. C. Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. **I.L.R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal. 47.**

——**S. 127 (b)**—*Valuation of land—Principle as to.*

It is a well-established principle in rating that property must be valued as it exists at the time when the rate is made, with all the existing circumstances *rebus sic stantibus*. Prospective appreciation or depreciation cannot be taken into account by the rating authority, nor can a hypothetical state of things be assumed. The Legislature intended to give effect to this principle only when it used the phrase "land valued with the building" in S. 127 (*b*). The land is not to be regarded as bare land It is to be taken in its present disposition and valued. (*R.C. Mitter and Mahamad Akram, JJ.*) CORPORATION OF CALCUTTA *v.* PROVINCE OF BENGAL. **I.L R. (1940) 1 Cal. 168=44 C.W.N. 165=A.I.R. 1940 Cal 47.**

——**Ss 129 to 142**—*Applicability—Liability to assessment not admitted.*

Ss. 129 to 142 of the Calcutta Municipal Act presuppose that the land and buildings which are the subject-matter of the valuation are assessable to the consolidated rate. In other words, they have reference to those cases where the liability to assessment and valuation is admitted, and the objection is to the quantum of the valuation, or the method in which it has been carried out. They have no application to cases where the right of the corporation to levy the consolidated rate is itself questioned. (*Panckridge, J.*) GARRISON ENGINEER OF FORT WILLIAM *v.* CORPORATION OF CALCUTTA. **42 C.W.N. 789.**

——**S. 133 (i)**—*Applicability.*

X died leaving a will whereby he dedicated absolutely to certain deities the outer portion of the premises in suit, and bequeathed the remaining portion to his sons in equal shares absolutely. The two portions of the premises were not structurally separate and independent and were not capable of separate enjoyment. The assessment of these two portions was divided under S. 133, Cl. (*i*) of the Calcutta Municipal Act.

Held, that the assessment was properly dealt with as coming under the provisions of S. 133, Cl. (*i*) of the Act, and that no such division of the assessment was possible except under its provisions. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* BON BEHARY SHAW. **I L.R. (1938) 2 Cal. 209=178 I.C. 99=11 R.C. 320=42 C.W.N. 582=A.I.R. 1938 Cal. 581.**

——S. 139 —"Valuation"—Meaning of. *See* CALCUTTA MUNICIPAL ACT, Ss. 141 AND 139. **43 C.W.N. 789.**

——**Ss. 141 and 139**—*Appeal to Small Cause Court—Question of liability to assessment—Jurisdiction of Court to deal with.*

In an appeal under S 141 of the Calcutta Municipal Act, the Small Cause Court has jurisdiction to deal not only with the quantum of the assessment but also with the question of liability to assessment.

Per *Nasim Ali, J.*—There is nothing in S. 139 of the Calcutta Municipal Act to limit the meaning of the word "valuation" to the quantum of valuation only. It includes the whole process of valuing as well. (*Derbyshire, C.J. and Nasim Ali, J.*) PROVINCE OF BENGAL *v.* CORPORATION OF CALCUTTA. **I.L.R. (1939) 2 Cal. 23=43 C.W.N. 789=185 I.C. 546=12 R.C. 381=A.I.R. 1939 Cal. 706.**

——**S. 157**—*Consolidated rate—Liability of owner—Allegations in plaint—Duty of Corporation.*

In order to make the owner of the premises liable for the entire consolidated rate under S. 157 of the Calcutta Municipal Act, it is necessary that the Carporation should show that the premises in question are ordinarily occupied by more than one person holding in severalty. Where the plaint filed by the Corporation contains no such allegation, nor is any reference made to S. 157, the Court would be right in refusing to allow the provisions of that section to be invoked by the corporation. The fact that some evidence bearing on the question of occupation by more than one person holding in severalty is adduced at the trial, is not sufficient to remedy this initial defect. (*Patterson, J.*) THE CORPORATION OF CALCUTTA *v.* SUSIL KUMAR GHOSE. **I.L.R. (1937) 2 Cal. 353=170 I.C. 373=10 R.C. 148=41 C.W.N. 701 =A.I.R 1937 Cal. 363.**

——**(as extended to Howrah), S. 175**—*"Carries on trade"—Meaning of—Company with headquarters at Calcutta but having storage godown in Howrah and distributing goods in Howrah — Orders received and negotiations arranged in Calcutta—If carries on trade at Howrah—Necessity for licence in Howrah.*

A company receiving goods from various places and storing it in their premises in Howrah and distributing the goods to their customers from Howrah, the transactions being negotiated at Calcutta which is their headquarters undoubtedly carries on trade in Howrah within the meaning of S. 175 of the Calcutta Municipal Act

as extended to Howrah. It carries on business both in Howrah and in Calcutta, although the headquarters are in Calcutta and the business is arranged at Calcutta and although only deliveries are made from Howrah on delivery orders sent from the Calcutta Office. Whether the Company collects its profits at Howrah or not, the Company is liable to take out a licence from the Howrah Municipality. Storage and delivery of the goods in Howrah cannot be considered to be merely auxiliary to the business in Calcutta. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I.C. 402=9 R.C. 513 =38 Cr.L.J 203=40 C W.N. 766=1936 Cr.C. 699 (2)=A.I.R 1936 Cal. 477.**

——**(as extended to Howrah), S. 175**—*Licence fee—If a tax on profits—Object of licence—Place of collection of profits—If relevant.*

The taking out of a licence for carrying on a trade is not meant to be a tax on the profits of the trade, but is intended to control the carrying of a trade. The liability to take out a licence does not depend on profits being made or collected at the place where the licence is taken out. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I.C. 402=9 R.C. 513=38 Cr.L.J. 203 =40 C.W.N. 766=1936 Cr.C. 699 (2)=A.I.R 1936 Cal. 477.**

——**S. 175**—*"Trade"—Meaning of.*

The word "trade" in S. 175 of the Calcutta Municipal Act is used in its ordinary sense, that is to say, exchange of goods for money or goods for goods with the object of making a profit. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I C. 402=9 R C. 513 =38 Cr.L.J. 203=40 C W.N. 766=1936 Cr.C. 699 (2)=A.I.R. 1936 Cal. 477.**

——**S. 205**—*Consolidated rate payable by occupier—First charge.*

Under S. 205 of the Calcutta Municipal Act, the consolidated rate payable in respect of any land or building is a first charge upon that land or building, whether it is payable by the owner or the occupier. But there is no first charge on the movable property within or upon such land or building except in respect of rates payable by the owner of such movable property. (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* FOOLCOOMARI DASI. **I.L.R. (1937) 1 Cal. 251=169 I.C. 474=10 R C. 3=41 C.W.N. 353.**

——**S. 205**—*Division of assessment of premises under S. 133 (i)—Whole of premises, if subject to statutory charge.*

If the division of assessment of the premises is made under the provisions of S. 133, Cl. (*i*) of the Calcutta Municipal Act, the whole of the premises so affected remain subject to the statutory charge (*Lort Williams, J.*) CORPORATION OF CALCUTTA *v.* BON BEHARY SHAW. **I.L R. (1938) 2 Cal 209=178 I.C. 99=11 R.C. 320=42 C.W. N. 582=A.I.R 1938 Cal 581.**

——**S. 250—Scope—Breach of statutory duty under—If bar to claim for damages in respect of damage caused by negligent acts of another.** *See* TORT—NEGLIGENCE. **63 Cal. 592.**

——**S. 271**—*"Premises"—Meaning of—Land belonging to one person built upon by another—*

Notice on owner of land—Non-compliance—Liability to conviction.

"Premises" intended for human habitation in S. 271 of the Calcutta Municipal Act mean structures or buildings on the land and not the land itself. The requisition under S. 271 is therefore to be made on the owner of the structures erected upon the land and not on the owner of the land itself, where the land and the structures belong to different persons. The owner of the land who fails to comply with a requisition served on him under S. 271 cannot therefore be convicted. (*Jack, J.*) MST. KHAIRUNNISSA BIBI *v.* CORPORATION OF CALCUTTA **165 I.C 130=37 Cr.L.J. 1087=9 R.C. 345=40 C.W N. 797.**

——S. 359 (6) and (7)—*Particular portion of bustee land declared non-bustee—Bustee standard plan with regard to that land—If nullity.*

Although a particular portion of the bustee may be declared non-bustee, the bustee standard plan with regard to that land is not a nullity, it is for the Corporation then to determine how much, if anything of the standard plan, should be cancelled or varied. The same view applies to streets. Sub-S. (6) of S. 359 applies to such a case. So also, sub-S. (7) has been specifically inserted to meet the case of a street, projected but not actually made, the alignment of which affects the land which under the earlier sub-sections is declared to be non-bustee. When the land is 'de-bustified', *i e*, declared a non-bustee land under the earlier sub-sections of S 359, the practical question arises as to how far, if at all, the alignment of the projected street should be varied. (*Ameer Ali, J.*) KISSORY LALL *v* CORPORATION OF CALCUTTA. **A.I.R 1938 Cal. 870.**

——S 363—*Erection of portion of building without sanction—Order of demolition by Magistrate—Power of latter to enquire into propriety of withholding sanction.*

The erection of a portion of a building without obtaining the written permission of the Corporation is unlawful and the Corporation can under S 363 of the Calcutta Municipal Act obtain from the Municipal Magistrate an order for the demolition of such erection The section does not give the Magistrate any power to enquire as to whether the sanction was rightly withheld or not. (*Jack, J.*) TARAK CHANDRA DAS *v.* CHIEF EXECUTIVE OFFICER, CORPORATION OF CALCUTTA. **180 I.C 907=11 R C. 757=68 C.L.J. 476=43 C.W.N. 186=A.I.R. 1939 Cal. 285.**

——S. 363—*Reconstruction of building without sanction—Power of Magistrate to order demolition.*

The mere fact that there has been reconstruction of a building without sanction does not give the Magistrate a right to order demolition under S. 363 of the Calcutta Municipal Act, unless there has been erection of a new building or alteration of or addition to the existing building within the meaning of the Act. (*Derbyshire, C.J. and Bartley, J*) SHAIK BADLI MEAH *v.* CORPORATION OF CALCUTTA. **180 I.C. 824=11 R.C 756=40 Cr.L.J. 528=68 C L J. 478=A.I.R. 1939 Cal. 289.**

——Ss. 363 and 493—*Scope and effect—Proceeding for demolition under S. 363—Magistrate, if can impose fine under S. 493.*

The proceedings under Ss. 363 and 493 of the Calcutta Municipal Act are mutually exclusive and resort to the one bars resort to the other. The Corporation is, therefore, prevented from instituting proceedings under both sections in the same case, whether simultaneously or one after the other. It does not, however, follow from this that if in a proceeding for demolition of an unauthorised structure under S. 393 the Magistrate is satisfied on the facts that a case exists for imposing a fine under S. 493, he may not make such a penal order, either in lieu of or in addition to an order for demolition. (*Biswas, J*) CORPORATION OF CALCUTTA *v.* BANGSHIDAR BIDASARIA. **173 I.C. 303=10 R C. 496=41 C.W.N. 1373=A.I.R. 1938 Cal. 36.**

——Ss. 365 (1), 488 and Sch. XVII, R. 58—*Stop order to applicant who has obtained benefit of presumption raised in R. 58—Legality—Disobedience of stop order—If offence.*

An order to stop the progress of work under S. 365 (1) of the Calcutta Municipal Act can only be issued in cases in which work is proceeding unlawfully in the manner indicated in S. 363 of the Act If an applicant for permission to erect a building who has become entitled to the benefit of the presumption raised in R. 58 of Sch. XVII continues the building operations without contravening any of the provisions of the Act or of any rules or bye-laws made thereunder, even after belated refusal of his application by the Corporation, the work in connection with the erection of the applicant's building is not carried on unlawfully within the meaning of S. 365. The Corporation has, therefore, no authority to issue a stop order under that section to the applicant. If the applicant disregards an illegal stop order issued against him, he commits no offence under S. 365 read with S 488 of the Act. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——S. 371—*Rubbish dumped by Corporation on private land with owner's consent—Liability of owner for nuisance.*

Per *Mukherjea, J.*—If the act of the Corporation in dumping refuse on a private land is privileged as coming within the protection afforded by S 371 of the Calcutta Municipal Act, the owner of that land by consenting to the act, cannot be made liable in law for nuisance, if any. (*Mukherjea and Roxburgh, JJ.*) CHENDRA SEKHAR *v* CORPORATION OF CALCUTTA. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——S. 371—*Selection of place for disposal of rubbish—Duty of Corporation—Interference by Civil Court.*

Per *Mukerjea, J.*—S. 371 of the Calcutta Municipal Act does not merely give a permissive right to the Corporation to do certain things; it enjoins the performance of certain obligatory duties. It cannot be said therefore that the powers under the section must be exercised without creating a nuisance. As this is an obligatory duty, it must be performed, but both in the selection of the site for disposal of the rubbish as well as in the method of doing its work, the Corporation is bound to see that the least practicable nuisance is created. The Corporation has got to approach the question from this standpoint, and if after considering these matters, it comes to a particular decision as to the site for disposal of its rubbish, the decision in the absence of any *mala fides* on its part should not be interfered with by Civil Courts. (*Mukherjea and Roxburgh, JJ.*) Chandra Sekhar *v.* Corporation of Calcutta. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——**S. 371 (1)**—*Place of dumping—If must be public or belong to Corporation.*

Under S. 371 (1) of the Calcutta Municipal Act, the place of dumping rubbish need not be public in the sense that it must be one which can be availed of or used by the public in general nor is it necessary that it must be owned by the Corporation itself. The section does not purport to say anything as to whom the place of depositing or disposing of the rubbish should belong, nor does it authorise the Corporation to do any act which would amount to trespass under ordinary law. An arrangement for controlled dumping in insanitary tanks belonging to private owners on receipt of payment from them by the Corporation is fully covered by its terms. (*Mukherjea and Roxburgh, JJ.*) Chandra Sekhar *v.* Corporation of Calcutta. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——**S. 371 (1), Proviso (1)**—*Sanction under—If must be express.*

The sanction of the Corporation or of the officer to whom it has delegated its powers required under the first proviso to S. 371 (1) of the Calcutta Municipal Act need not be in any particular form or manner. If the Chief Executive Officer to whom the Corporation has delegated its powers under S. 371 approves in his note the line of action proposed in the report of the Chief Engineer as to the selection of a site as a convenient place for disposal of rubbish, his note can certainly be taken as an implied sanction or approval of the scheme. The defect, so far as the sanction is concerned, is in form, not in substance; and no Court would on that ground alone stay the hands of the Corporation. But in cases which affect the health and comfort of a large body of rate-payers, it is eminently desirable that sanction is taken in clear and express terms. (*Mukherjea and Roxburgh, JJ.*) Chandrasekhar *v.* Corporation of Calcutta. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I.R. 1940 Cal. 67.**

——**S. 391**—*Applicability—Cinemas—Necessity for licence—Cinematograph Act (II of 1918)—Scope—Power of Corporation to prevent opening of unlicensed Cinema.*

A cinematograph show is one which comes under the words "Theatre or Circus or other similar place of public resort or amusement" in S. 391 of the Calcutta Municipal Act. The applicability of the section to a cinema is not excluded by reason of the Cinematograph Act of 1918. Consequently the owner of cinema show is under an obligation to take out a licence from the Corporation before he opens a cinema or keeps it open. The fact that the owner has already taken out a licence from the Commissioner of Police as required by the Cinematograph Act does not relieve him of the necessity to take out a license from the Corporation. When such an owner fails to take out a licence, the Corporation is entitled under the law to suppress or prevent the opening of the cinema, and its act in so doing is neither illegal nor *ultra vires* so as to entitle the aggrieved owner to claim damages. (*Ghose, J.*) The Corporation of Calcutta *v* The Monarch Bioscope Co. **162 I.C. 666=8 R.C. 623=40 C.W.N. 497=63 C.L.J. 1=A.I.R. 1936 Cal. 145.**

——**Ss. 406 and 407**—*Scope—Storing mustard oil in transit as broker.*

Even if the accused had been storing the mustard oil in transit as a broker, that would not take him out of the provisions of Ss. 406 and 407. Sub-S. (1) of these two sections is wide enough to cover such a case. (*S. K Ghose, J*) Rameswar Marwari *v.* Amar Nath Sinha. **187 I.C. 425=41 Cr.L.J. 460=12 R.C. 594=A.I.R. 1940 Cal. 76.**

——**S. 418 (2)**—*When can be invoked.*

Under S. 418 (2) of the Calcutta Municipal Act, the burden of proving that any food in respect of which the prosecution is instituted was not intended for human consumption is, no doubt, on the accused. But before this section could be invoked, it is necessary for the prosecution to prove that what is charged as unwholesome food is "food." (*Biswas, J.*) Gangadhar Nath Mull *v.* Corporation of Calcutta. **I.L.R (1938) 1 Cal. 558=172 I.C. 954=10 R.C. 481=39 Cr.L.J. 259=41 C.W N. 1344=A I.R. 1938 Cal. 15.**

——**S. 478 (17)**—*Bye-law 2 issued under Bengal Act III of 1899—Conviction for its violation—When sustainable.*

In order to sustain a conviction in respect of a violation of bye-law 2 which was issued under S. 559 (18) of the Bengal Act III of 1899 and which remains in operation even after the repeal of that Act by virtue of S. 25 of the Bengal General Clauses Act, it is necessary for the prosecution to show that the accused person has actually deposited building materials, etc., in a public street or on any land vested in the corporation and that he did so against the terms of a licence granted to him in this behalf or without having obtained a licence at all. Where, therefore, the evidence adduced is to the effect that the deposit of the building materials was actually made by a contractor who was engaged in building a house for the person in whose favour a licence for the deposit of building materials was issued by the corporation, and there is nothing to indicate that the licensee was actually responsible for depositing the materials, the conviction of the latter for violating the terms of his licence granted under the bye-law is not sustainable. (*Edgley, J.*) Benode Behari Dhar *v.* The Corporation of Calcutta. **43 C.W.N. 223.**

——**S. 498 and Sch. XVII, R. 62**—*Grant of permission to build—Effect of—Permission infringing Sch. XVII.*

A written permission by the corporation to erect a building is not in itself conclusive proof that all the requirements of the Act have been complied with in respect of that building. It does not, protect the owner of the building from attack under S. 362 (1) (*c*), if the building is actually in breach of the provisions of the Act. If the building infringes any of the requirements of the Act the permission would appear to be a nullity in face of S. 319. (*B. N. Rau, J.*) Sheikh

NIZAMUDDIN *v* CORPORATION OF CALCUTTA. **70 C. L.J. 311=A.I.R. 1940 Cal. 11.**

——**S. 498 and Sch. XVII, R. 62**—*Grant of permission—When becomes effective—Resolution by standing committee granting permission to build—Revocation—Power of Committee before issue of permission.*

Under S. 498 of the Calcutta Municipal Act, every written permission granted under the Act must be signed by the Executive officer, and if there has been any delegation by the Executive officer under S. 12 (3), by the Municipal officer to whom the delegation has been made. In other words, the grant does not become effective until there is a properly signed written permission. If, therefore, the Building Standing Committee discovers, after it has confirmed its resolution granting permission to erect a building but before a written permission has actually issued over the signature of the proper officer, that the confirmation is in breach of the Act, there is nothing in the Act to prevent the Committee undoing the mistake and revoking the confirmation. (*B. N. Rau, J.*) SHEIKH NIZAMUDDIN *v* CORPORATION OF CALCUTTA. **70 C.L J. 311=A.I.R. 1940 Cal. 11.**

——**S. 523 (1)**—*Construction—"Court having local jurisdiction, or by the High Court, as the case may be'—Meaning and effect of—Suit involving dispute as to compensation—Amount beyond jurisdiction of small cause suit—Jurisdiction—High Court or Small Cause Court.*

As between different Courts of Small Causes, *i.e.*, Presidency and Provincial, the jurisdiction is local whereas between the Court of Small Causes on the one hand and the High Court on the other the jurisdiction depends only upon the value of the claim. The words "having local jurisdiction" in S. 523 (1) refer to the Court of Small Causes only. The words "as the case may be" refer to the pecuniary jurisdiction. Where, in a suit involving a dispute as to compensation, the amount claimed is in excess of the pecuniary jurisdiction of the Court of Small Causes, the latter has no jurisdiction to entertain the suit though it may have local jurisdiction to deal with the matter. The High Court alone has jurisdiction to entertain and decide the suit. (*Nasim Ali and Henderson, JJ.*) BHUIYAN BHASKAR CHANDRA *v.* CORPORATION OF CALCUTTA. **40 C.W.N. 764.**

——**S. 533**—*Accused absent on adjourned date—Magistrate, if can hear case in his absence.*

The terms of S. 533 cannot be extended against the accused in such a manner as to entitle the Magistrate to hear the accused in his absence because he had not appeared on the subsequent date on which the case was adjourned. In the absence of any provision to the contrary in the Calcutta Municipal Act, the provisions of the Criminal Procedure Code will apply, and therefore the Magistrate is not entitled to hear and determine the case in his absence on the subsequent date. (*Jack, J.*) KUSUM KUMARI DEBI *v.* CORPORATION OF CALCUTTA. **168 I.C 698=9 R.C. 872=38 Cr.L.J. 632=A.I.R. 1937 Cal 218.**

——**S. 534**—*Prosecution under S. 488—Limitation—Duty of Corporation*

The provisions of S. 534 indicate the necessity for prompt action and delay in prosecuting an offence under the Act is as little to the interest of

the Corporation as to that of the rate-prayers. Where, therefore, Corporation seeks to prosecute certain persons under S. 488 of the Act and there is no evidence whatever on the record to show when the offence was first brought to its notice, it is the duty of the Corporation to establish that the proceedings although begun at a late stage are still within the period prescribed by law. (*Guha and Bartley, JJ.*) CORPORATION OF CALCUTTA *v.* GANESH CHANDRA DHAR. **1936 Cr.C. 111=A.I.R. 1936 Cal. 20.**

——**S. 535**—*Applicability — Complaint against Corporation—Injunction against Corporation—If can be granted—Specific Relief Act, S.* 56 (i).

Per *Mukherjea, J.*—S. 535 of the Calcutta Municipal Act is not intended to be applicable to a case where the complaint is against the Corporation itself. But even if it is held that it allows a proceeding against the corporation and the Magistrate can pass a suitable order for removing or abating a nuisance committed by it, the Civil Court is not in any way prevented from granting injunction against the Corporation in a proper case of actual or apprehended nuisance under S. 56 (i) of the Specific Relief Act. (*Mukherjea and Roxburgh, JJ.*) CHANDRASEKHAR *v.* CORPORATION OF CALCUTTA. **186 I.C. 776=12 R.C. 518=44 C.W.N. 194=A.I R 1940 Cal. 67.**

——**S. 538**—*Suit against corporation—Necessity for notice.*

Upon proper construction of S. 538, the limitation or qualification "in respect of any act purporting to be done under this Act" occurring in that section applies not only to persons acting under the directions of the corporation, or any Municipal officer or servant but also to the corporation, any Municipal officer or servant. Therefore for a suit against the corporation notice contemplated by S. 538 is only required if the suit is in respect of acts purporting to be done under the Act. (*Lort Williams, J.*) BANDO & CO *v.* CALCUTTA CORPORATION. **184 I C 562=12 R.C. 246 (2)=43 C. W.N. 1173=AI.R. 1939 Cal. 614.**

——**S. 538**—*Suit against corporation for money payable under contract—Notice, if necessary.*

Each issue arising out of the construction and application of sections in statutes relating to the powers and obligations of public authorities, must be decided upon the facts and the wording of the section in each particular case. Generally speaking such provisions in statute relating to the powers and obligations of public authorities do not apply to suits arising *ex contractu.* Therefore a suit against the corporation for money alleged to be payable under contract done and materials supplied and for compensation for breaches of those contracts is not one 'in respect of acts purporting to be done' by the corporation under the Act and is as such maintainable without previous notice to the corporation (*Lort Williams, J.*) BANDO & CO. *v.* CALCUTTA CORPORATION. **184 I. C. 562=43 C W N. 1173=12 R. C. 246 (2)=A I.R. 1939 Cal. 614.**

—— **S. 559 (52)**—*Bye-law* 13—*Validity.*

A bye-law to be valid must be (1) *intra vires* the authority who makes it; (2) certain in its terms and positive; (3) not repugnant to the general law, and lastly (4) reasonable. S. 559 (52), Calcutta Municipal Act, 1899, only gives the

Corporation power to make bye-laws with regard to places of amusement and entertainment owned or conducted by third parties. It does not give the power to make bye-laws for the regulation of public parks vested in the Corporation or of the tanks and bathing places situated therein. So bye-law 13, as framed under S. 559 (52) of the Act, restraining persons from bathing in public tanks or ponds in a public square or garden, does not fulfil the conditions required for a bye-law to be valid, and not being reasonable and *intra vires* of the authority of the Corporation to make such a bye-law under S. 559 of the Act, bye-law 13 as framed is void and inoperative. Such a bye-law being void and inoperative as from the time it was made, S. 25, Bengal General Clauses Act, does not apply and make the bye-law operative after framing of the new Act III of 1923, which repealed Act III of 1899, under which the bye law was framed. (*Costello and Panckridge, JJ*) ANIL KUMAR BHATTA CHARYA *v.* CORPORATION OF CALCUTTA. **I.L.R. (1937) 2 Cal. 397=174 I.C. 91=10 R C. 618=A.I.R. 1937 Cal. 603.**

——Sch. I—*'Fort William'—Meaning of.*

The words 'Fort William' in Sch. I of the Calcutta Municipal Act bear their natural and ordinary meaning, that is to say, the fortification and the area enclosed thereby. They do not mean the area defined from time to time by notification of the Governor-General in Council under the Fort William Act. (*Panckridge, J.*) GARRISON ENGINEER OF FORT WILLIAM *v.* CORPORATION OF CALCUTTA. **42 C.W.N. 789.**

——**(as extended to Howrah), Sch VI, Cl. 5**—*Applicability—Business carried on partly in one and partly in another Municipality.*

Sch VI, S. 5 of the Calcutta Municipal Act as extended to Howrah only provides for cases where the trade is carried on at different premises within one and the same Municipality. It does not apply to the case of a company which carries on its trade partly in one and partly in another Municipality. In the latter case separate licences are required in each Municipality. (*Jack, J.*) BURMA SHELL OIL STORAGE AND DISTRIBUTING CO. OF INDIA, LTD. *v.* HOWRAH MUNICIPALITY. **63 Cal. 1203=166 I.C. 402=9 R.C 513=38 Cr L.J. 203=40 C.W.N. 766=1936 Cr.C. 699 (2)=A.I.R. 1936 Cal. 477.**

——**Sch. XVII, R. 56**—*Decision by Corporation on objections after applicant shows cause—Time limit.*

No precise period has been prescribed by the rules within which the corporation must come to a formal decision as to the validity of the objections raised by it after cause has been shown by the applicant. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C. W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch. XVII, Rr. 56 and 57**—*Requisition to applicant to expose foundations for inspection—Nature of—Second inspection held within 15 days without further requisition—If entitles Corporation to extension of time for issuing order.*

If on an application under R. 52 for permission to erect a building the Corporation issues a requisition to the applicant to expose the foundations of the building in order that they might be inspected, the requisition is one for information under R. 56 and it cannot be regarded as an objection. The corporation cannot, by merely holding a second inspection within fifteen days of the first inspection without the issue of any requisition for further information under R. 56 (3), acquire a right to an extension of time within which it must issue the prescribed written order under the latter part of R. 57. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C W N. 561=A.I R. 1940 Cal 292.**

——**Sch. XVII, R 56 (1)**—*Requisition for information and documents—Power of Corporation to issue.*

R. 56 (1) of Sch. XVII should not be read separately from the remaining sub-rules of R. 56 for the purpose of conferring upon the Corporation a general residuary power to issue requisitions for information and documents at any time, even after the procedure laid down in the remaining sub-rules of R. 56 has been exhausted. Sub-R. (1) is clearly intended to be read with the remaining sub-rules of R. 56 and the Corporation can issue only one initial requisition mentioning all the points on which further information and documents are required and all objections which it may find it necessary to formulate. Such a requisition must be issued within fifteen working days after the receipt of the application under R. 52 for permission to execute the work. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W N. 561=A I.R.1940 Cal. 292.**

——**Sch. XVII, Rr. 57 and 58**—*Order of Corporation—Communication to applicant—Necessity for.*

R. 57 contains no express provision on the point whether the order of the Corporation, in order to be valid, must be communicated to the applicant, but having regard to the particular emphasis which is laid on the expression "grant permission" in Rr. 57 and 58, it would appear to have been the intention of the framers of the rules that, as soon as the Corporation has come to a decision on this point, its order must be communicated to the applicant and the presumption raised under R. 58 will become operative if the order is not communicated to the applicant within fifteen working days of the date of the decision (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

——**Sch XVII, R. 57**—*"Fifteen days"—If means working days.*

The period of fifteen days which is prescribed by R. 57 of Sch XVII refers to working days. (*Edgley, J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A. I.R. 1940 Cal. 292.**

——**Sch. XVII, R. 58**—*Benefit of presumption—Waiver.*

An applicant for permission to erect a building who has become entitled to the benefit of the presumption raised in R. 58 of Sch. XVII, has a right to continue his building operations even after a belated refusal of his application by the Corporation, and he is not liable to be criminally prosecuted for it. He cannot be deemed to waive this right to immunity in respect of a criminal prosecution merely because he submits to the Corporation after the order of refusal, an application agreeing to abide by its decision. (*Edgley,* *J.*) HRISHIKESH DUTT *v.* MUNICIPAL COMMISSIONERS OF HOWRAH. **44 C.W.N. 561=A.I.R. 1940 Cal. 292.**

———**Sch. XVII, R. 62**—Grant of permission to build—Effect of—Permission infringing Act. *See* CALCUTTA MUNICIPAL ACT, S. 498. **70 C.L.J. 311.**

———**Sch. XVII, R. 62**—Resolution by Standing Committee granting permission to build—Revocation—Power of Committee before issue of permission. *See* CALCUTTA MUNICIPAL ACT, S. 498. **70 C.L.J. 311.**

CALCUTTA POLICE ACT (IV OF 1866), S. 3—*Betting slips—If instruments of gaming.*

As gaming includes wagering or betting, the slips, if they are used for the express purpose of facilitating betting operations, would certainly come within the mischief of the definition of "instruments of gaming" under S. 3. (*Mukherjea, J.*) ABDUT LATIF *v.* EMPEROR. **I.L.R. (1938) 1 Cal. 672=67 C.L.J. 82=174 I.C. 974=10 R C. 741=39 Cr.L.J. 500=A.I.R. 1938 Cal. 237.**

———**S. 3**—*"Common gaming house"—Meaning of.*

The premises occupied and kept by a person are not "common gaming house" within the meaning of S. 3 unless some fixed charge or profit accrues regularly to such person apart from any fluctuating profit which may occur from time to time between the gamblers themselves as a result of gambling. (*Cunliffe and Henderson, JJ.*) BEATTIE *v.* EMPEROR. **169 I.C. 87=9 R.C. 895=38 Cr.L.J. 706= A.I.R 1937 Cal. 84.**

———**S. 3**—"Keeping a common gaming house." *See* **42 C.W.N. 1222.**

———**S. 3**—*"Common gaming house"—Meaning of—Requisites to be proved—"Instruments of gaming"—Gain—Meaning.*

To make a house, room, place, etc., a common gaming house, two things are necessary, namely: (1) instruments of gaming must be kept or used there, and (2) such instruments must be kept or used for the purpose of gain of the person owning, occupying, using or keeping such house, room, place, etc. To satisfy the first element, slips of paper used for the purpose of facilitating betting operations, *e.g.*, papers on which bets had been recorded are instruments of gaming. To satisfy the second element, the intended gain must result to the person owning, occupying, using or keeping the place otherwise than as a result of betting by him. The chance of profit or the actual profit made by the successful gambler is not such gain as it is contemplated. To take instances: an entrance fee charged by a person owning, occupying or using the place would be gain within the meaning of the section. A commission charged by such a person from persons winning wagers as a result of betting in that place is such gain. A person running a proprietary club where he allows gaming or betting would be the keeper of a common gaming house, whether he himself takes part in betting or not. Such a person makes profit or intends to make profit from his establishment which profit is not the direct result of betting in which he himself may have taken part. The mere chance of winning wagers is not gain. (*Henderson and R.C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **41 C.W.N. 123 =I.L.R. (1937) 1 Cal. 610=167 I.C. 771=9 R.C. 759= 38 Cr.L.J. 449=1936 Cr.C. 1124=A.I.R. 1936 Cal. 788.**

———**Ss. 3 and 45**—*Offence—Accused accepting marked five rupee note to put on certain horses—Liability to conviction.*

Accused was found to have accepted a marked five rupee note with instructions to put on certain horses. He was found with two others. There were no incriminating articles except a racing book.

Held, that the evidence was insufficient to show that the place was a common gaming house within the meaning of S. 3 and that the mere acceptance of the marked five rupee note was not sufficient to find the accused guilty under S. 45. (*Jack, J.*) HARI CHARAN BANERJEE *v.* EMPEROR. **163 I.C. 152=37 Cr..LJ. 851=8 R.C. 697 (3)=1936 Cr.C. 582=A.I.R. 1936 Cal. 355.**

———**Ss. 3 and 47**—*Slips containing records of bets on past events—If instruments of gaming.*

Slips of paper containing records of bets which are no longer current bets, the events on which the bets had been made having already taken place, are not instruments of gaming as defined in the Calcutta Police Act, when there is no proof that the accused or any of them were in the house in which they were found for the purpose of receiving money shown to be due by the slips. Such slips, therefore, are not in themselves evidence under S. 47 of the Act that the house in which the accused were found is a common gaming house or that they were there for the purpose of gaming. (*Jack, J.*) TORCATO *v.* EMPEROR. **66 C.L.J. 165=41 C.W.N. 1346.**

———**Ss. 44 and 47**—*Accused not present at search—Betting materials found in room—If sufficient for his conviction.*

Where a person charged with keeping a common gaming house and permitting a room to be used as a gaming house is not present in the room at the time of the search, the provisions of S. 47 do not apply to him personally and the mere fact that betting material is found in the room is not sufficient to warrant his conviction under S. 44 when there is no evidence to show that the accused is the owner or occupier of the room or that he realizes commission for allowing other persons to use the room for the purpose of carrying on the business of betting. (*Henderson, J.*) RANJIT SINGHA ROY *v.* EMPEROR. **174 I.C. 845=39 Cr.L.J. 493=10 R.C. 731=A.I.R. 1938 Cal. 273.**

———**Ss. 44 and 3**—*Keeping common gaming house—Liability of unauthorised book maker—Proof of profit apart from profits of betting—If necessary.*

It is forbidden by law to keep a book and to receive bets on hores-racing outside the enclosure of the race course. If a person takes a room outside the race course and receives bets from any one who comes to him and in fact makes himself an unauthorised book-maker, he would come under the mischief of keeping a common gaming house as defined in S. 3 of the Calcutta Police Act. In such a case, it would not be necessary to show that he, as an unauthorised book maker, was making any profit beyond what he made by his book-making. (*M.C. Ghose, J.*) KALI CHARAN BANIA *v.* S,K. BRAHMACHARI. **42 C.W.N. 1232.**

——**Ss. 44 and 47**—*Search under S. 47—Effect and value of—If conclusive as to guilt.*

The result of a search under S. 47 is that there is evidence before the Magistrate which would entitle him as a Court of fact to find that the searched premises were in fact a common gaming house; but it would not entitle him in absence of direct evidence to presume anything whatsoever with regard to the guilt of a person charged with a specific offence under S. 44. (*Cunliffe and Henderson, JJ.*) BEATTIE *v.* EMPEROR. **199 I.C 87=9 R.C. 395=38 Cr.L.J. 706=A.I.R. 1937 Cal. 84.**

——**S. 45**—*Onus of proof.*

In a case under S. 45 the onus clearly lies upon the prosecution to show that the house in which the accused was found was a common gaming-house as defined in S. 3 of the Act. In order to satisfy the requirements of this section, it would be for the prosecution to show that instruments of gaming were kept or used in that house for the profit or gain of the person, owning, occupying, using or keeping such house. (*Edgley, J.*) SUDHIR KUMAR ROY *v.* EMPEROR. **182 I.C. 986=12 R.C. 123 (2)=40 Cr.L.J. 724=A.I.R. 1939 Cal. 326.**

——**Ss. 46 and 47**—*Canstruction and scope—Necessity of strict construction and compliance.*

Per *Henderson, J.*—In order to determine whether S. 47 of the Act applies it is necessary to see whether there was a proper search within the provisions of S. 46. Unless the provisions of these sections are strictly interpreted and complied with, there can be no doubt that persons will be improperly convicted. (*Henderson and R.C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 610=167 I C. 771=9 R.C. 759=41 C.W.N. 123=38 Cr.L.J. 449=1936 Cr.C. 1124=A.I.R. 1936 Cal. 788.**

——**S. 47**—*Betting slips seized from a room—If evidence of common gaming house.*

Betting slips written out for the purpose of facilitating betting not within the race course with licensed book makers or by means of a totalisator, but within a room where they were seized, are instruments of betting and are, therefore, evidence under S. 47 of the Calcutta Police Act to show that the room in question was being used as a common gaming house, although the betting slips were seized at a time when betting operations were not going on. (*Nasim Ali, J*) PHANI BHOOSHAN KUMAR *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 471=172 I.C. 146=10 R.C. 347=39 Cr.L. J. 89=A.I.R. 1937 Cal. 637.**

——**S. 47**—*Interpretation—If creates a presumption.*

Though the words "until the contrary is made to appear" in S. 47 are rather appropriate to a presumption in the technical sense of the word, yet the absence of any word like "may presume" or "shall presume" in the section is very much significant; the discovery of the instrument of gaming in the place on a proper search which is contemplated by the Act would be an evidence not only to prove the existence of these instruments in that place, as an element to constitute a common gaming house but it would be an evidence on the other point also, as regards the making of profits or gain by the owner or occupier, etc., of the place; although according to the ordinary law it cannot be treated as an evidence of the other fact. When the prosecution relies upon S. 47, the accused can certainly explain away the whole circumstances and "show the contrary" as the section lays down. If the explanation is sufficient, the evidence practically loses its force; if on the other hand no explanation or evidence to the contrary is coming from the side of the accused, a duty is cast upon the Court, to weigh and appraise the evidence in the best manner possible and he may if he thinks proper convict the accused on this evidence, though he is not bound to do so. A.I.R. 1936 Cal. 788, Rel. on. (*Mukherjea, J.*) ABDUL LATIF *v.* EMPEROR. **I.L. R. (1938) 1 Cal. 672=67 C.L.J. 82=174 I.C. 974 =10 R C. 741=39 Cr. L.J. 500=A.I.R. 1938 Cal. 237.**

——**S. 47**—*Scope and effect — Presumption under—Nature and effect.*

The expression "It shall be evidence, until the contrary is made to appear" in S. 47 does not create a presumption in the technical sense in which that term is used in the Indian Evidence Act. In that case the Magistrate would be bound to convict unless the defence gives rebutting evidence of a negative character. But in nearly every case, it would be difficult if not impossible for them to do so. The natural meaning of the words is that the finding of certain things shall be evidence that the place is a common gaming house. Packs of cards may be found in hundreds of places which are not common gaming houses and it would be transparently absurd to say that the finding of a pack of cards in a house would be evidence that that house is a common gaming house. This section was intended to create a special rule of evidence, because in view of the preliminary provisions, there is not this absurdity in a case when there had been a proper search under S. 46. S. 47 only raises a presumption of fact, and so a rebuttable presumption. If a search warrant is issued under S. 46, and if on a search made on the basis of a warrant, instruments of gaming are found at the place or on the person gaming, this fact would be evidence of the further fact that the place is a common gaming house. The effect of such evidence may be nullified by other evidence on the record. (*Henderson and R.C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **I.L.R. (1937) 1 Cal. 610=167 I.C. 771 =9 R.C. 759=41 C.W.N. 123=38 Cr.L.J. 449=1936 Cr.C. 1124=A.I.R. 1936 Cal. 788.**

——**S. 47**—*Search warrant by competent authority—Issue of—Effect — Presumption—Specific evidence as to recitals in warrant—Necessity for.*

Where a warrant under S. 47 is issued by a competent authority, and it recites the facts that an information on oath had been received and that an inquiry had been made, and then states that that authority had reason to believe that the place to be searched is a common gaming house, the presumption attaching to the regularity of official acts would be attracted, and it would not be incumbent on the Crown to lead evidence on the point indicated above. (*Henderson and R. C. Mitter, JJ.*) RANGA LAL SEN *v.* EMPEROR. **I.L. R. (1937) 1 Cal. 610=167 I.C. 771=9 R C. 759 =41 C.W N. 123=38 Cr.L.J. 449=1936 Cr.C. 1124=A I.R. 1936 Cal. 788.**

——**Ss. 47 and 3**—Slips containing records of bets on past events—If instruments of gaming. *See* CALCUTTA POLICE ACT, SS. 3 AND 47. **41 C. W.N. 1346.**

——**S. 78-A**—*Notice issued after commencement of trial—Validity.*

The provisions of the Criminal Procedure Code regarding investigations by the Bengal police do not apply to investigations by the Calcutta police. The Calcutta Police Act itself does not contain any rules of procedure regarding the conduct of investigation by the Calcutta police. Hence, a notice issued under S. 78-A after commencement of trial of some accused cannot be held as *ultra vires* because investigation cannot be supposed to have come to an end the moment a chalan is put up. (*Patterson, J.*) DWARIKA NATH *v.* EMPEROR. **177 I C. 171=11 R.C. 212=39 Cr.L.J. 842=A.I R. 1938 Cal. 545.**

CALCUTTA PORT ACT (III OF 1890)—*Exercise of statutory powers by railway owners and employees—Pipes of local authority under railway line—Agreement that work to be done to pipes by railway owners at local authority's expense—Local authority's property flooded through alleged negligent acts of railway owner's employees—Work done in exercise of statutory powers—Suit for damages—Claim based on omission to perform statutory duty—Liability.*

A statutory body constituted under the Calcutta Port Act of 1890 were the owners and operators of a double-track railway. A local authority had a pumping station near the railway to which water was led from a river by four pipes which passed beneath the railway. The railway owners having decided to lower the railway line at a certain point in order to do away with the inconvenience of a level crossing existing there, were obliged to lower the local authority's four pipes and duly did so, carrying the pipes below the railway line, as lowered, in three brick tunnels. Subsequently the local authority wished to increase their supply of water from the river, which involved the laying of an additional pipe line. As the new pipe also had to cross the railway line, it was agreed by letters passing between the parties that the railway owners' staff should do the work of laying it at the local authority's expense. As the result of a severe fall of rain flooding took place, and the local authority's pumping station was flooded and damaged. The local authority alleged that the flooding of the pumping station was due to two holes made and kept open by the railway owners' superintendent. The holes in question had been made by the superintendent directly in connection with the project of laying the additional pipe line for the local authority. The railway owners denied negligence and contended that they were in any event protected as the suit was not instituted within three months, which constituted the special period of limitation under S. 142 of the Calcutta Port Act, 1890.

Held, that the statutory body were not acting in the capacity of private contractors. The work that was done was of an exploratory character, and the above body did not divest themselves of their statutory capacity and did not assume some other capacity in having the work done.

Held also, without deciding the plea of negligence, that the local authority having requested the railway owners, a statutory body, to do certain work, and the railway owners and their employees having acted in exercise of their statutory powers, the action was barred by S. 142 of the Calcutta Port Act. The words "or purporting or professing to be done" in S. 142 of the Act postulate that work which is not done in pursuance of the statute may nevertheless be accorded its protection if the work professes or purports to be done in pursuance of the statute.

Held, further, that the Calcutta Port Act of 1890 afforded protection not only in respect of a claim based on alleged breach of a statutory duty but also in respect of one based on an alleged omission to perform such a duty. (*Derbyshire, C. J.* and *Costello, J.*) 63 C. 592, reversed. (*Lord Allness.*) COMMISSIONER FOR THE PORT OF CALCUTTA *v.* CORPORATION OF CALCUTTA. **I.L.R. (1938) 1 Cal. 440=64 I.A. 363=40 Bom.L.R. 6=31 S.L. R. 686=41 C.W N 1317=1937 A.L.R. 737=1937 O.L.R. 473=3 B.R. 777=10 R.P.C. 83=1937 A L.J. 1042=46 L.W. 721=1937 M.W.N. 1208=1937 A.W.R. 1131=66 C.L.J. 188=170 I C. 332=A.I.R. 1937 P.C. 306=(1937) 2 M.L.J. 594 (P.C.).**

——**S. 84**—*Applicability — Illegal erection—Making additions to—Offence.*

Where the original wall itself is an illegal erection, the making of additions or re-erecting part of it brings the case within S. 84. It is no defence in such a case to plead that the accused was only re-erecting a part of it. (*Henderson and R. C. Mitter, JJ.*) GANGEYA NAROTHAM SASTRI *v.* EMPEROR. **I L R. (1937) 1 Cal. 603=168 I.C 972=38 Cr.L.J. 666=9 R.C. 887=A.I. R. 1937 Cal. 45.**

CALCUTTA SURVEY ACT (I OF 1887)—*Maps prepared by Municipality under—Entries in—Presumption of correctness—Evidence Act, S. 83.*

The Calcutta Survey Act, no doubt, contains no provision for a statutory presumption of correctness to attach to the entries in the maps prepared by a Municipality under the Act; but the maps being prepared under the authority of Government, a presumption of correctness attaches to them under S. 83 of the Evidence Act. (*Rowland, J.*) JAGAN KOERI *v.* CHAIRMAN OF THE GAYA MUNICIPALITY. **4 B.R. 71=10 R.P. 251=171 I.C.732=18 Pat.L.T. 464=A.I.R. 1937 Pat. 567.**

——**S. 22**—*Applicability—Suit for declaration of title and possession—Claim to area in excess of area included within demarcated boundaries—Suit brought beyond one year—If barred.*

It cannot be held that a mere declaratory suit, *i.e.*, for declaration of title, is not a suit to set aside any demarcation of boundaries. The boundaries stated in the Survey are supposed to correspond with the title, and, therefore, any decision affecting the title necessarily affects the boundaries that have been demarcated. And where a plaintiff sues for a declaration that his title exists over an area in excess of the area included within the boundaries that have been demarcated, the suit in effect is one to set aside the demarcation of the boundaries, and will be barred if not brought within the period limited by the section. (*Agarwala, J.*) MUNICIPAL COMMISSIONER OF THE GAYA MUNICIPALITY *v.* MT RUPKALI. **3 B.R. 776=18 Pat.L.T. 466=171 I**

C. 45=10 R.P. 159=1937 P.W.N. 665=A.I.R. 1937 Pat. 516.

——S. 22—*Scope and effect—Failure to sue within one year—If fatal—Suit for declaration after one year—If barred—Bengal Tenancy Act—Distinction.*

S. 22 of the Calcutta Survey Act definitely bars any suit not brought within one year from the date of the notification approving the survey if the object of the suit is to set aside any demarcation of boundaries made under the Act. The scope of the section is quite different from that of the Bengal Tenancy Act. Under the latter Act, an entry in the record-of-rights merely provides a piece of evidence to which a statutory presumption attaches. No statutory consequence follows from neglecting to institute a suit to challenge an entry in the record-of-rights, except that in any litigation in which such an entry is put in evidence, it must be presumed to be correct until the contrary is proved by evidence. That is not the case under S. 22 of the Calcutta Survey Act. A suit for a declaration, if in effect it is one to set aside the demarcation of the boundaries, would be barred unless brought within one year. (*Agarwala, J.*) MUNICIPAL COMMISSIONER OF GAYA MUNICIPALITY *v.* RUPKALI. **171 I.C. 45=10 R.P. 159=1937 P.W.N. 665=3 B.R. 776=18 Pat.L.T 466=A.I.R. 1937 Pat. 516.**

CANNING COLLEGE AND BRITISH INDIAN ASSOCIATION CONTRIBUTION ACT, Ss. 3 and 4—*Suit for declaration that plaintiff is not liable to make contributions but that defendant is liable—Maintainability—U. P. Land Revenue Act, S. 233 (m)—Plaintiff obtaining under-proprietary rights under deed of gift from Talukdar—Liability to make contributions.*

A suit for a declaration that the plaintiff is not liable to make contributions towards the Canning College and the British Indian Association but that the defendant is liable for the same, is not barred by S. 233 (*m*) of the Land Revenue Act. The contributions in question are, no doubt, realizable as revenue within the meaning of Cl. (*m*) of S. 233, but the suit does not fall under that clause. Where under a deed of gift executed by the talukdar, the defendant is to hold the entire taluka as a superior proprietor and the plaintiff is to be proprietor of only under-proprietary rights in the villages gifted to him, the defendant alone is liable to make the contributions under S. 3 of the Canning College and British Indian Association Contribution Act and not the plaintiff who as under-proprietor is liable to pay the amount fixed by the deed of gift to the talukdar and is not liable to pay land revenue to Government as such. (*Nanavutty and Zia-ul-Hasan, JJ.*) MAHOMED IMTIAZ ALI KHAN *v.* MAHOMED AKBAR HUSAIN KHAN. **13 Luck. 279=168 I.C. 361=9 R.O. 474=1937 O.L.R. 277=1937 O.W.N. 566=1937 R.D. 281=A.I.R. 1937 Oudh 323.**

CANTONMENT—*Peshawar—Cantonment land—Ownership—Burden of proof.*

Where Government once owned land in a cantonment to which General Order No. 179 of 1836 applied, the occupiers of the buildings thereon are licensees and the onus is upon the occupiers of buildings to show that they are not licensees but owners of the land on which the buildings are situated. Where lands did belong to Government after the Peshawar cantonment came into existence, but before passing into private occupation and the General Order No. 179 of 1836 or any order or regulation embodying its principles applied to Peshawar Cantonment at and after its inception in 1851, the onus is on the occupiers to show that the original private occupation was not that of a licensee and that they themselves were not licensees holding under cantonment tenure. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SUJAN SINGH *v.* SECRETARY OF STATE. **A.I.R. 1936 Pesh. 217.**

CANTONMENTS ACT (II OF 1924), Ss. 55 (2) and 68 (3)—*Invalid constitution of the Assessment committee—If cured by S. 55 (2)—Assessment proceedings—Legality.*

Where the Cantonment Board appointed an Assessment Committee under S. 68 (3) of the Cantonments Act to which nominations were permitted to be made by persons not belonging to the Cantonment Board, the Committee is not a validly constituted one. But the defect is not cured by S. 55 (2) of the Act for the words 'Committee of a Board' occurring therein means only a Committee appointed by the Cantonment Board under S. 44 (1) (*e*) of the Act. Hence the assessment proceedings of the Board are illegal. (*Norman.*) CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——Ss. 66 and 104—*Failure to enter amount of assessment—Illegality or irregularity—Condonation.*

When a list fails to show that which the law expressly directs, it should show, there is an illegality and not merely an irregularity such as might be condoned under S. 104 of the Cantonments Act. Hence the omission to enter in the list framed under S. 66 of the Caotonments Act. the amount of the assessment is an illegality affecting the merits of the case. (*Norman*). CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——S. 68 (8)—Assessment Committee on nominations by persons not belonging to Cantonment Board—Committee not validly constituted. *See* CANTONMENTS ACT, Ss. 55 (2) AND 68 (3). **1939 A.M.L.J. 1.**

——Ss. 83 and 84—*Scope—Jurisdiction of Civil Court—Suit for refund of tax levied by cantonment authority or for injunction restraining levy—Competency.*

Section 84, Cantonments Act, affords a remedy to an injured person against the levy of a tax from him, which has been imposed under the Cantonments Act. Not only that, but S. 88 of the Act provides that an order passed by the appellate authority mentioned in S. 84 shall be final. Under the circumstances, the remedy of a person to resort to a Civil Court for refund of the excess tax levied from him or for an injunction restraining the Cantonment Authorities to levy the alleged excess tax in future is clearly barred. (*Rupchand Bilaram, J.C. and Lobo, A.J.C.*) IBRAHIMJI ISMAILJI *v.* CANTONMENT BOARD, HYDERABAD. **172 I.C. 732=10 R.S. 182=A.I.R. 1937 Sind 305.**

——S. 84—*Scope of—'Assessment' and 'levy'—Construction.*

It is a very narrow construction of the words 'assessment' and 'levy', if S. 84 is construed to mean that an appeal lies only against the quantum of the tax or against the legality of its imposition. 'Levy' means imposition, but not merely general imposition of a tax but the particular imposition on the individual affected. It is difficult to hold that S. 84 applies only to valuations of immovable property or questions of the legality of a tax. S. 84 is a general section on giving a right of appeal in all cases. Nor is there any restriction on the grounds for such an appeal. (*Weston.*) KISHEN LAL *v.* CANTONMENT BOARD, NASIRABAD. **1938 A M.L.J. 18.**

——S. 84 (2)—*Reference under—Several appeals—Procedure.*

A single reference under S. 84 (2) of the Cantonment Act by the Income-tax Officer in respect of several appeals is irregular. He should either make as many references as there are appeals, or should make a reference in one of them and then decide the rest in accordance with the answer received. (*Norman.*) CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A M.L.J. 1.**

——S. 88—*Suit for refund of tax levied—Jurisdiction of Civil Court.*

In cases where the plaintiff is demanding a refund of the amount of assessment or tax levied under the Cantonments Act, if the Court is of opinion that the tax is *ultra vires* of the Act, then the Civil Court will have jurisdiction. If however the Court is of opinion that the tax is *intra vires* of the Act, then it would not be open to the Civil Court to go into the question whether the tax is excessive or whether it has been rightly levied. (*Abdul Rashid, J.*) ABDUL GHAFUR *v.* CANTONMENT BOARD, KASAULI. **184 I.C. 469=12 R.L. 230=41 P.L.R. 597=A.I.R. 1939 Lah. 147.**

——S. 99 (2)—*Water tax—If a tax on property.*

Water tax is payment for water received and not a tax on property, for the notification imposing the tax provides that the tax shall not be levied in respect of such period during which water, owing to shortage of supply or any other cause, has not been available. (*Norman.*) CANTONMENT BOARD, NASIRABAD *v.* SHRI NARAIN. **1939 A.M.L.J. 1.**

——S. 104—Illegality and irregularity—Condonation—Test. *See* CANTONMENTS ACT, SS. 66 AND 104. **1939 A.M.L.J. 1.**

——S. 106 (c)—*If* ultra vires—*Government of India Act, 1919, Ss. 45-A and 84 (2)—India and Burma (Transitory Provisions) Order, 1937 and Government of India (Adaptation of Indian Laws) Order, 1937—Effect of.*

Under the Devolution Rules framed under the Government of India Act, 1919, 'cantonments' was a central subject and so were 'criminal law including procedure and all other matters not included among provincial subjects. On the other hand, 'administration of justice' was a provincial subject and in express terms included constitution, powers, maintenance and organisation of Civil and Criminal Courts, subject to legislation by the Indian Legislature as regards Courts of criminal jurisdiction. The Indian Legislature passed an enactment, the Cantonments Act (II of 1924), S. 106 (*c*) of which provided for the formation of cantonment funds to which were to be credited all fines recovered from persons convicted of certain offences committed within each cantonment. The United Provinces instituted a suit against the Central Government represented by the Governor-General in Council for a declaration that S. 106 (*c*) of the Cantonments Act was *ultra vires* the then Indian Legislature, that all fines imposed and realised by Criminal Courts for offences committed within the cantonment areas should be credited to the provincial revenues and that the plaintiffs were entitled to recover and adjust all such sums wrongly credited to the cantonment funds since 1924.

Held, (*i*) that under the Devolution Rules fines imposed by Criminal Courts could be properly credited to provincial revenues as receipts accruing in respect of the administration of justice only if not otherwise appropriated by competent authority; the central subject 'criminal law, including criminal procedure' included the power to legislate with respect to the destination of fines imposed for criminal offences, and S. 106 (*c*) of the Act was not *ultra vires*; (*ii*) even assuming that S. 106 (*c*) related to a provincial subject under the provisions of S. 84 (2) of the Government of India Act, 1919, the competence of Indian Legislature to enact that section could not be questioned in a Court of law; (*iii*) that as S. 106 (*c*) was a law in force immediately before the commencement of Part III of the Constitution Act, under the India and Burma (Transitory Provisions) Order, 1937, para. 4 (*a*), such fines credited to the contonment funds must be deemed not to form part of the revenues of the United Provinces till 31st of March, 1939; (*iv*) as S. 106 (*c*) has been deleted by the Government of India (Adaptation of Indian Laws) Order, 1937, all such fines must be credited to the provincial revenues from 1st April, 1939. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) THE UNITED PROVINCES *v.* THE GOVERNOR-GENERAL IN COUNCIL. **1939 F.C.R. 124=11 R.F.C. 44 (2)=180 I.C. 863=5 B.R. 554=40 Cr.L.J. 403=1939 O.L.R. 246=2 Fed.L.J. 123=50 L.W. 209=1939 P.W.N. 555=1939 M.Cr.C. 213=I.L.R. (1939) Kar. 98=1939 M.W.N. 750=A.I.R. 1939 F.C. 58=(1939) 2 M.L.J. (Supp.) 1.**

——Ss. 210 (1) (g) and 213—*Person served with notice prohibiting him from selling fruit—Person allowed to continue business on representation—Person applying for licence without paying prescribed fee—No licence issued—Summary trial and conviction—Legality.*

A person was served with a notice by the Cantonment Authority prohibiting him from selling fruit in his shop. The person represented to the authority that he had been carrying on business for a long time whereupon he was allowed to continue business. He then applied to the authority for a licence but did not pay the prescribed fee and no licence was issued. He was tried summarily under Ss. 210 (1) (*g*) and 213 and was convicted.

Held, that the conviction could not be interfered with in revision as under the circumstances the person could not take advantage of S. 210 (3) owing to his own conduct in applying for licence and not taking it out subsequently.

Held, further, that the case should not have been tried summarily as the question of compensation might have arisen under certain circumstances. (*Jai Lal, J.*) NARU RAM *v.* EXECUTIVE

OFFICER, CANTONMENT BOARD, MULTAN CANTONMENT. **175 I.C 544=10 R.L. 742=39 Cr.L.J. 653=A.I.R. 1938 Lah. 427.**

———S. 236 (1)—*Pimp—Liability to prosecution.*

There is nothing in the wording of S. 236 (1) which requires that the person importuning must importune to the commission of sexual immorality with himself or herself. A.I.R. 1926 Bom. 227, Rel. on. (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* NARAIN. **58 All 684=160 I.C. 884=8 R.A 670 (2)=37 Cr L.J. 372=1936 A.L.J. 193=1936 A W.R. 115=1936 A.Cr.C. 38=1936 Cr.C. 132=1936 All. L.R. 189=A.I.R. 1936 All. 129.**

———S. 236 (2)—*Proper complaint—Requirements.*

A complaint under S. 236 was sent in writing by a Regimental Provost Sergeant to a Sub-Inspector of Police who forwarded it in original to the Magistrate. The Magistrate acted upon the complaint. The Regimental Provost Sergeant was a member of the military police and was authorised to make complaints under S. 236. A part of the offence was committed in presence of this officer

Held, that a proper complaint was made to the Magistrate in accordance with the provisions of S. 236 (2). (*Allsop and Ganga Nath, JJ.*) EMPEROR *v.* NARAIN. **58 All. 684=160 I.C. 884=8 R.A. 670 (2)=37 Cr.L.J. 372=1936 A.L.J. 193 =1936 All.L.R. 189=1936 A.W.R. 115=1936 A. Cr. C. 38=1936 Cr. C. 132=A.I.R. 1936 All. 129.**

———S. 259—*Magistrate acting under—Jurisdiction—Limits.*

A Magistrate acting under S. 259 of the Cantonments Act has jurisdiction to decide whether the conditions under which the Cantonment Authority can resort to him are fulfilled or not. But he is not entitled to go into questions for which a separate remedy exists under the Act to the person from whom recovery is sought. (*Weston.*) KISHEN LAL *v.* CANTONMENT BOARD, NASIRABAD. **1938 A.M L.J. 18.**

———S. 259—*Remission of tax—Revocation—Claim to recover money due—Nature of.*

Where there is a revocation of certain remission of tax and the Cantonment Board applies under S. 259 of the Cantonments Act for recovery of the amounts due, its claim is only for arrears of taxes. The circumstance that the amount was once remitted does not change the nature of the claim. (*Weston.*) TARA CHAND *v.* CANTONMENT BOARD, NASIRABAD. **1938 A.M.L.J. 106.**

———S. 259—*Scope of—If confined to arrears prior to amendment.*

S. 259 of the Cantonments Act is not necessarily confined to arrears of taxes due prior to the amendment. The amendment creates no fresh liability to pay nor does it in any way enlarge the liability. It merely provides a procedure for recovery. (*Weston.*) TARA CHAND *v.* CANTONMENT BOARD, NASIRABAD. **1938 A.M.L.J. 106.**

———S. 280—*Rules—Land Administration Rule, R. 13—Letter by Government of India and Resolution by Cantonment Board condoning encroachment—If confer title on person encroaching.*

When persons encroach on cantonment land, mere condonation by the Cantonment Board cannot confer on those persons title to the land encroached upon. A letter by the Government of India to the Cantonment Board reciting that the encroachments have been condoned by lapse of time does not confer any title to the land on the person encroaching; the letter is not law but only an executive instruction to the Board; nor does a resolution by the Cantonment Board passed in pursuance of such a letter reciting that the encroachment is "old and condonable", confer any legal title on the person encroaching. Title to land cannot be conferred by condonation. (*Norman*). NANGA *v.* AMRA AND CANTONMENT BOARD, NASIRABAD. **1936 A M.L.J. 44.**

CANTONMENTS (HOUSE ACCOMMODATION) ACT (VI OF 1923), S. 4—*Applicability—Licences given under General Order No. 179.*

Cantonments (House Accommodation) Act, 1923, S. 4, clearly does not apply to a licence under General Order No. 179 unless the Secretary of State and the other party entitled consent to be bound by the terms of the Cantonments (House Accommodation) Act and consent in writing. (*Young, C.J. and Monroe, J.*) SHAMAS-UL-NIHAR FAZAL ELAHI *v.* SECRETARY OF STATE. **164 I.C. 1046=9 R.L. 187=A.I.R. 1936 Lah. 582.**

———S. 7—*Reasonable rent—Criterion.*

The best criterion for arriving at a reasonable figure of rent of a house is to find out the rent of bungalows in the locality. (*Mir Ahmad, J.*) ATTAR SINGH *v.* SECRETARY OF STATE. **182 I.C. 566=12 R. Pesh. 6=A.I.R. 1939 Pesh. 22.**

———S. 15—*Landlord contesting question of rent—Provision for payment to him of rent fixed by officer—Need for.*

There should be some provision in the Act that where a house has been taken over and the question of rent is contested by the landlord the amount fixed by the officer commanding should be paid to the landlord without prejudice to his right to fight in Court the question of the enhancement of the rate of rent. (*Mir Ahmad, J.*) ATTAR SINGH *v.* SECRETARY OF STATE. **182 I.C. 566=12 R. Pesh. 6=A.I.R. 1939 Pesh. 22.**

———S. 15—*Reference under—Mortgagee not in possession of property acquired on lease—If necessary party.*

The Cantonments (House Accommodation) Act only refers to an owner. A notice is issued to an owner and if there is any person in occupation, to the occupier, and it is the owner alone who can make a reference to the Civil Court. Hence in a reference under S. 15 the owners are not bound to make a mortgagee who is not in possession of the property acquired on lease a party and his non-joinder will not defeat the suit, although it is advisable that the mortgagee should be added under O. 1, R. 10, C. P. Code, not as necessary party but as a person whose presence before the Court is necessary "in order to enable the Court effectually and completely to adjudicate and settle all the questions involved in the suit." (*Mir Ahmad, A.J.C.*) GANGA RAM *v.* SECRETARY OF STATE. **167 I.C. 158=9 R. Pesh. 80=A.I.R. 1937 Pesh. 17.**

CARRIAGE OF GOODS BY SEA ACT (XXVI OF 1925), S. 2, Art. IV, R. 2 (q)—*Applicability and scope—Lighter transporting goods* *from wharf to steamer lying at anchor in the roads—Loss of goods due to fault of tindal—Liability of owners of lighter.*

The rules made under the Carriage of Goods by Sea Act of 1925, apply by reason of S. 2 of that Act, only to the carriage of goods by sea in ships carrying goods from any port in British India to any other port whether in or outside British India. A lighter transporting goods from the wharf to a steamer lying at anchor in the roads does not come within the purview of S. 2 of the Act. Even if the lighter be held to be a "ship" cl. (*q*) of R. 2 of Art. IV of the schedule to that Act would make the owners of the lighter liable for the loss caused by the fault of their agent, the tindal. A common carrier is liable for the loss of goods entrusted to him for carriage unless the loss be due to an act of God or of the King's Enemies. (*Wadsworth, J.*) Dhanamma *v.* Coromandal Co., Ltd., Cocanada. **1939 M.W.N. 216 =185 I.C. 16=12 R.M. 517=49 L.W. 341=A.I.R. 1939 Mad. 401=(1939) 1 M.L.J. 235.**

——**Sch. I, Art. III, Para. 6**—*Construction—Period of one year—If can be extended.*

The period of one year fixed in Para. 6, Art. 3, Sch. I is to be construed strictly and is not to be allowed to be extended by vague and indefinite arguments and pleas. Where a ship leaves the port on a particular date, she must be deemed to have delivered the cargo to the consignees within the meaning of para. 6, Art. 3, and it is not open to the consignees to take advantage of a survey, which has been unduly delayed, in order to extend the period of time. (*Davis, J.C. and Mehta, A.J.C.*) Haji Shakoor *v.* Volkart Bros. **168 I.C. 330=9 R.S. 233=30 S.L.R. 345=A.I.R. 1937 Sind 11.**

——**Sch. I, Art. III, Para. 6**—*Port trust—If agents of shipowners.*

The Port Trust are not the agents of the shipowners to hold identified and ascertained consignments indefinitely at the will of the consignees, so as to make the shipowners liable for the loss caused to the consignments, although in particular cases it may well be that they are agents of the shipowners for the limited purpose of identifying and delivering the consignments mixed together. (*Davis, J.C. and Mehta, A.J.C.*) Haji Shakoor *v.* Volkart Bros. **9 R.S. 233=30 S.L.R. 345=168 I.C. 330=A.I.R. 1937 Sind 11.**

——**Sch. I, Art. III, Para. 6**—*'Removal'—Meaning.*

The word 'removal' in Para. 6, Art. III, Sch. I, Carriage of Goods by Sea Act, means physical removal. (*Davis, J.C. and Mehta, A.J.C.*) Haji Shakoor *v.* Volkart Bros. **9 R.S. 233=30 S.L.R. 345=168 I.C. 330=A.I R. 1937 Sind 11.**

CARRIER—*Common carrier—Motor bus service essentially intended for carriage of passengers—Proprietor of—If common carrier in respect of goods—Consignment of goods handed to conductor of bus for delivery to person calling for it at specified place—Liability for loss.*

The proprietor of a motor bus service, which is essentially intended for the carrying of passengers and their luggage or goods, if any, cannot be regarded as a common carrier so far as transport of goods is concerned. If the conductor of a bus belonging to such a service on his own responsibility, accepts a consignment of goods from

a person other than a passenger undertaking to deliver it to a person who would call for the same at a specified place, and takes payment for such transport, issuing a ticket to the consignor in the same way as to a passenger who has luggage, and the consignment miscarries, the proprietor cannot be treated as a common carrier so as to make him liable for the act of the conductor in his employ. The matter is one between the consignor ann the conductor, and the proprietor is not responsible on any such contract to which he is not a party. (*Abdul Ghani, J.*) Maddappa *v.* Firm of Ramiah Setty and Srikanta Setty. **17 Mys. L.J. 284.**

CARRIERS ACT (III OF 1865). S. 2—Applicability—State-Owned Railways. *See* Limitation Act, Arts. 30 and 31. **I.L.R. (1937) 2 Cal. 614.**

——**S. 3**—*Public lorry—Loss of goods in—Liability for—Contract Act, Ss.* 151 *and* 152.

Where a passenger in a public lorry entitled to transport himself and certain luggage without extra charges, loses his luggage (in this case a hold all).

Held, that the owners of the lorry were common carriers, and so were liable for the loss of goods. (*D. R. Norman.*) Vakil & Co. *v.* Maha Narain. **1937 A.M.L.J. 56.**

——**S. 10**—*Notice under—If a part of the cause of action—Statement as to its issue if can be implied.*

In a suit against persons alleged to be common carriers within the meaning of the Carriers Act, for the loss or injury to goods entrusted to them for carriage, it is not necessary for the plaintiff, as in the case of S. 80, C. P. Code, to expressly state in the plaint that he has issued a notice under S. 10, Carriers Act. Such an averment is implied under O. 6, R. 6, C. P. Code, and it is for the defendants to deny in their written statement according to O. 8, R. 2, that they are common carriers or to raise the plea of the absence of notice. Where they fail to do so, the onus is on them to prove and to show that they took good care in the carriage of the plaintiff's goods. (*Roberts, C.J. and Dunkley, J.*) U Ba Tin *v.* U Tun On. **178 I.C. 739=11 R R. 266=A.I.R. 1938 Rang. 437.**

CASTE DISABILITIES REMOVAL ACT (XXI OF 1850)—Change of religion—Effect on guardianship of minor children—Inapplicability of rule in Jammu and Kashmir. *See* Hindu Law—Guardianship. **41 P.L.R. J. & K. 33.**

——Scope of. *See* Malabar Law—Conversion of a Member. **46 L.W. 772.**

——**S. 1**—*Person changing religion—Law governing succession of his children.*

The Caste Disabilities Removal Act of 1850 applies only for the benefit of the person who changes his religion. In other words, when once a person has changed his religion and changed his personal law, that law will govern the rights of succession of his children. (*Bennet and Harries, JJ.*) Mahomed Abdul Aziz Khan *v.* Mahbub Singh. **160 I C. 48=8 R.A 544=1936 A.L.J. 488=1936 A.W.R. 198=A.I.R. 1936 All. 202.**

CASTE PANCHAYAT—Defamation by excommunication. *See* Penal Code, S. 499, Excep. 9. **49 L.W. 268=1939 M.W.N. 127.**

CATTLE TRESPASS ACT (I OF 1871), S. 10—*Applicability—Proprietor of private protected* *forest or embankment—If "cultivator or occupier."*

The proprietor of a private protected forest or of an embankment is an occupier of land within the meaning of S. 10 of the Cattle Trespass Act. There is no reason why he should not be regarded as the occupier of land which he has reserved for afforestation. Similarly the occupier of land used as an embankment who builds or maintains an embankment. In either case, S 10 applies to cattle doing damage, whether in the forest or in the embankment. (*Courtney Terrell, C.J. and James, J.*) GOPAL SETHI *v.* HRUDANAND MAHAPATRA. **1939 P.W.N. 295=20 Pat.L.T. 340.**

——S. 10—Seizure—Legality — Extent of damage—Relevancy. *See* CATTLE TRESPASS ACT, Ss. 22 AND 10—RIGHT TO COMPENSATION. **1939 O.W.N. 150.**

—— Ss. 20 and 22—*Complaint under S. 22—Forum—Presentation to wrong Court—If cured by S. 537, Cr. P. Code.*

Where a complaint mainly under S. 22 of the Cattle Trespass Act, though Ss. 323 and 504 of the Penal Code were also mentioned, is presented to a panchayat Court within time, but which by reason of S. 17 of the U. P. Village Panchayat Act was not competent to entertain it, and it was subsequently transferred to the proper Court, the presentation is not proper and cannot be cured by S. 537, Cr, P. Code. (*Thomas, C.J. and Yorke, J.*) MEHDI HUSAIN *v.* EMPEROR. **175 I.C. 662=1938 O.W.N. 596=1938 A.Cr.C. 51=11 R.O. 2=1938 O.L.R. 303=39 Cr.L.J. 827=A.I.R. 1938 Oudh 183.**

—— S. 21—*Requirements—Non compliance with—Effect on limitation.*

S. 21, Cattle Trespass Act, enjoins the District Magistrate to summon the person complained against and make an inquiry into the case; but non-compliance with provisions of this section does not affect the merits of the case. If the non-compliance with the provisions of S. 21 has the effect of making the order of District Magistrate illegal, any suit for compensation on that account would clearly be governed by Art 2, Limitation Act. If on the other hand it does not affect the legality of the District Magistrate's order, no suit would be competent. (*Addison and Din Mohammad, JJ.*) AMAR SINGH *v.* DEPUTY COMMISSIONER, GUJRANWALA. **169 I.C. 922=10 R.L. 57=39 P.L.R. 915=A.I.R. 1937 Lah. 748.**

——S 22—*Amount of compensation—Fees paid by complainant to pleader—If to be included.*

In assessing the amount of compensation to be awarded under S. 22 of the Cattle Trespass Act, a Magistrate is not at liberty to include in the compensation payable the fees paid by a complainant to the pleader employed by him for the purpose of the prosecution of his case. (*Pandrang Row, J.*) VENKATESALU NAIDU *v.* CHITTAPPA. **1938 M.W.N. 831=48 L.W. 214=177 I.C. 896 (1)=11 R.M. 390=39 Cr.L.J. 956 (1)=1938 M. Cr. C. 235=A.I.R. 1938 Mad. 820=(1938) 2 M.L.J. 285.**

——S. 22—*Award of compensation—Specific claim—Necessity—Imprisonment in default of payment of compensation—Legality.*

Compensation under S. 22 of the Cattle Trespass Act cannot be awarded unless a specific claim therefor is made by the complainant in respect of loss caused by the seizure of cattle. Further, it is not competent to a Magistrate to pass under S. 22 a sentence of imprisonment, for default in payment of compensation. (*Thomas, C.J.*) BAIJOO *v.* EMPEROR. **14 Luck. 325=178 I C. 722=11 R O 125=40 Cr.L.J. 141=1938 O L.R. 512=1938 A.W.R. (C.C.) 123=1938 O.W.N. 1130=1938 O.A. 915=A.I.R. 1939 Oudh 37.**

—— Ss. 22 and 10—*Right to compensation—Requisites—Smallness of damage, if makes seizure illegal.*

For compensation to be given under S. 22 of the Cattle Trespass Act, there must be a finding that the seizure or detention of the cattle was illegal, that is to say, the seizure was not in accordance with S. 10, Cattle Trespass Act. Where the question is whether the cattle were doing damage to the crop, the fact that the damage was likely to be small, cannot render the seizure illegal. If in law one is entitled to impound the cattle, the smallness of the damage or any consequent unreasonableness of the impounding, is no ground for awarding compensation. (*Hamilton, J.*) RAM CHANDRA SINGH *v.* EMPEROR. **1939 O.W.N. 150=1939 A.W.R. (C.C.) 56=1939 O.A. 289=1939 A.Cr.C. 81.**

——S. 24—*Conviction under—Finding of damage done by cattle—Necessity for.*

It is essential to a conviction under S. 24 of the Cattle Trespass Act that there should be a clear finding of damage done by the trepassing cattle. (*Dhavle, J.*) CHOKAT AHIR *v.* SURAJ SINGH. **186 I.C. 182=6 B.R. 301=12 R.P. 474=1940 P.W.N. 271=41 Cr.L.J 257=A.I.R. 1940 Pat. 299.**

CENTRAL PROVINCES ACTS, ETC.

Borstal Act (IX of 1928).
Civil Circulars.
Courts Act (I of 1917).
Court of Wards Act (XXI of 1899).
Debt Conciliation Act (II of 1933).
Excise Act (I of 1915).
Land Alienation Act (II of 1916).
Land Records Manual.
Land Revenue Act (XVIII of 1881).
Land Revenue Act (II of 1917).
Land Revenue Manual.
Local Fund Audit Act.
Local Self-Government Act (IV of 1920).
Money Lenders Act (XIII of 1934).
Motor Vehicles Taxation Act.
Motor Vehicles Taxation Rules (1927).
Municipal Act (II of 1922).
Protection of Debtors Act (1937).
Reduction of Interest Act (XXXII of 1936).
Revenue Book Circular.
Revenue Manual.
Tenancy Act (I of 1920).
C. P. and Berar Prohibition Act (1938).
C. P. and Berar Sales of Motor Spirit and Lubricants Taxation Act (1938).

CENTRAL PROVINCES BORSTAL ACT (IX OF 1928), S. 5—*Scope—Order of detention for non-payment of fine—Legality.*

S. 5 of the C. P. Borstal Act authorises detention only in lieu of transportation or imprisonment. There is no provision in it for any detention in default of payment of fine imposed. An order of detention in default of payment of fine is therefore illegal and liable to be set aside.

(*Gruer, J.*) EMPEROR *v.* PANNALAL. **173 I.C. 899=10 R.N. 334=39 Cr.L.J. 427 (1)=1938 N. L.J. 8=A.I.R. 1938 Nag. 131.**

——**S. 10**—*Scope—Detention in Borstal institution—Term served—Subsequent order for detention—Legality.*

Under S. 10 of the C. P. Borstal Act, a person who has been once detained and has served his term in a Borstal institution cannot be detained again. A second order for such detention is illegal. (*Bose, J.*) EMPEROR *v.* RAMCHAND. **19 N.L.J. 162.**

CENTRAL PROVINCES CIVIL CIRCULARS—*Circulars 2-4, Para. 11—Suit dismissed against all defendants with costs—Only one counsel's fee should be awarded to them.*

Where there are more than one defendant, each represented by separate pleader, and there is a simple direction in the judgment that the suit is dismissed with costs, only one counsel's fee should be allowed and the fee is apportionable equally among all the defendants. (*Stone, C.J. and Vivian Bose, J.*) HARGOVIND DULLABH JIWAN *v.* KIKABHAI RAHIMTULLAH. **I.L.R. (1938) Nag. 348=176 I.C. 257=11 R.N. 45=A.I.R. 1938 Nag. 84.**

CENTRAL PROVINCES COURTS ACT (I OF 1917), Ss. 14 and 26—*District Judge and Additional District Judge—Distinction—Appeal presented to latter, when presentation should be to the former, if in order*

S. 14 of the Central Provinces Courts Act only enumerates three classes of Subordinate Civil Courts. One of such classes is the District Court. When it is presided over by more than one Judge, the Chief Judge of that Court is called the District Judge and the others are called Additional District Judges. S. 26 of the Act makes a distinction between the District Court and the jurisdiction of the Additional Judge to that Court. So the Additional Judge is clearly a judge of the District Court although his power to exercise the jurisdiction of the District Court is restricted. Whenever the Additional Judge hears and determines an appeal, the appeal would be deemed to be heard and determined by the District Court to which he is an Additional Judge. So when an appeal is presented to an Additional Judge when it ought to have been presented to the District Judge it could not be said to have been presented to an improper Court. (*Niyogi, J.*) GHULABCHAND *v.* KISHANLAL. **I.L.R (1939) Nag. 306=181 I C. 556=11 R.N. 476=1938 N.L. J. 454=A.I.R. 1939 Nag. 42.**

——**Ss. 16 and 26**—*Appeal filed before Additional District Judge—If properly presented.*

An appeal was wrongly filed before an Additional District Judge at one place and was admitted by him. The District Court transferred it to an Additional District Judge at another place, having proper jurisdiction.

Held, that Additional District Judges did not form separate Courts but were attached to the District Court and formed part of it. Their powers were not necessarily as extensive as those of the District Judge himself but a mere curtailment of powers by executive orders could not constitute a separate Court. A presentation to an AdditionalDistrictJudge was really a presentation to the District Court itself for purpose of limitation. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag. 219=171 I.C. 371 =10 R.N. 109=A.I.R. 1937 Nag. 80.**

CENTRAL PROVINCES COURT OF WARDS ACT (XXI OF 1899), Ss. 30 and 27—Suit on behalf of Ward—Mistake in the name of Ward—Amendment, if can be allowed. *See* C. P. CODE, O. 1, R. 10—SCOPE OF. **175 I.C. 911=A.I.R. 1938 Nag. 458.**

CENTRAL PROVINCES DEBT CONCILIATION ACT (II OF 1933)—*Execution sale—Conciliation Board if can to interfere after sale.*

Quaere:—Whether once a sale in execution has been held, the Debt Conciliation Board can interfere? (*N. Gordon, R.M.*) TUKARAM *v.* MOHANLAL. **19 N.L.J. 174.**

——*Jurisdiction of Debt Conciliation Board—Applicant not agriculturist—Jurisdiction of Board—Omission of decree-holder to object—Subsequent objection in Civil Court—If precluded.*

The C. P. Debt Conciliation Act was enacted to make provision for the setting up of Debt Conciliation Boards to give relief to agriculturist debtors. The Debt Conciliation Boards set up by the Act must confine their activities only to cases where the debtors are agriculturists. If the applicant for relief is not a debtor, *i.e.*, a person whose main source of livelihood is agriculture, the Act would not apply to him, and the Conciliation Board would have no power to afford him any relief. The Board has absolutely no jurisdiction in a case where the judgment-debtor applicant is not an agriculturist. The fact that the decree-holder omits to protest against the Board's exercising jurisdiction in the matter cannot confer on the Board a power which it did not possess under the Act and does not preclude him from raising the question of jurisdiction before the Civil Court sitting in execution or the Civil Court from considering and trying the issue as to jurisdiction. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

——*Nature of measure—Mode of interpretation.*

The Central Provinces Debt Conciliation Act is a coercive measure intended to affect vested interests and rights and to bring pressure to bear upon creditors to effect a settlement with their debtors; therefore however beneficent it may be to the debtors, it acts detrimentally to the creditors and hence the Act must in accordance with the usual rules of construction, be construed strictly. Any ambiguity in its clauses must therefore be resolved along lines which interfere as little as possible with existing rights unless the contrary is unmistakably indicated in other parts of the Act. (*Niyogi and Bose, JJ.*) AKBARI ALI *v.* SETH SOBHARAM. **I L.R. (1939) Nag. 654=1939 N.L. J. 283=A.I R. 1939 Nag. 282.**

——**Ss. 2 (e) and 8 (2)**—*"Debt"—Liability under partition decree.*

The definition of "debt" in Cl. (*e*), S. 2 is wide enough to include any liability for a cash payment on account of net cash and compensation for equalization of shares under partition decree, and the decree-holder entitled to realise such amount due is a creditor. (*Pollock, J.*) 'Pannalal *v.* Baijnath. **I.L.R. (1937) Nag. 76=165 I. C. 412 (1)=9 R.N. 77=A.I.R. 1936 Nag. 145.**

———S. 2 (e)—*"Debt"—Liability to render accounts of village profits—Suit against Lambardar village profits—Reference to Conciliation Board—Competency—Jurisdiction of Civil Court.*

The word "debt" as defined by S. 2 (*e*) of the C. P. Debt Conciliation Act does not include a liability that may be found due on taking accounts of village profits. A suit for village profits, which is primarily one for rendition of accounts by the agent to the principal, cannot therefore be referred to the Debt Conciliation Board. Nor has the Board any jurisdiction to compel a lambardar to render accounts, which is a matter purely within the jurisdiction of the Civil Court. S. 16 (*a*) (1) of the Act is not a bar to the entertainment of the matter by the Civil Court which is the only authority having jurisdiction to enquire into the issue as to whether a special tribunal acts within its powers or not. (*Niyogi, A.J. C.*) Babu Sakharam *v.* Shrinandan Lal. **167 I.C. 843=9 R.N. 223=19 N.L.J. 16.**

———Ss. 2 (e) and 15—*Debt—Personal debts of deceased coparcener of joint Hindu family—Surviving coparceners' liability—Issue of a certificate in respect of—Effect.*

The surviving coparceners in a joint Hindu family are not liable for the personal debts of a deceased coparcener. As such they cannot apply under the Debt Conciliation Act for there is 'no debt' within the meaning of S. 2 (*e*) of the Act. But if they apply in respect of such a debt and obtain a certificate under S. 15 (1) of the Act, it is in respect of a debt which is not the debt of the applicants under the Act and hence is beyond the Board's jurisdiction and is ineffective. (*Grielle, J.*) Bapusaheb *v.* Bhagirathisao. **1939 N.L.J. 458=A.I.R. 1940 Nag. 38.**

———S. 2 (e)—*'Debt' if excludes arrears of rent.*

The definition of 'debt' does not exclude arrears of rent. (*Niyogi, J.*) Chandanlal *v.* Sambhaji. **1938 N.L.J. 360.**

———S. 4—*Applicability—Insolvency proceedings.*

The expression "any suit or other proceedings" in S. 4 does not apply to insolvency proceedings because they are not in respect of any "debt". (*Niyogi, J.*) Chhotelal *v.* Nathuram **I.L.R. (1938) Nag. 165=172 I.C. 697=10 R.N. 241=20 N.L.J. 252=A I R. 1937 Nag. 288.**

———S. 4—*Duty of Debt Conciliation Board—*Bona fides *of applicant—Scrutiny of.*

The Debt Conciliation Act lends itself to abuse and fraud very easily, and must be very strictly construed and vigilantly applied by the special authority created by the Act. The Debt Conciliation Boards should therefore be alert and should first satisfy themselves about the *bona fides* of every application for settlement of debts. (*Niyogi, J.*) Tika Ram *v.* Ganpat Sahai. **182 I.C. 81=11 R.N. 499=1938 N.L J. 17=A I.R. 1938 Nag. 373.**

———S. 4—*Fraud on Court—Purchase of land for purposes of jurisdiction—Parties admittedly agriculturists.*

Where the parties were admittedly agriculturists, the fact that they bought a bit of property

with a view to give jurisdiction to a particular Board, or to acquire the requisite qualification to apply, would not make the act of purchase a fraud upon the Court. (*Niyogi, J.*) Balwant *v.* Tukaram. **1938 N L.J. 235.**

———S. 4—*Right to apply to under—"Debtor"—Person earning livelihood as pleader's clerk for many years—Acquisition of tenancy for purpose of application—Right of such person to apply.*

A person who has been earning his livelihood as a pleader's clerk for many years and as a private servant and who acquires some tenancy land only to enable himself to apply for settlement of his debts, is not an agriculturist and is not a debtor entitled to apply under S. 4 of the Act. (*Niyogi, J.*) Tika Ram *v.* Ganpat Sahai. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

———(as amended by Act XV of 1936), Ss. 7 and 7-A—*Scope—If retrospective—Effect on power of Civil Court.*

S. 7-A, introduced by the amending Act XV of 1936, cannot have retrospective effect; but in cases where it applies the result is that it is not open to any Civil Court to say that the Board had not in fact jurisdiction. (*Pollock, J.*) Shivdin *v.* Ram Rattan. **20 N.L.J. 57=170 I.C. 905=10 R.N. 85=A.I.R. 1937 Nag. 259.**

———(as amended by Act XV of 1936), Ss. 7-A, 8 (1) and 8 (2)—*Application for conciliation for debt—Notices issued to creditors—Creditors forming joint Hindu family, two of them being major and third minor—Mother of minor described as his guardian—No guardian appointed according to O. 32, C. P. Code, to represent minor—Order discharging minor's share—Suit by assignee of debt for its recovery—Civil Court's jurisdiction to question Board's procedure.*

When S. 7-A of the Act does not apply, the Civil Courts have jurisdiction to consider whether the Board acted with jurisdiction or not in a particular matter. On an application under the Act by a debtor, notices were issued to the creditors who formed a joint Hindu family but two of whom were major and the third a minor. The mother of the minor was described as his guardian both in the application and in the notices. No one appeared on behalf of the minor. The Board refused to accept the other two major members of the family as representatives of the minor and without appointing a guardian for the minor under O. 32, C. P. Code, passed an order under S. 8 (2) discharging the minor's share of the debt. On a suit being instituted by an assignee of the debt for its recovery, the lower Court dismissed the suit with respect to the minor's share in the debt holding that it had no jurisdiction to question the procedure of the Board.

Held, that the action of the Board was without jurisdiction and was not a mere irregularity in procedure. The minor was not represented by properly appointed guardian under O. 32, C. P. Code, and had been prejudiced by reason of his non-representation. The Civil Court had jurisdiction to consider validity of the procedure followed by the Board and it could proceed in respect of the minor's share. (*Bose, J.*) Kanhaiyalal Hajarimal *v.* Govinda Tukaram. **174 I.C. 962=10 R.N. 429=A.I.R. 1938 Nag. 203.**

——**S. 7-A**—*Scope—Retrospective operation—Order of Conciliation Board discharging debt before introduction of S. 7-A—Jurisdiction of Board—If can be questioned in Civil Court in execution.*

S. 7-A of the C. P. Debt Conciliation Act has no retrospective operation. An order of the Debt Conciliation Board discharging a decree-holder's debt before the introduction of S. 7-A into the Act, can therefore be challenged by the decree-holder as being without jurisdiction in the Civil Court executing the decree. (*Niyogi, J.*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C. 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

——**(as amended by Act XV of 1936), S. 7-A**—*Scope—Retrospective operation—Pending proceedings—Application made prior to coming into force of section.*

S. 7-A of the Debt Conciliation Act, as amended in 1936, does not apply to pending proceedings, *i.e.*, proceedings arising out of an application under the Act presented prior to the date when the section came into force. The right of a party to have the question of the jurisdiction of the Debt Conciliation Board decided by the Civil Court is a substantive and vested right, which every party had before the enactment of S. 7-A. The section takes away the jurisdiction of the Civil Court to determine this question and vests it exclusively in the Board. S. 7-A cannot therefore have retrospective operation so as to affect the vested rights of parties in regard to pending proceedings. In the case of such proceedings, therefore, the Civil Court must itself determine whether the Board is legally seized of the proceedings and has jurisdiction or not, if such a question is raised. (*Bose and Puranik, JJ.*) LACHMANSINGH *v.* DURGAPRASAD. **20 N.L.J. 203.**

——**S. 8**—*Delivery of movables to avoid attachment—Discharge of judgment debt under S. 8 of the Act—Decree-holder found to have knowledge of proceedings—Right of judgment-debtor to restoration of movables.*

Where to avoid an attachment the judgment-debtor delivered certain movables to the decree-holder and later on the debt was discharged under S. 8 of the Debt Conciliation Act, the proceedings of which, the decree-holder was found to be cognizant of, the judgment-debtor is entitled to the restoration of the movables. (*Niyogi, J.*) AZIMMIYA *v.* NAYNYA. **1938 N.L.J. 233.**

——**Ss. 8 and 12**—*Discharge of debt—Subsequent wrong procedure—If affects discharge.*

S. 8 of the Central Provinces Debt Conciliation Act deals with an earlier stage in the proceedings than does S. 12. If a debt is discharged under S. 8 then clearly it is only the remaining debts to which an agreement of amicable settlement under S. 12 can apply. The phrase 'to whom not less than 40 per cent. of the total amount of the debtor's debts are owing' must only mean debts which are owing at the time when the settlement is being effected. Where a debt has already been discharged under S. 8, subsequent wrong procedure with reference to S. 12 cannot affect the discharge. (*Gruer, J.*) SITARAM *v.* JAGANNATH. **1939 N.L.J. 78.**

——**S. 8**—*Failure to file statement within time—Discharge of debt—Application to revive also dismissed—Re-agitation in Civil Court—If permissible.*

Where after the service of the notice a creditor fails to file his statement within the time allowed and the debt is discharged, and an application by him to revive the debt on the ground that the delay in filing the statement was due to a mistaken idea of the practice of the Board is also dismissed, it is not open to the aggrieved creditor to come to a Civil Court and re-agitate the matter. (*Puranik, J.*) JAWARCHAND *v.* TAPIRAM. **1940 N.L.J. 256.**

——**S. 8 and Civil Procedure Code (V of 1908), O. 21, R. 2**—*Joint judgment-creditors—Right to a notice under S. 8—Release of debt by one—Others how affected.*

A joint judgment-creditor to whom notice was not issued is not bound by the proceedings taken before the Debt Conciliation Board. Hence where one of such joint creditors appears before the Board and says that he remits the debt and as a result no settlement is effected in respect of that debt, the others are not precluded when the debtor applies under O. 21, R. 2, C. P. Code, from appearing and opposing the entering up of satisfaction. (*Niyogi, J.*) KAMA *v.* NARAYAN. **1939 N.L.J. 399.**

——**S. 8**—*Notice to manager of joint family of two brothers—Statement by manager alone—Sufficiency.*

Where notice was issued to the manager alone of a joint family of two brothers, and he submits a statement of account, it is on behalf of the two brothers and there is no point in having the same statement sent twice over. There is thus no failure to submit a statement on behalf of either. (*Gruer, J.*) TARACHAND *v.* SHRIKRISHNA. **1939 N.L.J. 225.**

——**Ss. 8 and 9**—*Relative scope—Suit in Civil Court pending—Application by debtor to Conciliation Board—Creditor filing statement but not producing document evidencing debt—Effect—Board declaring debt discharged — Legality—Jurisdiction of Court to proceed with suit.*

The penalties for failure to file a statement under S. 8, and for failure to produce the documents under S. 9 of the Debt Conciliation Act, are distinct. The debt would be deemed to be discharged only in case the statement is not filed; the scope of S. 8 (2) is strictly limited to what is required by the creditor to be done under S. 8 (1). When the creditor files a statement, but fails to produce the document, the case falls under S. 9 and goes out of the scope of S. 8 and the Debt Conciliation Board has no power to declare the debt having been duly discharged. Such an order is *ultra vires* and illegal and cannot affect the jurisdiction of the Civil Court in regard to a matter pending before it arising out of the same transaction. The Civil Court can therefore proceed with the pending suit as if the debt had not been discharged. (*Niyogi, J.*) RAMLAL *v.* SETH SHEOLAL. **169 I.C. 323=10 R.N. 2=20 N.L.J. 21.**

——**Ss. 8 and 15**—*Scope—Debt Conciliation Board—Jurisdiction to declare debt discharged—Conditions.*

A Debt Conciliation Board has no authority to say that a debt is deemed to have been duly discharged except where the creditor has failed to comply with the provisions of S. 8 (1). Debt Conciliation Act. There is no provision in the Act under which a Board is entitled to say that the claim is dismissed. When a creditor refuses to accept a reasonable offer, the Board can deal with the matter under S. 15. A civil suit therefore to recover the amount is not barred. (*Pollock, J.*) Sarupchand *v.* Barelal Ramsingh. **I.L.R. (1937) Nag. 530=174 I.C. 991 (1)=10 R.N. 430 =A.I.R. 1937 Nag. 195.**

——**Ss. 8, 9 and 16**—*Scope—Suit on mortgage—Subsequent proceedings before Debt Conciliation Board—Mortgage bond produced in Court and not filed before Board—Order declaring debt discharged—Legality—Suit—If barred.*

Where a mortgagee institutes a suit on his mortgage producing the mortgage bond in the Civil Court, and the mortgagor thereafter applies to the Debt Conciliation Board for settlement of the debt, the failure of the creditor to produce the mortgage deed before the Board will not authorise the Board to declare that the debt is duly discharged. It is not open to the Board to say that the debt is duly discharged under S. 8 (2) of the Debt Conciliation Act merely because plaintiff mortgagee has not, in the opinion of the Board, complied with S. 9 (1). The mortgage deed produced in the CivilCourt cannot be said to be in the possession or under the control of the plaintiff within the meaning of S. 9, because it has been filed in the Civil Court. Since the Board has no jurisdiction to pass an order declaring the debt discharged in such a case, the suit in the Civil Court is not barred by S. 16 of the Act, in spite of an order by the Board declaring the debt discharged. (*Pollock, J.*) Motiram *v.* Bhurmalsao. **169 I.C. 268=9 R.N. 313=20 N.L.J. 29.**

——**S. 8**—*Submission of statement of accounts—If could be sent by post.*

The submission of the statement of accounts by post is sufficient for the purposes of S. 8 of the Central Provinces Debt Conciliation Act. (*Gruer, J.*) Tara Chand *v.* Shrikrishna. **1939 N.L.J. 225.**

——**S. 8 (1) and (2)**—*Failure to submit statement within two months—Subsequent filing of statement—Board accepting delayed statement without objection—If condonement of delay—Jurisdiction to declare debt discharged.*

Under the proviso to S. 8 (1) of the Debt Conciliation Act, the Debt Conciliation Board has power to extend the period for submission of a statement by a creditor, if it is satisfied that the creditor was, unable for good and sufficient cause to comply with the directions of the Board under S. 8 (1). Where the Board accepts a statement which was not filed by a creditor within but filed beyond two months as required by S. 8 (1), without taking exception to the delay, it must be held that the Board in effect condones the delay; and when the Board condones the delay, the debt cannot be deemed to be duly discharged under S. 8 (2) by reason of the failure to submit the statement within the period of two months. The Board in such a case would be acting without jurisdiction if it declares the debt duly discharged under S. 8 (2). (*Pollock, J.*) Motiram *v.* Bhurmalsao. **169 I.C. 268=9 R.N. 313=20 N.L.J. 29.**

——**S. 8 (1)**—*Notice under—Creditors who are omitted in the application under S. 4—Position of—Right to a decree.*

The notice contemplated in S. 8 (1) of the C. P. Debt Conciliation Act, presupposes that the debtor has disclosed the names of all his creditors. To construe that such an publication affects unknown creditors as well would result in grave injustice to creditors whose names were not disclosed in application under S. 4. The case of such creditors must be treated as lying outside the sphere of the Debt Conciliation Act. They are therefore entitled to a full decree. (*Niyogi, J.*) Haji Mohamad *v.* Harbaji. **1938 N.L.J. 141.**

——**S. 8 (1) and (2)**—*Ambiguity in notice under S. 8 (1)—Statement filed within date fixed by notice but beyond two months prescribed—Effect—S. 8 (2)—If comes into operation.*

Where a notice issued under S. 8 (1) of the Debt Conciliation Act required the creditor to file his statement within two months from the date of the service of notice and at the same time mentioned the date within which he was to do it, which was clearly beyond the two months mentioned in the earlier portion and where a statement was filed within the date mentioned it was held that the statement was filed within time and that the action of the Board must be taken to be in effect a condonation of the delay coming under the proviso to S. 8 (1) and hence there was no scope for S. 8 (2) to come into operation and treat the debt as discharged. (*Clarke, J.*) Sangai Anand Kumar *v.* Har Narayan. **1938 N.L.J. 296.**

——**S. 8 (1) and (2)**—*Notice fixing time less than that required by section—Filing of statement after time fixed but before time allowed by law—Discharge of debt—Legality.*

Where a notice under S. 8 (1) of the Central Provinces Debt Conciliation Act fixed a time for the filing of a statement of debts which was less than the 2 months as required by the section and where a creditor files his statement within the 2 months allowed but beyond the date fixed in the notice served on him, his debts cannot be discharged under S. 8 (2) of the Act. A discharge under the above circumstances is without jurisdiction and Civil Courts have jurisdiction to inquire and must inquire whether facts exist on proof of which it shall be deemed that the debt has been duly discharged under S. 8 (2) of the Act. (*Grille, J.*) Gangadhar *v.* Pandurang. **1939 N.L.J. 164.**

——**S. 8 (2)**—*Applicability—Conditions—Jurisdiction to declare debt discharged—Condition precedent to.*

It is only when a creditor fails to comply with the provisions of S. 8 (1) of the Debt Conciliation Act that the debt is deemed to have been duly discharged under S. 8 (2); and if the creditor complies with S. 8 (1), the Conciliation Board has no jurisdiction to declare his debt duly discharged. (*Pollock, J.*) Shivdin *v.* Ram Rattan. **I.L.R. (1938) Nag. 489=170 I.C. 905=10 R.N. 85=20 N.L.J. 57=A.I.R. 1937 Nag. 259.**

——**S. 8 (2)**—*Construction—"Debt" — Debt owed by several persons—Application to Debt Conciliation Board by one debtor only—Creditor failing to file statement to Board—Effect—Liabi-*

lity of other debtors not applying—If extinguished.

The "debt" to which reference is made in S. 8 (2) of the Debt Conciliation Act refers only to a debt owed by a debtor who has applied to the Debt Conciliation Board and cannot be interpreted as referring to the liability to discharge a debt which lies on a person who has not applied to the Board and with whom the Board is not concerned. If several persons are jointly and severally liable in respect of a debt, and one of them makes an application to the Board, the liability of the others who do not apply to the Board, will not be extinguished by reason of the creditor's failure to file a statement before the Board in answer to the application made by one of the debtors only. (*Grille, J.C.*) PREMLAL MANNULAL *v.* JIWAN. 20 N.L.J. 25.

——S. 8 (2) and Civil Procedure Code, O. 21, R. 15—*Joint decree—Application to Debt Conciliation Board—Issue of notice to one of the decree-holders only—Failure to comply with—Discharge under S. 8 (2) of entire debt—Other decree-holder, if can apply for execution of whole decree.*

There was a decree in favour of two persons. Though the debtor applied to the Debt Conciliation Board for the settlement of his debts and mentioned the names of both the decree-holders, notice was issued to only one of them and on his failing to comply with the notice the entire debt was discharged under S. 8 (2) of the Act. The other decree-holder was held entitled to execute his decree, but only to the extent of his own interest in the decree. Under O. 21, R. 15, C. P. Code, the decree-holder cannot apply for execution of the whole decree when by a special Act part of the decree has been declared satisfied. (*Gruer, J*) VITHALRAO *v.* LALLOO DOMA. 1938 N.L.J. 361.

——S. 8 (2)—*Minor creditor—Discharge of debt due to—Absence of formal appointment of guardian—Sufficient representation of interest—Validity of the discharge of debt.*

Where in the case of minor creditor though there was no formal order appointing a guardian, yet his interest were sufficiently represented and protected by the elder brother, and an order discharging his debt is made, the proceedings before the Board are quite valid and the absence of a formal order as to guardianship could not render them void, inasmuch as there has been no prejudice to the minor. (*Puranik, J.*) JAWARCHAND *v.* TAPIRAM. 1940 N.L.J. 256.

——S. 8 (2) and Rr. 47 and 18—*Minor creditor—Procedure to be followed by debtor—Minor not duly represented—Discharge of debt—Legality—If curable under S. 18—Power of Civil Court to revive debt.*

Where a creditor is a minor, according to R. 47 of the rules framed under Central Provinces Debt Conciliation Act, the debtor applicant to the Board has to follow the procedure indicated in O. 32, C. P. Code. Where owing to the failure to get a minor properly represented before the Board, his debt is discharged, it is an illegality not curable under R. 18 of the rules. A Civil Court can treat the order of discharge as null and void and revive the debt under S. 8 (2) of the Central Provinces Debt Conciliation Act. (*Niyogi, J.*) PITAMBER RAMCHANDRA *v.* SAHEB CHAND HARAKCHAND. I.L.R. (1939) Nag. 697=1939 N.L.J. 472=185 I.C. 418=12 R.N. 155=A.I.R. 1939 Nag. 277.

——S. 8 (2)—*Proper service of notices—Statements filed out of time—Some of the debts conciliated by agreement thereafter—Propriety—Discharge of other debts—Aggrieved creditors, if can plead that delay in filing statement had been condoned by the Board.*

Where after the due services of notices, the statements were not filed in time and acting on the warning of the chairman of the Board that the debts were liable to be discharged, most of the creditors agreed to an arrangement of conciliation of their debts, and the other debts were discharged it is not open to the aggrieved creditors to plead, that the action of the Board was either improper or that its action in conciliating some of the debts after the expiry of the period for filing the statement amounted to a condonation of the delay in the filing of their statements. The order of the Board discharging the debts is quite in order and could not be declared *ultra vires.* (*Stone, C. J. and Bose. J.*) SETH KISHANLAL *v.* ABDUL HALIM. 1940 N.L.J. 252.

——S. 8 (2), Proviso—*Discharge of debt—Creditor's remedy—Independent application to Civil Court, if competent.*

When a debt is discharged under S. 8 of the Central Provinces Debt Conciliation Act, the creditor can, according to the proviso to sub-S. (2) to S. 8 of the Act, apply for its revival either to the Board or a Civil Court. But an application to a Civil Court can only be made when either a suit or execution proceedings about the debt are in progress. An independent application for its revival is incompetent. A dismissal of such an application does not debar a Court from determining the question when the creditor brings a suit on the debt. (*Gruer, J.*) LAXMAN *v.* ABUKHAN. 1939 N.L.J. 62.

——S. 9—*Applicability and construction—Suit by creditor on bond—Subsequent proceedings before Debt Conciliation Board—Omission by creditor to file bond before Board as bond filed in Court—Order by Board declaring bond not relevant in suit—Legality—If binding on Civil Court.*

It is clear from the wording of S. 9 (3) that the section would not apply to the case of a creditor who has filed a suit already on the basis of the instrument of obligation. When a creditor has filed the document along with the plaint, as he is bound to do under the law, it cannot be said that the document is either in his possession or under his control. In such a case, therefore, the bond cannot be treated as being not admissible in evidence. If the Debt Conciliation Board in such a case wrongly declares that the bond filed by the creditor in the suit, but not filed before the Board, will not be relevant for proving his claim in the suit already filed by him, the Civil Court would be guided not by the order of the Board, but by the terms of sub-S. (3) of S. 9 of the Debt Conciliation Act only. (*Niyogi, J.*) RAMLAL *v.* SETH SHEOLAL. 169 I.C. 323=10 R.N. 2=20 N.L.J. 21.

——S. 9 (3)—*Order under—Effect of.*

The effect of an order under S. 9 (3), is not to invalidate the transaction but merely to shut out certain document from evidence. Where therefore an order is made under S. 9 (3) excluding a mortgage deed from evidence in any suit by the creditor, the order though effectually precludes a suit on mortgage does not invalidate the mortgage but keeps it alive. Hence the creditor cannot fall back upon original consideration and sue on that cause of action so long as the mortgage is alive. (*Vivian Bose, J.*) RATILAL *v.* RAJARAM. **177 I. C. 698=11 R N. 165=1938 N.L.J. 276=A.I.R. 1938 Nag. 251.**

———**Ss. 9-A and 18**—*Effect of S. 9-A—Signing and verification—Provision as to, if mandatory—Order though harsh, if can be interfered with.*

The only reason why S. 9-A of the Central Provinces Debt Conciliation Act is not embodied in S. 8 (1) is because it refers also to S. 9 (1) of the Act and so was put after both sections, but its effect clearly is that S. 8 must be read along with S. 9-A. A statement without signature or verification as prescribed is not in proper form. The word 'shall' used in S. 9-A is mandatory. S. 18 clearly provides that no appeal or application for revision shall lie against any order passed by a Board, and when the Civil Court finds that the order though harsh, is technically correct it cannot interfere. (*Gruer, J.*) BABOO *v.* HERALAL. **1939 N.L.J. 171.**

———**S. 12**—*Agreement between creditor and debtor—Mode of enforcing—Separate civil suit—Maintainability.*

Where the creditor and the debtor arrive at an agreement before the Debt Conciliation Board by which certain lands were to be transferred to the creditors according to S. 12 of the Debt Conciliation Act, it can be executed as if it were a decree and also the agreement like a decree is binding on the parties and they cannot go behind it. The filing of a separate civil suit to enforce the settlement is unnecessary and not contemplated by the Act. The Collector could act on the agreement and effect the necessary partition. (*Gruer, J.*) SHANKARDAS *v.* NANDLAL. **1939 N.L.J. 85.**

———**S. 12**—Agreement to settle debt—Failure to carry out—Suit on original debt—Maintainability. *See* CONTRACT ACT, S. 62 AND CENTRAL PROVINCES DEBT CONCILIATION ACT, S. 12. **1939 N.L.J. 256.**

———**Ss. 12 and 15**—*Scheme of S. 12—A separate agreement by creditors whose debts were less than 40 per cent. of total debts—Value—Certificate, if could be issued.*

The scheme of S. 12 of the Central Provinces Debt Conciliation Act is that efforts should be made to arrive at an amicable settlement, and that it shall be put into form and that, that form shall be signed by all the parties to the settlement. It was never contemplated that there should be as many agreements as there were creditors. Where originally creditors whose debts amounted to more than 60 per cent. of the total debts agreed to the conciliation but subsequently when separate agreements were executed by each creditor one of the major creditors refused to sign the agreement and thereby reduced the amount of debt conciliated to less than 40 per cent. of the total debt, it was held that the agreements executed were not binding and a certificate under S. 15 of the Act could not be issued in such a case. (*Stone, C. J. and Bose, J.*) GOPIKISAN *v.* AMARCHAND. **1940 N.L.J. 67.**

———**Ss. 12 and 13**—*Scope and applicability of—Jurisdiction of Civil Courts—When arises.*

The settlements contemplated by the Central Provinces Debt Conciliation Act are not restricted within their scope and payment of the debts can be agreed to be made either in cash or in kind. Further, if the 'amounts' due are made payable in cash, then the provisions of S. 13 are attracted and in that case the jurisdiction of the Civil Courts does not arise until the provisions of S. 13 (3) of the Act have been complied with but if the amounts are payable in kind, then the agreement is enforceable as a decree by the Civil Courts the moment it is registered. (*Stone, C.J. and Bose, J.*) SHRIDHAR KRISHNARAO *v.* NARAYAN NAMAJI. **I.L.R. (1939) Nag. 503=184 I.C. 864=1939 N.L.J. 218=A.I.R. 1939 Nag. 227.**

———**S. 12 and Civil Procedure Code, S. 47 (2)**—*Settlement of debt—Promise to transfer property—Registered agreement—Non-compliance with—Suit for specific performance—Relief—Basis.*

Where a settlement of a debt was effected by a registered agreement involving the transfer of property and on a failure to so transfer the property a suit was filed for specific performance of the agreement it was held that the Court was justified in operating under the powers conferred by S. 47 (2), C. P. Code, alternatively under its inherent powers and treating the suit as a proceeding to enforce the agreement as a decree of Civil Court and giving relief to the plaintiff. (*Stone, C. J. and Bose, J.*) ABDUL RASHID KHAN *v.* SINGHAI BANSILAL. **1939 N.L.J. 500=A.I.R. 1940 Nag. 92.**

———**Ss. 12 and 15**—*Some of the creditors not agreeing to accept conciliation—Power to issue certificate as against them—Jurisdiction—Limits.*

Where the debts due to the creditors who accept the award does not come to the 40 p.c. of the total liability as required by S. 12 (1) of the Act, the Debt Conciliation Board would be acting without jurisdiction and would have no power to make any conciliation and issue the certificate under S. 15 as against those creditors who do not agree to conciliate. They are entitled to pursue their remedy by suit in the usual way. (*Stone, C. J. and Bose, J.*) SADASHEO RAO *v.* ROOPCHAND. **184 I.C. 719=1939 N.L.J. 142=A.I.R. 1939 Nag. 136.**

———**S. 12 (1) and (2)**—*"Amicable settlement"—Special oath—Agreement to abide by—Effect of.*

When a creditor relinquishes his claim to a sum of money due to him on the debtors taking a special oath proposed by him, that amounts to an amicable settlement between the creditor and debtor within the meaning of S. 12 (1) of the Debt Conciliation Act; a decree obtained by the creditor in respect of the debt prior to the oath therefore ceases to exist and is replaced by the agreement to take the oath which under S. 12 (2) takes effect on registration as if it were a decree of a Civil Court. The decree previously obtained by the creditor cannot, therefore, any longer be executed. (*Pollock, J.*) CHETRAM BAGRI *v.* HARILAL. **20 N.L.J. 27.**

———**S. 13**—*Settlement—Death of debtor and default in instalments—Recovery—Proper procedure.*

When a debtor whose debts have been settled in an agreement registered under S. 12 (3) of the C. P. Debt Conciliation Act, dies and there is a default in the payment of any amount due under the agreement, the proper course is for the Deputy Commissioner to bring the names of the legal representatives of the deceased debtor on record and to proceed with the recovery of the amount in default in accordance with sub-S. (1) of S. 153 of the Act. The death of the defaulter does not prevent the recovery of the amount in default. (*Burton, F C.*) Ratansingh *v.* Seth Samarthmal. **1940 N.L.J. 417.**

——**S. 13 and Berar Land Revenue Code (1928), S. 164 (c)**—*Sale under S. 13 of the former Act read with S. 164 (c) of Berar Land Revenue Code—Creditor or his agent, if prohibited from bidding.*

Where a sale is held under S. 13 of the Debt Conciliation Act read with Cl. (*c*) of S. 164 of the Berar Land Revenue Code, there is nothing in the above two provisions which restricts in any way, a creditor or his agent from bidding for and purchasing property put up for sale. (*Greenfield, F.C.*) Sitaram *v.* Ramrao. **1938 N.L.J. 473.**

——**S. 15**—Certificate in respect of the personal debts of a deceased coparcener—Validity. *See* Central Provinces Debt Conciliation Act, Ss. 2 (*e*) and 15—'Debt.' **1939 N.L.J. 458.**

——**Ss. 15 and 16**—*Certificate under S. 15—Finding as to reasonableness of settlement offered—If can be re-agitated in Civil Court.*

The Debt Conciliation Board has jurisdiction to decide whether the offers made for the settlement of the debt were reasonable or not and when once it has issued a certificate under S. 15 of the Debt Conciliation Act stating that the creditor had refused to accept a reasonable offer, the Civil Court is powerless to go into the question whether the offer was reasonable or not. Such an enquiry is excluded by S. 16 (*a*) (ii) of the Act. (*Gruer, J.*) Govindramji *v.* Gunagi Domaji. **1939 N.L.J. 322.**

——**Ss. 15 and 21**—*Execution sale prior to application under Debt Conciliation Act—Confirmation, if can be interfered with under Ss. 15 and 21.*

Neither S. 15 nor S. 21 of the Central Provinces Debt Conciliation Act affects the power of a Civil Court under O. 21, R. 92, C. P. Code, to confirm a sale held in execution proceedings when such sale has taken place before an application under S. 4 of the above Act has been made to the Debt Conciliation Board. (*Niyogi and Bose, JJ.*) Akbari Ali *v.* Seth Sobharam. **I.L.R. (1939) Nag. 654 =1939 N.L.J. 283=A.I.R. 1939 Nag. 282.**

——**S. 15**—*Power to issue certificate—When could be exercised—Scope and applicability of sub-Ss. (2) and (3) of S. 15.*

S. 15 (1) of the C. P. Debt Conciliation Act gives the Board power to issue a certificate at any time, if the creditor has refused to accept what the Board considers to be a fair offer and it is in no way dependent on the making of an agreement under S. 12. Sub-S. (2) of S. 15 comes into force where such a certificate has been issued and the Court shall not allow the plaintiff any costs in the suit or any interest on the debt after the date of such certificate in excess of simple interest at 6 per cent. per annum. Sub-S. (3) comes into force only when there is an agreement and in that case it is only the execution of the decree that is stayed but it has nothing to do with interest or costs. (*Pollock, J.*) Jankiprasad *v.* Balmukund. **1940 N.L.J. 261.**

——**Ss. 15 and 12**—*Scope and effect of.*

Ss. 15 and 12 (1) of the Debt Conciliation Act must be read together. If the 40 per cent. rule did not apply, the alternative stand could not be taken that S. 15 could be independently brought into action against any individual creditor who when questioned under S. 10 did not agree to a reasonable settlement. (*Gruer, J.*) Govindramji *v.* Gunaji Domaji. **1939 N.L.J. 322.**

——**(as amended in 1935), Ss. 15 (1) and 21, Proviso**—*Scope—Execution sale—Purchase by decree-holder—Subsequent issue of certificate under S. 15 (1)—If ground for refusing confirmation of sale—C. P. Code, O. 21, R. 92.*

The confirmation of a sale held in execution is not a proceeding to execute a decree so as to fall within the ambit of S.21, of the Debt Conciliation Act, proviso. When the property has been sold in execution, the title vests in the purchaser from the date of sale subject to confirmation, and the proviso to S. 21 cannot be held to prevent the executing Court from confirming the sale. The fact that the decree-holder is the purchaser makes no difference. The executing Court cannot therefore refuse to confirm the sale on the ground that after the sale the Debt Conciliation Board issues a certificate under S. 15 (1) of the Act. Under O. 21, R. 92, C. P. Code, the purchaser in execution has an absolute right to have the sale confirmed when there has been no objection under R. 89, 90 or 91. (*Pollock, J.*) Haji Hasan *v.* Pannalal. **19 N.L.J. 296.**

——**S. 15 (2)**—*Applicability—Decree—Execution—Certificate from Debt Conciliation Board—Effect of.*

S. 15 (2) of the Debt Conciliation Act applies only where the creditor is suing for recovery of a debt in respect of which a certificate has been granted. It does not apply where the creditor is applying in execution for the recovery of a decretal debt. (*Pollock, J.*) Bhabutmal *v.* Balwantrao. **I.L.R. (1937) Nag. 344=169 I.C. 294=9 R.N. 318=20 N.L.J. 28=A.I.R. 1937 Nag. 120.**

—— **S. 15 (3)**—*Construction—'Sues'—Meaning.*

The words 'sues for the recovery of a debt' include the prosecution of a suit for the recovery of a debt, even if the suit was instituted before registration of the agreement. (*Pollock, J.*) Rishabkumar *v.* Bholay Singh. **I.L.R. (1937) Nag. 37=166 I.C. 459=9 R.N. 124=A.I.R. 1936 Nag. 267.**

—— **S. 15 (3)** — *Construction— Words 'such agreement has ceased to subsist' meaning of.*

The words 'such agreement has ceased to subsist' occurring in S. 15 (3) of the Debt Conciliation Act cannot mean 'such agreement has ceased to subsist *in part.*' Where the rest of the agreement is still in force, its effect must remain (*Gruer, J.*) Syed Ismail Baliramji. **1939 N.L. J. 38**

——**S. 15 (3)**—Effect on surety—Remedy against principal debtor. *See* Contract Act, Ss. 134 and 139. **A.I.R. 1938 Nag. 413.**

——**S. 16**—Applicability—Order without jurisdiction—Order declaring debt discharged—Suit

—If barred. *See* C. P. DEBT CONCILIATION ACT, Ss. 8, 9 AND 16. **20 N.L.J. 29.**

———**S. 16**—*Construction and scope—Jurisdiction of Civil Court to enquire into validity of orders passed by Debt Conciliation Board.*

If the Debt Conciliation Board had no jurisdiction to try to effect a settlement, all proceedings before it would be completely invalid and the Civil Courts would have jurisdiction to enquire whether those proceedings were invalid for want of jurisdiction, but if the Board had jurisdiction, then the Civil Courts would not have jurisdiction to inquire whether that jurisdiction was properly exercised and the legality or validity of any orders passed by the Board cannot be questioned in any Civil Court at all except perhaps on the ground of fraud. (*Pollock, J.*) SHIVDIN *v.* RAM RATTAN. **I.L.R. (1938) Nag. 489=170 I.C. 905 =10 R.N. 85=20 N.L.J 57=A.I.R. 1937 Nag. 259.**

———**S. 16**—*Intention of Legislature—Civil Court, if can examine the reasons for issue of certificate under S.* 15.

The intention of the Legislature in S. 16 of the Central Provinces Debt Conciliation Act was to preclude the Civil Courts from examining the reasons, whether right or wrong, which induced the Debt Conciliation Board to issue a certificate under S. 15 of the Act. It may be that if fraud was practised on the Board, the Civil Courts could set the matters right. Where in spite of the allegations of a creditor a certificate is issued under S. 15 it could not be questioned by the Civil Court. (*Gruer, J.*) JANBA DAYARAM PARDESHI *v.* MANNOOKASHIRAM KIRAD. **185 I.C. 888 =12 R.N. 177=1939 N.L.J. 486=A.I.R. 1939 Nag. 312.**

———**S. 16**—*Interference by Civil Court.*

Though, if the Conciliation Board exceeds its jurisdiction and such action is questioned, the Civil Court will enquire into the question of jurisdiction, it will not interfere with the proceedings of the Board, if they are with jurisdiction. (*Puranik, J.*) JAWARCHAND *v.* TAPIRAM. **1940 N.L.J. 256.**

———**S. 16**—*Jurisdiction—Civil Court sitting in execution—Power to question jurisdiction of Debt Conciliation Board to entertain application under S.* 4.

A Civil Court sitting in execution has power to inquire into the question whether the Debt Conciliation Board had jurisdiction to entertain and hear an application under S. 4 of the Debt Conciliation Act made by a person who was not an agriculturist. (*Niyogi, J*) TIKA RAM *v.* GANPAT SAHAI. **182 I.C 81=11 R.N. 499=1938 N.L.J. 17=A.I.R. 1938 Nag. 373.**

———**S. 16 (1)**—*Intention and scope of—Suit by creditor prior to debtor's application—Proper disposal.*

Giving the best construction to Ss. 16, 21 and 23 of the Central Provinces Debt Conciliation Act, the true intent appears to be as follows: Where in point of fact proceedings are pending before a Debt Conciliation Board at the time of the presentation of a plaint, the Court has no jurisdiction to dispose of the matter. If, however, thereafter the proceedings before the Debt Conciliation Board terminate without a settlement of that debt, the power of the Court to deal with the suit revives and no defence based on limitation and on defendant counting the time during which the matter has been pending before the Board (at least after the abortive filing occurred) can be considered (S. 23). The application before the Board being terminated without settlement the debt remains. That debt can now be sued for. If a plaint has already been filed it will be treated as filed immediately after the application before the Board terminated and no new Court-fee will be payable. A suit by a creditor in ignorance of a prior application by his debtor under the Debt Conciliation Act could not be dismissed straightaway on the production of a certificate from the Board. (*Niyogi, J. on difference between Stone C.J. and Clarke, J.*) BALKRISHNA RAJARAM *v.* BAIJNATH. **I.L R. (1939) Nag. 185=182 I.C. 662 =12 R.N. 24=1939 N.L.J. 173=A.I.R. 1939 Nag. 150.**

———**S. 16 (a) (i)**—Suit against lambardar for village profits—Jurisdiction of Debt Conciliation Board to compel lambardar to render accounts—Civil Court's jurisdiction. *See* C P. DEBT CONCILIATION ACT, S. 2 (e). **19 N.L J. 16.**

———**S. 18**—Interference by Civil Court—Order technically correct but harsh. *See* C. P. DEBT CONCILIATION ACT, Ss. 9-A AND 8. **1939 N.L.J. 171.**

———**S. 19**—*Agreement before the Board—Subsequent unforeseen events lightening burden of debtor—Effect—Power to revise agreement.*

Where an agreement has been entered into before the Board, and owing to the happening of certain unforeseen events, the burden of the debtor is lightened, there is nothing in the C. P. Debt Conciliation Act to suggest that the agreement should be deemed to have ceased to subsist, either wholly or in part. It is but equitable that it should be revised but it is the Board alone that has the power to do so under S. 19 of the Act. (*Gruer, J.*) SYED ISMAIL *v.* BALIRAMJI. **1939 N.L J. 38.**

———**S. 21 (as amended by Act XIV of 1935)**—*Amendment, if retrospective.*

Looking at the question as a whole, it is clear that the amendment of S. 21 by Act XIV of 1935 is not merely procedural, but that it affects substantive rights and so in the absence of express words to that effect, it ought not to be applied to pending proceedings. (*Stone, C.J. and Bose, J.*) GANESH PRASAD *v.* GOPAL. **1938 N.L J. 101.**

———**S. 21**—*Applicability—"Debt"—Meaning—Joint decree against several persons—Application under S. 4, by some only—Sale of property of others in execution—Confirmation of—If can be stayed.*

"Debt" in S. 21 of the C. P. Debt Conciliation Act means a debt of the debtor who applies under S. 4. Where in the case of a joint decree against several persons only one of them applies under S. 4, S. 21 cannot come into operation, so as to stay the confirmation of the execution sale of the properties of the other judgment-debtor who have not so applied under S. 4. (*Niyogi, J.*) MADHO *v.* RAMCHANDRA. **I L.R (1939) Nag. 104=11 R N. 216=178 I.C. 268=1938 N.L.J. 60 =A.I.R. 1938 Nag. 273.**

———**S. 21**—*Applicability—Debtor—Person adjudicated insolvent—Right to apply under.*

If a debtor who is adjudged an Insolvent applies to the Debt Conciliation Board for settlement of his debt, the proceedings pending in the Insolvency Court cannot be suspended under S. 21, Debt Conciliation Act. S. 6 of the Act presupposes that the debtor has some property of his own and that his creditors have a remedy available to them in ordinary Civil Courts. When a debtor is divested of all his property in consequence of his having been adjudged insolvent, he no longer remains a "debtor" as such and he cannot possibly describe the property vested in the Insolvency Court as his property in the application which is required to be made in terms of S. 6 of the Act. (*Niyogi, J.*) CHHOTELAL *v.* NATHURAM. **I. L R. (1938) Nag. 165=172 I.C. 697=10 R.N. 241=20 N.L.J. 252=A.I.R. 1937 Nag. 288.**

——**S. 21**—*Applicability—Insolvency proceedings, if could be stayed—'Other proceedings' in S. 21, meaning of.*

Proceedings in insolvency cannot be suspended under S. 21 of Central Provinces Debt Conciliation Act. An insolvent after adjudication, though he might continue to be debtor for the purposes of those proceedings, cannot be a debtor for the purposes of the Debt Conciliation Act, as his property is vested in the Insolvency Court which strips him of the essential ingredient of his status as a debtor. The expression 'other proceedings' in S. 21 of the Act must be taken to be those contemplated in S. 16 (*i.e.*) execution proceedings. (*Niyogi, J.*) SHRIDHAR *v.* GANESH. **1938 N.L.J. 133**

——**S. 21**—*Applicability—Passing of foreclosure decree—Effect—Execution, if affected by proceedings under Debt Conciliation Act.*

With the passing of a final foreclosure decree, the debt comes to an end. The decree is not a money decree and cannot be regarded as a debt of record so that the decree is not a debt at all. The old debt has merged in the decree and hence no debt left which can confer jurisdiction on a Debt Conciliation Board. An execution of such decree could proceed unhampered by S. 21 of the Central Provinces Debt Conciliation Act. (*Stone, C.J. and Bose, J.*) MAHEMAJI *v* CHANDRABHAN. **1939 N.L.J. 451=A.I.R. 1940 Nag. 42.**

——**S. 21**—*Applicability—Proceedings subsequent to execution sale.*

S. 21 of the Central Provinces Debt Conciliation Act cannot come into operation to suspend proceedings subsequent to execution sale. The reason seems to be that when the sale is held the sale proceeds are set off against the judgment-debt. The debt being not in existence, the debtor cannot say he is debtor in respect of this judgment debt. (*Niyogi, J.*) HARI SADASHEO *v.* WAMAN VITHAL. **1938 N.L.J. 229.**

——**S. 21**—*Certificate produced after confirmation of sale in execution—Effect of.*

By virtue of S. 21 of the Central Provinces Debt Conciliation Act any suit or proceeding in respect of any debt for the settlement of which an application under S. 4 has been made to the Board, shall be stayed till the disposal of such application. The date of the presentation of the certificate issued under R. 11 of the rules framed under the Act is immaterial. The certificate is a stay order and is imperative and hence the confirmation of sale should be stayed. (*Grille, J.*) THAKUR PRASAD *v.* RAGHURAJSINGH. **1938 N.L.J. 150.**

——**S. 21**—*'In respect of any debt'—A sale having for its origin the conciliation of a debt—Suit in respect of, if can be stayed.*

Simply because the transaction of sale in suit had its origin in the settlement of a debt, the suit does not become one 'in respect of that debt' and so could not be stayed under S. 21 of the Central Provinces Debt Conciliation Act. A suit for a declaration and possession of fields conveyed under a sale by a mortgagor in satisfaction of the debt due, is not such a suit that could be stayed under S. 21 when the mortgagor subsequently applies for conciliation of his suit and shows the vendee as a creditor therein. (*Gruer, J.*) HIRAMAN *v.* LAXMAN. **1938 N.L.J. 475.**

——**S. 21**—*Property sold by Civil Court before filing of Boards certificate—Subsequent confirmation of sale—Validity.*

Under S. 21 of the Debt Conciliation Act, the Civil Court is not bound to stay proceedings until it has been brought to its notice that there are proceedings pending before the Board by production of a certificate before it. In the absence of such certificate, it is open to the Court to continue the proceedings. Where, therefore, such certificate is not filed in the Court until the property has been sold in execution of a decree, the subsequent confirmation of the sale is not barred by any provision in the Act, and both the sale and confirmation of the sale are valid. (*Pollock and Digby, JJ.*) MAHTABSINGH *v.* KRISHNACHANDRA. **10 R.N. 227=172 I.C. 592=A.I.R. 1938 Nag. 109.**

——**S. 21**—*Scope—Application to Civil Court—Objection to jurisdiction of Debt Conciliation Board—Maintainability—Civil Court's power to enquire into and decide.*

An application under S. 21 of the Debt Conciliation Act necessarily contemplates an application which it is competent for the applicant to make under the Act. and the Board referred to there means a Board which has jurisdiction to entertain the application. The Civil Court to which the application is made has the power to examine the competency of the Board to adjudicate on matters which are also before them. No separate suit is necessary in order to determine these questions. The Civil Court must ordinarily proceed with matters pending before it upon which it is competent to adjudicate. Any party relying upon a bar to these powers must establish the same, and the Court has then naturally to enquire into and determine the validity of the objection raised. This may involve an enquiry into the jurisdiction of the Debt Conciliation Board to entertain the matters before the Court, and the Civil Court itself is the tribunal competent to decide these matters. (*Bose and Puranik, JJ.*) LACHMANSINGH *v.* DURGA PRASAD. **20 N.L.J. 203.**

——**S. 21**—*Scope—Certificate under—Suit for possession of land—If can be stayed.*

The certificate under S. 21 of the Central Provinces Debt Conciliation Act can stay only suits in respect of any debt for the settlement of which application has been made, but it cannot justify the stay of a suit for possession of land.

(*Pollock, J.*) Amarchand *v.* Mt. Sambai. **20 N.L.J. 218.**

——S. 21—*Scope—Certificate under Act as applied in Berar—If to be recognised and acted upon in Central Provinces.*

Though Berar is not British India, and though a certificate issued by a Debt Conciliation Board in Berar is not *ipso facto* valid in the Central Provinces, such a certificate, as a matter of judicial comity and commonsense, ought to be recognised and acted upon in the Central Provinces. (*Gruer, J.*) Murlidhar *v.* Khushal Chand. **20 N.L.J. 240.**

——S. 21—*Scope—If controls O. 21, R. 92, C. P. Code—"Proceedings"—Meaning of—Sale in execution held prior to debtor's application under S. 4—Confirmation of sale—If precluded.*

The word "proceedings" in S. 21 of the Central Provinces Debt Conciliation Act must be understood as referring to proceedings in which the creditor and debtor, *i.e.*, the decree-holder and the judgment-debtor alone are concerned, and cannot be extended to cover the case of an auction-purchaser in execution. The term is not comprehensive enough to cover a proceeding for confirmation of sale under O. 21, R. 92, C. P. Code, the terms of which are mandatory and are not controlled by S. 21 of the Debt Conciliation Act. The latter section does not preclude the executing Court from confirming an execution sale held prior to an application made by the debtor under S. 4 of the Debt Conciliation Act. (*Niyogi, J.*) Madho *v.* Ram Chandra. **I.L.R. (1939) Nag. 104=11 R.N. 216=178 I.C. 268=1938 N.L.J. 60=A.I.R. 1938 Nag. 273.**

——S 21—*Suspension of proceedings in Civil Court—When takes place.*

The suspension of proceedings contemplated by S. 21 of the Central Provinces Debt Conciliation Act does not take place until by the production of the appropriate certificate the Civil Court has been informed of the pendency of the proceedings before the Board. (*Stone, C.J. and Bose, J.*) Mahemaji *v.* Chandrabhan. **1939 N L.J. 451=A.I.R. 1940 Nag. 42.**

——**S. 21, Proviso**—*Nature of agreement referred to—Conciliation of debt by transfer of land—If contemplated by the Act.*

It is only an agreement as contemplated by S. 12 of the Central Provinces Debt Conciliation Act, that is referred to in the proviso to S. 21 of the Act. Neither is a conciliation of debt by transfer of land contemplated by the Act, nor does any agreement of such a nature that may be arranged by the Board come within its purview. (*A.L. Binney, F.C.*) Dajiba Jagannath Joshi *v.* Narayan Govindra Shahadani. **1938 N.L.J. 472.**

——**(as amended in 1935), S 21, Proviso**—*Scope—Executing a decree—Proceedings for confirming sale—If amount to.*

After the sale in execution of a decree has been held and the sale price has been set off against the judgment-debtor deposited in Court subsequent proceedings for confirming the sale are proceedings between the judgment-debtor and the auction-purchaser, just as are proceedings for the delivery of possession to the auction-purchaser. In these proceedings, the decree-holder plays no part, and these proceedings do not amount to executing a decree so as to fall within the ambit of the proviso to S. 21. The property has been sold in execution of the decree and the title of the auction-purchaser vests in him from the date of sale, subject to confirmation, which is inevitable in the absence of any objection. Hence there is nothing in the proviso to S. 21, as amended, to prevent the Court confirming the sale. (*Pollock, J.*) Haji Dada Kachhi Malik *v.* Panna Lal. **169 I.C. 99=9 R.N. 300=19 N.L.J. 296=A.I.R. 1937 Nag. 98.**

——S 23—*Applicability—Principal debtor alone applying under the Act—If extends time as against surety.*

Where a principal debtor alone has chosen to seek relief under the Debt Conciliation Act, that cannot have the effect of extending the time for filing a suit against the surety, for the debt of the surety was never before the Board and hence S. 23 of the Conciliation Act will not extend time as against him. (*Pollock, J.*) Kesheorao *v.* Laxman. **186 I.C. 763=12 R.N. 253=1939 N. L.J. 604=A.I.R. 1940 Nag. 91.**

——**S. 24-A**—Board's proceedings—Nature of—Board if can pass an order under S. 195, Cr. P. Code. *See* Cr. P. Code, S. 195 and C. P. Debt Conciliation Act, Ss. 24-A and 18. **1940 N.L.J. 23.**

CENTRAL PROVINCES EXCISE ACT (I OF 1915), S. 2 (6) and (13)—*Diluted denatured spirit—If an excisable article.*

Under S. 2 (6) of the Central Provinces Excise Act 'liquor' includes spirit and under S. 2 (13) of the same Act 'excisable article' means any liquor or intoxicating drug. Therefore, diluted denatured spirit is an excisable article under the Act. (*Pollock, J.*) Ahmad Khan *v.* Emperor. **1939 N.L.J. 75.**

——**S. 62**—*Rules under, R. 6—Agreement of partnership in liquor contract—Validity.*

An agreement of partnership in liquor contract is void *ab initio* being opposed to public policy. Further such a partnership is clearly prohibited by R. 6 made under S. 62, C. P. Exise Act. (*Gruer, J.*) Nandlal *v.* Thomas. J. William. **I.L.R. (1937) Nag. 376=171 I.C. 948=10 R.N. 145=A.I.R. 1937 Nag. 250.**

CENTRAL PROVINCES LAND ALIENATION ACT (II OF 1916)—*Scope of—If prohibits only sale and not attachment.*

If properties cannot be sold then it cannot be attached. The Land Alienation Act when it prohibits sale prohibits attachment also. (*Bose, J.*) Deputy Commissioner, Hoshangabad *v.* Firoz Khan. **I.L.R (1940) Nag. 261=176 I.C. 163=11 R.N. 38=A.I.R. 1938 Nag. 504.**

——S. 16—*Money decree against member of an aboriginal tribe—Prohibition against sale of his property—If applies to attachment or appointment of receiver.*

Attachment is not an end in itself, but is only an adjunct to sale. So it follows that where the Court is for any reason prohibited from selling the property or dealing with it otherwise in lieu of sale, the attachment must be raised. In the case of an aboriginal, the prohibition against interference with his property is complete; not only can there be no sale but even a receiver cannot be appointed to manage his property. An attachment of his property must be raised. (*Bose and Puranik, JJ.*) DAULAT SHAH BAPU *v.* SARASWATI BAI. **I.L.R. (1939) Nag. 398=173 I.C. 877=10 R.N. 327=A.I.R. 1938 Nag. 281.**

———S. 16—*Property not saleable under—Civil Court's power to attach.*

No Civil Court has power to attach, even for the purpose of temporary alienation, a judgment-debtor's property which is not saleable in execution under S. 16, C. P. Land Alienation Act. (*Niyogi, J.*) BALARAM MISRA *v.* MANOOSINGH. **I.L.R. (1937) Nag 261=167 I.C. 807=9 R.N. 214=A.I.R. 1937 Nag. 41.**

———S. 25—*Object of—Presentation of appeal to High Court by the Deputy Commissioner in person, if necessary.*

The object of S. 25 of the C. P. Land Alienation Act is to bring to the notice of the Court an illegality in its decree or order and thus to save the property of certain class of persons. The Act does not contemplate that rules of procedure with reference to presentation, etc., are to be followed and as such all that is necessary is that the application under S. 25 (3) should arrive either by post or by personal presentation. It does not matter how it reaches the High Court. (*Bose, J.*) DEPUTY COMMISSIONER, HOSHANGABAD *v.* FIROZ KHAN. **I.L.R. (1940) Nag. 261=176 I. C. 163=11 R N. 38=A.I.R. 1938 Nag. 504.**

———S. 25 (2)—*Right to apply under when arises—Simple money decree—Attachment—Effect.*

In the case of a simple money decree, the order of attachment involves permanent alienation, mortgage or lease of land. So copies of such order should be sent to Deputy Commissioner under S. 25 (1) of the Land Alienation Act. If it is not sent, he can under S. 25 (2), apply within two months of his being informed of such order, the manner of his obtaining information being immaterial. (*Bose, J.*) DEPUTY COMMISSIONER, HOSHANGABAD *v.* FIROZ KHAN. **I.L.R. (1940) Nag. 261=176 I.C. 163=11 R.N. 38=A.I.R. 1938 Nag. 504.**

CENTRAL PROVINCES LAND RECORDS MANUAL—"Banjar" *land—Meaning of—Cultivated land allowed to lie fallow—If* banjar.

Banjar is a generic term which means village waste land and includes both *pahad* as well as *zudpi* jungle. Land may be either occupied or unoccupied. Unoccupied land may or may not be *banjar*. Though unoccupied land covers waste-land, all unoccupied land is not waste-land. The unoccupied land is divided into 7 sub-heads of which only 4 constitute *banjar* or village waste. Occupied land is land belonging to definite persons in the sense that it is or has been in their actual physical occupation. The rest of the area is the village area which does not belong to specific persons, though owned by the malguzars. Of this area certain portions form the village waste, and that is what comprises the *banjar*. *Banjar*, however, does not include land, which, having been under cultivation, has been allowed to lie fallow either for a period under or over three years. (*Bose, J.*) SHANKER *v.* DEVIDAS. **19 N.L.J. 112.**

CENTRAL PROVINCES LAND REVENUE ACT (XVIII OF 1881), S. 65-A (5) and (7)—*Construction and scope—Protected thikadar in Sambalpur District—Failure to pay thika jama—Liability to ejectment on ground of—"In accordance with any law for the time being in force"—Meaning of.*

It is impossible to construe S. 65-A (7) of the C. P. Land Revenue Act as giving the landlord a right to eject the protected thikadar merely for non-payment of thika-jama or upon the grounds mentioned in cl. (*b*) of the sub-section. S. 65-A (5) clearly contemplates that the liability of a protected thikadar is something less than the liability of an unprotected thikadar to be so ejected. A thikadar, gaontia or farmer in the Sambalpur District holds an interest very similar to that of a permanent tenure. There can be no ejectment for non-payment of rent unless the lease or agreement contains something in the nature of a proviso for re-entry. A landlord in India has no common law right to eject a tenure-holder for non-payment of rent. His right to eject depends in each case upon the terms of the agreement of lease. In the absence of a right to eject the tenure-holder given by the agreement or lease, mere failure to pay the thika jama does not entitle the landlord to eject the thikadar. The form of S. 65-A (7) suggests that the legislature intended to save existing rights rather than to create new rights. All that the sub-section does is to save for the landlord any rights which he might have, in accordance with the law for the time being in force and not inconsistent with the Act, to eject his thikadar on either of the grounds mentioned in Cls. (*a*) and (*b*). If by the general law he has no such right, then the protected thikadar cannot be ejected in the absence of a provision to that effect in the lease or agreement. The words "decree for ejectment passed in accordance with any law for the time being in force," cannot be construed as meaning a decree for ejectment in accordance with the law of procedure for the time being in force. (*Harries, C.J., Wort and Dhavle, JJ.*) LAL SADANAND SINGH *v.* MADAN MOHAN SAHU. **18 Pat. 509=182 I.C. 721=12 R.P. 48=20 Pat. L.T. 497=5 B. R. 803=1939 P.W.N. 407=A.I. R. 1939 Pat. 305 (F.B.).**

———S. 87—*Scope and effect of—Settlement award mentioning shares of members of family in estate—If bars claim to estate as impartible.*

The fact that the award at a proprietary settlement of an impartible estate specified the notional shares of the members of the family cannot debar a party to the settlement from setting up a claim that the estate is impartible. S. 87 bars a claim only if it was made or tabled as the subject of consideration and expressly decided. Where there is nothing to show that an issue was ever raised before the settlement officer or that there was an express decision, the section cannot operate as a bar to the claim. (*Niyogi and Gruer, A.J.Cs.*) RATANSINGH *v.* JAIRAMSINGH. **31 N.L.R. (Supp.) 191=162 I.C. 577=8 R.N. 278=A.I.R. 1936 Nag. 80.**

———**(II OF 1917) and Central Provinces Tenancy Act**—*"Land" as used in the Act, if includes abadi.*

The term 'land' is not used in its ordinary sense in the Central Provinces Land Revenue and Tenancy Acts and as used in the Act does not include house sites in the abadi. (*Stone, C.*

J. and Bose, J.) GANGAPRASAD *v.* ITWARSINGH. **1939 N.L.J. 429=A.I.R. 1939 Nag. 287.**

——Malguzar—*Rights to take water from jointly owned village tank.*

The mere fact that a person is a malguzar and that the tank is in joint ownership of the proprietary body does not give the person the right of using the water for irrigating his fields. Such right must be proved *aliunde*. (*Stone, C.J. and Clarke, J.*) RAMJI SAHEBLAL *v.* TANYABAPU. **A.I.R. 1940 Nag. 178.**

——*Revision—Long delay in filing—Change in law or ignorance as to forum—If grounds for excusing.*

A delay in filing a revision cannot be excused on the ground of either a change in the law or ignorance on the part of the party as to the proper forum for the presentation of the revision in Collector's cases. (*N. J. Roughton, F. C.*) KISAN *v.* ADKU. **1938 N.L.J. 127.**

——*Settlement record—Entry as to rent—Presumption as to—If to be preferred to jamabandi entry—Suit for rent of field jointly assessed with another—Absence of apportionment—Jurisdiction of Civil Court.*

A certain field was separately assessed for a certain rent as evidenced by the jamabandi entry but was jointly assessed with another field as evidenced by the settlement entry. A suit for recovery of arrears of rent in respect of the field was brought on the basis of the jamabandi.

Held, that the settlement entry must be presumed to be correct and should prevail over the jamabandi entry.

Held, further, that as there was no apportionment of rent between the two fields, the Civil Court was incapable of awarding a decree for arrears of rent in respect of one of the fields. (*Gruer, J.*) URKUDA BAPU *v.* SHRAWAN JAIRAM. **I.L.R.. (1937) Nag. 384=171 I.C. 733=10 R.N. 129=A.I.R. 1937 Nag. 156.**

——*Third appeal—Mutation proceedings—Concurrent findings of fact—Interference by Financial Commissioner—Grounds for.*

The Financial Commissioner would not ordinarily interfere in third appeal, especially in mutation cases, with the concurrent findings of the Courts below on questions of fact as the same can be challenged in the Civil Court. But where the lower Courts have not only erred in appreciating the evidence on the main issue in the case, but have approached the matter from an entirely wrong point of view, and when the finding of the Commissioner in second appeal is of a purely negative character, the case is one in which the Court of the Financial Commissioner will interfere. (*Greenfield, F. C.*) RUKHMABAI *v.* SADASHIVA. **20 N.L.J. 191.**

——**Ss. 2 (6) and 186**—*Lambardar—Appointment of—Person whose name is recognised by Revenue Court in mutation—Right of—Persons challenging such appointment—Duty to get decision from Civil Court on title.*

The person in whose name mutation has been sanctioned by a Revenue Court is, for the purpose of the Revenue Courts, the proprietor of the Mahal and is the only person entitled to be appointed lambardar. If any one else obtains a final decision from the Civil Court in his favour as to his superior title, he gets the right to be appointed a lambardar; but until he gets such a decision, he is not a proprietor under the Land Revenue Act and cannot be legally appointed as lambardar. (*Greenfield, F. C.*) MT. RUKHMABAI *v.* SADASHIV. **20 N.L.J. 250.**

——**Ss. 2 (8) and (12), 97 and 106 (j)** Bhogra Bhogi *land—Suit for rent of—Civil Court's jurisdiction—If barred.*

Bhogra Bhogi holder is the owner of a plot or plots of land separately assessed to land revenue in a mahal. *Bhogra Bhogi* land which is akin to *malik makbuza* plot is therefore excluded from the definition of mahal given in S. 2 (8), C. P. Land Revenue Act. Since patti is defined to mean lands held in a mahal, *malik makbuza* plot or what is the same thing as a *bhogra bhogi* plot cannot form part of a mahal and therefore cannot form a patti under S. 2 (12). A *malik makbuza* plot or a *bhogra bhogi* plot does not therefore form a patti and is not separate patti within the meaning of S. 97. The jurisdiction of the Civil Court to entertain a suit for recovery of rent of *bhogra bhogi* land is not therefore ousted under S. 106 (*j*) of the Act. (*Vivian Bose, J.*) DULARSINGH *v.* SITARAM. **I.L.R. (1938) Nag. 167=10 R.N. 134=171 I.C. 783=A.I.R. 1937 Nag. 184.**

——**S. 23 and C. P. Tenancy Act, S. 24**—*'Service', meaning of—Procedure for service of notice—Proceedings under S. 24 of Tenancy Act —Knowledge of order of ejectment—Necessity.*

The word 'Service' in S. 23 of the C. P. Land Revenue Act implies and means something more than mere tendering or delivering a copy of the notice; it means securing that the person concerned receives and gives an acknowledgment of the receipt of the copy. If this could not be done substituted service should be resorted to. It is of the essence of proceedings under S. 24, C. P. Tenancy Act, especially, that the tenant should be apprised of the order of ejectment and the date fixed for paying up the arrears to avoid it. Mere tendering of the notice cannot secure this. (*Burton, F. C.*) SARJA TUKARAM *v.* ISHWARGIR. **1939 N.L.J. 358.**

——**S. 25**—*What is condoned by.*

S. 25 of the C. P. Land Revenue Act, does not condone any irregularity in respect of service of notices, but only in respect of immaterial errors in designation of persons or description of property. (*Burton, F. C.*) SARJA TUKARAM *v.* ISHWARGIR. **1939 N.L.J. 358.**

——**S. 29**—If controlled by S. 6, proviso, C. P. Tenancy Act. *See* C. P. TENANCY ACT, S. 6, PROVISO. **20 N.L.J. 87.**

——**S. 33 (2)**—Scope—Ejectment order by Tahsildar confirmed by Sub-Divisional Magistrate—Second appeal. *See* **C. P. TENANCY ACT, S 24 (3). 20 N.L.J. 220.**

——**S. 39**—*Revision when remedy by way of appeal was open—If and when entertainable.*

S. 39 of the C. P. Land Revenue Act does not provide for an application being made for revision in lieu of an appeal or otherwise. The initiative is left with the Revenue Officer to revise an order or not. Ordinarily the powers of revision would not be used where an appeal could have been filed, but was not in fact filed, unless good reasons are given for not so doing and unless on the facts of each case the interests of legality and propriety require that the orders in question should be varied or reversed. (*Burton, F. C.*) Kislal *v.* Harnamsingh. **1939 N L.J. 559.**

——**S. 40**—*Rejection of application for review—If appealable.*

An appellate Court has no jurisdiction to entertain an appeal against an order rejecting an application for review. (*A. L. Binney, F. C.*) Dajiba Jagannath Joshi *v.* Narayan Govindra Shahadani. **1938 N.L.J. 472.**

——**S. 40**—*Review—Grounds—Importance of question involved.*

No principles are laid down in S. 40 of the C. P. Land Revenue Act to regulate in what cases review may be allowed. The practice seems to suggest that the test in such cases is the importance of the question involved. (*Burton, F. C.*) Kalkaprasad *v.* Thakur Budhasing. **1939 N. L.J. 293.**

——**S. 45**—*Khasra and village administration paper—Contents of—Conflict between—Preference.*

The village administration paper is expressly intended to record irrigation rights; the purpose of the khasra however is merely to record the conditions of the cultivation of the fields and hence the entry of irrigation right in the remarks column of the khasra must be treated as incidental. Greater value should therefore attach to the entries in the village adminstration paper if there is a conflict between the two documents. (*Stone, C.J. and Clarke J.*) Ramji Saheblal *v.* Tanyabapu. **A.I.R. 1940 Nag. 178.**

——**S. 45**—*Record-of-rights—What is included in.*

Under S. 45 the record-of-rights includes both the khasra and the village administration paper. Khasra falls under S. 45 (2) (*b*) and the village administration paper under S. 45 (2) (*c*). (*Stone, C.J. and Clarke, J.*) Ramji Saheblal *v.* Tanyabapu. **A I.R. 1940 Nag 178.**

——**Ss. 47 and 49**—*Enquiry under—Mutation—Dispute between nephew of deceased proprietor and daughter of deceased—Possession with nephew—If material.*

In the case of a disputed succession to a deceased proprietor, possession of a competing candidate carries little or no weight; especially where the fight is unequal, *e.g.*, as between the nephew of the deceased and the daughter of the deceased, possession of the nephew can carry no weight. (*Greenfield, F.C.*) Rukhmabai *v.* Sadashiva. **20 N.L.J. 191.**

——**Ss. 47 and 49**—*Scheduled estate—Pandharia Zemindari—Incidents of—Succession to—Rule—If impartible and governed by Hindu Law—Burden of proof—Wajib-ul-arz.*

The Pandharia zemindari in Bilaspur District is an estate, scheduled under S. 2 (3) of the C. P. Land Revenue Act and is not an ordinary mahal or holding. This being a privileged tenure held on special terms, its conditions and the rule of succession are regulated by the conditions of the wajib-ul-arz of the zemindari. In the face of a clear provision in the wajib-ul-arz laying down that the estate devolves on the widow in default of a direct heir for her lifetime, and on her demise to the nearest male heir, it must be held that the widow of the late zemindar is entitled to the zemindari on his death in preference to the brother's sons of the late zemindar. Mutation cannot therefore be effected in favour of the nephews of the zemindar. If a person alleges that the estate is a Raj Goud family governed by the Hindu Law that it is impartible and descends by the rule of primogeniture and not by any special rules of succession, it is for him to establish the same. In the absence of such proof, the Hindu Law affords no guidance to the succession and mutation. (*G. P. Burton, R. M.*) Dharamraj Singh *v.* Mankuwari Devi. **20 N.L.J. 47.**

——**S. 47 (1)**—*Scope—Mining lease—Expiry of—Order restoring prior occupancy tenant to possession—Appeal—Competency.*

An order by the Deputy Commissioner directing that an occupancy tenant over whose land mining rights had been assigned to another, should be restored to possession on the expiry of the mining lease, is only a direction made in his executive capacity for setting right an irregularity in the preparation of the annual papers referred to in S. 47 (1) of the C.P. Land Revenue Act, and is not appealable. (*E. Raghavendra Rao, H. M.*) Forrester *v.* Cowasji. **19 N.L.J. 203.**

——**Ss. 47 (4) and 49 (1)**—*Mutation proceedings started on report of Kanungo--Legality—Enquiry into possession—Necessity for.*

S. 47 (4) of the C. P. Land Revenue Act requires that mutation proceedings must be started on the report of the person lawfully entering into possession. Proceedings started on the report of a Kanungo are not legal and valid. And when both parties claim to be in possession, an enquiry ought to be made into the fact of legal possession, and a finding arrived at on the point as required by S. 49 (1). The omission to do so vitiates the proceedings. (*Raghavendra Rao, H.M.*) Hiralal *v.* Laxmansingh. **19 N.L.J. 49.**

——**Ss 47 (4) and 49 (3)**—*Mutation—Right to—Party failing to appear and lay claim in spite of notice—Right of to be recorded as proprietor.*

The acquisition of proprietary rights, and the recognition by Government, of a person as a proprietor involve the assumption of liabilities and responsibilities. And when a person, despite full notice of the proceedings, fails to lay claim to those rights and thereby to express willingness to accept those responsibilities and liabilities, it is not possible for a revenue officer in mutation proceedings to direct that he or she shall assume them The party so failing to appear and lay claim must be left out of account. (*Greenfield, F. C.*) Rukhmabai *v.* Sadashiva. **20 N.L.J. 191.**

——**S. 49 (1)**—*Duty of Revenue Court under—Possession—Meaning and nature of.*

Where an applicant for mutation before a Revenue Court has obtained lawful possession and title against the recorded proprietor, he is entitled to mutation, and the Revenue Court is bound under S. 49 (1) of the Land Revenue Act to record mutation in his name. If another party ousts the applicant subsequently from lawful possession illegally in execution of a decree by which the applicant is not bound, such ouster cannot be recognised by the Revenue Court. (*Greenfield, F.C.*) Gopidas *v.* Seth Mishrilal. **1938 N.L.J. 45.**

——S. 49 (3)—*Order of Revenue Court under—Effect of—If can be nullified by temporary injunction from Civil Court.*

A temporary injunction issued by a Civil Court can have no operation against the order of a Revenue Court passed under S. 49 (3) of the C. P. Land Revenue Act. Under S. 49 (4), the Revenue Courts must recognise a final decision of a Civil Court on a question of title; but until such final decision is recorded, the authority of the Revenue Courts under the other sub-sections of S. 49 prevails. (*Greenfield, F. C.*) MT. RUKHMABAI *v.* SADASHIV. **20 N.L.J. 250.**

——S. 68 (3)—Khudkasht *land subject to mortgage—If can be recorded* sir.

Though *khudkasht* land is subject to a mortgage it can be recorded as *sir* land if it otherwise satisfies the conditions laid down in sub-S. (3) of S. 68 of the Central Provinces Land Revenue Act. (*Burton, F. C.*) BALMUKUND *v.* DAULAT. **1939 N.L.J. 499.**

——S. 70—*Scope.*

S. 70 only deals with what the khasra is to contain as far as tenancy lands are concerned. It does not touch what it is to contain in the case of home-farm lands. (*Stone, C. J. and Clarke, J.*) RAMJI SAHEBLAL *v.* TANYABAPU. **A.I.R. 1940 Nag. 178.**

——S. 71—*Abadi—Licensee failing to build house—Forfeiture—Revocation—Easements Act, S.* 62 (*h*).

S. 71 of the C. P. Land Revenue Act makes it clear that the abadi of a village is reserved for the residence of the inhabitants or for purposes ancillary thereto. A person who has a licence to occupy the abadi site must use it for the purpose of residence, that is, he must erect a building on it for his dwelling. His failure to do so would be treated as an infringement of the terms of the licence and bring about forfeiture of the licence. Where the site stood without a house upon it for such a long period as 30 years,

Held, that it could well be regarded as good evidence to prove that licensee had no intention of ever building house on it and hence licence could be revoked. S. 62 (*h*) of the Easements Act is applicable to abadi sites as much as to any other class of land. (*Niyogi, J.*) CHHAGANLALSA *v.* NATHUSING. **I.L.R. (1938) Nag. 326=176 I. C. 936=11 R.N. 92=A.I.R. 1937 Nag. 338.**

——Ss. 73 and 80—*Decision of Settlement Officer—If final.*

A Settlement Officer has under the C. P. Land Revenue Act power to allow a reduction or exemption from rent and his decision is binding on the landlord during the currency of the settlement. (*Pollock, J.*) KAMLUSAO *v.* KISAN. **164 I.C. 941=9 R.N. 46=A.I.R. 1936 Nag. 221.**

——S. 75 (1)—Muafi *recorded as* "Ba waj hissedari wa rishtedari"—*Subsequent settlement recording same as to continue in perpetuity "so long as land remains in the family and is not alienated"—Usufructuary mortgage by* muafidar *—Effect of—If suspends* muafi.

A *muafi* grant was stated to be "*Ba waje hissedari wa rishtedari*" at a previous settlement, *i.e.*, that the land revenue was foregone because the land was taken by a member of the proprietor's family in lieu of a proprietary share. At the next settlement the settlement officer recorded that it should continue in perpetuity "so long as the land remains in their own family and is not alienated." The *muafidar* transferred the land to a stranger by way of a usufructuary mortgage.

Held, that the land being no longer in the possession of the family must be held to have been alienated, and that consequently the *muafi* right should be regarded as having ceased to exist so long as the mortgagee remained in possession, and the proprietor would be entitled to collect the revenue assessed upon the land.

Held, further, that on the owner resuming possession by redemption, the *muafi* would revive. (*Greenfield, F. C.*) SETH MEGHRAJ *v.* KASHIRAM. **1938 N.L.J. 52.**

——S. 75 (3)—*Reference under by Civil Court—Revenue Courts' power to question propriety of.*

Under S. 75 (3) of the C. P. Land Revenue Act, when a reference is made by the Civil Court, the Revenue Courts must act upon it. It is not open to them to say that the reference is improper and that the point upon which the reference has been made is one to be decided by the Civil Court itself. (*Greenfield, F. C.*) SETH MEGHRAJ *v.* KASHIRAM. **1938 N.L.J. 52.**

——S. 76—*Cesses—Patwari's remuneration.*

The remuneration that is payable to the patwari or a lambardar does not fall under the head of cesses. (*Niyogi, J.*) SHRINIVAS GOVIND *v.* SADASHEO SAKHARAM. **171 I.C. 658=10 R.N. 127=20 N.L.J. 173=A.I.R. 1937 Nag. 211.**

——S. 80—*Applicability.*

S. 80 of the Central Provinces Land Revenue Act deals with settlement decisions only and does not apply to year to year khasra entries made by the patwari. (*Gruer, J.*) BABA RAMCHANDRA KOMTI *v.* KONDOO JAGNA WADHAI. **1939 N.L.J. 496=A.I.R. 1940 Nag. 7.**

——S. 80—*Burden of proof—Suit to challenge settlement record after one year—Plea that no inquiry was held—Onus.*

The object of nazul proceedings is, no doubt, that disputed matters should be determined then and there, and unless the decisions arrived at are promptly questioned, they must stand good. The settlement entries are binding if not set aside within one year under Art. 14, Limitation Act, read with S. 80, C. P. Land Revenue Act. Where a parcha is given to a person as *malik makbuza* after settlement, and the entry regarding the area is challenged after more than one year from the offering of settlement record to proprietor, the burden of proof lies upon such person who asserts that no inquiry was made (*Gruer, J.*) SECRETARY OF STATE *v.* HABIBULLA. **I.L.R. (1938) Nag. 377=176 I.C. 346=11 R.N. 48=A.I.R. 1937 Nag. 407.**

——S. 80—*Entry of Settlement Officer—Presumption of due inquiry—Finality.*

It is the duty of the Settlement Officer under S. 70 of the C. P. Land Revenue Act of 1917 to ascertain and record the status and rights of all persons occupying land as tenants; and under S. 80 of the Act, it must be presumed in the absence of evidence to the contrary that the Settlement Officer did so, and any order or entry under S. 70 is conclusive under S. 80. (*Pollock, J.*) KANCHEDILAL *v.* ZABBARSHAH. **166 I.C. 686=9 R.N. 141=19 N.L.J. 123=A.I.R. 1936 Nag. 171.**

——S. 80—*Right of tenant to collect and sell tendu leaves*—Wajib-ul-arz—*Entry restricting right of tenant—No usage or contract to that effect proved—Right of tenant to sue for declaration of right and for amendment of* wajib-ul-arz—*C. P. Tenancy Act, S.* 95.

The ownership in trees growing on land is with the owner of the land, and enjoyment of those trees, whether from their shade or their produce, is with him who, being entitled to present possession of the land, has the right to enjoy the land. These rights are not cut down by S. 95, C. P. Tenancy Act. The section does not purport to deal with the position which arises when the trees are of a kind other than those mentioned therein; nor does it purport to create statutory easements that will permit the owner to get at trees in the possession of the tenant. It is designed to add to, rather than subtract from the tenant's rights and gives statutory expression to the tenant's rights in fruit trees. It also creates a statutory right in the tenant to fell and take certain timber and clear shrub. This right cannot be given up even by contract. If neither usage nor contract to the contrary be proved, the tenant has the produce of the tree, whatever the tree and whatever the produce growing on the land of which he has the tenancy. A tenant has therefore the right to pluck and collect the leaves of tendu trees in his holding and sell them to anybody he chooses, and the zemindar has no exclusive right or monopoly to purchase them. A tenant is certainly harmed by an entry in the village administration report unless that entry gives him rights greater than those that arise under the general law. So far as tendu leaves are concerned, unless the landlord has got rights by usage or contract, the right to them would be in the tenant, though the trees themselves belong to the zemindar. When there is no usage or contract limiting the tenant s rights, the zamindar can have no right to the produce. An entry in the *Wajib-ul-arz* of the village to the effect that the tendu leaves cannot be sold to anybody else other than the malguzar or the kadar or zemindar cannot in such a case be supported and is wrong. The tenant is consequently entitled to sue under S. 80 of the C. P. Land Revenue Act for a declaration of his right and for amendment of the *Wajib-ul-arz.* (*Stone, C.J. and Niyogi. J.*) BAHORAN *v.* LAL BHUWANPAL SINGH. **20 N.L.J. 131.**

——S. 80—*Scope—If retrospective.*

S. 80, C. P. Land Revenue Act of 1917, which requires the defeated party to sue within one year, cannot have retrospective operation. (*Niyogi and Subhedar, A.J.Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N L.R. (Supp) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

——S. 97—*Bhogra bhogi*—If separate patti. *See* C. P. LAND REVENUE ACT, SS. 2 (8) AND (12), 97 AND 106 (*j*). **A.I.R. 1937 Nag. 184.**

——S. 106 (j)—Scope—*Bhogra bhogi* land—Suit for rent of—Jurisdiction of Civil Court—If ousted. *See* C. P. LAND REVENUE ACT, SS. 2 (8) AND (12), 97 AND 106 (*i*). **A.I.R. 1937 Nag. 184.**

——S. 109—*Succession to tenure of protected thekadar—Principle governing.*

It is laid down in S. 109 of the Central Provinces Land Revenue Act, that the succession to the

tenure of a protected thekadar shall be regulated by the personal law of the deceased thekadar subject to certain conditions which to some extent modify the personal law applicable to Hindus. Hence the law applicable is the ordinary law of Hindu succession as modified in minor details and irrespective of any idea of notional jointness which might arise from the principle that the tenure is impartible. (*Grille, J.*) NARHARI *v.* MST. MAHARANI. **187 I.C. 750=12 R.N. 299=1939 N.L.J. 605=A.I.R. 1940 Nag. 102.**

——S. 112—*Scope of—Applicability to forfeiture of protected status.*

S. 112 of the Central Provinces Land Revenue Act is not applicable to a case where protected status is to be forfeited. The procedure for the latter case is provided in S. 111 and obviously it was neither intended nor provided that in a case in which the Commissioner has sanctioned forfeiture, an application under S. 112 should operate to forestall the formal declaration of forfeiture, S. 112 only applies to the case of a thekadar who is deprived of his status on the application of an entitled member of the family and not upon declaration of forfeiture. (*Burton, F.C.*) HAIDAR ALI *v.* KUVARLAL SINGH. **1940 N. L.J. 30.**

——Ss. 125 and 128—*Sale for arrears of land revenue—Absence of notice to mortgagee not in possession—Sale, if invalid—'Assigns' in S.* 125, *meaning of.*

A sale for non-payment of arrears of land revenue is not bad for failure to conform to the requirements of S. 128 of the C. P. Land Revenue Act, simply because a notice of demand had not been served on the mortgagee of the village as a defaulter. S. 125 in stating who are defaulters has included the 'assigns' of a person with whom the settlement was made, but by an explanation, has made it plain that 'assigns' includes a mortgagee in possession only. (*Pollock and Niyogi, JJ.*) SURAJDEEN *v.* ISHWARI PRASAD. **I.L.R. (1938) Nag. 550=1938 N.L.J. 342=181 I.C. 478=11 R.N. 462=A.I.R. 1938 Nag. 554.**

——Ss. 128 and 146—*Proclamation of sale not in accordance with Act—Effect.*

Where the proclamation for sale was issued as for a sale under C. P. Code, it is not in any way a compliance with R. 17 of the rules framed under S. 128, C. P. Land Revenue Act. It is not an informality curable under S. 25 of the Act. Where there is no proper proclamation according to the Land Revenue Act, a sale held under such a proclamation is not a sale which could be deemed to be held or which could be confirmed under the Land Revenue Act. (*Burton, F.C.*) BORDA CO-OPERATIVE SOCIETY *v.* YADAO. **1939 N.L.J. 405.**

——S. 138—*Sale proclamation in terms of—Sale, if free from encumbrances—Presumption.*

Under S. 138 of the Land Revenue Act, sale free of encumbrances is the rule and sale subject to encumbrances is an exception. When a Deputy Commissioner, signs a proclamation in terms of S. 138, it is unnecessary to pass an express order that the sale is to be free of encumbrances. (*Pollock and Niyogi, JJ.*) SURAJDEEN *v.* ISHWARI PRASAD. **I.L.R. (1938) Nag. 550=181 I.C. 478=11 R.N. 462=1938 N.L.J. 342=A.I.R. 1938 Nag. 554.**

——— S. 138—*Scope—Order for sale by Deputy Commissioner free of incumbrances—Subsequent order by Sub-Divisional Officer for sale subject to incumbrances— Legality—Sale—If void—Subsequent confirmation of sale by Deputy Commissioner—If validates sale.*

When the Deputy Commissioner orders the sale of a village for arrears of revenue free of incumbrances, a subsequent order by the Sub-Divisional Officer directing that the village should be sold subject to incumbrances is incompetent and without jurisdiction under S. 138 of the C. P. Land Revenue Act. It is an illegality which vitiates the sale and renders the sale void. The fact that Deputy Commissioner approves of and confirms the sale does not cure the illegality. (*Roughton.*) BHAYYALAL *v.* GANGAPRASAD. **19 N.L.J. 299.**

——— **Ss. 144 and 145**—*Sale set aside by S.D.O. but upheld by D.C.—Deposit by defaulter—Time.*

Though an application of S. 144 of the Land Revenue Act is made dependent upon an application not being filed under S. 145 of the Act, one object underlying the two sections is, that the defaulter shall have at least 15 days, after the payment of the purchase-money by the purchaser, in which to make his deposit, in order to set aside the sale. So where a sale is set aside by a S.D O. but upheld by D.C., and the price is paid by the purchaser thereafter, the defaulter is within time if he deposits his amount within 15 days of payment by the purchaser. (*Burton, F.C.*) KALKAPRASAD *v.* THAKUR BUDHASING. **1939 N.L.J. 293.**

——— **S. 144 (1)**—*Scope—Balance of purchase money—Non-payment within 15 days—Effect—Sale—If void—Absence of prejudice.*

The non-deposit by the purchaser at a sale in arrears of taccavi of the balance of purchase-money within 15 days as required by S. 144 (1) of the C. P. Land Revenue Act is a mere irregularity, and does not, in the absence of prejudice to the tenant or to the heirs of a deceased tenant, render the sale void. HARISHANKAR *v.* RAMLAL. **19 N.L.J. 269.**

——— **S. 144 (1)**—*Scope—Non-compliance—Failure to deposit balance purchase money within 15 days—If renders sale void—Absence of prejudice to tenant—Effect.*

The mere fact that the purchaser of a tenant's holding fails to deposit the balance of the purchase-money within the period of 15 days as required by S. 144 of the C.P. Land Revenue Act does not make the sale void, when no prejudice is thereby caused to the tenant. (*Bose, J.*) RANI SONA BAHU *v.* SOBHAGSINGH **167 I C. 848=9 R. N. 226=38 Cr. L.J. 467=19 N.L.J. 264.**

——— S. 145—*Construction—"Person whose immovable property has been sold"—Charge-holder—Right to apply under.*

A charge-holder cannot be treated in respect of the property charged as a "person whose immovable property has been sold" within the meaning of S. 145 of the C. P. Land Revenue Act of 1917 prior to its amendment in 1936, and has therefore no *locus standi* to apply under the section. (*Burton R.M.*) SETH GHASIRAM *v.* RAMLAL. **20 N.L.J. 97.**

——— S. 151—*Order by Civil Court allowing pre-emption — No objection raised — Subsequent objection before Governor-in-Council—Maintainability.*

Where an order granting pre-emption has been passed by the Civil Court and has been given effect to by the Collector, a party who has failed to appeal and object in the Civil Court cannot be allowed to raise objections in that behalf afterwards in the Revenue Court. The Governor-in-Council has no authority to exercise revisional powers in respect of orders of the Civil Court allowing pre-emption. (*Gordon, R.M.*) MAHADEO *v.* NARAYAN. **19 N.L.J. 76.**

——— **S. 151**—*Pre-emption by decree-holder—Deposit of purchase-money—Necessity—Right to set-off—Failure to deposit—Irregularity—Revision.*

Under S. 151, Land Revenue Act, a decree-holder pre-empting the property and thereby becoming the purchaser need not deposit the purchase-money before the Collector but is entitled to set-off his claim in the case against the price money to be deposited. The failure to deposit would at the most amount to an irregularity, but when such irregularity causes no material loss, the Governor-in Council will not interfere in revision. (*Gordon, R.M.*) MAHADEO *v.* NARAYAN. **19 N.L.J 76.**

——— **S. 152**—*Applicability—Jurisdiction of Civil Court—Suit by lambardar for recovery of amount of revenue paid by him on behalf of co-sharers as zabti bhogra—Jurisdiction of Civil Court—Contract Act, S. 69.*

Clause (10), S. 152, deals with claims arising from actual collections or from the processes to enforce the realization of arrears of revenue or arrears of sums realizable as revenue To come within this clause, the matter complained of and which gives rise to the suit must actually be connected with or arise out of an actual collection or some process for the recovery of arrears of revenue. The cause of action must be intimately connected with the collection or with the process for the recovery of revenue. Where a lambardar pays the whole revenue and then sues the co-sharers for amounts paid by him on their behalf as zabti bhogra, his claim is not one connected with or arising out of actual collection or anything connected with collection, but rather from payment made by him to co-sharers use; and in view of S. 33 which presupposes that Civil Courts have jurisdiction to try suits by lambardars for arrears of revenue payable through them by the proprietors whom they represent. S. 152 is not applicable. Such a suit falls under S. 69, Contract Act and can be entertained by Civil Courts. (*Harries, C.J. and Wort, J.*) HARIHAR DORA *v.* UPENDRA PATI. **6 B R. 218=185 I.C. 602=12 R. P. 384=A.I.R. 1939 Pat. 497.**

——— S. 157—*Failure of co-sharer lambardar to pay Sadar lambardar—Payment by him to Government—Recovery under S. 157—Remedy of patti lambardar.*

Where a patti lambardar who held her share free from assessment, failed to collect and pay the land revenue to the Sadar lambardar, and the sadar lambardar paid it and on application to the Tahsildar under S. 157, recovered the amount from the patti lambardar, her remedy is not by a suit against the Sadar lambardar for it would not be maintainable; but to sue the other co-sharers for their share of the land revenue or to apply to the Tahsildar to recover it for her or to sue the sadar lambardar for her share of village profits. (*Pollock, J.*) THAKURSINGH *v.* MST. PARWATIBAI. **179 I.C. 12=11 R.N. 278=1938 N.L.J. 292=A.I.R. 1938 Nag. 490.**

——**S. 157**—*Payment by Sadar lambardar—Sale of co-sharer's land—If free from encumbrances—Nature of right conveyed.*

If a Sadar lambardar fails to get in and pay over the land revenue to the Government, he is liable to have his land sold. But he is given a right over against the co-sharer whose revenue is in arrear. He may sell that co-sharer's land. Inasmuch as he had paid to Goverments, the first charge given by the statute to the Government passes to him. But it cannot wipe away a mortgagee's right. The Sadar lambardar has priority over the mortgagee standing in the Government shoes to the extent of the land revenue due in respect of the mortgagor's land, paid by him. Hence he can sell the land giving to the purchaser a like priority unless the mortgagee redeems the charge by payment. (*Stone, C.J. and Bose, J.*) ZALLIRAM BATTOLAL *v.* MANGAL SINGH. **185 I.C. 780=12 R.N. 173=1939 N.L.J. 477=A.I.R. 1939 Nag. 302.**

——**S. 169 (1) (a). (b) and (c)**—*Scope—Sub-Divisional Officer—Order rejecting objections as too late—Effect of.*

There was nothing in the terms of an order of a Sub-Divisional Officer to show that he declined to entertain objections until the question had been determined by the Civil Court; all that he said was that the plaintiffs had failed to avail themselves of the opportunity of putting forward their objections at the time when they were called for by proclamation and that the objection was made so late that it could not be entertained In passing such order the Sub-Divisional Officer added certain observations and suggested that the remedy of the objectors lay against the vendors in the Civil Court.

Held, the order did not fall under S. 169 (1) (*a*), (*b*) or (*c*). (*Niyogi, J.*) UMRAO ZUNGAR *v* SHIWA LAXMAN. **I.L.R. (1937) Nag. 476=170 I.C. 601=10 R.N. 68=A.I.R. 1937 Nag. 177.**

——**Ss. 169 (1) (b) and 220 (n)**—*Order to file civil suit within six months—Suit filed beyond that period—If entertainable.*

Where in an order under S. 169 (1) (*b*) of the C. P. Land Revenue Act a party is asked to file a civil suit within six months but he fails to do so and files it beyond that period the Civil Court cannot entertain the suit, it being barred under S. 220 (*n*). Such party has to face the consequences under S. 169 (2) (*b*) and take his chance before Revenue Court. (*Stone, C.J. and Puranik, J.*) MADHORAO DINKARRAO *v.* LAXMIBAI. **I.L.R. (1940) Nag. 110=176 I.C. 952=11 R.N. 95=A.I.R. 1938 Nag. 241.**

——**S. 169 (1) (b)**—*Partition—Party asked to file civil suit within six months—Case kept pending—Order sent to Deputy Commissioner for information—Order of Deputy Commissioner asking case to be filed—Which is the operative order.*

In a partition proceeding before a competent Sub-Divisional Officer, he passed an order under S. 169 (1) (*b*) as follows: "*A* is asked to establish his rights in Civil Court by filing suits within six months from this date. Till then the case be kept pending. Record forwarded to Dupty Commissioner for information." Deputy Commissioner endorsed on this as follows: "Case need not be kept pending so long. It be filed. Parties can reopen it in due course." Question was if Deputy Commissioner's order was final or that of the Sub-Divisional Officer's and did the superior officer's endorsement convert the Sub-Divisional Officer's order from S. 169 (1) (*b*) to S. 169 (1) (*a*).

Held, that the order of the Sub-Divisional Officer under S. 169 (1) (*b*) was final and that the Deputy Commissioner to whom the order was sent for information had no right to vary it in any way so as to bring it under S. 169 (1) (*a*), as the order was sent to him not by way of appeal or revision but in his administrative capacity only for information and the endorsement by Deputy Commissioner was his administrative act. (*Stone, C.J, and Puranik, J.*) MADHORAO DINKARRAO *v.* LAXMIBAI. **I.L.R. (1940) Nag. 110=176 I.C. 952=11 R.N. 95=A.I.R. 1938 Nag. 241.**

——**S. 187**—*Lambadari Rules—Rr.* 11 (1) (b) (*ii*) *and* 11 (1) (b) (*iii*)—*Scope of.*

The qualification for lambardarship laid down in Rr. 11 (1) (*b*) (ii) and 11 (1) (*b*) (iii) of the Lambardari Rules are to be only a guide to the Revenue Officers in making the appointment and the rules should not be read as attaching more weight to one consideration than to another. The decision has to be made after taking into account all the considerations. (*Roughton, F.C.*) GHANARAM *v.* DASRATHRAO. **1938 N.L.J. 365.**

——**Ss. 187 and 189**—*Mahal imperfectly partitioned—Lambardar—Effect on status of.*

Per *Grille, J.C., agreeing with Gruer, A.J.C., Subhedar, A.J.C.*, contra.—On an imperfect partition of mahal, a lambardar, does not cease automatically to exercise his powers when his proprietary interest in a patti of that mahal is lost. The mahal continues to be the mahal and does not lose its character as such on an imperfect partition into pattis, and lambardar of a mahal continues to be the lambardar until he has been removed. A lambardar is appointed by statute and is only removable by statute.

Per *Subhedar, A.J.C.*—A person who has been appointed lambardar of a mahal ceases to be a lambardar when the mahal is imperfectly partitioned. The legislature obviously contemplated that while the appointment of a lambardar must be expressly made for each mahal or patti, it left the formal removal of a lambardar so appointed absolutely in the discretion of the appointing authority and did not cast upon it the duty of formally removing him whenever, in the eye of the law, he ceases to function as such. (*Pollock, A.J.C., afterwards Grille, J C. on difference between Subhedar and Gruer, A J.Cs.*) KESHO JAGANNATH *v.* RAOJI GOPAL. **31 N.L.R. (Supp.) 132=161 I.C. 806=8 R.N. 240=A.I.R. 1936 Nag. 44.**

——**Ss. 187 and 188**—*Scope of—Respective duties of lambardar and sadar lambardar.*

S. 187 of the C P. Land Revenue Act lays a primary responsibility on the sadar lambardar to collect the land revenue from the lambardars and pay it to Government, though his ultimate responsibility may be no more and no less than that of other co-sharers who are all jointly and severally liable for the entire land revenue of the village. Under S. 188 (1) it is the duty of every lambardar to collect and pay to the sadar lambardar so much of the land revenue as may be payable through him. (*Pollock, J.*) THAKURSINGH *v.* MST. PARWATIBAI. **179 I.C. 12=11 R.N. 278 =1938 N.L.J. 292=A.I.R. 1938 Nag. 490.**

——**S. 187**—*Temporary lambardar—If can be appointed.*

There is no provision in the Central Provinces Land Revenue Act enabling the appointment of a temporary lambardar pending mutation proceedings. (*Burton, F.C.*) GOPINATH SUNDERLAL *v.* CHUNILAL SUNDERLAL. **1939 N.L.J. 290.**

——**S. 187 (3)**—'Duties', meaning of. *See* C. P. LAND REVENUE ACT, Ss. 189, 188 AND 187 (3). **1940 N.L.J. 199.**

——**S. 188 (2) (c)**—*Lambardar—Right to commission—When arises.*

The fact that the lambardar must render an account within six months does not affect the date when the cause of action arises for a suit for commission by the lambardar. The lambardar becomes entitled to his commission when he has paid the land revenue and the fact that he is bound to render accounts within six months does not prevent him from suing for the recovery of that commission before the lapse of six months. (*Pollock, A.J.C., afterwards Grille, J.C., on difference between Subhedar and Gruer, A.J.Cs.*) KESHO JAGANNATH *v.* RAOJI GOPAL. **31 N.L.R. (Supp.) 132=161 I.C. 806=8 R.N. 240=A.I.R. 1936 Nag. 44.**

——**S. 188 (2) (c) and (d)**—*Lambardar—Suit against co-sharer in possession if* sir *and* khudkasht *land for rental assessment—Maintainability.*

S. 188 (2) of the Land Revenue Act lays on the lambardar the duty of collecting the village profits; and he can, for the purpose of paying off the land revenue, which it is his duty to pay, ask the co-sharers in possession of *sir* and *khudkasht* land to contribute the rental assessment. Whether or not, it is reasonable on his part to demand payment from the co-sharers of this assessment before he furnishes them accounts, he has the right under S. 188 (2) (*c*) to collect the village profits and under S. 188 (2) (*d*) he is empowered to institute a suit to enforce this right. (*Pollock, J.*) RAOJI *v.* MADHORAO. **20 N.L.J 77=171 I.C. 956 =10 R.N. 147 (2)=A.I.R. 1937 Nag. 201.**

——**S. 188 (2) (c)**—*"Proprietor" meaning of.*

The word 'proprietor' in S. 188 (2) (*c*) is not restricted to a recorded proprietor only. The omission of the word 'recorded' must be deemed to have been made deliberately and with a purpose. The purpose appears to be to leave the door open to the unrecorded proprietor to sue in a civil Court which alone has the jurisdiction to try suits for village profits. (*Niyogi and Subhedar, A.J. Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N.L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

——**Ss. 188 (2) and 203 (3)**—*Scope—Transfer of site by tenant to co-sharer—Validity—Implied consent of lambardar—Sufficiency.*

A co-sharer has no right to choose any site in the abadi he wishes unless he has obtained the consent of the lambardar to that choice. But the consent of the lambardar need not be express. It can be implied from the fact that the lambardar is present at the time of selection of a site and does not object to it. A tenant can therefore validly transfer to a co-sharer a site in the abadi, if he selects it, with the consent, express or implied, of the lambardar. Such a transfer is not absolutely prohibited by S. 203 (3), but is permissible under S. 203 (3) read with S. 188 (2) of the C. P. Land Revenue Act. (*Stone, C.J.*) GULABSING *v.* CHHATARSING. **I.L.R. (1937) Nag. 58= 166 I.C. 563=9 R N. 125=19 N.L.J. 211=A.I.R. 1936 Nag. 283.**

——**S. 189**—*Relation of lambardar and co-sharer—Nature of—Principal and agent.*

The jural relation between a lambardar and the co-sharers is that of agent and principal. (*Niyogi and Subhedar, A. J. Cs.*) YADGAR HUSSAIN *v.* MUHAMMAD IBRAHIM RAZA. **31 N.L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag. 71.**

——**Ss. 189, 188 and 187 (3)**—*Lambardar gumasta—Failure to discharge duties and exercise powers—If entails removal of lambardar—'Duties' in S.187 (3), meaning of—Distinction between powers and duties.*

The meaning of the two Ss. 189 and 188 of the C. P. Land Revenue Act taken together, is that the gumashta is responsible for the duties of the officer of the lambardar and he may be dismissed for failure to discharge them and not the lambardar or lambardarini in whose place he has been appointed to perform the duties. The word 'duties' in S. 187 (3) of the Act must be taken to mean the whole of the functions which lambardar has to perform whether it be the duty specified in S. 188 (1) or the exercise of such of the powers which the lambardar has to undertake under sub-S. (2) as the gumashta can exercise. The distinction between 'duties' and 'powers' is marked more by the side headings than by the actual contents of the two sub-sections. It follows, that the lambardar is required to perform the function of collecting village profits and rendering an account to the proprietor and if there be a gumashta lambardar, it is the latter's duty. As it is the gumashta's own duty, the lambarder himself cannot be held responsible for his gumashta's failure to discharge it. (*Burton, F.C.*) MUNGABAI *v.* REOTIBAI. **1940 N.L.J. 199.**

——**Ss. 190 and 197**—*Mukaddam gumashta—Remuneration of—When recoverable as arrear of land revenue.*

Only the remuneration of such mukaddam gumashtas as are appointed by the Revenue Officer in accordance with the provisions of S. 190 (4) of the Central Provinces Land Revenue Act is recoverable as an arrear of land revenue in the terms of S. 197 of the Act and not that of a gumashta appointed by the mukaddam himself. (*Burton, F.C.*) TRILOKINATH *v.* KHUSHALRAO. **1939 N.L.J. 167.**

——**Ss. 190, 192**—*Scope—Mukaddam—Right to apply for fixing remuneration.*

There is nothing in the C. P. Land Revenue Act to suggest that the person appointed as mukaddam should move the Deputy Commissioner for his remuneration to be fixed. The duty of fixing remuneration under S. 192, C. P. Land Revenue Act, is as obligatory as the duty of appointing a mukaddam. If so, any delay on the part of the Deputy Commissioner in fixing the remuneration cannot prejudice the person who is entitled to receive it. And the Deputy Commissioner's order fixing the remuneration must relate to the whole period of service. (*Niyogi, J.*) SHANKAR RAO SADASHEO *v.* MADHO NARAYAN RAO. **173 I.C. 7=10 R.N. 283=A.I.R. 1937 Nag. 411.**

——**S. 192**—*Lambardar or mukkaddam—Fixing of remuneration under S. 192—Right to claim for period anterior to date of such fixing.*

In a suit for village profits, a lambardar or mukaddam is entitled to claim whether as plaintiff or as defendant, remuneration for his services for such years prior to the year in which his remuneration has been fixed by the Deputy Commissioner under the provisions of S 192 of the Land Revenue Act as are within the period of limitation. (*Stone, C.J. and Bose, J.*) MAHADEO *v.* JANARDAN. **I.L.R. 1938 Nag. 509=181 I.C. 5=11 R.N. 420=1938 N.L.J. 448=A.I.R. 1939 Nag. 75.**

——**S. 196**—*Rules framed under—R. 3—'Relative'—Meaning of.*

The word 'relative' occurring in R. 3 of the rules framed under S. 196 of the C. P. Land Revenue Act for the appointment of village watchman as interpreted in the explanation is used in its most general sense to cover any relationship whether traceable through the male or the female side and includes even relations by marriage. (*Burton, F.C.*) TIKWADYA ANDHARU *v.* LAWHA BUAHA. **1940 N.L.J. 109.**

——**S. 197**—Remuneration of mukaddam gumashta—When recoverable as arrear of land renenue. *See* C. P. LAND REVENUE ACT, Ss. 190 AND 197. **1939 N.L.J. 167.**

——**Ss. 202 and 220**—*Bar of jurisdiction of Civil Court—Scope and extent.*

S. 220 of the C. P. Land Revenue Act bars a Civil Court from entertaining any suit with reference to any question connected with or arising out of the powers under S. 202. Where a plaintiff seeks to obtain damages for the breaches of certain conditions in a contract with reference to the lease of his forest, it is not a matter which the Revenue authority is empowered to decide under S. 202. The mere fact that the same set of facts give rise to a civil action for damages as well as to revenue proceedings under S. 202 does not confer jurisdiction upon the Revenue authorities to usurp the functions of Civil Courts. (*Bose, J.*) JAMESHED *v.* KUNJILAL. **181 I. C. 177=11 R.N. 444=1938 N.L.J. 392=A.I.R. 1938 Nag. 530.**

——**S. 202**—*Rules framed under—R. 3 (2), proviso—Notice of clearing given—Expiry of period of 2 months—Starting of operations—Subsequent order restraining clearance—Completion of clearance—Legality*

It is true that the proviso to sub-R. (2) of R. 3 of the rules framed under S. 202, of the C. P. Land Revenue Act, speaks of clearing operations not being started until the two months period has expired, but it is obvious that if, after the two months' period has expired, the proprietor is entitled to start operations, he is also entitled to complete them. Once the period of two months has expired the proprietor has discharged his obligation and is free to take the action of which he has given notice. Any subsequent order after the two months is invalid. (*Greenfield.*) RAMJILAL AGRAWALA, *In re.* **1940 N.L.J. 316.**

——**S. 203**—*Foreclosure of* malguzar *share, sir and house—Mortgagor, if entitled to fresh site—Procedure to be followed—Right to materials of house.*

Where a mortgagor's *malguzari* share *sir* and house are foreclosed by a mortgagee under the mortgage decree, the mortgagor no doubt becomes entitled to a fresh site. In order to enable him to make other arrangements, the decree may be directed to be suspended. But he is not entitled to remove any of the materials of the house, for it has become the property of the mortgagee. (*Stone, C.J. and Bose, J.*) GANGAPRASAD *v.* ITWARSINGH. **1939 N.L.J. 429=A.I.R. 1939 Nag. 287.**

——**Ss. 203 and 188**—*Lambardar—Right to deal with house sites in* abadi.

Since the letting out of house sites in the *abadi* has not been placed among the duties of lambardars and since a clear cut distinction has been made between his duties and powers, it is clear that the lambardar has no statutory authority to deal with house sites in the *abadi* so far as S. 188 (1) is concerned. (*Stone, C.J. and Bose, J.*) GANGAPRASAD *v.* ITWARSINGH. **1939 N.L.J. 429=A.I.R. 1939 Nag. 287.**

——**S. 203**—*Malguzar mortgaging his proprietary rights and house in* abadi—*Foreclosure—Mortgaged house, if exempt from attachment—Mortgagor's right to house site—Limits.*

A malguzar mortgaged his village which included his *sir* lands. He also mortgaged his house in the *abadi*. Mortgagee obtained decrees on his mortgages and foreclosed the proprietary interest, on which the mortgagor became an ex-proprietary tenant of the *sir* lands. When the mortgagee sought to execute his decree against the house the mortgagor contended that under S. 203 of the C. P. Land Revenue Act he was entitled to a house in the *abadi* and as such the house was not attachable.

Held, that the mortgagor was only entitled to a house site of reasonable dimensions in the *abadi* as a tenant and not to any particular site or house and hence the house was attachable. (*Bose, J.*) RAMADHIN *v.* SHEODUTT. **180 I.C. 690=11 R.N. 389=1938 N.L.J. 445=A.I.R. 1938 Nag. 544.**

——**S. 203**—*Obtaining of site for building house to live in—Right of transfer—Presumption.*

Where a man obtains land in order to build a residential house in a growing town, the ordinary presumption would be that the land was acquired with a right of transfer. If a landlord contends that the tenant has no right to transfer his building, it is for him to show that the right of the tenant was so expressly limited. (*Pollock, J.*) GANPATRAO *v.* MOTILAL. **178 I.C. 535=11 R.N. 236=1938 N.L.J. 144=A.I.R. 1938 Nag. 480.**

——**S. 203** — *Proprietor mortgaging village share and house in* abadi—*Foreclosure—Right to retain house in* abadi.

Where a proprietor mortgages his village share (without cultivating rights in *sir*) and his house in the *abadi*, he cannot after the mortgage had been foreclosed claim to retain possession of the house in the *abadi*, on the ground that he is entitled under S. 203 of Central Provinces Land Revenue Act. He is only entitled to a house site and not a particular house site. The mortgagee's rights are statutory and S. 203 cannot derogate from them. (*Niyogi and Gruer, JJ.*) DUKHURAM *v.* KHANDERAO. **I.L.R. (1939) Nag. 59=181 I.C. 577=11 R.N. 478=1939 N.L.J. 9=A.I.R. 1939 Nag. 83.**

———**S 203**—*Scope and applicability—Restrictions on transfer, if applies to proprietors.*

S. 203 of the C. P. Land Revenue Act regulates the rights of the proprietor of the mahal *vis a vis* the persons specified in the section and has nothing to do with the rights and liabilities of the proprietors, when there are more than one, as between themselves. The restrictions on transfer do not apply to the proprietors. (*Stone, C.J. and Bose, J.*) GANGAPROSAD *v.* ITWARSINGH. **1939 N.L.J. 429=A.I.R. 1939 Nag. 287.**

———**S. 203**—*'Transfer' if limited to cases of sales—Mortgage of house and site in abadi—Right of re-entry, if arises,*

The term 'transfer' in S. 203 of Central Provinces Land Revenue Act cannot be understood as being limited to a conveyance of all the transferor's interest in the property, but it includes such limited form of conveyance as a mortgage. Where the right to occupy the house and the site in the abadi on which it is built, is conveyed to another for a certain number of years such transfer is forbidden by S. 203 and a right of re-entry arises in favour of the malguzar. (*Grille, J.*) THAKUR CHHATARSING *v.* THAKUR HAMERSING. **I.L.R. (1940) Nag. 167=186 I.C. 250=12 R.N. 193=1940 N.L.J. 44=A.I.R. 1940 Nag. 182.**

———**S. 203 (1)**—*Execution—Sale of house in* abadi—*Purchaser's right to site of house—Custom to the contrary—Onus of proof.*

An auction sale of a house in the *abadi* in execution of a decree does not convey to the purchaser therein any right to the site in the *abadi*, but passes only a right to the materials of the house, under S. 203, C.P. Land Revenue Act. The burden of proving any local custom to the contrary is on the purchaser who claims a right to the site. (*Gruer, J.*) BABUKANHU *v.* GANPAT RAO. **I.L.R. 1937 Nag. 350=169 I.C. 524=10 R. N. 12=A.I R. 1937 Nag. 107.**

———**S. 203 (3)**—*"Such site"—Meaning of.*

The words "such site" in sub-S. (3) of S. 203, C. P. Land Revenue Act, must be taken to refer to the words "a house-site of reasonable dimensions in the *abadi*" mentioned in sub-S. (1) of S. 203. (*Gruer, J.*) BABUKANHU *v.* GANPAT RAO. **I.L.R. 1937 Nag. 350=169 I.C. 524=10 R.N. 12 =A.I.R. 1937 Nag. 107.**

———**S. 203 (3)**—*Usufructuary mortgage—Position of mortgagee—Suit to eject him and for possession—Limitation—If Art.* 142 *or* 144 *or* 120 *of the Limitation Act applies.*

As an usufructuary mortgage is a 'transfer' within the meaning of S. 203 (3) of the United Provinces Land Revenue Act, and as the interest of the mortgagee though only of a limited interest, yet in relation to the land the mortgagee is only a trespasser. As such a suit to eject him and for possession by the landlord is governed either by Art. 142 or 144 of the Limitation Act but not by Art. 120. (*Stone, C. J. and Bose, J.*) KUWARJI *v.* BHURELAL. **182 I.C. 527=12 R.N. 9 =1939 N.L J. 136=A.I.R. 1939 Nag. 163.**

———**S. 203 (4)**—*Jurisdiction of Civil Court—Dispute as to allotment of house site in* abadi—*Jurisdiction to decide—Revenue Court or Civil Court.*

The question of the adequacy of a site in the *abadi. i.e.*, as to whether a tenant is in possession of a house-site of reasonable dimensions as provided by S. 203 (1) of the C. P. Land Revenue Act, is one involving a question of allotment and the proper venue for its decision is the Revenue Court under S. 203 (4). It is the proprietor of the *mahal* who is initially entitled to allot sites in the *abadi*. If the landlord and tenant disagree on the matter, the revenue officer is the proper authority to decide it under S. 203 (4). A Civil Court has no jurisdiction to settle the matter. (*Gruer, J.*) BABUKANHU *v.* GANPAT RAO. **I.L.R. (1937) Nag. 350=169 I.C. 524=10 R.N. 12=A. I R 1937 Nag 107.**

———**S. 203 (5), (6) and (7)**—*Scope and effect.*

Sub-Ss. (5) to (7) of S 203, C.P. Land Revenue Act, can hardly help an individual resident who to acquire the rights of transfer would have to get declaration made by the Local Government under sub-S. (5) of S. 203. In the absence of any Notification by the Local Government under sub S. (5) of S. 203, the fact that the activities in the village are mainly commercial will avail nothing. (*Niyogi, J.*) CHHAGANLALSA *v.* NATHUSING. **I L R. (1938) Nag. 326=176 I.C. 936=11 R N. 92=A.I.R. 1937 Nag. 338.**

———**S. 218 (4)**—*Deputy Commissioner's power to refer to Civil Court for making award—Limits.*

S. 218 (4) of the C. P. Land Revenue Act requires that the compensation shall be calculated by the Deputy Commissioner (or if necessary by the Civil Court) as nearly as may be in accordance with the provisions of the Land Acquisition Act. It does not require that the provisions of that Act shall be strictly followed. A reference by him to a Civil Court of the question of the amount to be awarded is within his powers. (*Roughton, H.M.*) HANUMANTRAO *v.* CHOUBEY MADAN MOHAN. **1938 N.L.J. 326.**

———**S. 218 (5)**—*Order to furnish security prior to entering on land—If legal.*

S 218 (5) of the C. P. Land Revenue Act requires the Deputy Commissioner's sanction to be given before land can be entered upon prior to payment of compensation and as such it is open to him to attach any reasonable condition as to security, to the sanction given (*Roughton, H.M.*) HANUMANTRAO *v.* CHOUBEY MADAN MOHAN. **1938 N.L.J. 326.**

———**S 218**—*Mining lease over land held by occupancy tenant—Rights of—Right to possession of land after expiry of lease.*

When Government assigns mining rights over land held by an occupancy tenant, the assignee is only an assignee of surface rights under S. 218 of the Land Revenue Act and he does not become an occupancy tenant of the land leased to him in mining rights—his rights cease on the expiry of his lease, and thereafter the occupation of the original tenant must be restored. (*E. Raghavendra Rao, H. M.*) Forrester *v.* Cowasji. **19 N. L.J. 203.**

———**S 218 (4) and (5)**—*Scope—Lessee of mine—Non-payment of compensation to surface owner—Right to sue sub lessee for wrongful removal of minerals—Measure of damages.*

A lessee or licensee of a mine can sue his sub-lessee and claim damages for trespass, working and wrongful removal of minerals, although he has not paid the compensation due to the surface owner and accordingly lawfully enter into and quarry. Although he may not, owing to such non-payment, enter and quarry it does not follow that the surface owner, or any one else claiming through him, can remove minerals, the right to remove which, during the period of the lease is in lessee or licensee. The measure of damages to which the lessee is entitled for wrongful removal by the sub-lessee, is the value of the minerals *in situ*, when there is no evidence to show that the removal was wilful and with knowledge that he had no right. (*Stone, C. J. and Niyogi, J.*) Hari Prasad *v.* Hanumant Rao. **I L R. 1936 Nag. 115=170 I.C. 554=10 R.N. 71=A.I R. 1937 Nag. 74.**

———**S. 219**—*Order under—Condition precedent to—Finding as land encroached upon being communal—Necessity for.*

In the absence of a finding on the record that a co-proprietor has encroached upon land which has been set apart by an entry in the village administration paper for communal purposes, no order can be passed under S. 219 of the Land Revenue Code. A finding as to the nature of the land alleged to be encroached upon is essential before such an order can be passed. (*G. P. Burton, R. M.*) Bhargavrao *v.* Secretary, Notified Area Committee, Sindi District, Wardha. **20 N.L.J. 83.**

———**S. 220**—*Jurisdiction of Civil Court—Decision of Revenue Court as to the basis of a partition.*

Where a Revenue Court decides the dispute between parties as to the basis of a partition to be made, it is not for the Civil Court to say whether in so doing the Revenue Court has acted *ultra vires* or not. But whether the decision of the Revenue Court is *intra vires* or *ultra vires* the Civil Court's jurisdiction has not been barred under S. 220 of the C. P. Land Revenue Act for the purpose of declaring the titles of the parties. (*Stone, C. J. and Clarke, J.*) Lakhandar *v.* Harlalpuri. **I.L R. 1940 Nag. 16=180 I.C 797=11 R.N. 394=1938 N.L.J. 463=A.I.R. 1939 Nag. 5.**

———**S. 220** — *Perfect partition proceedings—Powers of Settlement Officer—Question of title—Jurisdiction of Civil Courts.*

The C. P. Land Revenue Act does not oust the Civil Court's jurisdiction altogether. Chapter XI of the Act dealing with partition distinguishes perfect from imperfect partition. A Settlement Officer has no power to decide questions of title in perfect partition proceedings under Ch. XI, and therefore in that respect the Civil Courts have jurisdiction. In imperfect partitions the Deputy Commissioner has certain limited powers to deal with questions of title. An order for perfect partition does not oust the jurisdiction of the Civil Courts as regards the title to the properties, though the Civil Courts are precluded from considering whether a partition should have been made under the circumstances or whether the partition should have been in the way it has been effected or in some other way. (*Bose, J.*) Harlalpuri *v* Lakhandhur. **170 I C. 34=10 R.N. 55=19 N.L.J. 168=A I R. 1937 Nag. 163.**

———**S. 220 (n)**—*Scope and effect of—Proceedings instituted in Revenue Court—Suit in Civil Court—Bar of.*

Once the co-sharers who seek partition of their village invoke the jurisdiction of the Revenue Officer under the C. P. Land Revenue Act, they become bound by the special procedure of that statute and their rights and privileges thereon depend upon the compliance or non-compliance with the special procedure which is imperative on them to follow in the manner laid down by that statute. Where the co-sharers move the Revenue Court for partition, they bring themselves within the provisions of Ch. 11, C. P. Land Revenue Act, and unless the remedy in the Civil Court is available to them under that chapter, they will be precluded by S. 220 (*n*) of the Act from questioning the partition. Such co-sharers therefore have no independent right to institute a suit in Civil Court, for seeking any remedy which, if given, would upset the partition. (*Niyogi, J.*) Umrao Zungar *v.* Shiwa Laxman. **170 I.C. 601=10 R.N. 68=I.L.R. 1937 Nag. 476=A.I.R. 1937 Nag. 177.**

———**S. 220 (p)**—*Civil Courts—Jurisdiction—Remuneration of mukaddam for period preceding fixation—Power of Civil Court to award.*

A mukaddam's right to remuneration for services rendered by him is independent of the fixation of it, since it has relation to the performance of the statutory duties imposed on a mukaddam by S. 193, C. P. Land Revenue Act, and the rules framed thereunder. On principles of natural justice a servant must be paid from the time that he begins to render service. Consequently the presumption must be made that a mukaddam is entitled to get his remuneration as soon as he is appointed. Therefore a mukaddam of a village, who is not a lambardar, is entitled to recover his remuneration for a period prior to the order of the Deputy Commissioner fixing his remuneration under S. 192, C. P. Land Revenue Act, subject of course to the Limitation Act, and the Civil Courts are not precluded by S. 220 (*p*) of the Act from awarding such remuneration. He is also entitled to his remuneration on the principle of *quantum meruit.* (*Niyogi, J.*) Shankar Rao Sadasheo *v.* Madho Narayan Rao. **173 I.C. 7=10 R.N. 283=A.I.R. 1937 Nag. 411.**

———**S. 222**—*Applicability—"Waste land"—Meaning of—Demarcation—Inference—Presumption.*

The question of the applicability of S. 222 is one of law after the facts have been ascertained. No special meaning is to be attached to the phrase "waste land" and it will apply to the site which is vacant and unoccupied. Demarcation is to be inferred from the preparation of the maps which show that the land must have been measured. Demarcation is a necessary and implied operation in the settlement work and there is a presumption that steps were duly taken according to law. (*Gruer, J.*) Secretary of

STATE *v.* HABIBULLA. **I.L.R. (1938) Nag. 377=176 I.C. 346=11 R.N. 48=A.I.R. 1937 Nag. 407.**

——S. 227 (2) (k)—Rules under—Warrant without seal—Arrest under—Legality. *See* PENAL CODE, S. 225-B. **20 N.L.J. 219.**

CENTRAL PROVINCES LAND REVENUE MANUAL VOL. II, Page 43—*Instructions in—If has the force of law.*

The Central Provinces Land Revenue Manual contains mere executive instructions and they have not the force of law. Failure to observe the instructions does not amount to an illegality so as to invalidate a sale. (*Pollock and Niyogi, JJ.*) SURAJDEEN *v.* ISHWARI PRASAD. **I.L.R. (1938) Nag. 550=181 I.C. 478=11 R.N. 462=1938 N.L.J. 342=A.I.R. 1938 Nag. 554.**

CENTRAL PROVINCES LOCAL FUNDS ACT (1933), **Ss. 8 and 13**—*Procedure laid down by—If condition precedent to filing civil suit.*

There is nothing in the C. P. Local Funds Act to indicate that the procedure laid down in it is exclusive or must necessarily be followed before a civil suit is launched. (*Gruer, J.*) AMRAOTI T. M. COMMITTEE *v.* MINAMAL. **184 I.C. 494=12 R.N. 113=1939 N.L.J. 327=A.I.R. 1939 Nag. 247.**

CENTRAL PROVINCES LOCAL FUND AUDIT ACT, Ss. 10 (1) **and** 8 (b) (c)—*Surcharge—Notice—Conditions necessary.*

Before a notice can be served under S. 10 (1) of the C. P. Local Fund Audit Act, the Examiner, in cases which fall under cls. (*b*) and (*c*) of S. 8 of the Act must be satisfied that the loss has been occasioned or caused by gross negligence or misconduct. (*Stone, C. J. and Bose, J.*) ATMARAM *v.* ACCOUNTANT-GENERAL, C. P. **I.L.R. (1939) Nag. 51=11 R.N. 184=177 I.C. 902=1938 N.L.J. 220=A.I.R. 1938 Nag. 422.**

——**S. 14**—*Application to Dt. Judge—When lies—Procedure to be followed.*

When a person is surcharged under S. 10 he has under S. 14 the right to apply to the Dt. Judge. The Judge must consider whether in point of fact there was gross negligence or misconduct. In order to arrive at a conclusion of that nature, he must consider the evidence, case by case and not take a lot of cases all together, decide one, and say that all are the same. (*Stone, C.J. and Bose J.*) ATMARAM *v.* ACCOUNTANT-GENERAL, C.P. **I.L.R. (1939) Nag. 51=11 R.N. 184=177 I.C. 902=1938 N.L.J. 220=A.I.R. 1938 Nag. 422.**

C.P. LOCAL SELF-GOVERNMENT ACT (IV OF 1920), Ss. 21, 36, 47 and 79—Vice-Chairman of Local Board—If public servant under S. 21 (10), I.P. Code. *See* PENAL CODE, S. 21 (10), **19 N.L.J. 221.**

——**Ss. 23 and 24**—*Construction and scope—"Toll"—Meaning—Cattle brought within public market—Charge of ground rent by Malguzar—Legality—Suit for injunction—Right of.*

Where a market is notified so as to become a public market, S. 23 (1) applies and the effect of that section is *inter alia* to vest in the District Council the exclusive right to levy tolls. "Toll" means a sum of money which is taken in respect of some benefit, *viz.*, the temporary use of land. Where a malguzar having title to the land over

which a public market was situated charged ground rent in respect of the cattle that were brought within the market.

Held, that the action amounted to levying toll and was thus in violation of the exclusive right of the District Council to levy it. The fact that the District Council could not itself levy such toll under S. 24 did not entitle the malguzar to levy it as only one kind of toll could be levied and that could be levied only by the District Council.

Held further, that the District Council was the proper authority to bring a suit for an injunction restraining malguzar from violating its exclusive rights. (*Stone, C.J.*) MT. BAYABI *v.* DIST. COUNCIL, NAGPUR. **I.L.R. (1937) Nag. 246=165 I.C. 849=9 R.N. 98=A.I.R. 1936 Nag. 258.**

——**S. 23 (1)**—*Applicability to any market.*

S. 23 (1), C. P. Local Self-Government Act, applies to any market which corresponds to the definition of market given in S. 2 (2) of the Act whatever it may happen to be called. (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **I.L.R. (1939) Nag. 408=176 I.C. 736=11 R.N. 75=A.I.R. 1938 Nag. 188.**

——**S. 23 (1) and (3)**—*Rights of owner of market—Notification under S. 23 (1) of C. P. Local Self-Government Act—Rights of owner, if affected—Test—Remedy.*

In general, the owner of a market has a right to levy fees and tolls which are usually known as stallage, piccage, pennage and rent and no one can erect a stall on any portion of the land or otherwise claim exclusive occupation of it without a license from the owner. But these rights can be curtailed in various ways one of which is custom. The word 'control' as used in connotation with market means to manage or to regulate, but, in the case of markets these rights are very considerably curtailed. The only right which the owner has is to levy fees and tolls and if that is taken away by custom or statute or other means his right of control in this sense vanishes. A suit was brought by the owner of a market to cancel the Notification by Government issued under S. 23 (1), C. P. Local Self-Government Act on the ground that his rights were affected by levy of fees and toll and that his rights to levy fees for nistar were infringed by the Notification. According to the wazib-ul-arz of the village no person had right to make collections from the bazaar; the jungle tank and wells lay outside the boundaries of the market.

Held, that the rights of the owner were not affected by the Notification and the suit did not lie under S. 23 (3). (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **I.L.R (1939) Nag. 408=176 I.C. 736=11 R.N. 75=A.I.R. 1938 Nag. 188.**

——**S. 23 (3)**—*Who can sue under—Notification when to be cancelled.*

Any person, whose rights are prejudicially affected in some way by the notification under S. 23 (1) of the C. P. Local Self-Government Act, is entitled to sue under S. 23 (3) and the Notification must be cancelled if the prejudice is established. (*Bose, J.*) KRISHNARAO GOPALRAO *v.* SECRETARY OF STATE. **I.L.R. (1939) Nag. 408=176 I.C. 736=11 R.N. 75=A.I.R. 1938 Nag. 188.**

——**S.** 68—*Offence for violating rule made under S. 79—Prosecution—If should be only by local body.*

Where a person breaks Rule 16-A (2) made under S. 79 (1) (iv), C. P. Local Self-Government Act, and is convicted, what he has broken is not any section of the Act nor any bye-law under the section which are the only cases mentioned in S. 68 in respect of which prosecution by a District Council or Local Board or Market Committee is necessary, but a rule made by the Local Government. There is no provision in S. 68 that prosecution for a breach of such rule can only be initiated by a local body. Where therefore a complaint is made by a Magistrate and it is taken cognizance of under S. 190, Cr. P. Code, and the person is prosecuted and convicted for breach of Rule 16-A (2), such prosecution is not illegal. (*Grille, J.*) EMPEROR *v.* GULAB SINGH. **I.L.R. (1938) Nag. 420=10 R.N. 121=171 I.C. 620=38 Cr.L.J. 1093=A.I.R. 1937 Nag. 387.**

——**S.** 73 (2)—*Limitation under—Computation of period—Starting point—Suit for damages for wrongful dismissal.*

When an aggrieved party obtains relief at one time but as a result of some proceeding he is deprived of it and he is relegated to his original position, a new cause of action should be deemed to accrue in his favour. In pursuance of a resolution, the Chairman of a District Council issued an order to an employee informing him that his services were dispensed with. The employee appealed to the Deputy Commissioner who set aside the Chairman's order. The Deputy Commissioner's order was upheld by the Commissioner. The District Council thereupon moved the Local Government for revision of Commissioner's order and the Minister for Local Self-Government reversed the Commissioner's order and restored that of the Chairman, District Council. The employee filed a suit challenging the legality of the order of the Chairman as well as that of the Minister for Local Self-Government and prayed for damages for wrongful removal from service:

Held, that the period of limitation, *viz*, six months prescribed by S. 73 (2) of the C. P. Local Self-Government Act must be computed from the date of the Minister's order as the cause of action for the suit arose on the day on which the Minister passed his order which had the effect of making the Chairman's order final and effective. (*Niyogi, J.*) DISTRICT COUNCIL OF SEONI *v.* NANHARIYARAM SHARMA. **I.L.R. (1939) Nag. 312=179 I.C. 434=11 R.N. 292=A.I.R. 1938 Nag. 499.**

——**S.** 79 (1) (iv)—Rules under—R. 16-A (2)—Violation of—Prosecution—Procedure. *See* C. P. LOCAL SELF-GOVERNMENT ACT, S. 68. **A.I.R. 1937 Nag. 387.**

CENTRAL PROVINCES MONEY-LENDERS ACT (XIII OF 1934, as amended by Act XIX of 1937), S. 9—*Applicability and scope—Mortgage—If "loan"—Mortgoge executed and suit instituted before 1934—Preliminary decree and final decree prior to amendment—If can be re-opened—Retrospective operation.*

As from 19-3-1937, the C.P. Money-Lenders Act (as amended in 1937) applies to mortgage transactions made with money-lenders, as a mortgage would clearly fall within the term "loan", although the Act of 1934, before its amendment was not applicable to a loan transaction which was in substance a mortgage, a charge or a sale of immovable property. A Court should therefore be very slow to give retrospective effect to S. 9 of the Act as amended in the case of a transaction of loan which was not a loan within the meaning of the Act at the time when the suit was brought. The Amending Act of 1937 is not retrospective in operation and does not affect transactions prior to it. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. **I.L.R. (1938) Nag. 91=179 I.C. 129=11 R N. 271=20 N.L.J. 285=A.I.R. 1938 Nag. 112.**

——**S.** 9—*Total interest paid, if relevant.*

According to S. 9 of the Central Provinces Money-Lenders Act, no Court shall decree on account of arrears of interest a sum greater than the principal of the loan. The fact that the total interest paid up to date may amount to more than the principal, is quite beside the point. (*Gruer, J.*) RAMCHANDRA *v.* MADHORAO. **1938 N.L.J. 364.**

——**S.** 11—*Applicability—Conditions—Relationship of decree-holder and judgment-debtor—Sufficiency—Debt in respect of sale and purchase of cotton—Decree-holder not money-lender—Effect.*

Before the benefit of S. 11 of the Money-Lenders' Act can be availed of, it must be shown by the applicant that the decree-holder is a money-lender and that the transaction giving rise to the decree was a loan as defined by the Act. It is not enough that the relationship of decree-holder and judgment-debtor exists between the parties. A debt in respect of the sale and purchase of cotton is not a loan under the Act. (*Stone, C.J, and Puranik, J.*) GULABCHAND UTTAMCHAND *v.* BRUEL & Co. **1938 N.L.J. 9.**

——**S.** 11—*Application under for instalments—Forum.*

An application under S. 11 of the Central Provinces Money-Lenders' Act for instalments must be made to the Civil Court exercising ordinary jurisdiction. Obviously, an executing Court cannot vary the decree. The Court empowered by S. 11 to vary the decree is the Court that passed the decree (*Stone, C.J. and Bose, J.*) GANPATRAO *v.* JAGANNATHRAO. **1940 N.L.J. 187=A.I.R. 1940 Nag. 196.**

——**S.** 11—*Construction—"At any time"—Application for instalments after acceptance of bid at execution sale—Competency—S. 11. if controls O. 21, R. 92, C. P. Code.*

S. 11 of the Money-Lenders' Act has to be construed strictly, as it restricts existing rights under the law, and should not be allowed to override the provisions of the existing law, *i.e.*, the provisions of O. 21, R. 92, C. P. Code, S. 11 cannot be interpreted so as to permit of an application for instalments being entertained after the bid at an auction sale in execution of a decree has been accepted and when the confirmation of the sale has become inevitable. Once the bid has been accepted, the Court has to confirm the sale under O. 21, R. 92, C. P. Code, unless good cause is shown under Rr. 89, 90 or 91 of O. 21. (*Roughton, F.C.*) KRISHNARAO *v.* BHANU. **1938 N.L.J. 15.**

——S. 11—*Powers conferred by, discretionary.* The power conferred by S. 11 of the Central Provinces Money-Lenders' Act (1934) is a discretionary power. (*Stone, C.J. and Bose, J.*) GANPATRAO *v.* JAGANNATHRAO. **1940 N.L.J. 187=A.I.R. 1940 Nag. 196.**

——**S. 11**—*Scope and applicability—Secured creditors, if can be compelled to accept instalments.*

S. 11 of the C. P. Money Lenders Act is applicable to a case where a decree has been passed and an application has been made in respect of that decree by the Judgment-debtors. Though the creditors who prove their debts in insolvency and get their names entered in the schedule, may be said to be decree holders, the same thing cannot be said of a secured creditor who only gets his security valued. Such a secured creditor can not be compelled by the Court to accept any payment of the debt by instalments. (*Puranik, J.*) BALIRAM *v.* LAXMAN. **1940 N.L.J. 387.**

——S. 11—*Scope—Executing Court—Power to direct payment by instalments.*

S. 11 of the Money-lenders Act gives power to an executing Court to direct that any decree which comes before it for execution shall be made payable by instalments. In cases to which S. 11 applies, the Court, quite apart from S. 42 read with O. 20, R. 11 (2), C. P. Code, has power to direct payment by instalments. (*Stone, C.J. and Bose, J.*) JIWANDAS *v.* LILAWATIBAI. **I L.R. (1938) Nag. 407=172 I.C. 671=10 R.N. 231=20 N.L.J. 141=A.I.R. 1937 Nag. 409.**

CENTRAL PROVINCES MOTOR VEHICLES TAXATION ACT (as amended in 1935), **S. 3 (1), Proviso**—*Effect of amendment—'Tax' in Central Provinces Municipalities Act, meaning of.*

By an amending Act in 1935 the words "rent or fees" were deleted from the proviso to S. 3 (1), Central provinces Motor Vehicles Taxation Act. This clearly raises the implication that a person residing within one Municipality would not be liable to pay any tax on his motor vehicles which any other Municipal Committee might impose under the provisions of S. 66, Municipalities Act, as applied to Berar, but would be liable for any other fee imposed by its bye-laws. The definition of 'tax' in the Central Provinces Municipalities Act, would not include any toll, rate, due or fee of any kind whatever in addition to whatever kind of impost is mentioned in S. 66. Licence fee for motor lorry imposed by Amraoti Town Muncipality is not tax and hence a person residing within Chandur Bazar Notified Area Committee would be liable for licence fees imposed by Amraoti Town Municipality in respect of motor lorries plying between Chandur Bazar and Amraoti. (*Grille, J.*) AMRUTLAL *v.* PRESIDENT, TOWN MUNICIPAL COMMITTEE, AMRAOTI. **181 I.C. 520=11 R.N. 466=1939 N.L.J. 262=40 Cr.L.J. 556=A.I.R. 1939 Nag. 171.**

——**R 29 (i)**—*Offence under—What has to be proved.*

R. 29 (*i*) of the Central Provinces Motor Vehicles Rules, 1927, does not prohibit the taking of liquor. To bring a driver under the rule it must be shown that the driver was under the influence of alcohol. (*Pollock, J.*) RAMLAL *v.* EMPEROR. **1939 N.L.J 204.**

CENTRAL PROVINCES MUNICIPALITIES ACT (XVI OF 1903), S. 39—*Levy of tax by Municipality—Notice by Municipal Committee defining rate of tax—Validity of resolution—Approval by special Committee.*

The appellants instituted two suits against the respondent Committee disputing the validity of a tax purporting to be imposed under the Central Provinces Municipalities Act, 1903, on the trade of ginning and pressing cotton by means of steam or mechanical process. Sub-S. (1) of S. 39 of the said Act provides as follows: "A Committee may resolve at a special meeting to propose the imposition of any tax for purposes of this Act; and sub-S (2) provides that "where a resolution has been passed under sub-S. (1) the Committee shall publish . . . . a notice defining . . . the amount of the tax to be imposed." The respondent Committee published a notice defining the amount or rate of tax to be imposed on the trade of ginning and pressing cotton by means of steam or mechanical process. The Judicial Committee remanded the case for the respondent Committee to let in evidence as to the contents of the resolution passed at the special meeting of the Committee.

Held, on the evidence, that the respondent Committee had failed to prove that the amount or rate of tax had been resolved upon at the special meeting and that the tax had therefore not been validly imposed. Decision of the Judicial Commissioner of the Central Provinces reversed. (*Lord Thankerton.*) RADHA KISHAN JAIKISHAN *v.* MUNICIPAL COMMITTEE, KHANDWA. **64 I.A. 118=172 I.C. 461=10 R P.C. 150=4 B.R 244=1938 A.L R 63=1938 O L R. 38=(1937) 2 M.L.J. 792 (P.C.).**

——**(II OF 1922) and Bye-laws**—*'Gross annual letting value'—Meaning of—If includes payments by tenants as taxes.*

The expression 'gross annual letting value' or 'gross rent' as used in the C P Municipalities Act and the bye-laws does not include the sums paid by the tenant on account of conservancy tax or water rate, unless the tenant agrees to pay a lump sum as rent including taxes or rates without specifying their amounts. When a tenant pays specific sums on account of taxes or rates in addition to what he pays for use and occupation of the premises demised to him, to the Municipal Committee directly or through the owner, such sums cannot be included in the calculation of the 'letting value' or rent. (*Pollock and Niyogi, JJ.*) P.V. DIXIT *v.* MUNICIPAL COMMITTEE, NAGPUR. **1940 N L.J. 112.**

——*Notice issued by Health Officer—Affixing of rubber stamp by municipal servant in the presence and with consent of Health Officer—Validity of notice.*

A notice issued by the Health Officer of the Municipality, who is empowered in that behalf is not invalidated by the fact that a subordinate municipal servant impressed the Health Officer's rubber stamp on the notice, when it is proved that the subordinate servant used it in that officer's presence and with his consent. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N.L.J. 195.**

——*Property tax—Assessment—House standing on* nazul *land—Value of land—If to be deducted.*

In valuing a house which stands on *nazul* land, the value of the land must be excluded, as the lessee is liable to ejected from the land on the expiry of the term of the lease. A person cannot be treated as a lessee when he is to be ejected and as an owner when he is to be taxed. A. V. WAZALWAR *v.* MUNICIPAL COMMITTEE, NAGPUR. **20 N.L.J. 175.**

——*Property tax—Assessment—Valuation of dilapidated house unfit for human habitation—Principles.*

In the case of dilapidated house unfit for human habitation, which is used only for storing lumber, fuel, etc., it is not correct to value the house for purposes of taxation as a good living house deducting a certain percentage for deterioration. Nor is it correct to assess it on the mere value of the material. A. V. WAZALWAR *v.* MUNICIPAL COMMITTEE, NAGPUR. **20 N.L.J. 175.**

——*Tax imposed by Municipal Committee, Nandura, on trade of ginning—Nature of.*

The tax on ginning and pressing of cotton imposed by the Municipal Committee, Nandura, under Notification No. 399-130, M-VIII dated 2nd February, 1934 and published in the Local Gazette is not a tax on income derived from the trade but on the process of ginning and pressing. It does not seek to take anything out of the income. (*Grille and Niyogi, JJ.*) ONKARSA *v.* THE MUNICIPAL COMMITTEE, NANDURA. **I.L.R. (1940) Nag. 446.**

——**S. 3**—*"Owner"—Malguzar—If owner—Inclusion of malguzari land in Municipal area—Effect.*

Inclusion of malguzari land within a Municipal area does not change the rights and liabilities of the malguzar and the tenants *inter se*. Nor is the malguzar an owner as defined in S. 3 of the C. P. Municipalities Act. (*B.G. Khaparde.*) KESHEORAO *v.* CIVIL STATION SUB-COMMITTEE, NAGPUR. **20 N.L.J. 238.**

——**S. 23**—Curability under—Meeting convened by issue of notice signed by secretary. *See* C. P. MUNICIPALITIES ACT, Ss. 31 (2) AND 23. **I.L.R. (1940) Nag. 446.**

——**S. 25**—*R. 7 of rules framed under—Scope of—Payment to Counsel to represent committee in appeal by a dismissed employee, without sanction—Liability to refund.*

R. 7 of rules framed under S. 25 of the C. P. Municipalities Act, makes no provision for representation by Counsel on behalf of the Committee, but only for the employee in special cases. As such, any payment made to Counsel without previous sanction, for representing the committee before the Local Government in an appeal by a dismissed employee of the Municipality, is not covered by any provision of the Act or rules thereunder and as such is recoverable from those who were responsible for its expenditure. (*Gruer, J.*) AMRAOTI T. M. COMMITTEE *v.* MINAMAL. **184 I.C. 494=12 R.N. 113=1939 N.L.J. 327=A.I.R. 1939 Nag. 247.**

——**S. 25 (1), Proviso**—*Scope—Post of Secretary to Civil Station Sub-Committee—If protected post.*

The post of a Secretary to the Civil Station Sub-Committee in a Municipal Committee is virtually a post of additional Secretary in the Municipality and is therefore covered by the proviso to S. 25 (1) of the C. P. Municipalities Act. (*D.P. Mishra.*) CIVIL STATION SUB-COMMITTEE, NAGPUR *v.* G. T. MESHRAM. **1938 N.L.J. 34.**

——**S. 25 (7)**—*Rules under, R. 2 (1) (a)—Appeal—Employees under S. 25 (1), Proviso—Dismissal by Municipal Committee—Right of appeal.*

Employees referred to in the proviso to S. 25 (1) of the C. P. Municipalities Act have no right of appeal against their dismissal by Municipal Committees under R. 2 (1) (*a*) of the rules framed uuder S. 25 (7) of the Act. (*D.P. Mishra.*) CIVIL STATION SUB-COMMITTEE, NAGPUR *v.* G. T. MESHRAM. **1938 N.L.J. 34.**

——**Ss. 31 (2) and 23**—*'To convene' in S. 31 (2), meaning of—Issue of notices signed by the secretary—Presumption—Failure to convene by president—If curable by S. 23—Validity of meeting if affected.*

'To convene' in S. 31 (2) of the C.P. Municipalities Act means to call together or to assemble, and not to issue notice. There is no law, rule, or bye-law laying down any special procedure to regulate the exercise of the president's power to covene meetings. When notices are sent to every member or circulated among members by the secretary, it must be presumed that it was with the consent of the chairman, particularly to the imposition of the tax and precludes any objection to its regularity or legality. (*Grille and Niyogi, JJ.*) ONKARSA *v.* THE MUNICIPAL COMMITTEE, NANDURA. **I.L.R. (1940) Nag. 446.**

——**S. 45**—*Intention underlying—'Interested'—Interpretation.*

The intention underlying S. 45 (1) of the C. P. Municipalities Act is to prevent jobbery and impure administration. As such, the word 'interested' occuring in S. 45 (1) of the Act is to be interpreted in its ordinary wide sense and not confined to interest in money. Where the interest proved could not possibly lead to corruption then the word could be interpreted in favour of the accused. Where one member of a Municipal Committee helps another member merely out of friendship in respect of a contract in which the latter was found to have an 'interest,' the former also becomes a person interested in the contract within the meaning of the section. (*Niyogi and Gruer, JJ.*) HAZARIMAL *v.* EMPEROR. **I.L.R. (1940) Nag. 133=187 I. C. 161=12 R.N. 278=41 Cr. L. J. 424=1939 N L J. 567=A. I. R. 1940 Nag. 81.**

——**S. 45 (1) and Sale of Goods Act, S. 64**—*Acquisition of interest in a contract of sale subject to conditions after date of sale—If makes a member of Municipal Committee 'interested' in a subsisting contract.*

Though no doubt according to S. 64 of the Sale of Goods Act a sale becomes complete in the case of an auction, when the hammer falls, yet if the sale is one with conditions, until those are fulfilled the contract remains in force and is subsisting. Where a member of a Municipal Committee acquires an interest with reference to certain manure sold in public auction and bought by somebody else, and the auction sale is subject to certain conditions, the member becomes interested in a contract with the committee within the meaning of S. 45 (1) of the Central Provinces Municipalities Act, inasmuch as the contract of sale remains in force till the conditions are fulfilled. (*Niyogi and Gruer, JJ.*) Hazarimal *v.* Emperor. **I.L.R. (1940) Nag. 133=187 I. C. 161=12 R.N. 278=41 Cr.L.J. 424=1939 N. L.J. 567=A.I.R. 1940 Nag. 81.**

——S. 48—*Applicability—Enhancement within powers but procedure irregular—Suit to recover tax collected.*

It is true that if a Municipal Committee exercises powers which it did not possess, it should not be regarded as acting in pursuance of the statute governing its powers, and its acts should not be regarded as being those done under the statute. But there is a difference between a case when a corporate body exercises a power which is wholly absent and a case where it has power but it exercises it illegally or with material irregularity. In the former case the Municipal Committee's act from beginning to end is illegal; whereas in the latter case the act is quite legal in the beginning but becomes illegal in the end. Where the Municipal Committee has power to enhance the tax on animals brought to slaughter-house and follows the procedure laid down in S. 68, Central Provinces Municipalities Act, but in doing so it lapses into an irregularity, namely omission to consider the objections filed by the butchers, the Municipal Committee is certainly exercising, although irregularly, the power conferred on it by S. 68 and to that extent the Municipality is acting under the statute. Hence, the suits to recover amounts collected in excess of lawful rate are governed by S. 48 and if not filed within six months are barred by time. (*Niyogi, J.*) Amroati Town Municipal Committee *v.* Bhikan Shekh. **I.L.R. (1939) Nag. 216=179 I. C. 817=11 R. N. 319=A. I. R. 1938 Nag. 455.**

——S. 58—*Scope—If confers a power of review.*

S. 58 of the C. P. Municipalities Act provides for the control of the Deputy Commissioner and commissioner by the Provincial Government, and of the Deputy Commissioner by the Commissioner and nothing more. It does not provide for a review of one's own orders of the above mentioned persons. There being no other section, it is evident that the Act has no provision for review. (*Mishra.*) Municipal Committee, Nagpur *v.* Wazalwar. **1938 N.L.J. 205.**

——**Ss. 66, 77 and 78**—*Applicability—Right to interest apart from S. 77 (1)—Interest claimed independently of tax—Recovery of—Procedure under S. 78—Recourse to—Permissibility.*

There is nothing in the C. P. Municipalities Act apart from S. 77 of the Act which gives a right to the Municipal Committee to recover interest on any tax which falls into arrears. The claim for interest which the Committee is entitled to make is only ancillary to the claim to recover the arrears of tax, and Ss. 77 and 78 as well as the rules framed under S. 77 (1) only speak of arrears of municial tax which refers to a tax payable under S. 66 (1) (*a*). S. 66 does not however give the Committee any right to recover interest as a part of the tax. Interest cannot therefore be regarded as an arrear of tax; nor can it be regarded as "any other money claimable by the Committee under this Act" within the meaning of S. 77 (1). The procedure laid down in S. 78 is consequently not applicable or available to a Municipal Committee for recovery of interest which is claimed independently of the amount payable as tax. (*Niyogi, J.*) Municipal Committee, Akot Dt. *v.* Surajmal Shriram Ginning Factory. **I.L.R. (1938) Nag. 482=175 I.C. 476=10 R.N. 448=20 N.L.J. 145=A.I.R. 1938 Nag. 119.**

——S. 66, **Rules under, R. 12** (a)—*Non-domestic purpose—Test—Water used by inpatients in doctor's house—Nature of user.*

The true test to determine whether water is used for non-domestic purpose is to see whether the water is directly used for any trade or business. If the trade or business requires for its prosecution the direct use of water, that use is clearly non-domestic; but when the business is of a nature where the use of the water is only incidental although it may be necessary so far as the persons connected with the business are concerned then it does not cease to be a domestic purpose. Thus when a medical practitioner uses a part of his dwelling-house for providing accommodation for the residence of his inpatients, he does not use the water directly for his business. The water is used incidently by persons for the same purpose for which he himself uses it as a part of the amenities of the building temporarily occupied by them. The water does not cease to be domestically used, only because it is used by the patients as opposed to the owner or his family or that the part of the dwelling house is used for professional or business purposes. (*Niyogi, J.*) Laxman Vasudeo *v.* Municipal Committee, Nagpur. **I L R (1939) Nag 330=178 I.C. 755=11 R.N. 250=A.I.R. 1938 Nag. 466.**

——S. 66 (1)—*Assessment of conservancy cess and water rate—Land held on lease from Municipality—Gross letting value—If to be taken into account.*

Where a person holds land under a lease from the Municipality, whether there is a building or not, for the purpose of assessing the conservancy cess and water rate, the gross annual letting value of the land has to be taken into consideration. (*Niyogi and Pollock, JJ.*) Sumatibai Deo *v.* Municipal Committee, Nagpur. **188 I.C. 541=1940 N.L.J. 303.**

——S. 66 (2)—*Terminal tax—Liability for—'Chemical'—What it includes.*

Ammonium Sulphate and Sulphate of Potash are 'chemicals' taxable under Sch. II (*e*) of Notification No. 5931-1934-M-viii, dated 25th October, 1932. The mere fact that they were to be used as manure cannot take them out of the category of chemicals. Neither do they cease to be chemicals because they contain impurities. (*Gruer, J.*) Kamuruddin *v.* The Municipal Committee, Khandwa. **183 I.C. 443=12 R.N. 61=1939 N. L.J. 265=A.I.R. 1939 Nag. 195.**

——**S. 67 (7) and (8)**—*Notification—Failure to mention sub-Cl. (7)—Failure to mention date from which tax was to come into effect—If affects validity of notification.*

The omission to mention sub-S. (7) in the notification under S. 67 of the Municipalities Act is not material because Local Government could not publish a notification under any other provision except that one. The failure or omission to mention the date from which the tax was to come into force, cannot invalidate the notification The rule of interpretation bearing on the commencement of statutes, that a statute takes effect from the first moment of the day on which it was passed unless another day is expressly named for the beginning of its operation, will have to be applied to the notification. In any case the omission to specify the date cannot deprive the notification itself of its presumptive force bearing on the proceedings relating to the imposition of the tax. Under sub-S. (8) of S. 67, notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provision of the Act. That serves to validate the entire proceeding relating when he attends the meeting. If there is evidence of the president's assent to the calling of any meeting, he must be deemed to have convened the meeting. His assent is inferable from his presence at the meeting. Even if there was any irregularity it could not, in its nature affect the validity of the meeting itself and is cured by S. 23 of the Municipal Act. (*Grille and Niyogi, JJ.*) ONKARSA *v.* THE MUNICIPAL COMMITTEE, NANDURA. **I.L.R (1940) Nag. 446.**

——S. 67 (8)—*Notification of imposition of tax —Effect of—If conclusive.*

Under S. 67 (8), C. P. Municipalities Act, a notification of the imposition of a tax is conclusive evidence that the tax has been imposed in accordance with the provisions of the Act. Therefore under S. 4, Evidence Act, the Court must regard it as proved that the tax was imposed in accordance with the provisions of the Act and must not allow evidence to be given for the purpose of disproving it. (*Pollock, J*) JAGANNATH *v.* SECRETARY, MUNICIPAL COMMITTEE, MEHKAR. **I.L.R. (1937) Nag 414=170 I.C. 133=10 R N. 47=A.I.R. 1937 Nag. 168.**

——S. 77—*Applicability and scope—Application to Magistrate for distress and sale of moveable property — Maintainability — Conditions—Strict compliance with section—Necessity for.*

The C. P. Municipalities Act provides a special procedure which the Municipal Committee has to follow before applying to a Magistrate for a warrant for recovery by distress and sale of movable property. Under S. 78 of the Act which lays down that procedure, it is incumbent on the committee, to cause a bill for the amount due to be delivered to the person liable to pay the sum, and if the bill remains unpaid for ten days it is empowered to issue a notice of demand for payment, and it is only if the payment is not made within seven days from the date of service of that notice that the sum is deemed to be an arrear of tax. Unless and until this procedure is strictly followed the committee acquires no right to approach a Magistrate to recover the tax in arrears. (*Niyogi, J.*) MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R. (1938) Nag. 482 =175 I.C. 476=10 R.N. 448=20 N.L.J. 145=A. I.R. 1938 Nag 119.**

——S. 77—*Jurisdiction of Civil Court—Claim to interest independently of tax—Claim rejected by Deputy Commissioner—Suit in Civil Court—Bar of.*

It is not open to a Civil Court to grant a decree for interest after the Deputy Commissioner has refused to grant it under S. 77 (1) of the C. P. Municipalities Act. The power to award interest is given by the Act to the Magistrate alone and the Municipal Committee has no right to recover it independently of the Act. Further the Civil Court cannot entertain a claim for interest after the creditor has recovered his principal debt unless it is due under a contract. (*Niyogi, J.*) MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R. (1938) Nag. 482=175 I.C. 476=10 R.N. 448=20 N.L. J. 145=A.I.R. 1938 Nag. 119.**

——S. 77 (1)—"Any other money claimable by the Committee under this Act"—Meaning of. *See* C P. MUNICIPALITIES ACT, Ss. 66, 77 AND 78. **20 N.L J. 145.**

——S. 78—Applicability—Interest—Claim to independently of tax—Procedure for recovery. *See* C P. MUNICIPALITIES ACT, Ss. 66, 77 AND 78. **20 N.L.J. 145.**

——S. 79 and Berar Land Revenue Code (1928), S. 141—*Sale for arrear of municipal tax —Property, if transferred free of prior encumbrances.*

An arrear of municipal tax is made by S. 79 of the C. P. Municipalities Act (as applied to Berar) recoverable as if the property were assessed to land revenue and the arrear were an arrear of land revenue due thereon. If a sale is resorted to in this connection, it will be under S. 141 (*c*) of Berar Land Revenue Code, and the result would be that in accordance with S. 149 (2) of the Land Revenue Code, the sale would transfer the property free of all prior encumbrances imposed upon it. (*Burton, R.M.*) MUNICIPAL COMMITTEE, AKOLA *v.* VITHAL. **1939 N.L J. 362.**

——S. 83—*Applicability—Interest recovered by Municipality as tax—Right of appeal—Jurisdiction to decide legality of levy.*

It cannot be held that S. 83 of the C. P. Municipalities Act comes into operation only when there has been levy of a tax and not when there has been levy of *interest*. Where the Municipal Committee purports to recover the interest as a tax under the special procedure of distress and sale, the party aggrieved is indisputably entitled to avail himself of the right of appeal given by S. 83. The Deputy Commissioner on appeal has full jurisdiction to decide whether the levy of the sum by resorting to S. 77 (1) was or was not according to law. (*Niyogi, J.*) MUNICIPAL COMMITTEE, AKOT DT. *v.* SURAJMAL SHRIRAM GINNING FACTORY. **I.L.R (1938) Nag. 482=175 I C. 476=10 R.N. 448=20 N.L.J. 145=A.I.R. 1938 Nag. 119.**

——S. 83—*Reference to High Court—When could be availed of.*

The advantage of the provisions of S. 83, C. P. Municipalities Act could be taken only by Government when hearing revision petition against order of the commissioner and not after it had been decided. (*Mishra.*) MUNICIPAL COMMITTEE, NAGPUR *v.* WAZALWAR. **1938 N.L J. 205.**

——Ss. 84 (3) and 85 (2)—*Refund of taxes— Jurisdiction of Civil Court.*

It is the duty of the Municipal Committee to assess each house, to decide who is the owner or occupier liable to assessment, and to recover that assessment. Whether that assessment has been correctly calculated or not or whether it is being levied on the right person is a matter for the Municipal Committee to decide, and it cannot be said that its action is *ultra vires* if it decides it wrongly. In view of the provisions of Ss. 84 (3) and 85 (2) of the C. P. Municipalities Act, no civil suit will lie for a refund of the taxes paid when there are no allegations in the pleadings to show that the Municipal Committee has acted *ultra vires*. (*Pollock, J.*) SECRETARY, MUNICIPAL COMMITTEE, NAGPUR *v.* RAMCHANDRA. **185 I. C. 893=12 R.N. 179=A.I.R. 1940 Nag. 174.**

———**S. 85**—*Rules framed under—Applicability—Application for refund of sums recovered as tax.*

The refund of an amount recovered as a tax by the municipality, even if that amount was calculated on a wrong basis is governed by the rules made under S. 85 of the C. P. Municipalities Act, (*Pollock, J.*) RAMLAL BHUNYADIN *v.* MUNICIPAL COMMITTEE, NAGPUR. **184 I C. 489 =12 R.N. 114=1939 N.L.J. 493=A.I R. 1940 Nag. 73.**

———**S. 106**—*"Land"—Meaning of.*

The word "Land" in S. 106 of the C. P. Municipalities Act is used in opposition to "House," and indicates sites uncovered by structures belonging to the same or different owners taking, or having a right to take, rents for the said use of land and paying cesses and taxes to the Municipality. There is no warrant for holding that the section applies to open or covered lands the malguzars of which does not receive rents or pay taxes for such lands as such malguzar. (*B. G. Khaparde.*) KESHEORAO *v.* CIVIL STATION SUB-COMMITTEE, NAGPUR. **20 N. L.J. 238.**

———**S. 106**—*Scope—Abadi within Municipality Responsibility for sanitation—Right of Municipal Committee to make malguzars responsible.*

A Municipal Committee which collects taxes in order to be able to discharge certain statutory duties laid on them cannot expect others to discharge these duties for them; and they cannot claim to make the malguzars responsible for the sanitation of their *abadi* lands on the mere ground that those lands are included in the municipal area. The municipality are not consequently entitled to call on the malguzars of a village situated with the municipal limits to construct a latrine in the *abadi* for the use of the inhabitants of the Basti. (*B.G. Khaparde.*) KESHEORAO *v.* CIVIL STATION SUB-COMMITTEE, NAGPUR. **20 N. L.J. 238.**

———**Ss. 168 and 199**—*Order of appointment of Health Officer as Secretary for issue of notice of Health Department, if* ultra vires—*Notice not signed as "Secretary, Municipal Committee"—Validity—Non-compliance with—Offence.*

There is nothing in the C. P. Municipal Act to prevent the appointment of two Secretaries and allocation of duties between them. The appointment of the Health Officer of the Municipality as Secretary to the Municipal Committee, for the purpose of issuing notices relating to the Health Department, which appointment is sanctioned by the Government, cannot be regarded as a delegation prohibited by S. 168 of the Act. It is merely a distribution of the duties which is perfectly legal and *intra vires.* A notice issued by the Health Officer under his signature under S. 199 of the Municipal Act is therefore perfectly legal, and non-compliance with it is an offence under the Act. Even if the Health Officer does not state that he signs it as "Secretary, Municipal Committee," it is a mere defect in form covered by S. 168 (4) and not an illegality. (*Gruer and Bose, JJ.*) LOCAL GOVERNMENT *v.* GANPATRAO. **167 I.C. 729=9 R.N. 204=38 Cr.L J. 437=19 N.L.J. 192=A.I.R. 1937 Nag. 119.**

———**S. 178 (3)**—*Scope and effect of.*

By reason of S. 178 (3) of the Municipal Act, a bye law does not become effective until it has been confirmed by the Local Government. But the bye-laws are made by the Municipal Committee at a special committee and not by the Government. All that the Government can do is to prevent the bye-laws made from taking effect by refusing to confirm it. (*Grille. J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N.L.J. 195.**

———**S. 178 (5)**—*Rules under—Offence—"Manufacture"—Bullock cart.*

A bullock cart with pneumatic rubber tyres composed largely of iron, but which has also wooden planks in it does not fall under the vague heading of 'manufacture' and is not liable to octroi duty, and statutes imposing pecuniary burden must be strictly construed and failure to make payment of octroi duty in respect of such a cart is not an offence under R. 47 of the rules read with S. 178 (5) of the Municipal Act. (*Gruer, J.*) MAROTI RAO *v.* MUNICIPAL COMMITTEE, KAMPTEE. **A.I.R 1937 Nag. 11.**

———**(as applied to Berar), S. 179 (g)**—*Rules under—R. 1—Words "plying for hire within limits of Amraoti Town Municipality"—Interpretation.*

The word "plying for hire within the limits of Amraoti Town Municipality," occurring in R. 1, cannot be confined to the narrow interpretation that the whole of the service which is offered must take place within the limits of the Municipality and that otherwise the rules do not apply. Hence vehicles operating as a regular service between Amraoti Town and Chandur Bazar and picking up passengers within limits of the Amraoti Town Municipality ply for hire within the limits of the Amraoti Town Municipality. (*Grille, J.*) AMRUTLAL *v.* PRESIDENT, TOWN MUNICIPAL COMMITTEE, AMRAOTI. **181 I.C. 520=11 R.N. 466=1939 N.L.J. 262=40 Cr.L.J. 556=A.I R. 1939 Nag. 171.**

———**S. 180, Proviso**—*"At the time of the making of such bye-law"—Meaning of.*

The words "at the time of the making of such bye-law," in the proviso to S. 180 of the C. P. Municipal Act, must refer to the making of the bye-law by the Municipal Committee and can have no reference to the confirmation of any bye-law by the Government. Government has no power to make bye-laws or alter them. It can only accept or reject them. The making must therefore refer to the final resolution of the Municipal Committee in respect of the bye-laws. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N. L.J. 195.**

——S. 199—*Applicability—Erection of building without sanction—Conviction under—Sustainability.*

The mere erection of a building without the sanction of the Municipal Committee is not an offence for which a conviction can be sustained under S. 199 of the C. P. Municipalities Act. The correct procedure in such a case is for the Municipal Committee to take action under S. 103 of the Act; and when this necessary step has not been taken, a conviction under S. 199 is unsustainable. (*Grille, J.*) PANDURANG KOMTI *v.* SECRETARY, MUNICIPAL COMMITTEE, CHANDA. **I. L.R. (1936) Nag. 56=164 I.C. 939=9 R.N. 47=37 Cr.L.J. 1038 (2)=19 N.L.J. 81=A.I.R. 1937 Nag. 79.**

——S. 218—*Delegation to Health Officer to institute prosecutions—Framing of new bye-laws afterwards—Fresh delegation—Necessity for.*

Where the Health Officer of a Municipality is empowered by the Municipal Committee to institute prosecution for and to compound offences under certain sections of the Act, and the then bye-laws framed under the Act, that delegation applies to new bye-laws framed subsequently also. It is not necessary for the Municipal Committee to give a fresh delegation each time a bye-law is made. (*Grille, J.C.*) RAMCHANDRA *v.* EMPEROR. **19 N.L.J. 195.**

CENTRAL PROVINCES PROTECTION OF DEBTORS ACT (IV OF 1937), S. 3—*Molestation—Resort to violence, when does not amount to.*

Where owing to the annoyance caused by a debtor in asking the creditor to go to a Civil Court for his money, the creditor resorts to violence against the debtor, he does so not to compel the debtor to pay the debt when he was not disposed to pay but only as a punishment for his impertinence and as such it would not amount to an offence under S. 3 of the Central Provinces Protection of Debtors Act. (*Niyogi, J.*) LAXMAN NAMDEO *v.* EMPEROR. **185 I.C. 348=12 R.N. 156=41 Cr.L.J. 168=1939 N.L.J. 455=A.I. R. 1939 Nag. 281.**

CENTRAL PROVINCES REDUCTION OF INTEREST ACT (XXXII OF 1936)—*Scope—If retrospective.*

The C. P. Reduction of Interest Act clearly retrospective in its operation. (*Stone, C.J. and Digby, J.*) BHAGWANTRAO *v.* DAMODAR. **I.L.R. (1938) Nag. 91=179 I.C 129=11 R.N. 271=20 N.L.J. 285=A.I,R. 1938 Nag. 112.**

——S. 2 (d)—*Secured debt—Attachment after judgment.*

An attachment of the judgment-debtor's property after judgment does not cause the judgment-debt to be a 'secured debt' for no 'lien' is created thereby so as to attract S. 2 (*d*) of the Central Provinces Reduction of Interest Act. (*Stone, C.J. and Bose, J.*) SETH LAXMINARAYAN *v.* SETH GHASIRAM. **1939 N.L.J. 257=A.I.R. 1939 Nag. 267.**

——**S. 3**—*Applicability—Renewal in* 1933 *of bond executed in* 1930.

Where the debt was incurred in 1930, though the renewal of the bond took place in 1933, the Court could ascertain the principal due on 1st January, 1932, and grant the debtor a relief. (*Puranik, J.*) SHEOSHANKER SAHAI *v.* SETH SURAJMAL. **1940 N.L J. 325.**

——**S. 3 (3)**—*Applicability—If confined to decrees passed before the Act came into force.*

The scheme of S. 3 of the C. P. Reduction of Interest Act is first to provide for claims not decreed and then for decrees already passed. S. 3 (3) is intended to apply only to decrees passed before the Act came into force. (*Pollock, J.*) ABDUL HUSAIN *v.* SETH DWARKADAS. **1940 N.L J. 260=A.I.R. 1940 Nag. 159.**

CENTRAL PROVINCES RELIGIOUS AND CHARITABLE TRUST ACT (1937), S. 10—*What orders Court can pass—Enquiry into past administration—If within the scope of the Act.*

The Court is empowered under S. 10 of the Central Provinces Religious and Charitable Trust Act to pass orders for the proper management or administration of the trust property. Hence an enquiry into past administration is beyond the scope of the Act, and it is a civil suit that is the proper remedy in such a case. (*Gruer, J.*) SITARAM PAMAJI *v.* HARI KANHUJI. **188 I.C. 320=1940 N.L.J. 173.**

——**S. 12**—*Report under-signed only by two—Defect, if curable.*

S. 12 of the Central Provinces Religious and Charitable Trust Act requires that the report should be signed by three persons. Where it was signed only by two, the defect is not curable, as the application was bad at its inception and amendment could not better it. (*Gruer, J.*) SITARAM PAMAJI *v.* HARI KANHUJI. **188 I.C. 320=1940 N.L.J. 173.**

CENTRAL PROVINCES REVENUE BOOK CIRCULAR—*Sale by Coltector—Confirmation—Appeal—Order by appellate Court without hearing purchaser—Legality.*

When a sale by the Collector has been confirmed, and an appeal is preferred, the auction-purchaser must be heard before an order to his disadvantage can be passed by the appellate Court. (*Gordon, R.M.*) RAJARAM *v.* BIBHUTSING. **19 N.L.J. 74.**

——Sale by Collector—Confirmation—Subsequent compromise between parties—Procedure—Order referring decree-holder to Civil Court—Propriety. *See* C. P. CODE, S. 70. **20 N.L.J. 93.**

——**Vols. II-III, 8**—Collector's sale—Proclamation not specifying mortgage—Collector directing sale subject to mortgage on mortgagee's application without inquiry on old proclamation—Propriety—Sale—If to be set aside. *See* C. P. CODE, O. 21, R. 90. **20 N L.J. 181.**

——**Vols. II-III, 8**—*Mortgage mentioned in proclamation—Declaration of invalidity prior to sale—If ground for setting aside sale.*

The fact that a mortgage mentioned in the sale proclamation as existing on the property sold is declared void after the proclamation and before the sale renders the sale liable to be set aside. (*Raghavendra Rao, H.M.*) LAXMAN BAPUJI TELI *v.* GANPAT NAGOJI TELI. **20 N.L.J. 179.**

——**Vols. II-III, R. 10**—Scope—If modifies O. 21, R. 69(2), C. P. Code. *See* C. P. CODE, O. 21, R. 69 (2). **20 N.L.J. 80.**

——**Circular III-8, rules 10 to 15**—*Auction sale—Inadequacy of price—If justifies refusal of confirmation.*

C. P. REV. BOOK CIRC. III-8.

Once a bid has been accepted, inadequacy of price is no ground for refusal to confirm a sale, even if there be no specific order accepting the bids. *(Gordon, R.M.)* Wamanrao *v.* Mankuarbai. **19 N.L.J. 134.**

——**Circular III-8**—Sale by Collector—Setting aside—Grounds—Irregularity in publishing sale—Objection not raised before sale—Failure to prove substantial injury—Sale—If liable to be set aside—C. P. Code, O. 21, R. 90, as amended in Central Provinces. *See* C. P. Code, O. 21, R. 90 (as amended in C. P.) **19 N.L.J. 318.**

——**Circular III-8**—Scope—Duty of Collector under—C. P. Code, O. 21. R. 90, as amended in Central Provinces—Applicability to Collector's Cases. *See* C. P. Code, O. 21, R. 90 (as Amended in C. P.). **19 N.L.J. 282.**

——**Circular III-8**—*Rules in—Collector's sale —Irregularities in sale proclamation—Omission to publish at Collector's Court or Tahsil—If vitiates sale.*

The rules framed under the C. P. Code, and referred in the C. P. Revenue Book Circular issued after the amendment of O. 21, R. 90, C. P. Code, must be construed to mean the rules under O. 21, R. 90, as adapted by the High Court of Nagpur. Omission of details in the sale proclamation and the omission to affix the proclamation on the Collector's notice board and on the Tahsil notice board are not such irregularities as will vitiate the sale. The objection to such irregularities must be raised before the sale. When they are not so raised, they are not grounds on which the sale can be set aside. *(Burton, R.M.)* Girdharilal *v.* Ratiram. **19 N.L.J. 312.**

——**Circular III-3,R, 10**—*Discretion of Collector under—Acceptance of bids—Order for fresh sale—Reference to Civil Court.*

The reference prescribed by R. 10 of Revenue Book Circular III-8, is for the purpose of determining whether the last bid in the auction held by the Tahsildar is adequate. If the Collector has reason to believe that that bid was inadequate, he has power to order a fresh auction, and can order a fresh enquiry and also make a reference to the Civil Court. *(Gordon, R.M.)* Bhikubai *v.* Gangadhar. **19 N.L.J. 156.**

——**Circular III-8, Rules 14 and 15**—*Collector's case—Revision to Deputy Commissioner—Competency.*

Under rules 14 and 15 of the Revenue Book Circular III-8, the Deputy Commissioner has only power of appeal but not of revision in Collector's case. *(Gordon, R.M.)* Mahadeo *v.* Narayan. **19 N.L. J. 76.**

——**Circular III-8, Rr. 14-17**—*Execution by Collector—Order for sale by Sub-Divisional Officer—Omission to appeal—Revision to Deputy Commissioner—Competency.*

When no appeal is filed within time to the Deputy Commissioner against an order for sale passed by the Sub-Divisional Officer, an application in revision to the Deputy Commissioner against that order is incompetent. *(E. Gordon, R.M.)* Tukaram *v.* Mohanlal. **19 N.L.J 174.**

——**Circular III-8, Rr. 15 and 16**—*Order of Deputy Commissioner refusing to restore appeal dismissed for default—Revision by Governor-in-Council—If competent.*

C. P. TENANCY ACT (1898), S. 41.

Proceedings in Collector's cases are governed by the rules in the Revenue Book Circular III-8, and the provisions of the C. P. Code, only apply because of the directions in those rules. Every order passed by a Revenue Officer in such proceedings is subject, in the matter of appeals and revisions, to Rr. 14 and 15 of the Revenue Book Circular. R. 15 allows revision by the Governor-in-Council only in the case of orders passed in appeal. An order of the Deputy Commissioner dismissing an application refusing to restore an appeal dismissed for default is not an order passed in appeal and therefore is not open to revision by the Governor-in-Council. *(Burton, R.M.)* Ramlal *v.* Ghasiram. **19 N.L.J. 314.**

CENTRAL PROVINCES REVENUE MANUAL, Vol. I, p. 119 R. 1, Explanation—Malik makbuza *losing rights in holding under S. 41, C. P. Tenancy Act—Liability to pay patwari's dues—Levy of dues—Right to recover from occupancy tenant.*

The *malik makbuzas* who have lost their right to cultivate their holding under S. 41, C. P. Tenancy Act, stand only in the position of proprietors who have forgone their right to cultivate the land. The person that is to be deemed to be proprietor for purposes of payment of patwari's dues is not the *malik makbuza* but the occupancy tenant who actually cultivates the land. Hence if such patwari's dues have been wrongly recovered by the Tahsildar from the *malik makbuza*, he is entitled to recover the same from the occupancy tenant in actual cultivation of the holding. *(Niyogi, J.)* Shrinivas Govind *v.* Sadasheo Sakharam. **171 I.C. 658=10 R.N. 127=20 N. L.J. 173=A.I.R. 1937 Nag. 211.**

CENTRAL PROVINCES TENANCY ACT (XI OF 1898), S. 2 (2)—Lac cultivation—If agriculture—Lease of lac trees for three years—Registration. *See* T. P. Act, S. 107. **A.I.R. 1937 Nag. 289.**

——**Ss. 11 and 13**—*Admission of two to tenancy —Tenancy not divided by metes and bounds—Payment of rent jointly—Death of one of the tenants—Rights of landlord.*

Where an owner of property carves a lesser interest, such as a tenancy, out of his rights, the reversion, of course, remains in him, but when the reversion falls in, there is no transfer of title from the tenant to himself. When a landlord chooses to let in two people on the land giving each a right to uninterrupted possession of the whole upon their paying him jointly the whole rent, his reversion cannot fall in until the rights of both have determined. *(Bose, J.)* Amergir *v.* Rambhajan. **I.L.R. (1940) Nag. 255=175 I.C. 536=10 R.N. 459.**

——**S. 41 (2) and (3)**—*Scope—Absolute occupancy holding—Mortgage without landlords consent—Subsequent mortgage in favour of landlord —Suit on former—Latter impleaded as puisne mortgagee—Plea that prior mortgage is invalid and not binding on him—Landlord discharged from suit—Declaration that mortgage did not bind him —Effect of—Subsequent suit on landlord's mortgage—Maintainability against purchaser in execution of decree on prior mortgage.*

In a suit on a mortgage executed by a tenant in respect of his absolute occupancy fields, the landlord who was impleaded as a party to the suit as a subsequent mortgagee of the fields pleaded that the suit mortgage, not having been effected with his consent as required by S. 41 (3), C. P. Tenancy Act, did not bind him He was discharged from the suit with the declaration that the mortgage did not bind him as it was ineffectual. The landlord subsequently brought a suit to enforce his mortgage against the mortgagor's legal representatives and against the prior mortgagee who had purchased the fields in execution of his own decree on his mortgage which was the subject of the former suit. The mortgagee-purchaser pleaded that the plaintiff landlord has lost his right to enforce his mortgage by setting up a paramount title in the prior suit and in declining to redeem the prior mortgage in his favour.

Held, (1) that the mortgage effected by the tenant without the landlord's consent did not bind him, and therefore the subsequent mortgage in his favour operated on the entire interest of the mortgagor-tenant as if it had not been burdened with a prior incumbrance; (2) that the transfer of a prohibited nature under S. 41 (2) of the C. P. Tenancy Act which was not permitted by the landlord would remain valid as between the tenant and his transferee until avoided by the landlord, so far as the landlord was concerned. Unless he consented to it, the mortgage effected without his consent, though prior in time, would be postponed to the landlord's later mortgage, and the mortgagee would be bound to redeem the landlord's mortgage; (3) the declaration given in the prior suit that the mortgage did not bind the landlord did not deprive him of his right as a subsequent mortgagee to enforce his own mortgage against the prior mortgagee. (*Stone, C.J. and Niyogi, J*) RAMKARAN *v.* SETH KANHAIYALAL. **170 I.C. 71=I.L.R. (1937) Nag. 208=10 R.N. 40=19 N.L.J. 290=A.I.R. 1937 Nag. 189.**

——**S.** 41 (7)—*Scope—Occupancy tenant—Mortgage without landlord's consent—If void.*

S. 41 of the C. P. Tenancy Act of 1898 (repealed by Act I of 1920) conceded to the absolute occupancy tenant the right to transfer his right in the holding within certain limits; beyond those limits, the transfer to be binding on the landlord required the concurrence of the landlord. If the landlord withheld his consent the transfer did not become void *ab initio*, but operated as a valid transfer between the tenant and his transferee though it did not affect the landlord. The transfer is valid until it is avoided by the landlord. (*Stone, C. J. and Niyogi, J.*) RAMAKARAN *v.* KANHAYALAL. **I.L R. 1937 Nag. 208=170 I.C. 71=10 R.N. 40=19 N.L.J. 290=A.I.R. 1937 Nag. 189.**

——**S.** 46—*Applicability—Lands ceasing to be agricuttural and treated as non-agricultural.*

S. 46 of the C. P. Tenancy Act has no application to a case where the lands have ceased to be connected with any agricultural holding. and are residential house property and have been treated as non-agricultural and transferable land. (*Rowland, J.*) PARMESHWAR PRASAD *v.* WALJI CHHATRI. **6 Cut.L.T. 62.**

——**S.** 92— *Scope—"Tenant" — Usufructuary mortgagee from recorded tenant—Ejectment of from holding—Suit for restoration of possession under S. 9, Specific Relief Act—Jurisdiction of Civil Court.*

A mortgage of a tenancy is not an absolute assignment and does not create privity of estate between the lessor and the mortgagee. The relationship of landlord and tenant does not therefore exist between a landlord and a usufructuary mortgagee from the recorded tenant of the holding. The mortgagee is not a tenant within the meaning of S. 92 of the C. P Tenancy Act, where such a mortgagee in possession is ejected from the holding, a suit by him under S. 9 of the Specific Relief Act for restoration of possession is maintainable in the Civil Court and is not barred by S. 92. (*Rowland, J.*) BALMAKUND MISRA *v.* LALIT MOHAN MISRA. **6 Cut.L.T. 64.**

——**(I OF 1920)**—*Applicability and scope.*

The C. P. Tenancy Act fastens itself upon the original contract between the parties, and regulates their future rights and liabilities, the moment there is a transaction which falls within its purview. (*Vivian Bose, J.*) BABURAO *v.* SANDU. **I.L R. 1936 Nag. 5=165 I.C. 122=9 R.N. 62=A.I.R. 1936 Nag. 180.**

——*Construction—Rights under the old Act—How affected.*

The provisions of the new Act must not be so construed as to take away rights that have accrued under the old Act. (*Pollock, J.*) PACHO *v.* NIHELAL. **1940 N.L.J. 377.**

—— *Interpretation — Notions derived from English and ordinary Indian Law, with reference to landlord and tenant, to be excluded.*

The Central Provinces Tenancy Act creates special tenures which are unknown to the ordinary law. Unless one follows closely the spirit and the provisions of the Act and excludes from consideration, pre-conceived notions gathered from English Law or from ordinary Indian Law with reference to landlord and tenant, one will be landed in considerable difficulties to arrive at the true meaning and intention of its provisions. (*Stone, C. J., Niyogi and Bose, JJ.*) PUNJARAM JAGOBA *v.* RAMU CHINTOO. **I.L R. 1940 Nag. 348=186 I.C. 731=12 R.N. 234=1940 N.L.J. 121=A.I.R. 1940 Nag. 49 (F.B.).**

——*Policy of—Gift of* sir *land—Surrender of occupancy right to donee— Validity—Duty of Court.*

The policy of the C. P. Tenancy Act is to secure and preserve to a proprietor whose proprietary rights are transferred a right of occupancy in his *sir* lands. This policy cannot be defeated by the proprietor making a gift of his *sir* land and then as part of the same transaction surrendering his occupancy right to the donee. Whenever it appears that a transaction is void as contrary to the policy of a statute, the Court should take notice of the nullity and proceed accordingly. (*Stone, C.J.*) SIDNATH *v.* JASODA BAI. **10 R.N. 287=173 I.C. 145 (2)=A.I.R. 1938 Nag. 185.**

——*Scope—If retrospective—Vested rights acquired under prior Act of* 1898—*If affected or taken away—Permanent lease of* Sir *lands under old Act—Foreclosure by mortgagee of land after new Act and ejectment of mortgagor—Rights of lessee to possession—If lost.*

Certain fields in a Mauza were *Sir* lands of *T*, who held 8 annas share in the village. The cultivating rights in these fields were permanently leased out in 1917, when the old Tenancy Act XI of 1898 was in force, by *T* to the adoptive father of the plaintiff appellant, who remained in possession and paid rent to *T*. In 1921, after the new Act I of 1920 came into force, the respondent, who held a mortgage over this village share, foreclosed it and in 1930, he obtained a decree for arrears of rent against *T's* son *D*, who was recorded as an occupancy tenant after the loss of the proprietary rights In execution of the decree the respondent in 1931 took actual possession of the fields thereby dispossessing the appellant who thereupon sued for possession.

Held, that the rights obtained by the respondent over *Sir* land by his foreclosure were subject to the perpetual lease granted by *T* in 1917 to appellant's adoptive father, which was binding on the respondent and that the absolute right which was conferred on the appellant by the old Tenancy Law could not be worsened or prejudicially affected by the new Tenancy Act of 1920, which should not be given retrospective effect, and the appellant should therefore be held entitled to be restored to possession of the fields in question. (*Gruer, J.*) KAMTANATH *v.* CHUDAMANSINGH. **20 N.L.J. 35.**

——**S. 2 (5) (d)**—*Improvement—House built in* abadi—*If amounts to—House built in holding when amounts to.*

Where an occupancy tenant builds a house in the *abadi* though with a view to live near the holding and protect it, is not an improvement. Though built on the holding itself, it cannot be an improvement unless it is 'required' by the holding. (*G. P. Burton, R. M.*) MT. BUDHANBAI *v.* THENGU. **1938 N.L.J. 136.**

——**S. 2 (9) and (11)**—*"Rent"—"Tenant"—Registered* kabuliyat *to cultivate* malikmakbuza *land for fixed period at fixed annual payment—Creation of tenancy.*

Where defendants executed a registered *kabuliyat* to plaintiff (a *malikmakbuza-holder*) to cultivate plaintiff's land for a particular period agreeing to pay a certain sum every year in return.

Held, that the defendants were tenants of the plaintiff and that the money they bound themselves to pay was rent within the meaning of the Act. (*Vivian Bose, J.*) BABURAO *v.* SANDU. **I. L.R. 1936 Nag. 5=165 I.C. 122=9 R.N 62=A.I. R. 1936 Nag. 180.**

——**S. 3**—*"Tenant"—If includes sub-tenant.*

The word 'tenant' in the Act includes a "sub-tenant". A person, therefore, who is a 'sub-tenant' is a 'tenant' under S. 3 of the Act. Such a person cannot be a 'thalwa'. (*Pollock, J.*) RAMKRISHNA BHAU *v.* BISRAM. **171 I C. 909=10 R. N. 147 (1)=A.I.R. 1937 Nag. 160.**

——**S. 5**—*Devise in contravention of—Devisee taking possession—Dispute between co-devisees—Validity of will, if can be raised.*

A will violating the provisions of S. 5 of the C.P. Tenancy Act though it is void in law, yet if a devisee has taken possession under the will and has acted under the will, he cannot in a suit by a co-devisee to enforce the will plead the invalidity of the will. (*Pollock, J.*) NAROTTAMDAS *v.* GURUPRASAD. **1938 N.L.J. 181.**

——**Ss. 6 and 105**—*Absolute occupancy holding pre-empted by landlord—Mortgagee—Suit by impleading landlord pre-emptor—Pre-emptor discharged—Decree—Mortgagee purchasing holding in execution—Suit by to recover possession against landlord—Competency— Right to pre-emption money.*

The substantative right of pre-emption given to the landlord under S. 6 (4) (*c*) is independent of the right of any mortgagee of the tenant right and is paramount. In addition to this the value of the absolute occupancy holding as if it were not mortgaged or charged as fixed by the Revenue Officer is conclusive and cannot be challenged in the Civil Court in view of S. 105 (*a*). But the Revenue Officer has not been given any special powers to distribute or dispose of the deposit made by the landlord. Consequently S. 105 (*a*) will not operate to deprive the Civil Courts of their indisputable jurisdiction to direct how the sum deposited by the landlord should be disposed of. An absolute occupancy tenant's field was sold in an execution of money-decree passed against him and under S. 6 the property was pre-empted by the landlord at price fixed under S. 6 (5) free of all incumbrances. A motgagee of the tenant rights brought a suit on his mortgage after the pre-emption proceedings and obtained a final decree thereon in execution of which he purchased the field for himself. The landlord was discharged from that suit in consequence of his having asserted his paramount title under S. 6. The mortgagee thereafter brought a suit against the landlord for recovering possession of the field, alleging that he not being a party to the pre-emption proceedings, they were not binding on him and as the landlord was a party to his mortgage suit and he having failed to redeem the mortgage, possession could be recovered.

Held. that the mortgagee could not recover possession, as on pre-emption proceedings taking place, the landlord took the property free of all incumbrances and the mortgage or other charge if any shifted from the holding and went over to the pre-emption price leaving the land free to the landlord. But the mortgagee could recover the money deposited in Court which was only a security substituted for land. And the fact that he had failed to ask for a decree against the pre-emption price in his previous suit on mortgage could not preclude him from doing so. (Change in S. 6 to remedy defect suggested.) (*Stone, C. J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL. **I.L.R. 1938 Nag 268=174 I.C. 762=10 R.N. 413=A.I.R. 1938 Nag. 80.**

——**S. 6**—*Acquiescence by landlord—What amounts to—Landlord and others creditors of tenant—Transfer of absolute occupancy land to one of the creditors as part of agreement before the Conciliation Board.*

Where the landlord along with others are creditors of his tenant and where as part of the agreement before the Conciliation Board the absolute occupancy land is transferred to one of the creditors on his undertaking to pay the debt due to the landlord, the whole arrangement including the landlord's part in it is one transaction and the only inference that can be drawn from his connection and part is that he did consent to the transfer. (*Burton, F.C.*) JAGDEORAO BALAJI *v.* MAHADEORAO ANYAJI. **1939 N.L.J. 170.**

———**S. 6**—*Applicability—"Transfer"—Sub-tenant in possession continuing in possession under agreement of sale of occupancy right—If transfer—Registered transfer—If necessary.*

Where a sub-tenant in possession of an occupancy holding gets a right of occupancy in the holding in pursuance of an agreement of sale and continues in possession of the holding the transaction is a transfer to which S. 6 of the C. P. Tenancy Act applies. S. 6 is not intended to be limited to such transfers as have duly registered. (*G. P. Burton, R.M.*) MANNU *v.* YESHWANT RAO. **20 N.L.J. 84.**

———**S. 6**—*Mortgage—Purchase of mortgaged holding—Rights and liabilities of—Failure to redeem mortgage—Pre-emption by landlord—Effect on rights of mortgage.*

The purchaser of the mortgaged property is not personally liable to pay anything in excess of the value of the mortgaged property. If the purchaser of the mortgaged property fails to redeem, he loses his right to the mortgaged property which in the case of landlord pre-empting under S. 6, C. P. Tenancy Act (1920) is the pre-emption money. (*Stone, C.J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL. **I.L.R. (1938) Nag. 268=174 I.C. 762=10 R.N. 413=A.I.R. 1938 Nag. 80.**

———**S. 6**—*Scope—Notice to incumbrancer—If necessary.*

S. 6 does not provide for notice to any incumbrancer and hence it is not imperative on the Revenue Officer to give a notice to any incumbrancer. (Compulsory issue of notice by Revenue Officer of pre-emption proceedings to all incumbrancers is urged by legislative amendment of the section.) (*Stone, C.J. and Niyogi, J.*) RAMKARAN BONDRU *v.* SURAJMAL KANHAIYALAL. **I.L.R. (1938) Nag 268=174 I.C. 762=10 R.N. 413=A.I.R. 1938 Nag. 80.**

———**S. 6**—*Transfer of absolute occupancy holding—No notice to landlord—Landlord not taking steps to avoid it—Sale in execution of rent decree—Transferee if affected.*

A transfer of an absolute occupancy holding is valid unless and until it is avoided by the landlord in the manner and to the extent provided by S. 6 of the C. P. Tenancy Act. The sale of such a holding in execution of rent decrees to which the transferee was not a party when he was the tenant of the holding does not bind him. The transferee obtains a good title and becomes a tenant from the date of transfer. (*Grille and Bose, JJ.*) MADHORAO *v.* SETH PANNALAL. **I.L.R. (1940) Nag. 190=177 I.C. 173=11 R.N. 131=1938 N.L.J. 152=A.I.R. 1938 Nag. 292.**

———**S. 6**—*Transfer of occupancy holding—Liability for rent.*

On the transfer of an occupancy holding, the tenant ceases to be a tenant from the date of transfer. Hence he is not liable for the rent after that date. Irrespective of the fact whether the transferee is a tenant or not between the date of the transfer and the date on which it is avoided, one thing is clear and that is he is liable either for rent or for damages for use and occupation. (*Pollock, J.*) SHREE VITHAL BHAGWAN *v.* NARAYAN RAO. **182 I.C. 617=12 R N. 23=1939 N.L.J. 196=A.I.R. 1939 Nag. 175.**

———**S. 6 (2)**—*Failure of tenant to defer transfer—Effect—If raises a presumption of waiver of intention to transfer.*

There is nothing in S. 6 of the C. P. Tenancy Act, that detracts from the written notice once delivered to the landlord or to show that it is affected in any way by the subsequent conduct of the tenant, and there is nothing to justify the suggestion that the act of the tenant in proceeding with the transfer before the expiry of the month can raise a presumption on the part of the landlord that the notice of the intended transfer has been waived. (*Burton, F.C.*) GOVINDRAO *v.* KRIPARAM. **1939 N L J. 107.**

———**S. 6 (5)**—*Deposit in Court of pre-emption price—Charge for rental arrears—Mode of realisation.*

Where there is a deposit in Court of amount fixed as the pre-emption price, though it is charged with the rental arrears the landlord could not proceed against the money simply by obtaining an order from the Revenue Court to hand it over to him. He must first execute the decree for arrears already obtained and should obtain a decree for arrears for which no decree had been obtained. He must proceed to enforce his rights against the money in the same way as he would enforce them against the land. (*Roughton, F.C.*) TODAR *v.* RAMBHADRA. **1938 N.L.J. 164.**

———**S. 6, Proviso**—*Construction and scope—"Costs"—If include costs of appeals as well—If overrides S. 29, Land Revenue Act.*

The costs incurred, by a landlord in his application mentioned in the proviso to S. 6 of the C. P. Tenancy Act do not extend to and do not include costs incurred in appeals arising out of that application. The proviso does not override the provisions of S. 29 of the Land Revenue Act as regards apportionment of costs. (*G. P. Burton, R.M.*) PHUSRAJ *v.* GULSINGH. **20 N.L.J. 87.**

———**S. 9**—*Nature and scope of the charge created by—Rights of subsequent mortgagees paying the rent due by the tenant.*

The charge given in S. 9 of the C. P. Tenancy Act is a special statutory right (*i.e*) it is a charge created by operation of law. The extent to which the ordinary law as to charges is set aside is indicated in S. 9 itself and it cannot be carried further by implication. The object of S. 9 is to give the landlord precedence for his rent. That object is completely attained the moment the holding is sold in the manner specified in the section. The 'first charge' enures no further than that. S. 9 does not confer any rights of subrogation. Therefore where certain subsequent mortgagees pay the rent due by the tenant, to save the security, have only to rely on S. 92 read with S. 100, T. P. Act. (*Stone, C.J. and Bose, J.*) SITARAM *v.* KRISHNARAO. **1940 N.L.J. 179=A.I.R. 1940 Nag. 156.**

———**S. 9**—*Payment of decree amount after actual sale—If sufficient.*

Where an absolute occupancy holding is sold in execution of a decree for arrears of rent, the charge in favour of the landlord is satisfied and the purchaser of the holding gets the holding free of that charge. Any one who claims to have any interest in the holding can pay up the decretal amount during the execution proceedings until the holding is sold in execution. Once the holding is sold the right of such person to redeem the charge is barred and he is not thereafter entitled to pay the amount of decree for arrears of rent. (*Niyogi, J.*) SHANKER NATH *v.* BABULAL. **I L R (1936) Nag. 138=164 I.C. 931=9 R.N. 44=A.I. R. 1936 Nag. 148.**

——S. 9—*Sale in execution of decree for rent of absolute occupancy holding—If free from encumbrances.*

Where an absolute occupancy holding is sold in execution of a rent decree the sale is not one free from encumbrances and hence a mortgagee of the holding can enforce his mortgage which is prior to the date of the decree for rent. (*Pollock and Digby, JJ.*) BHIKULAL *v.* BHAIYALAL. **187 I.C. 785=12 R.N. 313=1939 N.L.J. 601=A.I.R. 1940 Nag. 97.**

——**S. 9**—*Sale under rent decree—Auction-purchaser—Rights.*

Where in an execution of a rent decree the absolute occupancy fields are sold, the auction-purchaser is in no better position than that of an ordinary auction-purchaser in execution of a money decree and so he does not take the fields free from encumbrances. (*Gruer, J.*) GANBA PAIKU KUNBI *v.* GANPATSAO. **I.L.R. (1937) Nag. 498=176 I.C. 155=11 R.N. 35=A I R. 1937 Nag. 376.**

——**S. 12**—*Exemption from attachment—Nazul plots cultivated by judgment-debtor.*

The mere fact that the word 'occupancy' or 'maurusi' is used in the Nazul settlement records would not give the occupants a right to claim that the land was not liable to attachment in execution of a decree and it was never intended by Government to deal with these persons as tenants governed by the Tenancy Act. (*Pollock, J.*) SAMBHSHIO *v.* LAXMAN ZINGAJI. **1940 N.L.J. 162=A.I.R. 1940 Nag. 210.**

——**Ss. 12 and 13**—Plea of transfer being in violation of S. 12—Onus. *See* EVIDENCE ACT, Ss. 101 AND 102. **1938 N.L J. 474.**

——**S. 12**—*Scope—Tripartite agreement between* malguzar *tenants and latter's creditors—Surrender of occupancy fields by tenants—Lease of same by* malguzar *to creditor in discharge of tenant's debt due to creditor—If void.*

Defendants 1 and 2 owed money to the plaintiffs on accounts, but had no money to pay to their creditor. They therefore offered to surrender their occupancy fields to the 3rd defendant who was the *malguzar* and undertook to induce him to lease the fields to the plaintiffs. The *malguzar*, on being approached, agreed to this and in pursuance of this tripartite arrangement, the defendants 1 and 2 surrendered the fields to the 3rd defendant who on the same day leased them to the plaintiffs. Plaintiffs set off the major portion of the amount due to them as consideration for the transaction giving the balance. After a time plaintiffs sued for refund of consideration money on the ground that the lease was fraudulently foisted on them, and that the lease was also void being a transfer in contravention of the C. P. Tenancy Act.

Held, (1) that the transaction was not transfer, but a surrender and release, and was not prohibited under the Act; (2) that S. 12 of the C. P. Tenancy Act, which did not prohibit transfers as such, but permitted them to a limited extent,

limited them to persons specified there, was not enacted for the benefit of the tenant, but for the protection of his co-tenants and heirs and did not prohibit the transaction; and (3) that the transaction was therefore not void and the suit must therefore fail. (*Bose, J.*) SETH RAMNARAYAN *v.* BATTULAL. **170 I.C. 170=10 R.N. 50=20 N. L.J. 89=A.I.R. 1937 Nag. 235.**

——**Ss. 12 and 13**—*Setting aside of transfer by occupancy tenant—Deed of transfer illegally registered—Jurisdiction of Civil Court.*

A Revenue Court alone has jurisdiction to set aside a transfer by an occupancy tenant, although the deed of transfer may have been illegally registered in spite of the prohibition contained in S. 12, C. P. Tenancy Act. The party who is prejudiced by the transfer must have recourse to the provisions of S. 13 and cannot invoke the jurisdiction of the Civil Court. (*Niyogi, A.J.C.*) KANHAIYA KUNBI *v.* SITARAM KUNBI. **31 N.L.R. (Supp.) 96=159 I.C. 862 (2)=19 N.L.J. 44=8 R.N. 144=A.I.R. 1936 Nag. 18.**

——**Ss. 12 and 89**—*Transfer in S. 12 if includes surrender.*

Per *Stone, C.J.*—'Transfer' in S. 12 does not include the 'surrender' referred to in S. 89 of the C. P. Tenancy Act. (*Stone, C.J., Bose and Digby, JJ.*) ASARAM *v.* LUDESHWAR. **I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

——**S. 12**—*Transfer of undivided share—When permissible.*

Under S. 12 of the C. P. Tenancy Act an occupancy tenant may transfer any right in his holding to a co-tenant or person who, if he survived the tenant without nearer heirs, would inherit his right. (*Pollock, J.*) ABDUL JABBAR *v.* MST. RAMMA. **1940 N.L.J. 164=A.I.R. 1940 Nag. 160.**

——**S. 12 (1)**—*Acquisition of tenancy by adverse possession by remote heir—Ejectment, if can be resisted.*

Where a person has acquired the tenancy by adverse possession against the admitted tenant, if he happens to be in the time of the tenant's heirs, cannot be ejected by the landlord. (*Stone, C.J., Niyogi and Bose, JJ*) PUNJARAM JAGOBA *v.* RAMUCHINTOO. **I.L.R. (1940) Nag. 348=186 I. C. 731=12 R N 234=1940 N.L.J. 121=A.I.R. 1940 Nag 49 (F.B.).**

——**S. 12 (1)**—*Transfer—What is included in.*

Bose, J.—The word transfer in S. 12 (1) is not confined to the narrow types of transfer with which Transfer of Property Act deals. It would include a 'transfer' by prescription. (*Stone, C.J., Niyogi and Bose, JJ.*) PUNJARAM JAGOBA *v.* RAMUCHINTOO. **.LR (1940) Nag. 348=186 I.C. 731=12 R.N. 234=1940 N.L. J. 121=A.I R. 1940 Nag. 49 (F.B.).**

——**S. 12 (4)**—*Scope—Deed of relinquishment by one tenant in favour of other in settlement of dispute—If prohibited.*

S. 12 prohibits certain transfers mentioned in the body of the section. A deed of relinquishment by an occupancy tenant for valuable consideration in favour of another claiming a right to the holding of a deceased tenant in settlement of a dispute with him is not a transfer and therefore there is no contravention of S. 12. Hence such a document can rightly be admitted to registration. (*Bose and Puranik, JJ.*) SAHAUDRA BAI *v.* SHRI

Deo Radha Ballabhji. **I.L.R. (1940) Nag. 94=176 I.C. 57=11 R.N. 24=A.I.R. 1938 Nag. 30.**

——**S. 13**—*Landlord—Who is—Basis of decision.*

In deciding who is the landlord of the tenant for the purposes of S 13 of the C. P. Tenancy Act, the Revenue Court should have regard solely to the record-of-rights and the annual village records alone and it should not seek to decide who the landlord concerned is. (*Burton, F.C.*) Kislal *v.* Harnamsingh. **1939 N.L.J. 559.**

——**S. 13**—*Scope of—Surrender obtained by co-sharer—Lambardar resorting to remedy under S. 13—Equitable relief to co-sharer.*

S. 13 of the C.P. Tenancy Act enables the tenant's heirs or the lambardar to apply for an order for possession. It does not enable the tenant to get such an order. Thus the Act accepts the position that the tenant by his surrender has divested himself but makes provision for his heirs to get back in his place, alternatively it empowers the lambardar to apply for possession. The surrender is not one void *ab initio.* Where a co-sharer obtained a surrender from a tenant and the lambardar thereafter obtained possession by virtue of an order under S. 13, in a suit by the co-sharer who took the surrender for contribution among other reliefs, it was held that on equitable considerations the plaintiff should be recompensed not necessarily the amount he expended for the surrender, but such amount as a reasonable man would have paid less the costs his co-sharers would have incurred in the proceedings under S. 13. (*Stone, C.J. and Clarke, J.*) Lachhamansingh *v.* Motisingh. **1940 N.L.J. 404.**

——**S. 13**—*Surrender to co-sharer.*

Document drawn in the form of surrender to a co-sharer amounts to transfer. A.I.R. 1925 Nag. 259; A.I.R. 1927 Nag. 161, Foll. (*Niyogi, A.J.C.*) Kanhaiya Kunbi *v.* Sitaram Kunbi **31 N.L.R. (Supp.) 96=159 I.C. 862 (2)=19 N.L.J. 44=8 R.N. 144=A.I.R. 1936 Nag. 18.**

——**S. 23**—*Construction—"All arrears in respect of such holding"—Meaning—If include arrears subsequent to decree but prior to ejectment.*

According to the natural meaning of S. 23 the exprsssion "All arrears in respect of such holding" means not only all arrears covered by the decree under execution, but also all arrears up to ejectment whether decreed or not; therefore all arrears of rent, whether decreed or not, must be deemed to be satisfied when the defendant is ejected in execution under the section. (*Pollock, J.*) Sobharam *v.* Jagmohan Singh. **I.L.R. (1937) Nag. 161=168 I.C. 62=9 R.N. 236=19 N.L.J. 237=A.I.R. 1936 Nag. 269.**

——**Ss. 23 to 25**—*Scope—Recorded co-tenants—Decree for arrears of rent against one only—The other not impleaded—Ejectment proceedings—If binding on latter or his heirs.*

B and *R* were recorded as co-tenants of a certain holding. A decree for arrears of rent was passed against *R* only. *B* though living at the time of suit against *R*, was not made a party to the rent suit. In ejectment proceedings the landlord obtained actual possession of the holding. The heirs of *B* offered to pay the rent due during the ejectment proceedings, but the landlord refused to accept it even though the offer was made within the time allowed under S. 24 of the Act. The heirs of *B* then brought a suit for possession of the holding on the ground that the rent decree and the subsequent ejectment proceedings were not binding on them as their predecessor in title, *i.e.*, *B* was not made party to the rent suit against *R*.

Held, that the suit for possession by the heirs of *B* was proper as they could not be deemed to have been constructively ejected from the holding by the landlord in a decree for arrears of rent against *R* to which *B* was not a party (*Bose, J.*) Shyamlal Debidin *v.* Gond Singh. **171 I.C. 935=10 R.N. 143=A.I.R. 1937 Nag. 175.**

——**S. 24**—*Applicability—Joint decree for arrears of rent in respect of occupancy holding and absolute occupancy holding—Order of ejectment—Legality—Executability by Revenue Officer.*

S. 24, C.P. Tenancy Act, only applies to a decree that falls within the scope of S 23. S. 24 contemplates the execution by the Revenue Officer by ejectments of a decree for arrears of rent due on an occupancy holding and for no other arrears. The section cannot be construed to apply to a decree for arrears due on an absolute occupancy holding, and no decree passed even in part for these latter arrears can be legally executed by ejectment of the tenant from his occupancy holding. An order of ejectment passed in respect of a joint decree for arrears of rent due upon an occupancy as well as of an absolute occupancy holding is *ultra vires* and cannot be maintained or put into effect by a Revenue Officer under S. 24. (*Burton, R.M.*) Meghraj *v.* Ghanshyam Singh. **20 N.L.J. 156.**

——**S. 24**—*Ejectment with reference to more than one holding—Procedure to be adopted by the Revenue Officer.*

As S. 24 (2) of the C. P. Tenancy Act empowers a Revenue Officer to deal with only one holding of a tenant on the receipt of a decree for ejectment from a Civil Court, where the decree and ejectment order relate to more than one holding, the Revenue Officer could not legally proceed with the ejectment under S. 24 and he must refer the order back to the civil Court concerned. (*Burton, F.C.*) Mangesharao *v.* Shriram Dalpat. **1939 N.L.J. 291.**

——**S. 24**—*Period of four months—Computation—Starting point.*

The period of four months allowed to a tenant under S 24 begins not from the date of service of notice; but from the expiry of a month after that date. (*Burton, R.M.*) Markandi *v.* Balaji. **19 N.L.J. 250.**

——**S. 24**—*Powers of Revenue Officer executing order of ejectment—Jurisdiction to question order of ejectment.*

There can be no doubt that a Revenue Officer receiving an order for ejectment of an occupancy tenant may question whether it is such as may be executed in the particular manner under S. 24 of the C. P. Tenancy Act, if it is apparent that the case is not one falling under S. 25, and fulfilling the conditions of S. 23 of the Act. Where the grounds for questioning the order are contained in order passed by a competent Civil Court in appeal against the decree upon which the ejectment order is based, the Revenue Officer is on stronger ground. (*Burton, R.M*) Bhagwant Atmaram *v.* Ramchandra. **20 N.L.J. 124.**

———S. 24—Proceedings under — Tenant, if should have been apprised of order of ejectment. *See* C. P. LAND REVENUE ACT, S. 23 AND C. P. TENANCY ACT, S. 24. **1939 N.L.J. 358.**

———**S. 24**—*Revenue Officer—Power to question validity of ejectment order of Civil Court.*

An executing Court can within certain limits question the validity of a decree when the question of jurisdiction is involved. And a Revenue Officer, acting under S. 24, C. P. Tenancy Act, is competent, when the question of legality of a decree or an ejectment order based on it, passed by a Civil Court is raised and the defects are patent on the record, to question the validity of the order by reference, if necessary, to the proceedings which led to the decree being passed and to the order of ejectment being issued. (*Burton, R. M.*) MEGHRAJ *v.* GHANSHYAM SINGH. **20 N.L.J. 156.**

———**S. 24**—*Scope—Final order of ejectment—Execution—Power of Revenue Officer to accept arrears after period of grace and set aside ejectment order.*

Once the period of four months mentioned in sub-R. (3) of S. 24, C. P. Tenancy Act, has expired, the ejectment proceedings must take their course, and the tenant has thereafter no right to have the order of ejectment set aside on payment of the decretal arrears. The order of ejectment passed at the end of the period of grace is a final order of the Revenue Officer and must be carried out. Payment by the tenant on a subsequent date of the arrears does not justify the Revenue Officer in setting aside the order of ejectment. It is not correct to hold that the Revenue Officer can accept the decretal amount from the tenant at any time up to the issue of the warrant of possession. (*Gordon, R.M.*) GANGADHAR KRISHNA *v.* MOTIRAM KESHEORAO. **19 N.L.J. 99.**

———**S. 24**—*Service of notice — Procedure — Order on the basis of first notice when a second one has been issued—Legality.*

It is essential for the procedure laid down by S. 24 of the C. P. Tenancy Act that the notice of ejectment shall be served upon the tenant. Where an order for ejectment is passed on the basis of a first notice which was not properly served and a second one had been issued, the procedure is irregular and prejudicial to the tenant. (*Burton, F. C.*) MANGESHARAO *v.* SHRIRAM DALPAT. **1939 N.L.J. 291.**

———**S. 24**—*Service of notice on tenant—If condition precedent to taking possession.*

According to S. 24 (2) of the C. P. Tenancy Act, the landlord is not entitled to take possession of the fields in execution for arrears of rent, without giving notice to the tenant. All tenants including recognized or recorded co-tenants are entitled to a notice under that section before they can be legally ejected. (*Pollock, J.*) ABDUL JABBAR *v.* MST. RAMMA. **1940 N.L.J. 164=A.I.R. 1940 Nag. 160.**

———**S. 24 (2)**—*Notice under—Error in description of khasra numbers—Effect—If renders notice void.*

A notice under S. 24 (2) of the C. P. Tenancy Act is not void on the ground that there is an error in describing a khasra number and in stating its area. There must be a substantial error such as has in fact misled or was likely to mislead the tenant, otherwise the defect or error is not fatal. (*Greenfield, F. C.*) LACHHMAN *v.* SETH PARTAPCHAND. **20 N.L.J. 274.**

———**S. 24 (3)**—*Order of ejectment by Tahsildar—Appeal to Sub-Divisional Officer rejected—Second appeal — Competency — Interference by Commissioner—If* ultra vires.

Where an order of ejectment under S. 24 (3) of the C. P. Tenancy Act has been passed by the Naib Tahsildar, and an appeal from that order has been rejected by the Sub-Divisional Officer, a second appeal does not lie to the Commissioner in a matter of the exercise of discretion, as the same does not fall under any of the clauses of sub-S. (2) of S. 33, C. P. Land Revenue Act. If the Commissioner entertains the second appeal and interferes, his order is *ultra vires.* (*Greenfield, F.C.*) MT. SAVITRIBAI *v.* SHEONARAYANLAL. **20 N.L.J. 220.**

———**S. 24 (3) and R 2**—*Scope—Order of ejectment—Second appeal beyond four months—Jurisdiction of Commissioner to extend time for payment.*

Where the matter is one of mere discretion, the Commissioner in second appeal has no power to exercise a discretion beyond that which is vested in the trial Court. Where the second appeal against an order of ejectment under S. 24 (3) of the C. P. Tenancy Act is filed only after the expiry of the maximum period of four months fixed by S. 24 (3) read with R. 2 of the notification under that section, the power to grant further time is exhausted by the expiry of the time, and an order by the Commissioner extending the time for payment is illegal. (*Greenfield, F.C.*) MT. SAVITRIBAI *v.* SHEONARAYANLAL. **20 N.L J. 220.**

———**S. 24, proviso**—*Period of grace if absolute—Power of Revenue Officer to extend—Omission to claim value of improvements—Failure of Revenue Officer to ascertain and determine compensation—If vitiates ejectment—Ss.* 30, 31 *and* 32.

The plain meaning of the proviso to S. 24 of C. P. Tenancy Act is that no circumstances, even subject to the provisions of S. 30, can the Revenue Officer allow a period beyond that specified in S. 24. The procedure required under S. 30 and the other sections mentioned must be concluded within the periods specified. It is open to the tenant, and it is incumbent on him, if he has made an improvement in respect of which he would be entitled to compensation, to claim such compensation. S. 30 refers to the improvement "claimable." The failure of the Revenue Court to ascertain and determine the amount of compensation, if any, cannot be held to vitiate the ejectment which has been effected; and a tenant cannot be allowed to take advantage of his own failure to claim compensation so as to secure the setting aside of an ejectment to which he was liable and thereby a further extension of the period of grace beyond the maximum prescribed. The ejectment ordered and incurred cannot be avoided unless the contingency mentioned in S. 32 occurs. (*Burton, R. M.*) SAKHARAM GOND *v.* RAMPRASADA. **20 N.L.J. 18.**

———**S. 25**—*Ex-proprietary tenant of sir land held in severalty—Ejectment in execution of decree for arrears of rent—Right of lambardar to eject.*

Under S. 25, C. P. Tenancy Act, only the landlord as such may eject a tenant for arrears of rent. A tenant of ex-proprietary occupancy land which was formerly *sir* land held in severalty is the tenant of the vendee of his former share and not of the whole proprietary body, and, therefore, the lambardar of the patti cannot claim to be the landlord and to execute his decree by ejectment of the tenant. (*Burton, R.M.*) BHAGWANT ATMARAM *v.* RAMCHANDRA. **20 N.L.J. 124.**

——**S. 25 (b)**—*Decree under—Ejectment under—Effect on occupancy tenancy—Delivery of possession under—If only symbolical.*

The ejectment contemplated by the decree under S. 25 (*b*) of the C. P. Tenancy Act is a permanent one, and unless it is set aside, the legal effect of termination of the tenancy by law comes into existence from the moment of dispossession. When the decree is executed, and the parties and the process server proceed to the land and actual possession is given to the decree-holder with the acquiescence of the judgment-debtor (tenant), the latter cannot contend that only formal possession or symbolical possession is given to the decree-holder. (*Gruer, J.*) PYARELAL *v.* HAZARILAL BANIA. **20 N.L.J. 8.**

——**S. 25 (b)**—*Diversion of part of land to non-agricultural purposes—Decree for ejectment—If can be passed validly—Decree not set aside on appeal—Right to question validity in other proceedings.*

Under S 25 (*b*) of the C. P. Tenancy Act, a decree for ejectment can validly be made even though the occupancy tenant has diverted not the whole, but only a small part of the holding to non-agricultural purposes. It is not necessary under the section that every particle of the land should be diverted before ejectment can be ordered, and the section does not provide for ejectment from a part of the holding only. A decree for ejectment under the section remains valid and binding unless set aside in appeal and its validity cannot afterwards be questioned in other proceedings. (*Gruer, J.*) PYARELAL *v*, HAZARILAL BANIA. **20 N.L.J. 8.**

——**S. 30**—*Scope—Duty of Revenue Officer to ascertain improvements and determine value—Tenant—If bound to put forward claim.*

It is the duty of the Revenue Officer to determine the amount of compensation due to a tenant for improvements before he ejects him. The Act does not cast a duty on the tenant to make a claim. The officer even at the commencement of the proceedings should take steps to ascertain whether improvements have been effected in the holding, and not leave it to the tenants to claim compensation. The tenants are entitled as of right not to be ejected until the issue of compensation is decided and the amount determined as compensation is paid into Court. (*Greenfield, F. C.*) LALSING *v.* BISHNOOPRASAD. **20 N.L.J. 268.**

——**Ss. 30, 31 and 32**—Scope and effect of—Ejectment—If affected by omission to ascertain compensation for improvements—Period of grace under S. 24—If can be extended. *See* C.P. TENANCY ACT, S. 24, PROVISO. **20 N.L.J. 18.**

——**Ss. 30 and 32**—*Scope and effect of—Procedure as to ascertainment of improvements—Non-observance—Ejectment—Legality.*

Where a tenant has made an his holding, he cannot be ejected until he has received compensation. Under S. 30 of the C. P. Tenancy Act, if it is not so paid within the time fixed, he cannot be ejected and the decree has to be returned as unsatisfied. The absence of the tenant does not absolve the Revenue Officer from carrying the provisions of S. 32 of the Act, without which he is not competent to take action to eject a tenant. An ejectment effected in violation of them cannot be maintained. (*Burton, F.C.*) JAIRAM LAHOOJI *v.* KULPAT DALPAT KIRAR. **1939 N.L.J. 237.**

——**S. 35**—*Abandonment by widow—Challenging by reversioner—Onus.*

Where the landlords have taken possession of a holding in conformity with the provisions of S. 35 of the C. P. Tenancy Act, on an abandonment by a widow, and a reversioner claims possession on the ground that the abandonment amounted to a surrender and was invalid for want of legal necessity, the burden is on such a reversioner to allege and prove that the abandonment was only a device to defeat the rights of the reversioners or that it was a result of a collusion with the landlord. The burden that would ordinarily lie on the landlord when a surrender is impeached, does not lie on him when he has come into possession by operation of law. (*Niyogi, J.*) MURLIDHAR *v.* HAJARILAL. **1939 N.L.J. 60.**

——**S. 41**—*Scheme of the section as regards mortgages.*

The scheme of S. 41 of the C. P. Tenancy Act so far as mortgages are concerned is to require mortgages above a certain figure, varying with rent, to be notified in writing to the landlord. This is to give the landlord time to consider whether he will or will not pre-empt. If he pre-empts he gets the land free of encumbrances and the mortgagee gets a charge on the purchase-money to the extent of his debt. But a transfer without notice is voidable. All through, the scheme appears to keep the land in the occupation of the tenant or failing him to give the landlord the right to acquire it at a fair market price. If the option is not exercised the transfer is good. (*Stone, C.J. and Clarke, J.*) DARYAO SINGH *v.* KUKDAY. **182 I C 263=11 R. N. 1=1938 N.L.J. 366=A.I.R. 1939 Nag. 91.**

——**S. 42**—*Village servant—Blacksmith—Status of—Lambardar's power to appoint.*

A blacksmith is a servant of the malguzar and not a village servant. He can be appointed only by the malguzar of the patti in which he is to render service. The lambardar as such cannot appoint him for the patti of which another person is malguzar. (*Niyogi, J.*) DARBARI LOKNATH *v.* HARLAL. **173 I.C. 272=10 R.N. 294=A.I.R. 1937 Nag. 416.**

——**S. 45 (1)**—*Scope—Lease—*Sir *land—Debtor recorded as occupancy tenant and creditor as landlord—Creditor put in possession and allowed to recover debt from usufruct—No reservation of rent—Effect of.*

Where a lease by a debtor put the creditor into the possession of usufruct and allowed the creditor to recover his debt from it, without containing any reservation as to the rent and the debtor was recorded as an occupancy tenant and creditor was shown as proprietor.

Held, that the lease transferred both the cultivating as well as the proprietary interests in the *sir* land and as such fell within the purview of S. 45, C. P. Tenancy Act. (*Vivian Bose, J.*) GANGARAM *v.* KANCHANBAI. **I.L.R. (1936) Nag. 60=164 I.C. 792=9 R.N. 34=A.I.R. 1936 Nag. 168.**

——**Ss. 46 and 47**—*Construction—Acquisition of land in possession of recorded tenant—Heir of recorded tenant—Right to object—Land Acquisition Act, S.* 18.

S. 46 is a general provision which prohibits the transfer by an occupancy tenant of his holding. And S. 47 being an exception to general rule in S. 46, gives the heir a bare right to be put into possession by the Revenue Officer but creates no interest in the heir under the general rule. Hence where land belonging to a woman who is a recorded tenant has been acquired under the Land Acquisition Act, her son cannot be said to have any interest in the land within the meaning of Land Acquisition Act and as such he cannot object to the award of compensation. (*Wort and Fazl Ali, JJ.*) S. M. DE SOUZA *v.* SECRETARY OF STATE. **165 I.C. 585=9 R.P. 191 (2)=18 Pat.L.T. 125=3 B.R 56=A.I.R. 1936 Pat. 542.**

——**S. 46**—*Effect of—Mortgage of occupancy fields—If void.*

Under S. 46, Tenancy Act of 1898, mortgages of occupancy fields are not void, but voidable at the instance of certain persons only and when such persons who have the right to avoid the transaction do not do so, the mortgage subsists and Art. 1 to Sch II, Tenancy Act, 1920, cannot apply. Under S. 46, the transfer is not void but voidable only in the manner and to the extent provided by the Act, and no further. (*Bose, J.*) DEONARAIN BALRAM *v.* KAMTA. **I.L.R. (1936) Nag. 167=171 I.C. 174=10 R.N. 96=A.I.R. 1937 Nag. 43.**

——**S. 46**—*Scope—Mortgage of occupancy field—Effect—Right of mortgagor to redeem.*

In a suit for redemption of a mortgage of an occupancy field, assuming the mortgage is invalid for some reason or other, the tenant's rights still remain intact in the mortgagor, and the mortgagee merely becomes a licensee of the mortgagor; the mortgagor's right to redeem therefore subsists unless it is barred by limitation. (*Bose, J.*) DEONARAIN BALRAM *v* KAMTA. **I. L. R. (1936) Nag. 167=171 I.C. 174=10 R.N. 96=A.I.R. 1937 Nag. 43.**

——**S 46**—*Scope*—Muafi-khairati *land—Mortgage by tenant by registered deed—If void—Remedy of landlord—Landlord taking surrender ignoring mortgage—Suit for possession—Maintainability.*

Where lands recorded as *muafi-khairati* or as *khairati mokasa*, is mortgaged by the tenant for consideration, the parties believing that the mortgagor has proprietary interest in the land, and the deed of mortgage contains nothing on the face of it to indicate to the registering officer that the transaction is one prohibited by the Tenancy Act, the registration of the deed of mortgage is not invalid and cannot be ignored or reopened except on the ground of fraud. The mortgage, however, is voidable by the under landlord or the heirs of the mortgagor under S. 46 (3) of the C. P. Tenancy Act, in the manner and to the extent provided by Ss. 47 and 48 of the Act. If the landlord does not avail himself of that remedy, it is not open to him subsequently to ignore the mortgage and take a gratuitous surrender from the tenant mortgagor. In spite of the surrender the tenancy has to be considered to continue for the purpose of preserving the rights of the mortgagee. The landlord is not entitled to recover possession of the land without redeeming the mortgage, and in the absence of an offer to redeem his suit for possession must fail. (*Pollock, J.*) KANCHEDILAL *v.* ZABBARSHAH. **166 I C. 686=9 R.N. 141=19 N L J. 123=A.I.R. 1936 Nag. 171.**

——**Ss. 46, 47 and 48**—*Transfer in contravention of S.* 46 (3)—*Effect—Landlord's remedy—Failure to avail remedy—Effect.*

A transfer by an occupancy tenant in contravention of the provisions of S. 46 (3) is not void but voidable by the landlord whose proper and only remedy is to proceed in the Revenue Court under Ss. 47 and 48. But, if such a voidable transfer is not avoided by persons who can avoid it under S 47, it would be a perfectly good transfer, and any gratuitous surrender in favour of the landlord by the tenant with the sole object of defeating his mortgagee cannot affect the tenancy which must be deemed to continue to preserve the rights of the mortgagee. (*Stone, C J. and Clarke, J.*) JABBARSHAH *v.* KANCHHEDI LAL. **182 I.C. 239=11 R N. 514=1939 N.L.J. 308=A I.R. 1939 Nag. 166.**

——**S. 46 (3) and (5)**—*Scope—Validity of transfer—How determined.*

Sub-S. (5) of S. 46 of the C. P. Tenancy Act does not determine the question of validity or otherwise of the transaction itself. For that purpose, reference must be made to sub-S. (3) of that section, which alone interdicts certain transfers. Sub-s. (5) merely shuts out the evidence, which would furnish a proof of the transfer, but does not enlarge the sphere of the prohibition. The registration or non-registration of the document does not affect the inherent character of the transfer, which is to be judged by another provision. (*Sir Shadi Lal*) PARASHRAM BALAJI *v.* ASARAM. **I.L R. (1936) Nag. 104=9 R.P.C. 119=41 C.W N. 101=64 C.L.J. 301=17 Pat L.T. 937=164 I C. 345=19 N.L.J. 228=45 L.W.7=1937 M W.N. 135=3 B.R. 6=1936 All. L.R. 861=1936 Pat.W.N. 895=1936 O L.R. 522=A.I.R. 1936 P.C. 301=71 M L.J. 856 (P.C.).**

——**S. 46 (5)**—*Duty of registering officer—Transfer of doubtful validity—Registration—Jurisdiction.*

The language of sub-S. (5) of S. 46 of the C. P. Tenancy Act shows that the registering officer is forbidden to register a document "which purports to transfer the right of an occupancy tenant in his holding or in any portion thereof." He is not required to enter upon an inquiry as to whether a certain property sought to be transferred would, or would not, amount to an occupancy right. Such an inquiry would obviously be beyond his province. His function is to peruse the instrument and to see whether it purports to make a prohibited transfer, and if he thinks that it does not embody any such transfer, he is bound to admit it to registration. It cannot be held that the registering officer has no jurisdiction to register the document because it includes a transfer which is of doubtful validity. (*Sir Shadi Lal.*) Parashram Balaji *v.* Asaram. I.L.R. (1936) Nag. 104=9 R.P.C. 119=41 C.W.N. 101=64 C.L.J. 301=17 Pat.L.T. 937=45 L.W. 7=3 B.R. 6=1937 M.W.N. 135=1936 All.L.R. 861=1936 Pat.W.N. 895=1936 O.L.R. 522=164 I.C. 345=19 N.L.J. 228=A.I.R. 1936 P.C. 301=71 M.L.J. 856 (P.C.).

——S. 49—*Land declared* sir *between date of mortgage and suit—Effect—Right to benefit conferred by S. 49—If can be claimed in execution—C. P. Code, S. 74 and O. 21, Rr. 97 and 98.*

Any rights conferred upon the mortgagor subsequent to the mortgage are normally subject to the mortgage. But where a statute intervenes and creates rights, the rights of both parties are subject to the provisions of the statute. Where between the date of the mortgage and a suit thereon the land is declared *sir* under S. 68 of the C. P. Tenancy Act, the mortgagor becomes entitled to the protection afforded by S. 49 of the Act. The benefits thereunder can be claimed in execution though it is not conferred by the decree. S. 74 and O. 21, Rr. 97 and 98, C. P. Code, entitle a judgment-debtor to resist execution for any just and sufficient cause and the rights created by statute would certainly come under just and sufficient cause. In the result the decree-holder would get possession of the proprietary rights in the land subject to the occupancy rights that have accrued to the judgment-debtor. (*Stone, C.J. and Bose, J.*) Gangaprasad *v.* Itwarsingh. 1939 N.L.J. 429=A.I.R. 1939 Nag. 287.

——S. 49—*Scope and object of—Device to evade law—Duty of Court.*

Per *Stone, C. J.*—It is the policy of the law to prevent the land-working classes being driven into the state of landless proletariates so far as may be, and accordingly it is provided by S. 49, C. P. Tenancy Act, that alienation of *sir* land, that is homefarm land in cultivation, shall be ineffective unless the sanction of the appropriate official has first been obtained. It is of the utmost importance that this safeguard should be maintained in full force and effect. It is likewise desirable that collusive actions having as their real object to defraud alienees who have given consideration should fail.

Per *Vivian Bose, J.*—The anxiety of the Legislature to protect this class is so great that S. 49 (2) of the Act prohibits registration of any document which does not reserve "the right of occupancy specified in sub-S. (1)". The object of this prohibition is clearly to bring to the notice of the parties exactly what their bargain amounts to under the law and if they have understood the position aright to enable them to amend their document so as to make their meaning clear beyond all possibility of doubt, and if not, then to let them realize that they have entered into a transaction one of whose objects is prohibited by law. The illegal part of the transaction is not the sale of the *sir* but the arrangement or device which attempts to evade the provisions of the Act.

Per *Digby, J.*—Where a surrender and a sale-deed of proprietary right are both executed on the same date and it has been arranged to make the surrender before the sale-deed is executed, the surrender deed is the execution of "device which is void and illegal". (*Stone, C.J., Bose and Digby, JJ.*) Asaram *v.* Ludeshwar. I.L.R. (1939) Nag. 1=177 I.C. 6=11 R. N. 109=A.I. R. 1938 Nag. 335 (F.B.).

——Ss. 49 and 110—*Scope and effect of—Rights of permanent lessee of* sir *fields—How affected.*

Where a proprietor after mortgaging his proprietary share grants a permanent lease of his *sir* fields and thereafter the mortgagee obtains a foreclosure decree in 1921, and where on the proprietor's default in payment of rent to his landlord the former mortgagee, he obtains an order for ejectment and also obtains possession, it was held as regards the rights of the permanent lessee who was not made a party either to the mortgage suit or ejectment proceedings, that the rights which had accrued to him under the old Act were expressly saved by S. 45 (5) and that hence those rights were acquired under the old Act and consequently are deemed to have been acquired by S. 110 of the present Act. His rights are saved to him and remain as they were before. S. 49 has not the effect of destroying those rights. (*Stone, C.J. and Bose, J.*) Thakur Chudaman *v.* Babu Kamtanath. 183 I.C. 695=12 R.N. 76=1939 N.L.J. 347=A.I.R. 1939 Nag. 230.

——S. 49—*Surrender—Suit to set aside illegal surrender—Surrenderee holding as* quasi-*trustee—Limitation—Law applicable.*

Per *Stone, C.J. and Vivian Bose, J.*—In a suit to set aside surrender which was found to be illegal on account of its being part of a transaction which was against the provisions of S. 49, it is not Sch. II, Art. 1, Tenancy Act, that applies to determine limitation but it is Limitation Act that governs such suit. As the surrenderee holds land as a *quasi*-trustee, he cannot set up a title adverse to the *cestui que trust* and hence it is Art. 142 and not Art. 144, that will govern the suit.

Per *Digby, J.*, contra.—Such a case is a clear case of exclusion from possession and it is Art. 1 of Sch. II, C. P. Tenancy Act, that will govern limitation and not any Article of the Limitation Act. (*Stone, C.J., Bose and Digby, JJ.*) Asaram *v.* Ludhfshwar. I.L.R. (1939) Nag 1=177 I. C. 6=11 R N. 109=A.I.R. 1938 Nag. 335 (F. B.).

——S. 49—*Surrender found illegal—Surrenderee, position of—Suit to set aside surrender—Powers of Court.*

Where a person sells his proprietary rights in a village and then surrenders his holding of *sir* lands in which he has acquired occupancy rights, and the surrender was illegal, the surrenderee holds the surrendered land for the benefit of surrenderor—a *cestui que trust*—because surrenderee is supposed to hold the lands burdened with an obligation in the nature of trust. In a suit to set aside the surrender Court can not only declare the surrenderee as a sort of trustee but can place the parties in the position they ought to be. (*Stone, C.J., Bose and Digby, JJ.*) Asaram *v.* Ludeshwar. I.L.R. (1939) Nag. 1=177 I.C. 6=11 R.N. 109=A.I.R. 1938 Nag. 335 (F,B.).

——S. 59 and Transfer of Property Act, S. 53-A—*Surrender under S. 59 of the Tenancy Act—If a transfer—Doctrine of part performance, if applies.*

A surrender by a tenant under S. 59 of the C. P. Tenancy Act is not a transfer and as there is no question of title passing between the parties, S. 53-A of the Transfer of Property Act can have no application at all to such a surrender. *(Grille, J.)* SAKHARAM *v.* DARYAO SINGH. **I.L.R. (1940) Nag. 177=1940 N.L.J. 87=A.I.R. 1940 Nag. 175.**

——**S. 62**—*Reduction of rent—Application for—Limitation—Limitation Act, Art.* 181.

An application under S. 62 of the C. P. Tenancy Act for reduction of rent on the ground of deterioration of land due to the construction of a canal is not governed by Art. 181 of the Limitation Act, and is not barred because it is made more than three years after the construction of the canal. The case would be one of continuing wrong under S. 23 of the Limitation Act. *(Gordon, R.M.)* NIRANJAN BAHADURI *v.* KUAR PRATAPSING. **19 N.L.J. 101.**

——**S. 63-A (3)**—*Right in the diverted holding—Extent—Building of a house—Mortgagee of house placed in possession in execution of his decree—Rights of the occupancy tenant.*

Although S. 63-A of the C. P. Tenancy Act retains the rights of the tenant in the diverted holding it does not follow that the tenant's rights as such continue to subsist in the object which has been the mode of diversion of the holding. Where an occupancy tenant builds a house and a mortgagee of it is placed in possession of it in execution of his mortgage decree, the occupancy tenant retains only the right to the mere site of the house and it will not become available until the house is removed. *(G. P. Burton, R. M.)* MT. BUDHANBAI *v.* TENGU. **1938 N.L.J. 136.**

——**Ss. 74 and 75**—*Applicability and construction—"Levy" of interest—Meaning of—Sums paid by tenant credited as interest on arrears—Tenants not paying voluntarily or agreeing to pay interest—Effect—Penalty under S. 74, if incurred—Presumption as to payments.*

Ss. 74 and 75 of the Tenancy Act refer to the levy and payment of the rent legally payable and the presumption with regard to such payment. Rent as defined in S. 2 (9) is what is paid or payable on account of the use or occupation of land; the rent payable is what is fixed in accordance with S. 15 and Ch. VIII, and does not include interest. Under S. 75 (1) when rent is due, every payment by the tenant to his landlord must be presumed to be a payment on account of rent unless the tenant otherwise agrees in writing. Interest clearly is not included and interest must therefore be held to be something in excess of rent and the landlord cannot therefore plead custom or tacit or oral understanding or agreement to cover a deduction or accounting of any sum paid by the tenant as interest unless he holds the tenant's agreement in writing to that effect. The same is the case with regard to S. 74, and the taking of interest must, therefore, come within the mischief of S. 74 in the sense "that it is something in excess of the rent legally payable." The recovery of interest without the free and binding consent of the tenant amounts to levy of interest and makes the landlord liable to penalty under S. 74. Where the tenants pay the interest not volutarily and they do not agree to pay interest, but pay it fearing that if they do not pay they would be liable to ejectment, it cannot be pleaded that there was any agreement or consent on the part of the tenant to the crediting of the payment to interest or to anything else than rent. Ss. 74 and 75 apply to such case, and the action of the landlord falls within the mischief of S. 74 and the sums paid by the tenant must be presumed to be a payment on account of rent under S. 75. *(G. P. Burton, R.M.)* THAKUR PRASAD *v.* SHAMLAL. **20 N.L.J. 54.**

——**(as amended in 1923), S. 83**—*Suit for arrears of rent less than Rs.* 100—*Decision by Subordinate Judge of second class—Appeal.*

As an appeal was competent from the decision of a Munsiff in a suit for rent less than Rs. 100 and as the word Munsif has been replaced by the words 'Subordinate Judge of the Second Class', by the amendment of 1923, an appeal would lie from the decision of a Subordinate Judge of the Second Class. *(Gruer, J.)* URKUDA BAPU *v.* SHRAWAN JAIRAM. **I.L.R. (1937) Nag. 384=171 I.C. 733=10 R N. 129=A.I.R 1937 Nag. 156.**

——**S. 89**—*Compliance—Deed of relinquishment by occupancy tenant in favour of landlord temple—Tenant being panch of temple and holding deed on behalf of trustees of temple—If sufficient delivery.*

An occupancy tenant executed a deed of relinquishment in favour of the landlord temple. The tenant was one of the panchas of the temple and therefore *prima facie* had authority to hold the deed on behalf of the trustees of the temple till they were in a position to consider the matter.

Held, that this amounted to a sufficient delivery of the deed and hence the provisions of S. 89 were satisfied. *(Bose and Puranik, JJ.)* SAHAUDRA BAI *v.* SHRI DEO RADHA BALLABHJI. **I.L.R. (1940) Nag. 94=176 I.C. 57=11 R.N. 24=A I.R. 1938 Nag 30.**

——**S. 89**—*Occupancy holding—Co-tenants—Rights of—Surrender by one alone of undefined portion—Competency—Landlord's right to eject one from undefined part.*

A co-tenant is entitled to cultivate the entire holding and has the right to pay its rent if he so desires. A co-tenant cannot surrender an undefined portion of an entire holding to the detriment of his co-tenants. The landlord therefore cannot eject a co-tenant from an undefined portion of the holding. A co-tenant is therefore entitled to the possession of the whole holding. *(Bose, J.)* SHYAMLAL DEBIDIN *v.* GOND SINGH. **171 I.C. 935=10 R.N. 143=A.I.R. 1937 Nag. 175.**

——**S. 89**—*Surrender—Registration, if necessary for its validity.*

There cannot be a valid surrender of an absolute occupancy or an occupancy holding without a registered instrument even though the landlord and the tenant are both agreed. *(Stone, C.J. and Bose, J.)* KASHI PRASAD *v.* BED PRASAD. **1939 N.L.J. 216=A.I.R. 1940 Nag. 113.**

——**S. 89**—*Surrender by tenant in favour of landlord—Effect of.*

When there is a determination of the tenancy by a surrender to the landlord, there is only a blotting out of the intervening interest and no transfer of any title from one to another and hence in such a case a landlord cannot be said to obtain title from the tenant. (*Bose, J*) Hindusingh *v.* Khetsingh. **1938 N L.J. 123.**

——S. 89—*Surrender—Validity—Tenant out of possession.*

Surrender signifies the merger of the tenant-right in the proprietary right so as to convert the tenancy holding into the landlord's khudkasht. The tenant-right which means the right to cultivate the land is distinct from actual cultivation just as title is from possession. Delivery of possession is not a necessary ingredient of a validity of a transfer of title or any kind of right recognized by law. *A fortiori* a relinquishment of a right to be valid need not be accompanied by delivery of possession. There is nothing in law to preclude the tenant from relinquishing his tenant-right, because he is out of possession. (*Niyogi, J.*) Dattu Ramji *v.* Waman Raghunath. **187 I.C. 247=12 R.N. 273=1940 N.L. J. 208=A.I.R. 1940 Nag. 247.**

——**S. 93, Proviso**—*Scope of—When comes into operation.*

The proviso to S. 93 of the Central Provinces Tenancy Act is not to be interpreted as requiring that, on the mere raising of objections on the basis of title by a non-applicant, the case necessarily must be postponed for the decision of those objections by the Civil Court. The proviso only means that in the face of a clear and genuine dispute existing as to the right of the parties in the tenancy, it must be referred to the Civil Court. (*Burton, F. C.*) Sarswatibai *v.* Ramchandra. **1939 N.L.J. 460.**

——S. 94—*Scope and object of.*

S. 94 of the C. P. Tenancy Act was inserted apparently in order to enable a landlord to recover possession of *sir* land which he had leased out with other land so that the tenant became the occupancy tenant of the entire holding, in other words, it was inserted in order to avoid the position created by S. 69 (*c*) of the old Act which gave the landlord the right to eject the tenant only when the entire holding consisted of *sir* land. There is, however, no indication that it was intended to confer such a right on the landlord in respect of a lease granted before the new Act came into force and to take away from tenants the right which they had acquired as ordinary tenants not to be ejected except on the grounds stated in S. 69 (*c*). (*Pollock, J*) Pacho *v.* Nikhelal. **1940 N.L.J. 377.**

——S. 95—Scope and effect—Tenant's right to tendu leaves—*Wajib-ul-arz*—Entry restricting tenant's rights—Suit for amendment and for declaration of right—Maintainability—Land Revenue Act, S. 80. *See* C. P. Land Revenue Act, S. 80. **20 N.L.J. 131.**

——S. 105 (a)—Scope—Pre-emption money—Disposal of—Civil Court's jurisdiction. *See* C. P. Tenancy Act, Ss. 6 and 105. **A.I.R. 1938 Nag. 80.**

——**S. 106, Proviso**—*Scope of—Suit for arrears of rent due by sub-tenant—Jurisdiction of Civil Court.*

The Court of an Additional Sub-Judge is a Civil Court and has jurisdiction to entertain a suit for arrears of rent due by a sub-tenant. The proviso to S. 106 limits the jurisdiction of regular Civil Courts (that is, presided by Judges who are not also Revenue Officers) to hearing suits for arrears due by a sub-tenant, but it does not purport to restrict in any way the powers of Judges of a Civil Court who are also Revenue Officers. (*Gruer, J.*) Urkuda Bapu *v.* Shawan Jairam. **I.L.R. (1937) Nag. 384=171 I.C. 733=10 R.N. 129=A.I.R. 1937 Nag. 156.**

——S. 110—Scope and effect of—Rights of permanent lessee of *sir* fields—How affected. *See* C. P. Tenancy Act, Ss. 49 and 110, Scope and Effect of. **1939 N.L.J. 347.**

——**Sch. II, Art. 1**—*Applicability—Co-tenants Exclusion of one and denial of title—Suit by excluded co-tenant for possession of undivided share in holding—Limitation.*

A co-tenant is a tenant within the meaning of Art. 1, Sch. II of the C. P. Tenancy Act. Where a co-tenant is excluded from possession and his title is denied, a suit by him for possession is governed by Art. 1 of Sch. II of the Act, and must be brought within two years. The article applies to a suit for possession of an undivided share in a holding (*Pollock, J.*) Abdul Azim *v.* Sheikh Gafoor. **I.L.R. (1937) Nag. 346=172 I. C. 934=10 R.N. 263=20 N.L.J. 143=A.I.R. 1937 Nag. 265.**

——**Sch. II, Art. 1**—*Applicability—Co-tenant in exclusive possession.*

Art. 1 of Sch. II has no application to a co-tenant claiming to be in exclusive possession of a holding. The ordinary law of limitation applies to such a case. (*Niyogi, J.*) Ramji *v.* Madki. **173 I.C. 103=10 R.N. 278=A.I.R. 1938 Nag. 89.**

——**Sch. II, Art. 1**—*Intention—Attaining quick finality in revenue record.*

Per *Digby, J.*—The intention of the C. P. Tenancy Act is evidently to secure freedom from the disputes regarding tenancy land, and set some short time limit to claims stirred up in villages, and to attain quick finality in the revenue records. (*Stone, C.J., Bose and Digby, JJ.*) Asaram *v.* Ludheswar **I.L.R. (1939) Nag. 1=177 I.C. 6 =11 R.N. 109=A.I.R. 1938 Nag. 335 (F.B.).**

——**Sch. II, Art. 2**—*Applicability—Art.* 116, *Limitation Act—If excluded.*

Where a suit for arrears of rent falls under both Art. 2, C. P. Tenancy Act, and also Art. 116, Limitation Act, the former Article is to be applied even if the instrument is a registered one. (*Vivian Bose, J.*) Baburao *v.* Sandhu. **I.L.R. (1936) Nag. 5=165 I.C. 122=9 R.N. 62=A.I.R. 1936 Nag. 180.**

CENTRAL PROVINCES AND BERAR PROHIBITION ACT (1938), S. 19—*Interpretation—Bond in lieu of sentence—Validity.*

The execution of a bond as contemplated by S. 19 of the Central Provinces and Berar Prohibition Act is in addition to and not in lieu of the sentence. (*Pollock, J*) Provincial Government *v.* Hari. **1939 N.L.J. 289.**

CENTRAL PROVINCES AND BERAR SALES OF MOTOR SPIRIT AND LUBRICANTS TAXATION ACT (1938), S. 3—Scope—If *ultra vires. See* Government of India Act (1935), S. 100 (1) and (3). **A.I.R. (1939) F.C. 1=(1939) 1 M.L.J. (Supp.) 1.**

CENTRAL PROVINCES AND BERAR TEMPORARY POSTPONEMENT OF EXECUTION OF DECREES ACT (XVI OF 1938), S. 3—*Section complid with by Judgment-debtor—Release of livestock from attachment—Right of judgment-debtor.*

If a judgment-debtor complies with the terms of S. 3 of the Act, he is entitled to the release of his livestock from attachment. The Court has no power to confine the attachment on the ground that the judgment-debtor was a dishonest debtor whose object was merely to avoid payment of the debt. (*Puranik, J.*) GADI *v.* TRILOK CHAND. **188 I.C. 432.**

——**S. 3 (3)**—*"Livestock"—Cattle of judgment-debtor.*

Cattle belonging to the judgment-debtor are "livestock" within the meaning of S. 3 (3) of the C. P. and Berar Act XVI of 1938. The words "of a perishable nature" in that clause qualify other movable property and should not be read along with the word "livestock". (*Puranik, J.*) GADI *v.* TRILOK CHAND. **188 I.C. 432.**

CERTIORARI—*Administrative Act — Madras Hindu Religious Endowments Board—Order assessing and demanding costs and expenses of legal proceedings under S. 70 of the Hindu Religious Endowments Act—Costs paid by Board to other party in legal proceedings included in demand—Jurisdiction — Writ—If can be issued—Remedy under S. 70 (2) availed of—Effect.*

A writ of *certiorari* does not lie to quash an order, merely ministerial; it is intended for the purpose of adjudication on the validity of acts judicial. The term "judicial" does not necessarily mean the act of a judge or legal tribunal sitting for the determination of matters of law. "Judicial" act means an act done by competent authority and imposing a liability or affecting the rights of others. An order passed by the Hindu Religious Endowments Board under S. 70 of the Madras Hindu Religious Endowments Act assessing and demanding the amount of costs and expenses incurred by the Board in connection with legal proceedings in respect of an endowment is only an adminstrative or ministerial order; not involving the determination of any question of the rights of subjects or any duty to act judicially, and consequently a writ of *certiorari* cannot be granted to quash such an order. Further the writ is not available because another remedy is provided for under S. 70 (2) of the Act. The fact that the Board in assessing the costs and expenses demands not only the amount spent by the Board in defending legal proceedings but also the amount which the Board has paid to others by way of costs is no ground for holding that the Board has exceeded its jurisdiction under the law, because S. 68 is wide enough to take in all these amounts. When the party has availed himself of the remedy under S. 70 (2), the order that can be the subject of a writ, if at all, is the one passed under S. 70 (2) and not the earlier order of assessment and demand. (*K.S. Menon, J.*) SRI MARIAMMAN KOIL DEVASTHANAM, IRRUKANGUDY *v.* HINDU RELIGIOUS ENDOWMENT BOARD, MADRAS. **166 I.C. 169=9 R.M. 339=1936 M.W.N 1186=A.I.R. 1937 Mad. 103=71 M.L.J. 594.**

——*Administrative Act—Madras Hindu Religious Endowments Board—Order directing trustee to distribute* theertham *and other honours*

in a particular order of precedence—Application for issue of writ—Maintainability—Observance of judicial forms and procedure—If makes act judicial—Madras Hindu Religious Endowments Act, S. 79.

A writ of *certiorari* does not lie in respect of administrative acts. Wherever a body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the Court exercised in the writ of *certiorari*. The rights of the subjects mean rights which can be legally enforced and not mere honours or precedence claimed or recognised as a matter of courtesy or usage. An order passed by the Madras Hindu Religious Endowments Board to the effect that certain persons are entitled to the 9*th theertham* and 9th place in the distribution of honours in a temple and directing the trustee of the temple to observe the order of distribution of *theertham* as stated in the order, is not an order determining questions affecting the rights of subjects, nor a judicial order. The distribution of *theertham* and other honours in temple is a matter of internal management and a matter of administration of the temple; and consequently no writ of *certiorari* can issue in such a case, especially when the Board has jurisdiction to control the discretion of the trustee in the matter of distribution of *theertham* and other honours. The mere fact that in coming to their decision the Board observes certain judicial forms and judicial procedure does not make the decision a judicial one. Nor is the position in any way changed by reason of the provisions of S. 79 of the Madras Hindu Religious Endowments Act. (*Pandrang Row, J.*) SRI EMBERUMANAR JEER SWAMIGAL *v.* HINDU RELIGIOUS ENDOWMENT BOARD, MADRAS. **166 I.C. 256=9 R.M. 355=1936 M.W.N. 954=44 L.W. 539=A.I.R. 1936 Mad. 973=71 M.L.J 588.**

——*Election dispute—Decision of election commissioner—Failure to determine questions arising —Power of High Court to issue writ—If confined to cases of want or defect of jurisdiction.*

Where the election commissioner entirely misapprehends the real question arising for decision in an election matter on a mistaken hypothesis and declares an election void without considering and without determining the very question upon which his jurisdiction to so declare depends, that is a proper case for interference by *certiorari* and the High Court will quash the order of the commissioner.

Per *Venkatasubba Rao, J.*—It is wrong to hold that nothing short of some sort of defect connected with jurisdiction can afford ground for a writ of *certiorari*; and the remedy by way of *certiorari* is not restricted to cases of jurisdiction strictly so called. If the election commissioner has exercised the jurisdiction entrusted to him *bona fide*, not influenced by extraneous or irrelevant considerations, and not arbitrarily or illegally, the High Court cannot interfere, though it has power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to him by law and also the refusal of the true jurisdiction by the adoption of extraneous considerations in arriving at a conclusion or deciding a point other than that brought before him, in which case the Court will regard him as declining jurisdiction. It is equally clear that it is not every mistake in law that can be remedied by this writ. In the case of tribunals exercising under the statute summary jurisdiction, the writ in actual practice can naturally lie only to correct errors of jurisdiction. In such cases emphasis is naturally laid on the question of jurisdiction. (*Venkatasubba Rao and Cornish, JJ.*) Mahabaleswarappa *v.* Ramachandra Raw. **I L R. (1937) Mad. 132=165 I C. 433=9 R.M. 238=44 L.W. 101=1936 M W.N. 720=A.I R. 1936 Mad. 669=71 M.L.J. 199.**

——Election dispute—Order by election commissioner in contravention of rules and on consent of parties—Legality—Jurisdiction to issue writ. *See* Madras Local Boards Act—Election Rules. **43 L.W. 47=A.I.R. 1936 Mad. 105.**

——Jurisdiction of High Court—Election to Village Panchayat—Decision of Collector—Finality—Failure to take evidence in election petition—If ground for interference. *See* Madras Village Panchayat Act, S. 44. **A.I.R. 1936 Mad. 969.**

——*Other remedy open—Writ—If can be granted*

It is well-settled that a writ of *certiorari* should only be granted when no other suitable remedy exists. (*K. S. Menon, J.*) Sri Mariamman Koil Devasthanam, Irrukkangudy *v.* Hindu Religious Endowment Board, Madras. **166 I.C. 169=9 R.M. 339=1936 M.W.N. 1186=A.I.R. 1937 Mad. 103=71 M.L.J. 594.**

——Revenue matters—Jurisdiction of High Court—Proceedings for collection of income-tax—Application for writ—Maintainability. *See* Government of India Act, S. 106 (2). **70 M.L.J. 343.**

——Writ of—Discretion of High Court—Decision of Hindu Religious Endowments Board in respect of distribution of *theertham* in temple and temple honours—If decision on legal right—Writ—If can issue. *See* Madras Hindu Religious Endowments Act, S. 18. **1939 M.W.N. 442.**

——Writ of—High Court's power—Order of Madras Debt Conciliation Board scaling down debt in case where it has no jurisdiction to do so—Issue of writ quashing order. *See* Madras Debt Conciliation Act, Ss. 4 and 17. **(1939) 2 M.L.J. 789.**

——Writ of—High Court's power to issue—Order without jurisdiction—Election to Madras Legislative Assembly—Candidate declared elected to Assembly as being the only nominated candidate at primary election—Order by District Magistrate declaring election void—If *ultra vires*—*Certiorari*—If can issue. *See* Government of India Act (1935) Sch. V, para. 20. **45 L.W. 623.**

——*Writ of—Jurisdiction of High Court.*

Wherever any person or body of persons is invested with legal authority to determine questions affecting the rights of subjects and has the duty in exercising that authority to act judicially he or they are subject to the controlling jurisdiction of the High Court of Justice exercised in the writ of *certiorari*. (*Roberts, C.J., Mya Bu and Dunkley, JJ*) Maung Pyu, *In the matter of.* **1940 Rang. L.R. 325=188 I C. 422=12 R.R. 365=A.I.R. 1940 Rang. 84 (S.B.).**

——Writ of—Jurisdiction of High Court—Election Commissioner acting without jurisdiction—Order declaring order of Government illegal and *ultra vires*—Order of Government neither *ultra vires* nor *mala fide*—Writ—Issue of—Order of Election Commissioner—Quashing of. *See* Madras Local Boards Act, Election Rules, R. 35 (2). **(1937) 2 M.L.J. 700.**

——Writ of—Jurisdiction of High Court to issue—Decision of Chief Judge of Bombay Small Causes Court—Decision in Municipal appeal—High Court's power to issue writ—Grounds for. *See* Bombay City Municipal Act, Ss. 217 and 219. **41 Bom.L.R. 984.**

——Writ of—Jurisdiction—Suit in Revenue Court by holder of village office—Claim to emoluments attached to office—Application for it to quash proceedings—Competency. *See* Madras Hereditary Village Offices Act, Ss. 13 (1) and 21. **(1937) 1 M.L.J. 37.**

——*Writ of—Madras Hindu Religious Endowments Act, S. 18—Orders under by Hindu Religious Endowments Board addressed to temple Committee—If administrative or judicial—Writ—If can issue—Member of temple committee and aspirant to office of temple trustee*—Locus standi *to apply for writ.*

Orders passed by the Hindu Religious Endowments Board in the exercise of general powers of Superintendence and control vested in the Board by S. 18 of the Madras Hindu Religious Endowments Act, addressed to a subordinate body, such as a temple committee and not purporting to decide any rights of parties are only administrative orders; they cannot be said to be orders of a judicial nature merely because they may have the effect of prejudicing the rights of private parties. The High Court will not therefore issue a writ of *certiorari* in respect of such orders. A member of the temple committee in question and an aspirant to the office of a trustee in a temple under the temple committee have no *locus standi* to apply for a writ of *certiorari*, especially when none of their rights have been prejudicially affected by the orders in question. (*Pandrang Row, J.*) Sreenivasa Ayyangar *v.* H. R. E. Board, Madras. **171 I.C. 990=10 R.M. 419=1937 M.W.N. 610=45 L.W. 323=A.I.R. 1937 Mad. 456=(1937) 1 M.L.J. 442.**

——Writ of—Powers of High Court to issue—Conditions—Discretion—Delay in applying—Dispute between Co-operative Society and ex-officer—Decision by tribunal without jurisdiction—Party contesting the matter on merits and taking chance of success before that tribunal—Execution of award—Subsequent application for writ—Interference. *See* Madras Co-operative Societies Act, S. 51. **(1937) 2 M.L.J. 858.**

——*Writ of—Power of High Court to issue—Regular exercise of* quasi *judicial powers—Enforcement—Issue of writs of* certiorari *and prohibition for the purpose of.*

The power of the High Court to issue writs of *certiorari* and prohibition to enforce the regular exercise of *quasi*-judicial powers by departments of Government, is unquestioned. (*Panckridge, J.*) Indumati Debi *v.* Bengal Court of Wards. **I. L. R. (1938) 1 Cal. 476=181 I. C. 973=11 R. C. 879=42 C.W.N. 230=A.I.R. 1938 Cal. 385.**

CERTIORARI.

———*Writ of—Principle underlying the issue of—Failure of Election Commissioner to record finding that the election has been materially affected in its result—Irregularity and illegality, patent—Interference.*

If a statutory tribunal performs its duties in disregard of the ordinary law or of the procedure and conditions imposed upon it by the law which gives its jurisdiction, the High Court can and should interfere to prevent an abuse of the power conferred by the statute; but it does not follow that the tribunal which obviously is the only tribunal having jurisdiction loses it by such disregard. Where in an election dispute the irregularity and illegality that attended the election, was so open and patent that it was not even contested, the mere fact that the Election Commissioner did not in so many words say that the rejection of certain votes by the election officer had materially affected the result of the election, could not vitiate the order and make it one without jurisdiction. (*Pandrang Rao, J.*) VENKATA MANIKYARAO *v.* BHADRACHALAM. **178 I.C. 467=11 R.M. 458=(1938) M.W.N. 196=47 L.W. 338=A.I.R. 1938 Mad. 507=(1938) 1 M.L.J. 375.**

———*Writ of—Rent Settlement Officers—Rangoon High Court—Power to issue.*

Rangoon High Court is the King's Court with general jurisdiction throughout Burma, and therefore it must have inherent power to issue the King's writs unless that power has been taken away by His Majesty by express terms, There is nothing in the Letters Patent which in terms deprives High Court of the power to issue the high prerogative writs. Hence, the Rangoon High Court has power to issue the high prerogative writs and Rent Settlement Officers appointed under the Burma Tenancy Act are amenable to that jurisdiction. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) MAUNG BYU, *In the matter of.* **1940 Rang.L.R. 325=188 I.C. 422=12 R.R. 365=A.I.R. 1940 Rang. 84 (S.B.).**

———Writ of—Revenue Court—Suit by holder of office of village blacksmith for possession of inam land attached to office alienated by previous holder—Decree by Revenue Court—If without jurisdiction—Application for writ of *certiorari* to High Court—Competency. *See* MADRAS HEREDIDARY VILLAGE OFFICES ACT, Ss. 13 AND 21. **(1938) 1 M.L.J. 406.**

———*Writ of—When can be issued.*

A proceeding is none the less a judicial proceeding subject to prohibition or *certiorari* though it is subject to confirmation or approval by some other authority. An application for prohibition or *certiorari* is never too late as long as there is something left for it to operate upon. *Rex* v. *Electricity Commissioners,* (1924) 1 K.B. 171 and In re *London Scottish Permanent Building Society,* (1894) 63 L.J.Q.B. 112, Rel. on. (*Lord Maugham.*) ESTATE AND TRUST AGENCIES *v.* SINGAPORE IMPROVEMENT TRUST. **46 L.W. 232=10 R.P.C. 60=170 I.C. 425=A.I.R. 1937 P.C. 265 (P. C.).**

CEYLON CIVIL PROCEDURE CODE, S. 349—*Scope.*

S. 349 relates only to decrees for the payment of money. (*Lord Maugham.*) DOROTHY MARGARET *v.* HENRY PETER. **162 I.C. 8=8 R.P.C 234=44 L.W. 640=1936 A.W.R. 460=1936 O.W.N. 390=1936 O.L.R. 261=38 P.L,R. 407=A.I.R. 1936 P.C. 126 (P.C.).**

CHARGE.

———S. 605—*Divorce proceedings—Decree absolute—Who can apply.*

The law of Ceylon in regard to making a decree absolute rests on S. 605, C. P. Code, and differs in an important respect from the English law and well settled practice, The application in England can only be made by the innocent party, In Ceylon if the conditions in S. 605 have been complied with (*i.e.*, if no cause has been shown and the time fixed has elapsed) the Court is bound to make the decree absolute, and there is nothing either in the law or the practice to prevent the application being made by the innocent or by the guilty spouse. (*Lord Maugham.*) DOROTHY MARGARET *v.* HENRY PETER. **162 I.C. 8=8 R.P.C 234=44 L.W. 640=1936 A.W.R. 460=1936 O.W.N. 390=1936 O.L.R 261=38 P.L. R. 407=A.I.R. 1936 P.C. 126 (P.C.).**

CEYLON ORDINANCE (XIV OF 1891), S. 17—*Registration—Priority—Fraud or collusion—Proof.*

In Ceylon mere notice of a prior unregistered instrument is not of itself sufficient evidence of fraud so as to deprive a person of a priority conferred by law as laid down by Ordinance No. 14 of 1891. Where however a father who has tranferred certain property to his son by a deed of gift, which is not registered, attempts to deprive his son of it, by subsequently transferring it to another person by a registered deed, and where the transferee is fully aware of his intentions and for his own purposes joins the father in the transaction, the transferee is guilty of collusion to deprive the son of his lawful rights in respect of the property under the prior instrument, and will not obtain priority by reason of prior registration. (*Lord Maugham.*) E ABEYESUNDERA *v.* CEYLON EXPORTS, LTD. **165 I.C. 417=9 R.P.C. 124=A.I.R. 1936 P.C. 259 (P.C).**

———**(XVIII OF 1923), S. 5**—*Transfer of property to husband—Capacity of wife.*

Whatever may have been the capacity of a wife in Ceylon prior to the year 1923 as regards a disposition, transfer or settlement of movable or immovable property in favour of her husband, under S. 5 of Ordinance XVIII of 1923, a wife is under no disability as regards coverture in disposing of her movable or immovable property in favour of her husband. (*Lord Maugham*) DOROTHY MARGARET *v.* HENRY PETER. **162 I.C. 8=8 R.P.C. 234=44 L.W. 640=1936 A.W.R. 460=1936 O.W.N. 390=1936 O.L.R 261=38 P.L.R. 407=A.I.R. 1936 P.C. 126 (P.C.).**

CHAMPERTY—Champertous agreement by applicant for leave to sue in *forma pauperis*—Right to leave. *See* C. P. CODE, O. 33, R. 5 AND R. 9 (c).

———Plea of—Person not party to agreement—If can set up champertous nature of agreement. *See* CONTRACT ACT, Ss. 201 AND 202. **1938 M.W.N. 259.**

CHARGE. *See also* T. P. ACT, Ss. 55 (4) AND (6) AND 100.

———Bona fide *purchaser—Notice—Onus—Decree declaring charge, if operates as notice.*

Where a charge falls squarely under S. 100, T. P. Act, or whether it comes under a more general rule of law the burden is on the transferee to establish that he is a *bona fide* transferee for value without notice. When a decree provides for the payment of future maintenance and makes provision expressly or impliedly for its own execution, then it does not put an end to the suit and consequently whether the matter be placed on the ground of *lis pendens* or on that of estoppel by record the result is the same. But when the decree is merely declaratory and inexecutable, the suit *qua* suit is at an end and then these rules do not apply and decree *qua* decree does not operate as notice. (*Stone, C. J. and Bose, J.*) Ghasiram *v.* Kundanbai. **1940 N.L. J. 1=A.I.R. 1940 Nag. 163.**

——Creation—Money lying in Court to credit of party—Attachment of, before judgment in suit against party—Latter admitting claim and agreeing to amount being called for and paid to plaintiff—Effect of. *See* C. P. Code, S. 73. **1937 A. W.R. 284=A.I.R. 1937 All. 424.**

——*Enforceability—Failure of charge on account of defect.*

If, for want of registration or any other defect, a charge fails of its effect, it cannot be enforced against a subsequent transferee even with notice. (*Kichlu and Wazir, JJ.*) Bank of Northern India *v.* Bhagat Ram. **39 P.L.R.J. and K. 167.**

——*Decree declaring—Purchaser without notice —If takes free of charge.*

Where a decree for maintenance declares that the property in the hands of the judgment-debtor in the suit is charged with the payment of a particular amount, under the law a *bona fide* purchaser of such property for value without notice of the charge takes it free of the charge: the reason being that the legal estate prevails over a mere equity except when the legal owner takes with notice. (*Stone, C. J. and Bose, J.*) Ghasiram *v.* Kundanbai. **1940 N.L.J. 1=A.I.R. 1940 Nag. 163.**

——Equitable charge—Creation of—Agreement between debtor and creditor that fund should be applied in particular way—Charge on future property—Validity. *See* C. P. Code, O. 21, R. 46. **42 C W.N. 971.**

CHARITABLE AND RELIGIOUS TRUSTS ACT (XIV OF 1920)—*Decision under—Nature and effect of—If operates as* res judicata.

The decision of the District Judge under the Charitable and Religious Trusts Act—a decision from which by S. 12 of the Act there is no appeal —is a decision in a summary proceeding which is not a suit nor of the same character as a suit which has not been made final by any provision of the Act, and in respect of which the doctrine of *res judicata* does not apply so as to bar a regular suit even in the case of a person who was a party to the proceedings under the Act. The terms of S. 6 of the Act are intended to define the consequences of the failure to comply with any order that may be passed under S. 5 (5) of the Act, but the words "if a trustee without reasonable excuse fails to comply" in the section cannot be read to exclude a contention in a regular suit that the plaintiff is not a trustee or to prevent a similar contention being raised by a defendant, to a suit under S. 92, C. P. Code. (*Sir George Rankin.*) Bhagwan Din *v.* Gir Har Saroop. **67 I.A. 1=I.L.R. (1940) Kar. (P.C.) 25=15 Luck. 1= 185 I.C. 305=12 R.P.C. 89=6 B.R. 179=51 L. W. 4=1940 M.W.N 3=44 CW.N. 294=42 Bom. L.R. 190=71 C.L.J. 169=1940 P.W.N. 156= 1939 A.W R. (P.C.) 188=1939 O.W.N. 1078= 1940 A L.J. 533=A.I.R. 1940 (P.C.) 7=(1940) 1 M.L.J. 1 (P.C.).**

——S. 3—*Applicability—Test—Wakf.*

There can be no doubt that on the wording of the statute that the Charitable and Religious Trusts Act applies only to those cases where the entire benefit under the wakf in trust is allotted to public purposes and not where the purpose of the trust is partly public and partly private. In every case, the real substance of the trust and the primary intention of the creator of the trust have to be looked at. If the intention of the creator was the creation of a trust for a public purpose, the dedication in favour of the poor relations of creator who are classed with the helpless widows in the neighbourhood will not destroy the public nature of the trust. (*Guha and Bartley, JJ.*) Emdad Ali Chaudhuri *v.* Tabubulla. **10 R.C. 522=173 I.C. 453=A.I.R. 1937 Cal. 313.**

——S. 3—*Applicability—Trust, partly public and partly private.*

S. 3 applies to a mixed trust partly for a public and charitable purpose and partly for private purpose. (*Ganga Nath, J.*) Nageshar Prasad Singh *v.* Ram Sarup Singh. **163 I.C. 234=8 R. A. 948=1936 A.L.J. 546=1936 A.W.R. 420= 1936 All.L.R 536=A.I.R. 1936 All. 411.**

——S. 3—*Construction—"Trust....for a public purpose of a charitable or religious nature"—Meaning of—Deed or will creating trust—Part of property or income set apart for private purposes —Specified part definitely set apart for public purposes—If falls under Act.*

Act XIV of 1920 is not inapplicable to a trust merely because a small sum is reserved for purposes which may not be strictly public purposes. Where under the same deed or will either a specified part of the property, for example, a defined share in the property, or a specified part of the income has been definitely set apart for public purposes, then the mere fact that any other part of the property or any other specified part of the income is for private purposes would not take the case out of the provisions of the Act. (*Sulaiman, C.J. and Harries, J.*) Pratap Singh *v.* Brijnath Das. **1937 A.L.J. 1183= 1937 A.W.R. 873=I L.R. (1938) All. 1=172 I.C. 945=10 R.A. 437=1938 A.L.R. 46=A.I.R. 1937 All. 786.**

——S. 3—*Order under—Revisability.*

The provisions of S. 115, C. P. Code, and S. 44, Punjab Courts Act, are very wide and an order of the District Judge under S. 3, Charitable and Religious Trusts Act, is revisable. (*Bhide, J.*) Mahomed Yar *v.* Khalil-ul-Rahman. **17 Lah. 768=165 I.C. 664 (1)=9 R.L. 281 (1)=38 P.L. R. 900=A.I.R. 1936 Lah. 695.**

——S. 3—*Orders under—Revision under S. 115, C.P. Code—If lies.*

Where a Judge passes an order under S. 3 of the Charitable and Religious Trusts Act directing a mutawalli to file accounts within a certain time, it cannot be said that in law no revision would lie from such order. (*Zia-ul-Hasan and Yorke, JJ.*) Ganga Ram Jaitley *v.* J. N. Jaitley. **1938 O. W.N. 1054=11 R O. 92=178 I.C. 167=1938 O. A. 800=1938 A.W.R. (C.C.) 85=1938 O.L.R. 467=A.I.R 1938 Oudh 262.**

——S.3—*"Public trust"—Mosque built by public subscription and used by Mahomedan public.*

Where a mosque was built with public subscriptions and used by the Mahomedan public for offering prayers and further was admitted by the respondent to be a religious trust in a prior suit.

Held, that such a mosque was a public trust and that an application under S. 3 calling upon the respondent to furnish certain information should be decided on merits. (*Bhide, J.*) MAHOMED YAR *v.* KHALIL-UL-RAHMAN. **17 Lah. 768=165 I.C 664 (1)=9 R.L. 281 (1)=38 P.L.R. 900 =A.I.R. 1936 Lah. 695**

——S. 3—*Public trust—What constitutes.*

To constitute a trust "created or existing for a public purpose of a charitable or religious nature" the author or authors of the trust must be ascertained, and the intention to create a trust must be indicated by words or acts with reasonable certainty. Moreover the purpose of the trust, the trust property, and the beneficiaries must be indicated so as to enable the Court to administer the trust if required. 57 A. 330=62 I. A. 446, Rel. on. (*Sir Shadi Lal.*) PARMA NAND *v.* NIHAL CHAND. **65 I A. 252=32 S.L R. 821=175 I.C. 459=48 L W. 62=42 C.W.N. 1013=1938 O.L.R. 309=1938 P.W.N. 578=11 R.P C. 6=1938 O.W.N. 693=67 C L J. 540=4 B.R. 673=1938 A L.R. 502=40 P.L R 829=40 Bom L.R. 907=1938 M.W N. 885=1938 A L J. 799=1938 O.A. 711=19 Pat L T. 712=I.L.R. (1938) Lah. 453=1938 A.W R. (P C) 145=A.I.R. 1938 P.C. 195=(1938) 2 M.L J. 228 (P.C.).**

——S. 3 (2)—*Audit of accounts—Power of Court to direct.*

Under Cl. (2) to S. 3, the Court is enabled to direct the examination and audit of the accounts in whosoever's hands the funds or the properties of the trust may be, quite apart from whether he is a trustee or not. (*Agarwala and Varma, JJ.*) RAMSAROOP DAS *v.* RAMESHWAR DAS. **175 I.C. 636=4 B.R. 622=11 R.P. 5=19 Pat.L.T. 639=A.I.R 1938 Pat. 280.**

——Ss. 5 (3) and (4)—*Jurisdiction of District Judge under—Limits—Decision as to nature of trust—When justified.*

S. 5 (4) of the Charitable and Religious Trusts Act in terms gives the Court of the District Judge jurisdiction to decide, under certain circumstances, the question whether a trust is one to which the Act applies. When either its existence or its being a trust to which the Act applies, is denied, and no undertaking as contemplated by sub-R. (3) is given, the District Judge is exercising a jurisdiction vested in him, if he decides as to the nature of the trust. (*Zia-ul-Hasan and Yorke, JJ.*) GANGA RAM JAITLEY *v.* J. N. JAITLEY. **11 R.O. 92=178 I C. 167=1938 O W.N. 1054=1938 O.A. 800=1938 A.W.R. (C.C.) 85=1938 O. L.R. 467=A.I.R. 1938 Oudh 262.**

——S. 7—*Powers of District Judge under—Extent of—Wakf property—Dispute between mutwallis—District Judge appointing defendant to collect rents—Suit against him by mutwalli—Notice under S. 80, C. P. Code—If necessary.*

On a dispute arising between the plaintiff and his brother who succeeded as mutwallis, the District Judge arranged that the defendant should take charge of the property, manage it, collect rents and divide the profits between the two brothers. The District Judge passed an order to the effect that a power of attorney should be

drawn up and executed in the terms of the agreement which he set forth in his order. The plaintiff refused to execute the power. The District Judge then passed an order that he would execute it himself on behalf of the plaintiff and he did so. The plaintiff instituted a suit in order to obtain his share of the profits from the defendant. One of the pleas taken by the defendant was that no suit should be instituted against him unless notice had been given to him under S. 80, C. P. Code.

Held, that the District Judge had no authority to execute the power of attorney on behalf of the plaintiff under the provisions of the Mussalman Wakf Act, and that even supposing that he was acting under the provisions of S. 7 of the Charitable and Religious Trusts Act and those of O. 21, R. 34, C. P. Code, he had no power to compel a trustee to follow his advice given under that section or to carry out any direction so given and that the trustee was entitled to seek advice for his own protection and if he followed that advice, he was protected, but if he did not choose to follow it, he could not be compelled to do so, although his failure to follow it would be at his own risk, and that in that view the action of the District Judge was without jurisdiction and the defendant had no right to collect the profits at all, and if he collected them, he was liable to be called to account by the person who was entitled.

Held, also, that assuming that the District Judge was acting properly in accordance with the provisions of S. 7 of the Charitable and Religious Trusts Act and those of O. 21. R. 34, C. P. Code, the District Judge was acting merely on behalf of the plaintiff, and the defendant was in the same position as he would have been if the plaintiff had executed the power of attorney himself and that in other words, the defendant was not an officer of the Court but merely the agent of the plaintiff, and that in that view of the matter he was also liable to be sued without the issue of any notice to him. (*Allsop, J.*) ABDUL RAB *v.* MOHAMMAD HASAN KHAN. **165 I.C. 681=9 R. A 296=1936 A.W.R. 1012=1936 A.L J. 1112=1936 All.L.R. 948=A.I.R. 1936 All. 801.**

CHARTER PARTY. *See* CONTRACT—CHARTER PARTY.

CHILD MARRIAGE RESTRAINT ACT (XIX OF 1929)—*Marriage contravening Act—Validity.*

The marriage of a Child in contravention of the provisions of the Child Marriage Restraint Act is not declared by that Act to be an invalid marriage. The Act merely imposes certain penalties on persons bringing about such marriages. (*Thom, J.*) MOTI *v.* BENI. **166 I.C. 847=9 R. A 455=38 Cr L J. 301=1937 All.L.R. 90=1936 A.L.J. 1097=1936 A.W.R. 920=1936 A.Cr.C. 192=1936 Cr.C. 1111=A.I R. 1936 All. 852.**

——*Offence beyond British India—Charged in British India—Sanction of Local Government or certificate of political agent—Necessity for—Cr. P. Code, S.* 188.

A charge in respect of an offence under the Child Marriage Restraint Act alleged to have been committed in French territory cannot be inquired into in British India except on the certificate of the Political Agent or the sanction of the Local Government, as required by the proviso to

S. 188, Cr. P. Code. There is nothing to the contrary in the Child Marriage Restraint Act. (*Lakshmana Rao, J.*) Subba Rao *v.* Kamaraju. **183 I.C. 708=12 R.M. 368=40 Cr.L.J. 822 (2)=1939 M.W.N 742=49 L.W. 656=1939 M.Cr.C. 198=A I.R. 1939 Mad 577.**

——*Scope of—District Magistrate—Transfer of case for disposal to Sub-Divisional Magistrate without inquiry—Legality.*

S. 10 of the Child Marriage Restraint Act requires a Court taking cognizance of an offence under the Act either itself to make an inquiry under S. 202, Cr. P. Code, or to direct a Magistrate of the 1st class subordinate to it to make such an inquiry. A transfer of such a case by a District Magistrate to a Sub-Divisional Magistrate for disposal without any such inquiry is therefore illegal. (*Lakshmana Rao, J.*) Sivagami Ammal *v*, Muthu Iyer. **180 I.C. 902=11 R.M. 766=1938 M.W.N. 1312=40 Cr.L.J. 514 (2)=1939 M.Cr.C. 11=48 L.W. 774=A.I.R. 1939 Mad. 294=(1939) 1 M.L.J. 111.**

——*Scope and object of—Child Marriage—Application to Court for funds for purpose of—If to be sanctioned—Considerations.*

Although the Child Marriage Restraint Act does not render a child marriage void, a Court of law ought not to sanction expenditure of funds in the hands of the Court, though its receiver, for the purpose of meeting a child marriage, of which the Legislature has clearly expressed its disapproval by the Act. (*Panckridge, J.*) Pan Mal Lodha *v.* God Mal Lodha. **63 Cal. 1153=170 I.C. 309=10 R.C. 147=A.I.R. 1937 Cal. 257.**

——*Scope and object of—If affects validity of marriages solemnized.*

The Child Marriage Restraint Act aims at the restraint of solemnization of child marriages. It does not affect the validity of the marriages after they have been performed. There may no doubt be cases where the Court in the exercise of its discretion, may refuse to give a declaration in the case of a marriage performed in contravention of the Act. (*Bennet and Ganga Nath, JJ.*) Ram Baran Upadhia *v.* Sital Pathak. **182 I.C. 568=12 R.A. 72=1939 A.Cr.C. 69=1939 A.W.R. (H.C.) 246=1939 A.L.J. 173=A.I.R. 1939 All. 340.**

——**Ss. 5 and 6**—*Applicability—Promotion of child marriage by parents—If offence under S. 5 or under both Ss. 5 and 6.*

S. 5 of the Child Marriage Restraint Act only applies to solemnisation of a child marriage by persons other than the parents of the minor and S. 6 alone applies to parents who promote a child marriage or negligently fail to prevent it. (*Pandrang Row, J.*) Public Prosecutor *v.* Rattayya. **I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=168 I.C. 723=1937 M.W.N. 212=45 L.W. 437=1937 M.Cr.C. 73=A.I.R. 1937 Mad. 490.**

——**Ss. 5 and 6**—*Complaint under—Finding that either or both contracting parties were infants—Duty of Magistrate.*

In cases of complaints of offences under Ss. 5 and 6 of the Act it is essential that trying Magistrate should find definitely that either or both of the contracting parties to the marriage were infants within the meaning of the Act, that is to say, that the bridegroom was under the age of 18 or that the bride was under the age of 14. (*Bartley and Henderson, JJ.*) Sew Ratan Lal Binani *v.* Emperor. **181 I.C. 916=11 R.C. 874=40 Cr.L. J. 605=A.I.R. 1939 Cal. 288.**

——**Ss. 5 and 6**—*Conviction under for celebration of marriage in Frenchpet—Doubt at the time of marriage as to Frenchpet being British territory—*Bona fide *mistake of fact—Plea in defence—If available—Operation of Act—If extra territorial.*

The Child Marriage Restraint Act makes it an offence to celebrate a child marriage. This penal law applies not only to the celebration of such a marriage in British India by any one, but also to the celebration of such marriages even outside British India by native Indian subjects. The petitioners were convicted under Ss. 5 and 6 of the Act. They pleaded that at the time of marriage, it was doubtful whether Frenchpet, where the marriage was celebrated for which they were convicted, was part of British India, and therefore they were not liable to be convicted.

Held, that the Act was extra territorial and that the mistake of fact under which they were labouring, namely that Frenchpet was French territory and not British India, even if *bona fide,* did not render the celebration of the marriage innocuous or innocent, and it did not follow that the proceedings were void or that the conviction was wrong. A mistake of fact like the one could be pleaded successfully only if on account of such mistake, an act which otherwise would be an offence ceased to be an offence. There was consequently nothing illegal in the conviction. (*Pandrang Row, J.*) Sreeramamurthi *v.* Ranganayakalu. **168 I.C. 736=9 R.M. 628=38 Cr.L.J. 587=1937 M.W.N. 22=45 L.W. 210=1937 M.Cr.C. 98=A.I.R. 1937 Mad. 273=(1937) 1 M.L.J. 388.**

——**S. 5**—*Duty of purohit solemnising marriage—Enquiry into age of parties—Failure to make—Effect—Mere look at parties and forming opinion as to age—Sufficiency of.*

A purohit prosecuted under S. 5 of the Sarda Act has the burden on him to prove that he had reason to believe that neither of the parties to the marriage was a child as defined by the Act. The section contemplates that the person solemnising a marriage must make some reasonable inquiry and satisfy himself that neither of the participants is a child. It is not enough if he merely looks at the bride and bridegroom and forms his own opinion. The law casts on him the duty of making reasonable inquiry and if he makes none, he renders himself liable to conviction. (*Pandrang Row, J*) Public Prosecutor *v.* Rattayya. **168 I.C. 723=I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=1937 M.W.N. 212=45 L.W. 437=1937 M.Cr.C. 73=A.I.R. 1937 Mad. 490.**

——**Ss. 5 and 6**—*Marriage in Native State—Accused living in British India—Certificate under S. 188, Cr. P. Code, if necessary.*

Where it is alleged that the accused lived in British India and arranged for a marriage in contravention of the provisions of the Child Marriage Restraint Act, to take place out of British India, the offence is committed inside British India and hence no certificate under S. 188, Cr. P. Code, is necessary. (*Davies.*) Mool Chand *v.* Bansi Dhar. **1939 A.M.L.J. 130.**

——**S. 5**—*Offence under—Application for permission to conduct festivities at marriage.*

The mere submission of an application to the Municipal Board for permission to hold a *nach* with music and fire-works, etc., on the occasion of a marriage would not amount to an offence under S. 5 of the Act. (*King, C.J.*) Bachchu Lal *v.* Emperor. **12 Luck. 263=162 I.C. 389 (2)=8 R.O. 376=36 Cr.L.J. 616=1936 O.W.N. 480=1936 Cr.C. 712=1939 O.L.R. 254=A.I.R. 1936 Oudh 311.**

——**S. 5**—*Preliminary acts—If punishable.*

S. 5 of the Child Marriage Restraint Act takes account only of performing, conducting or directing a child marriage, that is to say, the actual marriage ceremony itself, and not of any negotiation, preparation or any other preliminary acts. Hence these are not covered by S. 5 of the Act. (*Grille, J.*) Sheikh Haider *v.* Syed Issa. **I.L.R. (1939) Nag. 241=175 I.C. 615=39 Cr.L.J. 651=11 R.N. 2=A.I.R. 1938 Nag. 235.**

——**S. 6**—*Applicability—Bride under 14 years—Parents of bridegroom—Liability to conviction.*

The parents of a bridegroom are not liable to conviction under S. 6 of the Sarda Act, on the ground that the bride is under 14 years of age; they are liable to conviction only if the bridegroom, that is their own son, who was in their charge, be under 18 years at the time of the marriage. (*Pandrang Row, J.*) Public Prosecutor *v.* Rattayya. **I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=168 I.C. 723=1937 M.W.N. 212=45 L.W. 437=1937 M. Cr.C. 73=A.I.R. 1937 Mad. 490.**

——**S. 6**—*Scope—Bridegroom below 18 years—Conviction of both father and mother at same time—Sustainability—"Person having charge of a minor."*

The offence punishable under S. 6 of the Child Marriage Restraint Act is confined only to the person who has actual charge of the minor either as parent or as guardian at the time. Where the father of a bridegroom has been convicted of an offence under S. 6 on the ground that the bridegroom was below 18 at the time of the marriage, the mother of the bridegroom cannot be convicted at the same time under S. 6. The mother has no authority to prevent the marriage promoted by the father, and it cannot be said that she had charge of the bridegroom. Her mere participation in the marriage cannot be regarded as constituting an offence punishable under S. 6. (*Pandrang Row, J.*) Public Prosecutor *v.* Rattayya. **I.L.R. (1937) Mad. 854=9 R.M. 633=38 Cr.L.J. 594=168 I.C. 723=1937 M.W.N. 212=45 L.W. 437=1937 M.Cr.C. 73=A.I.R. 1937 Mad. 490.**

——**S. 6**—*Scope of—Promotion of child marriage outside British India—If punishable.*

S. 6 of the Child Marriage Restriant Act has reference only to a marriage that is prohibited. As child marriage outside British India is not prohibited, its promotion is not an offence punishable under the Act. (*Grille, J.*) Sheikh Haider *v.* Syed Issa. **I.L.R. (1939) Nag. 241=175 I.C. 615=39 Cr.L.J. 651=11 R.N. 2=A.I.R. 1938 Nag. 235.**

——**S. 8**—*Jurisdiction—Additional District Magistrate—Jurisdiction to try offence under Act—Cr. P. Code, S. 10* (2).

Reading S. 8 of the Child Marriage Restraint Act with S. 10 (2) of the Cr. P. Code, it must be held that an Additional District Magistrate who is empowered with all the powers of a District Magistrate under S. 10 (2) of the Cr. P. Code, is empowered to try cases under the Child Marriage Restraint Act. (*Horwill, J.*) Abdur Rahiman Kutty, *In re.* **I.L.R. (1937) Mad. 1034=169 I.C. 71=9 R.M. 679=38 Cr.L.J. 664=1937 M.W.N. 321=1937 M.Cr.C. 114=45 L.W. 435=A.I.R. 1937 Mad. 637=(1937) 1 M.L.J. 498.**

——**S. 9**—*Complaint—Case under S. 5 sent by Magistrate to police officer for investigation—Letter by police officer to Magistrate if a complaint.*

When a police officer investigates a non-cognizable case under orders of a Magistrate, the report which he makes at the end of his investigation is of the same nature as a report made under S. 157, Cr. P. Code, and such report being a police report is not a 'complaint' though if a police officer, acting without instructions from a Magistrate, reports a non-cognizable offence to a Magistrate with a view to the Magistrate taking action, this is a complaint. An offence under S. 5, Child Marriage Restraint Act, being punishable only with simple imprisonment up to one month or a fine of Rs. 1,000 or both, under Sch. III, Cr. P.Code, is not cognizable. Hence, when, such case is forwarded to an Assistant Superintendent of Police for investigation, a letter written on behalf of the Assistant Superintendent of Police to the District Magistrate is a 'Police Report' and not a 'complaint.' (*Baguley, J.*) Jagdeo Panday *v.* N. C. Hill. **1938 Rang.L.R. 150=176 I.C. 694=11 R.R. 74=39 Cr.L.J. 776=A.I.R. 1938 Rang. 257.**

——S. 9—Marriage in Native State—Complaint within one year but certificate obtained after one year—Trial, if legal. *See* Cr. P. Code, S. 188 and Child Marriage Restraint Act, S. 9. **1940 N. L.J. 304.**

——**S. 9**—*Scope and effect of—Complaint beyond one year—If saved by prior unsuccessful complaint filed within time — Limitation Act, S.* 14.

S. 14 of the Limitation Act is in terms restricted to civil proceedings and cannot be availed of in respect of proceedings under the Child Marriage Restraint Act. A complaint preferred beyond a year of the solemnisation of the marriage cannot be taken cognizance of under S. 7 of the Child Marriage Restraint Act. The fact that another unsuccessful complaint had been made to another Magistrate within time would not help to make the second complaint filed beyond time a valid one. (*Lakshmana Rao, J.*) Venkatanarasimham *v.* Satyanarayana Rao. **183 I.C. 595=12 R.M. 317=40 Cr.L.J. 816 (1)=1939 M.W.N. 415=1939 M.Cr.C. 106=49 L.W. 547 (1)=A.I.R. 1939 Mad. 512=(1939) 1 M.L.J. 775.**

——**(as amended by Act VII of 1938), S. 10 and Criminal Procedure Code, S. 537**—*Preliminary enquiry not held—Trial and conviction, if vitiated—S. 537, if cures defect.*

Where in respect of an offence under the Child Marriage Restraint Act the accused are tried and convicted without a preliminary enquiry being held as required by S. 10 of the Act, and no prejudice had thereby been caused to the accused, the trial and conviction is not on that ground in any way vitiated and the defect is cured by S. 537, Cr. P. Code. (*Gruer, J.*) EMPEROR *v.* MEHTAR DHANWA. I.L.R. (1940) Nag. 488 =1940 N.L.J. 224.

——**Ss. 10 and 11**—Scope—If mandatory—Non-compliance—Effect on trial—If irregularity curable by S. 537, Cr P. Code. *See* CR. P. CODE, S. 537. **20 N.L.J. 115.**

——**S. 10**—*Scope—Non-compliance—Failure to hold preliminary inquiry—Conviction—If liable to be set aside—Failure of accused to object to trial—Effect.*

S. 10 of the Child Marriage Act no doubt requires that a preliminary inquiry must be held. But where a Court finds that there is a *prima facie* case and also holds the offence established after a proper trial, it cannot be held that the conviction must be set aside for the technical reason that no preliminary inquiry was held as required by S. 10. This does not mean that Magistrates are entitled to disregard the provisions of S. 10 But where the accused does not object to the trial, he cannot benefit by an objection which is entirely technical in its nature. (*Agarwala, J.*) HARIHAR TIWARI *v.* ETWARI GOPE. **184 I.C 230 =6 B R. 24=40 Cr.L.J. 887 (1)=12 R.P 231= 1939 P.W.N. 670=20 Pat.L.T. 495=A.I.R. 1939 Pat. 525.**

——**S. 10**—*Scope—Omission to hold enquiry—Effect of.*

S. 10 of the Child Marriage Restraint Act is mandatory and clearly prohibits a Court from taking cognizance of an offence under the Act without a preliminary inquiry being held. A process issued without holding an inquiry as required by S. 10, is therefore unauthorised and illegal. (*Pandrang Rao, J.*) JAGGU NAIDU, *In re.* **183 I C. 581=12 R.M. 343 (1)=40 Cr.L J. 818 (1)=1939 M W.N. 411=1939 M.Cr.C. 139 =49 L.W. 552=A.I.R. 1939 Mad. 530=(1939) 1 M.L.J. 900.**

——**S. 11**—*Security bond defective—Trial, if vitiated.*

The mere fact that the security bond executed by the complainant under S. 11 of the Child Marriage Restraint Act is defective does not affect the merits of the case and, therefore, does not vitiate the trial. (*King, C.J.*) BACHCHU LAL *v.* EMPEROR. **12 Luck. 263=162 I.C. 389 (2) =8 R.O. 376=37 Cr.L.J. 660=1936 O.W.N. 480 =1936 O.L.R 254=1936 Cr.C. 712=A.I.R. 1936 Oudh 311.**

CHIT FUND—Assignment of rights by subscriber with consent of stake-holder—Suit by assignee for declaration of rights as assignee—Competency—Right to declaration as against stake-holder. *See* SPECIFIC RELIEF ACT, S. 42. **44 L.W. 704.**

——*Kuri—Successful bidder—Receipt of bid amount—Mortgage bond by bidder and her sons to secure payment of future subscriptions—Construction of—Kuri collapsing after two or three instalments—Bond assigned to another by stake-holder—Suit by assignee for return of bid amount less amounts subscribed—Maintainability.*

One *R* had been conducting a kuri chit with 18 members which was expected to run for 18 years. *V* the 1st defendant was a subscriber holding 1½ tickets and became the successful bidder at the first auction. As per the chit fund rules she got the money after executing a security bond to the stake-holder *R*, along with her sons the other defendants under which the properties of *V's* sons were mortgaged to *R* to secure the payment by *V* of the future instalments of subscriptions due by her. The chit thereafter was conducted only for two more years. *R* assigned his rights under the security bond executed by the defendants and the assignee sued the defendants on the mortgage to recover the amount.

Held, that the security bond in suit must be interpreted in the light of the rules of the chit fund, and the obligations undertaken by it were not repayment of the benefit already received but the payment of future subscriptions, that a reasonable interpretation of the bond as against the sons of the 1st defendant, who were not parties to the chit fund arrangement could only be that it was intended to secure the 1st defendant's obligation on the assumption that the chit fund would run its normal course; and therefore the suit brought before the termination of the kuri, on the basis that the kuri had callapsed, and that the benefited subscribers should refund the amount drawn by them with interest subject to their right to take back the amounts actually subscribed by them with a certain rate of interest, must fail. (*Varadachariar and Mockett, JJ.*) MARUDA KONAR *v.* VEERAMMAL. **168 I.C. 402=9 R.M. 571=1936 M.W.N. 1370=44 L W. 710= A.I.R 1936 Mad. 985=(1937) 2 M L.J. 17.**

——*Nature of transaction—Agreement by subscriber to pay subscription—Breach—Suit by stake-holder—If one for specific performance of contract to lend—Maintainability.*

Semble.—A suit by a stake-holder or starter of a chit fund for recovery of subscriptions from a subscriber cannot be regarded as a suit for specific performance of a contract to lend. The stake-holder is not a borrower nor the subscriber a lender. A chit fund transaction cannot possibly be regarded as in any sense a contract entered into by a subscriber to lend money to the stake-holder. It is more in the nature of a contract on the part of the subscriber to pay a certain sum of money to the stake-holder under the rules of the chit fund; and when he breaks his contract, there is nothing at all to prevent the stake-holder from suing for the money which the subscriber has contracted to pay. (*Beasley, C. J.*) RAMANADHA AIYAR *v.* NARAYANASWAMI AYYAR **169 I. C. 692=10 R.M. 92=1937 M.W.N. 439=45 L. W. 609=A.I.R. 1937 Mad. 364=(1937) 1 M.L J. 163.**

——*Price—Kuri—If a lottery—Suit by subscriber to recover subscriptions paid—Maintainability—Penal Code, S. 294-A.*

A kuri or chit-fund, started with the object of creating a fund for a temple consisted of 625 chits, the subscription for each chit being Rs. 3. A ticket was to be drawn every month for 50 months, and the subscriber who drew the winning ticket was to be paid Rs. 150, without any liability for future subscriptions. After the 50th month the non-winning subscribers were to be paid Rs. 150 each, *i.e.*, the amount actually subscribed by them, in a particular order, and the fund was to be closed. The plaintiff who had subscribed for two tickets for 45 instalments and who had not won a prize sued the promoters of the fund for recovery of the amount subscribed by him the kuri having terminated after the 45th month. The defendants pleaded that the Kuri was a lottery and the suit was not maintainable.

Held (per *Cornish, Varadachariar, Wadsworth and Lakshmana Rao, JJ.*), (1) that the chit-fund was a lottery within the meaning of S 294-A, I P. Code, and that the keeping of a place for conducting the kuri, and the publication of the same, were sufficient, so far as the promoters were concerned, to bring the matter within S. 294-A, I.P. Code; (2) that the suit was maintainable because the subscribers, of whom plaintiff was one were not guilty; the suit not being one for recovery of the prize or for enforcement of the other terms of contract but for refund of money paid was not one for enforcement of an illegal contract; (3) that the doctrine of *in pari delicto* would not apply so as to disentitle the plaintiff from suing; (4) that the claims of the subscribers would be governed by S. 84, Trusts Act; and (5) that in so far as the term of the contract made the liability of the promoters specific in the case, their personal liability was not excluded.

Per *Venkataramana Rao, J.*—The chit-fund in question was not a lottery, so as to constitute an offence under S. 294-A, I. P. Code, and that the plaintiff was clearly entitled to get back the subscriptions paid by him and also to get a personal decree against the promoters, and the case would be governed by S. 84, Trusts Act. (*Cornish, Varadachariar, Wadsworth, Venkataramana Rao and Lakshmana Rao, JJ.*) SESHA AIYAR *v.* KRISHNA AIYAR. **59 Mad. 562=162 I.C. 68=8 R.M. 908=43 L.W. 77=1936 M.Cr.C. 98=1936 M.W.N. 89 (2)=A.I.R. 1936 Mad. 225=70 M. L.J. 36 (F.B.).**

——*Rules—Construction—Company carrying on chit fund—Auction—Bidders required to execute bonds for future subscriptions—Provision for payment of prize amount on furnishing of security and execution of bond within two months—Company ceasing to carry on business within two months of bid—Effect.*

The rules of a chit fund conducted by a company provided, *inter alia*, that the respective successful bidders would be given their prize amounts (chit-amount-less discount) on their furnishing security to the satisfaction of the company for payment of future subscriptions, that if they failed to furnish security and execute the necessary bond within two months from the date of auction, the prize amount might, at the option of the company, be retained by the company or given to any other person prepared to furnish security, etc. There was also another rule which provided that the successful bidders were entitled to receive payment of the prize amount one week after the date of the next instalment. It was further provided that if through default of the company the chit should collapse, the subscribers who had won and received prizes would be bound to pay their subscriptions only on the dates on which subscriptions would have fallen due if the chit had not collapsed.

Held, that the time within which a successful bidder should furnish security was two months, and no default would be committed by a successful bidder until two months had elapsed from the auction. If the company in fact ceased to carry on business, a successful bidder in an auction held by the company within two months prior to the date of cessation of business would not be in default if he failed to furnish security to obtain the prize money; and in respect of such an auction held within two months prior to the date of the company ceasing to carry on business, no discount should be debited against the successful bidders during that time. (*Gentle, J.*) SUNDARAVARADAN *v.* NARASIMHACHARI. **1940 M.W.N. 545.**

——Stakeholder taking mortgage security bond from successful bidders—Effect of—Trust—Insolvency of stakeholder and sale of his properties by receiver—Suit by purchaser on security bonds—Maintainability. *See* TRUSTS ACT, S. 59. **1938 M.W.N. 523.**

CHOTA NAGPUR ENCUMBERED ESTATES ACT (VI OF 1876)—*Object of.*

The object of the Chota Nagpur Encumbered Estates Act is to protect the estate and at the same time do justice to its creditors by administering it in such a manner as to satisfy all claims against it in respect of debts antecedently incurred by the proprietor. For these claims all other remedies are barred except one which is to apply to the manager and get the debt entered on the schedule of debts and paid by the manager; failing recourse to this procedure, not only all remedies are barred, but the debt itself is barred. The aim of the whole proceedings is to hand back the property to the proprietor unencumbered by any of his old liabilities. (*Dhavle and Rowland, JJ.*) BENI MADHAB MAHTO *v.* GANESH SINGH SARDAR. **16 Pat. 459=1937 P.W.N. 392=18 Pat L.T. 717 =3 B R. 801=171 I.C. 65=10 R.P. 162=A.I.R. 1937 Pat. 486.**

——S. 2-B—*Scope—Order under in respect of undivided interest of Hindu coparcener—Legality.*

The undivided interest of a member of a Hindu joint family cannot be protected under the provisions of the Chota Nagpur Encumbered Estates Act. The holder of an undivided interest is not a holder of immovable property within the meaning of the Act. An order of protection under S. 2-B of the Act cannot therefore be passed in respect of the undivided interest of a member in joint family property (*Harries, C.J. and Dhavle, J.*) GOPAL BUX RAI *v.* SHYAMBEHARI SINGH. **188 I.C. 269=12 R.P. 689=6 B.R. 630.**

——Ss. 3 and 7—*Relative scope and effect of.*

S. 7, Chota Nagpur Encumbered Estates Act, expressly declares that every debt or liability other than those mentioned in the section and which is not duly notified to the manager shall be barred. S. 3 merely bars all proceedings pending in Courts and institution of new proceedings in respect of such debt during the continuance of the management of the estate of the proprietor under the Act. S. 7 thus does, not merely, like para. 1, S. 3, create a bar not restricted to the continuance of the management, but takes away the very foundation for any proceedings by the creditors after the release of the estate (*Dhavle and Rowland, JJ.*) BENI MADHAB MAHTO *v.* GANESH SINGH SARDAR **16 Pat 459=18 Pat.L.T. 717=3 B.R. 801=171 I.C 65=10 R.P. 162=1937 P. W.N. 392=A.I.R. 1937 Pat. 486.**

——S. 3 (b)—*Scope—Mortgagor's estate taken under management under Act pending appeal from decree on mortgage—Decree—Execution against manager.*

Pending appeal from a decree on a mortgage against the mortgagor proprietor, the mortgagor's estate was taken under management in accordance with the provisions of the Chota Nagpur Encumbered Estates Act, and the manager was made a party to the appeal. On appeal being dismissed, the decree-holder sought to execute it against the manager as he was made a party to the litigation.

Held, that the decree could not be executed against the manager as the decree was not on a debt contracted by the manager, but by the proprietor himself. (*Dhavle and Rowland, JJ.*) Beni Madhab Mahto *v.* Ganesh Singh Sardar. **16 Pat. 459=1937 P.W.N. 392=18 Pat.L.T. 717=3 B.R. 801=171 I.C. 65=10 R.P. 162=A.I.R. 1937 Pat. 486.**

——**(as amended by Act VIII of 1922), S. 12, paras. 1, 2, 3 and 6**—*Applicability—Restoration of estate to proprietor—Revival of debts.*

S. 12, para 6, Chota Nagpur Encumbered Estates Act, does not apply to a case to which para. 2, as amended by Act VIII of 1922, does not in terms apply. The revival of debts is expressly confined to the case dealt with in para. 2, S. 12 There is no revival of barred proceedings and debts if the restoration takes place under para. 1 or under para. 3, S. 12. (*Dhavle and Rowland, JJ.*) Beni Madhab Mahto *v.* Ganesh Singh Sardar. **16 Pat. 459=18 Pat. L.T. 717=3 B R. 801=171 I. C. 65=10 R.P. 162=1937 P.W.N. 392=A.I.R. 1937 Pat. 486.**

——**S. 12-A**—*Applicability—Execution sale—Sanction of Commissioner—Necessity.*

A sale in execution of a decree is an alienation within the meaning of S. 12-A of the Chota Nagpur Encumbered Estates Act and an execution sale held without the sanction of the Commissioner is void. (*Wort and Agarwala, JJ.*) Mahadeo Prasad *v.* Bhagwat Narain. **177 I.C. 810=5 B.R. 18=11 R.P. 187=1938 P.W.N. 400=A.I.R. 1938 Pat. 427.**

——**S. 12-A**—*Construction—"Holder"—Application by manager of Hindu joint family as manager for protection—Effect—Whole family—If holders—Mortgage by some members of family without sanction—Validity of.*

The word "holder" in S. 12-A of the Chota Nagpur Encumbered Estates Act is expressly used to mean a landholder who has a title to the property in question as owner in possession. It is a compendious way of describing the proprietors or owners of the estate which is going to be assumed charge of. It is not confined to a single person, and is capable of including a joint Mitakshara Hindu family. Where the estate belonging to a joint Hindu family is placed under the management of the Collector or some other officer under the provisions of the Act upon the application of the person who happens to be the karta of the family, he being described as a "holder" in the notification issued under S. 2, the disqualification referred to in S. 12-A of the Act applies not merely to the karta who has made the application but extends to the entire body of the co-parceners. The members other than the karta are no less "holders" of the estate, as the description given to the karta in the notification is given only in a representative capacity and must be held to apply to the entire family. There is nothing in the Act to prevent the manager of a joint Hindu family from applying for protection under the Act on behalf of the entire family, and where such an application is made by him in a representative capacity, the whole family and not he alone must be deemed to be the holder of the estate. Nor is there anything in the Act to suggest that a Mitakshara joint family is not entitled to protection under the Act. A mortgage executed by a member of the family without sanction is therefore invalid under S. 12-A and no mortgage decree can be passed on such a mortgage. (*Fazl Ali and Manohar Lall, JJ.*) Rameshwar Dayal Singh *v.* Ram Dass Sahu. **18 Pat. 434=184 I.C. 597=12 R.P. 255=6 B.R. 56=1939 P.W.N. 273=20 Pat.L.T. 619=A.I.R. 1939 Pat. 451.**

——**S. 12-A**—*Sales in execution come under S. 12-A.*

Sales in execution come within the provisions contained in S. 12-A, Chota Nagpur Encumbered Estates Act. (*Wort, Ag.C.J. and Manohar Lall, J.*) Mt. Sumitra Kuer *v.* Bhagwat Narain Singh. **180 I.C. 736=5 B.R. 482=11 R.P. 530=A.I.R. 1939 Pat 19.**

——**S. 12-A**—*Scope of—Mortgage without sanction—Right to personal decree.*

S. 12-A of the Chota Nagpur Encumbered Estates Act only prohibits an alienation of the property concerned or the creation of a charge thereon, it does not debar the persons affected or disqualified from borrowing money. Though therefore a person taking a mortgage from a disqualified person cannot get a mortgage decree, he is entitled to enforce the personal covenant in the mortgage deed and to get a personal decree provided his claim is made within the period of limitation. (*Fazl Ali and Manohar Lall, JJ.*) Rameshwar Dayal Singh *v.* Ram Dass Sahu. **18 Pat. 434=184 I.C. 597=12 R.P. 255=6 B.R. 56=1939 P.W.N. 273=20 Pat.L.T. 619=A.I.R. 1939 Pat 451.**

——**S. 21-B**—*Construction and scope—Party to litigation represented by manager—Death of—Failure to implead heirs—Abatement—Presence of manager on record—If prevents abatement.*

The fact that a party to a suit or appeal is represented by a manager under the Chota Nagpur Encumbered Estates Act does not dispense with the necessity of bringing on record his legal representatives on his death within the prescribed period of limitation. Though the manager continues on the record he only represents the holder for the time being, and not as principal. If therefore the heirs of the deceased holder are not impleaded there would be abatement though the manager is on record and though he will have to represent the heirs also. (*Harries, C.J. and Fazl Ali, J.*) Mahomed Murtaza *v.* Cyril Indernath Day. **19 Pat. 111=12 R.P. 407=185 I.C. 671=6 B.R. 232=A.I.R. 1940 Pat. 482.**

CHOTA NAGPUR TENANCY ACT (VI OF 1908), S. 4—*Applicability—Person inducted on land by co-sharer thicadar without consent of others—Status of.*

Under the Chota Nagpur Tenancy Act non-occupancy rights can arise only in the case of a holding which means "parcel or parcels of land" which is the subject-matter of a separate tenancy and not an undivided share. Hence a person who has been inducted on the land by one of the co-sharer thicadars without the consent of others is not a non-occupancy raiyat. (*Wort and Manohar Lall, JJ.*) Narayan Ram Sahu *v.* Kartic Singh. **174 I.C. 207=4 B.R. 411=10 R.P. 487=A.I.R. 1938 Pat. 113.**

——S. 5—*Tenure-holder and* raiyat—*Distinction—Test—Patta granting all rights in land except right to receive rent—If tenure or occupancy* raiyati—*If protected from avoidance under S.* 208.

The question whether a tenant is a *raiyat* or a tenure-holder depends ultimately upon the question of facts and the Court must look to the attendant circumstances and the terms of the grant or lease. No importance should be attached to the mere form of the *kabuliyat* or to the use of the word 'cultivator' in it. Nor is fixity of rent any criterion, for a *raiyati* holding may be held at a fixed rent equally with a tenure. There is of course nothing in the Chota Nagpur Tenancy Act which is inconsistent with there being a *raiyat* at fixed rate though the Act itself does not mention such a class of *raiyat*. Such a *raiyat* would under the Act be an occupancy *raiyat* with all its incidents, rights and liabilities but cannot have the special right given to a *raiyat* at fixed rate by the Bengal Tenancy Act. There is, again, under the Chota Nagpur Tenancy Act, no presumption as to a tenant being a tenure-holder or a *raiyat*, as the case may be, arising on the basis of area, unlike under the Bengal Tenancy Act. One of the incidents of a *raiyati* under the Chota Nagpur Tenancy Act is that if a *raiyat* dies intestate leaving no heir, the right comes to an end. Where there is an out and out transfer of land under a *patta* which in unequivocal terms grants to the lessee all the rights in the land except the right to receive the rent payable to the superior landlord, the only reservation being a quit rent of Rs. 21 per annum, the tenancy created cannot be said to be a *raiyati* tenancy; the grantee is a tenure-holder within the meaning of S. 5 of the Chota Nagpur Tenancy Act. The grantee has no occupancy right which is protected under S. 208 of the Act, and the lease can therefore be avoided under S. 205. (*Khaja Mahammad Noor, J.*) Bux Jagdamba Prasad *v.* Mahanand Ojha. **18 Pat.L.T. 206.**

——S. 6—"*Cultivation*"—*Tenant taking settlement for gathering fruits from existing orchard—If raiyat.*

There is no difference between taking settlement of land for purpose of planting an orchard, which may be held to be cultivation, and taking settlement of a land upon which an orchard already exists: in other words, taking settlement for gathering all the fruit from an existing orchard. (*Wort and Rowland, JJ.*) Kamakya Narain Singh *v.* Inderman Ram Sahu. **162 I.C. 981=8 R.P. 601=1936 P.W.N. 463=A.I.R. 1936 Pat. 265.**

——S. 14—*Scope—Tenure-holder creating zarpeshgi—Death of tenure-holder without heirs—Resumption by owner and grant of zarpeshgi to another—Suit by latter to eject original zarpeshgidar—Competency.*

The landlord granted a certain tenure to a person who created a zarpeshgi in respect of the land. On the death of the tenure-holder without heirs, the landlord resumed the land and granted a zarpeshgi to another. The new zarpeshgidar sued for possession of the land from the original zarpeshgidar and the landlord was impleaded as defendant.

Held, that even though the landlord was not plaintiff, the suit was properly constituted and that even if the landlord was not impleaded the plaintiff as the transferee of the landlord could equally enforce the rights under S. 14 just as much as the landlord. (*Rowland, J.*) Bhairodayal Sahu *v.* Jageshwar Sahu. **174 I.C. 627=4 B.R. 464=10 R.P. 540=A.I.R. 1938 Pat. 118.**

——S. 21 (b)—*Construction—'Irrespective', meaning of.*

The word 'irrespective' in Cl. (*b*) of S. 21 of the Chota Nagpur Tenancy Act cannot be held to mean 'subject to'. (*Wort, Ag.C.J. and Manohar Lall, J.*) Ramjap Dube *v.* Jagadish Chandra Deo Dhabal. **178 I.C. 274=11 R.P. 237=5 B.R. 78=A.I.R. 1939 Pat 161.**

——S. 22—Breach of—Finding that land had been rendered unfit for tenancy—Interference in second appeal. *See* C. P. Code, S. 103—Finding of fact—Finality. **178 I.C. 274=A.I.R. 1939 Pat. 161.**

——Ss. 46 and 47—*Mortgage of occupancy homestead—Suit on and decree—Execution sale—Legality—Duty of Court.*

It is true that under S. 46 of the Chota Nagpur Tenancy Act, an occupancy tenant can mortgage his homestead land forming part of his holding for a period not exceeding five years. But the holding or any portion of it cannot be sold in execution of a decree that might be passed on the mortgage. Once it is found that the lands sought to be sold form a *raiyati* holding, the holding cannot be sold and it is the duty of the Court to give effect to the plain provisions of S. 47, whether or not the judgment-debtor objects to the sale. (*Macpherson and Fazl Ali, JJ.*) Mt. Jamuni *v.* Bholaram. **15 Pat. 414=165 I.C. 574=9 R.P. 181=17 Pat.L.T. 650=1936 P.W.N. 710=A.I.R. 1936 Pat. 561.**

——Ss. 46 and 47—*Scope and effect—Mortgage of* raiyati *land in contravention of law—Validity—Subsequent change of land from* raiyati *to* chhaparbandi—*If validates transaction.*

A mortgage entered into in violation of S. 46 of the Chota Nagpur Tenancy Act cannot under S. 46 or S. 47 of the Act form the basis of a valid decree for sale. The fact that subsequent to the mortgage transaction the mortgaged property has ceased to be *raiyati* land and has become *chhaparbandi* will not validate a transaction in respect of the land which was invalid previously. (*Agarwala and Rowland, JJ.*) Maksudan Lal Sahu *v.* Niranjan Nath Das. **19 Pat. 507=187 I.C. 266=12 R.P. 575=21 Pat.L.T. 219=6 B.R. 446=A.I.R. 1940 Pat. 494.**

——S. 46 (2)—*Applicability—Occupancy tenant—Sub-lessee from, erecting buildings—Liability to ejectment by landlord.*

S. 46 (2) of the Chota Nagpur Tenancy Act entitles a landlord to maintain a suit as against persons taking a lease from occupancy tenants. Sub-lessees from occupancy tenants who erect buildings on the land after the sub-lease are liable to be ejected by the landlord under S. 46 of the Act. (*Das and Ross, JJ.*) Gobinda Koet *v.* Shiba Prosad Singh. **18 Pat.L.T. 374.**

——S. 47—*Applicability.*

Land which is merely part of the compound of a house and shop does not come within the purview of S. 47 of the Chota Nagpur Tenancy Act and is therefore not exempt from sale in execution. (*Agarwala and Madan, JJ.*) GHASIRAM MARWARI *v.* SHIBA PRASAD SINGH. **16 Pat. 316=1937 P.W.N. 521=169 I.C. 872=3 B.R. 638=10 R.P. 55=18 Pat L.T. 341=A.I.R. 1937 Pat. 321.**

——S. 47—*Scope and object of—Sale of* raiyati *lands in execution of decree in mortgage—Permissibility.*

The object of the Chota Nagpur Tenancy Act is to prevent the improvident *raiyats* of the area governed by the Act from mortgaging their property in time of need and from having their race gradually displaced by more or less wealthy persons from other parts of the country. Such lands cannot be sold in execution of a decree. (*Courtney-Terrell, C.J. and Kulwant Sahay, J.*) MANU MANDAL *v.* JUGAL KISHORE. **18 Pat.L.T. 430.**

——**(as amended in 1938), S. 63**—*Applicability—Offence when committed.*

S. 63 (1) (*a*) of the Chota Nagpur Tenancy Act makes it an offence for the landlord or his agent to levy certain due, and it is no offence if the person levying is neither a landlord nor a landlord's agent. (*Harries, C. J. and Manohar Lall, J.*) ANGELO *v.* KANDAN MANJHI. **185 I.C. 738=6 B.R. 241=12 R.P. 440=1940 P.W.N. 233=41 Cr.L J 221=A.I.R. 1940 Pat. 316.**

——**S. 63 (1) (a)**—*Scope—Offence under—Trial—Procedure—Criminal Procedure Code—Applicability—Cr P. Code, S. 197.*

There is nothing in S. 63 of the Chota Nagpur Tenancy Act which deprives the ordinary Criminal Courts of jurisdiction to try all offences under that section. S. 63 (1) (*a*) creates an offence, and *prima facie* the Code of Criminal Procedure including S. 197, Cr. P. Code, will apply to the trial of such an offence, as there is nothing in S. 63 which deals with the method of investigation and trial Nor does S. 258 of the Chota Nagpur Tenancy Act deprive a Criminal Court of its jurisdiction to try a criminal offence. It only contemplates proceedings of a civil nature. (*Harries, C. J. and Manohar Lall, J*) ANGELO *v.* KANDAN MANJI. **185 I.C. 738=6 B.R. 241=12 R.P. 440=1940 P.W.N. 233=41 Cr.L.J. 221=A.I.R 1940 Pat. 316.**

——**S. 64**—Applicability—Land held by occupancy raiyat for purpose of cultivation—Bulk of land brought under cultivation—Trespasser reclaiming part of area—Status of—Right to remain in possession as against occupancy raiyat. *See* LIMITATION ACT, ART. 142. **1938 P.W.N. 194=19 Pat.L.T. 133.**

——**Ss. 64, 65 and 66**—*Applicability and scope—Occupancy raiyat—Dispossession from plot of* korkar *land—Suit for declaration of title and for possession from trespasser within* 12 *years of dispossession—Plea of conversion into paddy land and acquisition of occupancy rights—Sustainability.*

It is not intended by the Chota Nagpur Tenancy Act that an occupancy *raiyat* should be deprived of his land by a person who trespasses upon it and converts it into paddy land, unless, of course, the trespasser acquires a title by adverse possession for the statutory period. The Act confers occupancy rights on persons to whom S. 64 of the Act applies. In a suit by a *raiyat* for a declaration of his title to and for possession of a plot of land which he alleged was part of his *raiyati* holding and from which he alleged dispossession of himself by the defendant, the latter pleaded that he had converted the land which was *korkar* into paddy land and had therefore acquired occupancy rights in the same under S. 64 of the Chota Nagpur Tenancy Act. The suit was admittedly within 12 years of the dispossession of the plaintiff.

Held, that S. 66 was a bar to the acquisition of *korkar* rights in the disputed land and barred the defence.

Quaere.—Whether S. 65 applied to the land of a tenant. (*Agarwala and Madan, JJ.*) BARA CHHATU RAJWAR *v.* ANANDA RAJWAR. **170 I.C. 94=10 R P. 74=3 B R. 655=18 Pat.L.T. 275=A.I.R. 1937 Pat. 367.**

——**S. 64**—*No occupancy right under another occupancy* raiyat—*Acquisition of—If recognised.*

Obiter.—There cannot be the acquisition of an occupancy right under another occupancy *raiyat.* A right of occupancy under a landlord is a right subordinate to him, but if such a right is acquired against a man who himself is an occupancy *raiyat* the right so acquired is the complete annihilation of right of the *raiyat* and that can only be acquired after 12 years under the general law. So if a man trespasses upon the holding of an occupancy *raiyat* and makes korkar therein, he acquires no occupancy right even if no application for ejectment is made within two years of the commencement of the korkar. (*Mahomed Noor, J.*) CHANDRA MOHAN SINGH *v.* BATU MIAN. **170 I C. 385=3 B.R. 711=10 R.P. 118=A.I.R. 1937 Pat. 422**

——**S. 64**—Pardhani *village—Right of proprietor to settle land—Position of* pardhan.

No doubt, a proprietor has a right to settle his land in any way he likes, but this right is subject to the right which others have acquired either by contract or custom. The position is similar to the position of a proprietor who creates a tenure and thereby limits his right over the land of such a tenure. *Pardhani* villages are something like tenures though not exactly so. A *pardhan* partakes the position of a tenure-holder and also of a *raiyat* of a privileged class in respect of the lands actually held by him. He is for some purposes an agent of the proprietor, though of course a hereditary agent not removable according to the will of the proprietor. At the same time. he is for certain purposes an agent of the *raiyats* also and custodian of their interest. When a village is *pardhani*, it is obvious that the rights of the proprietor in that village must be subject to the rights of the *pardhan* and of the *raiyats* of the village of which the *pardhan* is the custodian. Under S. 64 of the Chota Nagpur Tenancy Act, a custom is recognized under which *raiyats* are entitled to bring land under cultivation without the consent of the landlord This clearly shows that the legislature has recognized custom in derogation to the theoretical right of the landlord. Where, therefore, the entries in the record-of-rights show that the *pardhan* has a right to settle the uncultivated lands of the village and that the *raiyats* can reclaim the land with his permission, the rights of the proprietor to reclaim the waste lands of the village are subject to the consent of the *pardhan*, and the proprietor cannot make a *raiyati* settlement of the land ignoring the *pardhan*. (*Macpherson and Mohammad Noor, JJ.*) Chand Mul *v.* Naku Manjhi. **163 I.C. 24=8 R.P. 623=17 Pat.L.T. 467=1936 P.W.N. 493=A.I.R 1936 Pat. 508.**

——**Ss. 64 (3) and 67**—*Person reclaiming land belonging to another — If acquires occupancy rights.*

A person who prepares a paddy field by reclaiming land belonging to another, acquires an occupancy right therein, even though his reclamation involved a trespass on the land of the other. (*Dhavle, J.*) Doman Mia *v.* Gunaram Mahata. **159 I.C. 350=8 R.P. 274=A.I.R. 1936 Pat. 39.**

——**S. 69**—*Tenant transferring holding—Misuse by transferee—If incapable of remedy.*

S. 69 of the Chota Nagpur Tenancy Act cannot be construed to mean that when a tenant has transferred his holding, whatever the nature of the use or misuse of it is, it becomes incapable of being remedied. It is rather the nature of the misuse to which the section is directed and not to the person who is guilty of the misuse. If, therefore, a tenant transfers his holding to another person and the latter builds a house on it contrary to the terms of the tenancy, the misuse is capable of remedy. (*Wort, Ag C.J.*) Surja Gorain *v.* Gnanendra Nath Banerji. **5 B R. 237=179 I.C. 482=11 R.P. 380=A.I.R. 1939 Pat. 149.**

——**S. 72 (5)**—*Scope — Partial surrender of holding.*

S. 72 (5) contemplates cases of partial surrender of a holding by arrangement between a *raiyat* and his landlord. (*Agarwala, J.*) Ram Ranjan Ray *v.* Haku Mian. **159 I.C. 490 (2)=8 R.P. 284=A.I.R. 1936 Pat. 52.**

——**S. 74-A**—*Appointment of village headmen —Power of Deputy Commissioner—Surrender of tenancy by the last headman—Effect of.*

The Deputy Commissioner can appoint a village headman on an application under S. 74-A of the Chota Nagpur Tenancy Act, even though the last headman had surrendered his tenancy. The village headmanship is a tenancy to which an office is attached or *vice versa* and in which not only the headman but the raiyats are also interested. A headman may surrender his own interest but he cannot surrender interest of his successors nor can he terminate the tenancy and deprive the *raiyats* of their customary right to have a headman. (*Macpherson and Mohammad Noor, JJ.*) Jagdish Chandra Deo *v.* Shankarshan Bhumij. **15 Pat 488=162 I C 582=8 R P. 552=17 Pat.L.T. 445=1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 74 (a)**—*Interpretation — Application under—Limitation—S. 231, if applicable.*

S. 74 (*a*) according to ordinary interpretation is not dealing with a cause of action at all; it is defining the right to apply to the Deputy Commissioner to make an appointment of a village headman in the event of a vacancy and that application may be made either by the landlord or by the tenants. It presupposes that there is a custom requiring the appointment of a village headman

and what is dealt with by the section is not in the nature of a litigation or a dispute, but it is the calling into operation of an administrative duty on the part of the Deputy Commissioner. It would appear, therefore, more natural to say that as there is not in the strict sense a cause of action under S. 74 (*a*) but merely a right to invoke an administrative operation which may be exercised by either the landlord or the tenants, S. 231 is incapable of application. Even assuming that S. 231 does apply, the right of application under S. 74 (*a*) must be construed as a continuing right which endures as long as there is a vacancy. This would fit in with the exigencies of the case and indeed with the language of S. 74 (1) which does not fix any specific time at which the application should be made and accordingly from which the period of limitation would run. On the contrary the section makes the right of applying conditional on a state of facts, namely where a tenancy has been vacated. While that condition exists there is no ground for fixing on any specific moment of time. (*Lord Wright.*) Jagadish Chandra Deo Dhabal Deb *v.* Santal. **17 Pat. 110=172 I.C. 649=19 Pat.L.T. 74=1938 O.L R. 53=1938 P.W.N. 107=1938 A.L.R. 71=4 B.R. 234=1938 O.W.N. 52=10 R.P.C. 156=67 C. L.J 179=32 S.L R. 298=A.I.R. 1938 P.C. 61= (1938) 1 M.L.J. 302 (P.C.).**

——**(as amended in 1920), S. 74-A**—Pradhani—*New* pradhani *if to be treated as ancient* pradhani.

Pradhani is the custom of the locality and when a new *pradhani* is formed and treated as the ancient *pradhani* it will be governed by the same custom. So where even though certain newly formed *pradhani* were not in existence in 1788, yet these *pradhanis* will be governed by the same custom if they are treated as the ancient *pradhani.* (*Mahomed Noor and Saunders, JJ.*) Debnath Mahata *v.* Jagadish Chandra Deo. **15 Pat. 644 =165 I.C 378=9 R.P. 176=18 Pat.L T. 46=3 B.R. 44=1936 P.W.N. 885=A.I.R. 1936 Pat. 563.**

——**Ss. 74-A and 208**—Pradhani *rights—Nature of—If liable to be sold in execution of decree for rent.*

Though the *pradhans* recorded in *satwalipis* are tenure-holders in their relations to the superior landlord, they are also his permanent agents for certain purposes, as for instance, for the supply of rasad, etc. They are landlords of the raiyats of the village and also their headmen and holders of an office and are in this capacity their representatives. The raiyats are vitally interested in having a *pradhan* who should be their headman according to the prevailing custom. This right of the raiyats to have a *pradhan* intervening between them and the superior landlord was recognized by the legislature in S. 74-A. This section authorises any three or more tenants of the village to have a *pradhan* appointed by the Deputy Commissioner in case there is a vacancy and this they can do even if there is a *pradhan* appointed by the landlord. Hence according to this right of the raiyats the *pradhans* cannot be changed at the instance of the landlord only and a right in which third persons are interested cannot, therefore, be sold behind their back. Hence *pradhan* rights are not saleable in execution of rent decree. (*Mahomed Noor and Saunders, JJ.*) Debnath Mahata *v.* Jagadish Chandra Deo. **15 Pat 644=165 I.C. 378=9 R.P. 176=18 Pat. L. T. 46=3 B.R. 44=1936 P.W.N. 885=A.I.R. 1936 Pat. 563.**

——S. 74-A—*Scope—Appointment of village headman—Vacancy arising before enactment of section.*

S. 74-A of the Chota Nagpur Tenancy Act is general, and an appointment of a village headman can be made even if the vacancy occurred before its enactment in 1920. (*Macpherson and Mohammad Noor, JJ.*) Jagdish Chandra Deo *v.* Shankarshan Baumij. **15 Pat. 488=162 I.C. 582=8 R.P. 552=17 Pat. L.T. 445=1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——S. 74-A—*Scope*—Pradhani *tenancy—Saleability—Custom allowing—Validity.*

A custom recognizing saleability of *pradhani* tenancy cannot be given effect to as such custom is by necessary implication inconsistent with S. 74-A of the Act. (*Mahomed Noor and Saunders, JJ.*) Debnath Mahata *v.* Jagadish Chandra Deo. **15 Pat. 644=165 I.C. 378=9 R. P. 176=18 Pat.L T. 46=3 B. R. 44=1936 P.W. N. 885=A.I.R. 1936 Pat. 563.**

——Ss. 74-A (5) and 258—*Scope—Order of Deputy Commissioner appointing a headman—Suit for declaration that it is without jurisdiction—Maintainability.*

Sub-S. (5) of S. 74-A of the Chota Nagpur Tenancy Act does not bar a suit for a declaration that the order of the Deputy Commissioner appointing a village headman under that section is without jurisdiction. Such a suit is expressly permitted by S. 258 of the Act. (*Macpherson and Mohammad Noor, JJ.*) Jagdish Chandra *v.* Shankarshah Bhumij. **15 Pat. 488=162 I.C 582=8 R.P. 552=17 Pat.L.T. 445=1936 P.W. N. 421=A.I.R. 1937 Pat. 202.**

——S. 76—*Scope—Custom of non-transferability of 'dwami thicas'—If affected.*

The non-transferability of 'dwami thicas' is not inconsistent with any provision of the Chota Nagpur Tenancy Act and therefore the custom of non-transferability of 'dwami thicas' is not affected by S. 76, Chota Nagpur Tenancy Act. (*Mohamad Noor, J.*) Somar Ram *v.* Budhu Ram. **171 I.C. 115=10 R.P. 181=3 B.R. 811=18 Pat. L.T. 575=1937 P.W.N. 446=A.I.R. 1937 Pat. 463.**

——S. 78—*Object and scope of—Tenant parting with raiyati land—Effect on homestead.*

S. 78, Chota Nagpur Tenancy Act, was enacted as a protection to the cultivating tenant, so that he may not be turned out of his homestead as long as he holds his raiyati land. If he parts with the raiyati land, his tenancy of the homestead becomes subject to the ordinary incidents and does not suffice to keep up his status as a raiyat. The Legislature could not possibly have meant that though a raiyat may hold one homestead otherwise than as part of his holding as a raiyat and use it for carrying on his cultivation, the incidents of his tenancy of some other homestead held somewhere else for other business shall be regulated by the provisions of the Act applicable to land held by a raiyat. (*Wort and Dhavle, JJ.*) Secretary of State *v.* Beni Prasad Sahu. **170 I.C. 677=10 R.P. 138=3 B.R. 748=1937 P.W. N. 649=A.I.R. 1937 Pat. 444.**

——S. 87—*Suit under—Scope—Decision in—If bars civil suit for declaration of title and possession—S. 258.*

The scope of a suit under S. 87 of the Chota Nagpur Tenancy Act is a limited one. Such a suit has to be instituted before the Revenue Officer, and it must be a suit for the decision of a dispute regarding an entry made in, or omission from, the record-of-rights. There is nothing either in Ch. XII or in any of the other provisions of the Chota Nagpur Tenancy Act to justify the view that a party can be debarred from instituting a suit in the Civil Court to establish his title to and recover possession of his property merely because of there having been a proceeding under S. 87 with regard to such property. The record-of-right does not by itself create or extinguish title; it is only a piece of evidence, and the provisions of Ch. XII of the Act are intended to make it as perfect and immune from attack as possible. Under S. 87, a Revenue Officer cannot entertain a suit for possession, and the decision in a suit under S. 87 will not bar a suit for possession or other reliefs which the Revenue Officer is not competent to grant. The presumption of correctness attaching to the record-of-rights does not become irrebuttable after a decision under S 87. Consequently S. 258 does not bar a civil suit for possession even though incidentally it may have to be shown in that suit that the entry in the record-of rights is not correct, and the consequence of such a suit may be to some extent to vary, modify, or even indirectly set aside a decision, order or decree of a Deputy Commissioner. (*Fazl Ali and Luby, JJ.*) Gobardhan Sahu *v.* Lalmohan Kharwar. **15 Pat. 229=166 I C. 86=9 R.P. 252=3 B.R. 120=17 Pat.L. T. 956=A.I.R. 1936 Pat. 611.**

——S. 139 (4)—*Scope—Suit by landlord to restrain occupancy tenant from using land in a way detrimental to tenancy—Jurisdiction of Civil Court.*

A suit by a landlord for ejecting an occupancy raiyat for having used the land occupied by him in a way to render it unfit for purpose of the tenancy is entertainable exclusively by the Deputy Commissioner under S. 139 (4), Chota Nagpur Tenancy Act.

Quaere.—Whether under the Tenancy Law of Chota Nagpur, a suit lies in a Civil Court against an occupancy raiyat for an injunction to restrain him from using the land in a way detrimental to the tenancy. The landlord by bringing such a suit circumvents the jurisdiction of the Deputy Commissioner. (*Mohammad Noor and Varma, JJ.*) Nitai Lal Dutta *v.* Gobinda Bhushan Sen. **161 I.C. 695=8 R.P. 469=A.I.R. 1936 Pat. 142.**

——S 139 (4-A)—*Applicability—'Trespasser', meaning of.*

What the Legislature intended to provide for in S. 139 (4-A), was the class of cases in which the person whom it was sought to eject has gone upon the land with no sort of right and was a trespasser *ab initio*. So the section would not be applicable to the case of persons who were originally put in possession under a lease. (*Wort and Varma, JJ.*) Kabir Ram *v.* Giro Mahto. **16 Pat.**

682=19 Pat.L.T. 63=1938 P.W.N. 69=174 I.C 283=4 B.R. 421=10 R.P. 497 (2)=A.I.R. 1938 Pat. 174.

——— S. 139 (5)—*Scope —Suit involving question of title depending on applicability of Hindu Law of Inheritance (Amendment) Act—Jurisdiction of Civil Court—If barred.*

The question as to whether a party is entitled to avail himself or herself of the provisions of the Hindu Law of Inheritance (Amendment) Act in support of his or her title is one which cannot be decided in a summary proceeding for possession in a Revenue Court. S. 139 (5) of the Chota Nagpur Tenancy Act does not therefore oust the jurisdiction of the Civil Court from trying a suit involving such a question. (*Fazl Ali, Khaja Mahomed Noor, James, Dhavle and Varma, JJ.*) POKHAN DUSADH *v.* MT. MANDA. **16 Pat. 215=167 I.C. 17=9 R.P. 387=18 Pat.L.T. 8=1937 P.W.N. 22=3 B.R. 291=A.I.R. 1937 Pat. 117 (F.B.).**

———S. 177—*Applicability—Suit commenced before Deputy Commissioner but transferred to Civil Court—Procedure—Question of title—Appeal—Forum.*

S. 177 of the Chota Nagpur Tenancy Act applies only to a case tried before the Deputy Commissioner. It does not apply to a suit which though it commenced in his Court has been transferred under the proviso to S. 139 to a Civil Court. In such a suit the question of title can be determined and an appeal lies to the Judicial Commissioner under the ordinary rules of the Code of Civil Procedure which govern the procedure of the Civil Court, and thence to the High Court. (*Wort, J.*) CHINTAMAN MAHTON *v.* AMAR SINGH. **179 I.C. 954=5 B.R. 324=11 R.P. 430=20 Pat.L.T. 161=A.I.R. 1939 Pat. 369.**

———S. 181—*Applicability—"Decree passed. .. under the Act"—Meaning of—Decree not executable under S. 208—Limitation for execution—Procedure.*

In order that a decree may be "a decree.... passed under the Act," it is not necessary that it should be a "rent decree, that is one capable of execution under S. 208. There is no basis for holding that a decree is not passed under the Act unless it is capable of execution by the special method set out in S. 208. The Act is a complete Code in itself, and it contemplates that all decrees passed by the Deputy Commissioner in suits for arrears of rent are decrees passed under the Act, irrespective of the manner in which such decrees may be executed; and the rule of limitation prescribed by S. 181 of the Act will apply. If the decree cannot be executed under S. 208, the decree-holder may, with the permission of the Deputy Commissioner, proceed against any other property of the judgment-debtor, movable or immovable, as prescribed by S. 210 (3). It cannot be executed by a Civil Court. (*Macpherson and Fazl Ali, JJ.*) MAHARAJA PRATAP UDAINATH SAHI DEO *v.* BARAIK LAL SAHI. **15 Pat. 439=165 I.C. 959=9 R.P. 241=1936 P.W.N. 669=18 Pat.L.T. 36=3 B.R. 112=A.I.R. 1936 Pat. 615.**

———Ss. 181, 182 and 231—*Construction and scope—Decree of Deputy Commissioner—Transfer to Civil Court for execution—Legality—Limitation for execution—Application to renew old execution.*

S. 182 and the notification regarding maintainability of an execution case in a prescribed Court must be given a wider meaning. It is impossible to say that only a Rent Court or a Deputy Commissioner can hear proceedings under the Act. Hence the transfer of decrees of Deputy Commissioner to Civil Court for execution is legal. But when an application for execution is transferred to a Civil Court it will not lose its character as a proceeding under the Act and will not be governed by the rules and statutes which regulate the procedure of the Civil Court, including the Civil Procedure Code and the Limitation Act. The limitation for an application to execute a decree would be that provided by S. 181, Chota Nagpur Tenancy Act, even if the decree has been lawfully transferred to a Civil Court for execution and an application to renew old execution would be governed by S. 231. (*Varma and Rowland, JJ.*) INDERJIT NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAH DEO. **18 Pat. 378=182 I.C. 821=5 B.R. 830=1939 P.W.N. 641=12 R.P. 74=20 Pat L.T. 726=A.I.R. 1939 Pat. 230.**

———S. 182—*Decree passed by Deputy Commissioner—Transfer for execution—Court to which it can be transferred—Civil Court.*

Under S. 182 of the Chota Nagpur Tenancy Act the Deputy Commissioner has jurisdiction to transfer a decree for rent passed by him for execution to another Court; but he can only transfer the decree to a Court under the Act and not to a Civil Court. (*Macpherson and Fazl Ali, JJ.*) MAHARAJA PRATAP UDAINATH SAHAI DEO *v.* BARAIK LAL SAHI. **15 Pat 439=165 I.C. 959=9 R.P. 241=1936 P.W.N 669=18 P L.T. 36=3 B.R. 112=A.I.R. 1936 Pat. 615.**

———S. 190 (1)—*Applicability and scope—Omission to issue notice under—Execution sale—If void.*

Failure to issue a notice required under S. 190 (1), Chota Nagpur Tenancy Act, is a matter of jurisdiction and renders void the subsequent execution sale. The section applies to all warrants or notices, whether against the person or movable property or immovable property. (*Courtney-Terrell, C. J. and Madan, J.*) BARAIK RAM GOVIND SINGH *v* CHOWRA URAON. **16 Pat 632=1938 P.W N 78=173 I C. 644=4 B R. 315=19 Pat L.T. 259=10 R P. 430=A.I.R. 1938 Pat. 97.**

———S. 208—*Applicability—Suit for rent—Nonjoinder of some tenure holders—Decree—Nature of—Sale in execution—If affects shares of parties not impleaded in suit.*

A sale in execution of a decree in a suit in which all the tenure-holders were not represented is not a sale under S. 208, Chota Nagpur Tenancy Act and does not affect the shares in the tenure of persons not parties to the suit, although their names have not been recorded in the landlord's sherister. (*Harries, C. J. and Fazl Ali, J.*) MAHOMED MURTAZA *v* CYRIL INDERNATH DAY. **19 Pat. 111=12 R.P. 407=185 I.C. 671=6 B.R. 232=A.I.R. 1940 Pat. 482.**

———S. 208— Encumbrance — Lease — Patta granting all rights in land except right to collect rent—Out and out transfer reserving merely quit rent—Interest created—If occupancy *raiyati* or tenure—If protrcted from avoidance. *See* Chota Nagpur Tenancy Act, S. 5. **18 Pat.L.T. 206.**

——**Ss. 208, 213-A and 214**—*Scope*—Ex parte *rent decree—Sale of holding in execution—Suit by raiyat for setting aside on ground of fraud—Decree—Finding of fraud throughout the proceedings—Right of auction-purchaser to compensation—Latter not party to fraud—If material.*

James, J.—The right to institute a suit to set aside a sale on the ground of fraud or want of jurisdiction is expressly saved by the provisions of S. 214 of the Chota Nagpur Tenancy Act. In a case where fraud has been proved throughout the proceedings in the suit and in the sale, the revenue officer cannot be said to have any jurisdiction at all under S. 208 of the Act. Where the suit of a raiyat to set aside an *ex parte* rent decree, and the sale of his holding in execution is decreed on the ground of fraud—it being found that the proceedings in the suit and in the sale were vitiated by fraud and that the raiyat came to know of the suit and the sale long after the period of limitation prescribed by S. 213 of the Act had expired—the auction-purchaser is not entitled to compensation by way of equitable relief, even though he might not be a party to the fraud.

Dhavle J.—An execution brought about by the fraud of the decree-holder is liable to be set aside on that ground even though it is not established that the auction-purchaser has participated in or has been congnisant of the fraud. S. 213-A of the Chota Nagpur Tenancy Act is of no avail to the auction-purchaser, because that section is confined to cases where a decree for rent is set aside under that Act; but a suit for setting aside a decree on the ground of fraud, though saved by S. 258, is no more a bar to a suit under the Act than a suit for a declaration that a sale held in execution of a rent decree has been fraudulently confirmed and for possession which is saved by S. 214 of the Act. (*James and Dhavle, JJ.*) Nitai Dutta *v.* Ganesh Mahto. **172 I.C. 147=10 R.P. 289=18 Pat.L.T. 728=1937 P.W.N. 780=A.I.R. 1937 Pat. 644.**

——**Ss. 208 and 213**—*Scope—Separate* pattis *held by different persons in* thicca—*Partition of* thicca *recognised by landlord—Suit and decree for rent against Hindu widow holding one* patti—*Reversioner holding other* patti *not impleaded—Objection by latter to sale—Maintainability.*

In order to entitle a person to object under S. 213 of the Chota Nagpur Tenancy Act to a sale in execution under S. 208 on the ground that he had not been made a party to the proceedings leading to the sale, it has to be demonstrated that he was the person who owned the property sold immediately before the sale, and also that his application is not barred by limitation. The owner of one separate *patti* in a *thicca* is not the owner of another *patti* in the same *thicca*, when there has been a partition by metes and bounds, even though there may be a joint liability for rent especially when the division has been recognised. Nor can a person claiming a right of succession as reversioner to the husband of a Hindu widow have any vested interest so long as the widow lives; he cannot be regarded as the owner of the *patti* held by the widow in that capacity. Such a person is not a necessary party to a suit for rent against the widow holding a *patti*, and cannot object under S. 213 to a sale of the widow's holding in execution of a rent decree against the widow under S. 208. (*James and Dhavle, JJ.*) Bhagwat Prasad *v.* Sudharsan Bhagat. **16 Pat. 643=172 I.C. 115=10 R.P. 279=18 Pat.L.T. 753=1937 P.W.N. 803=A.I.R. 1937 Pat. 621.**

——**S 210 (2)**— *Scope— Permission under — Grant of—If to be express—If can be implied.*

The permission of the Deputy Commissioner required by S. 210 (2) of the Chota Nagpur Tenancy Act is not a mere formality; nor can it be implied from the mere fact that the Court allows execution to proceed. The section expressly requires the permission to be granted for reasons to be recorded in writing. It is not given as a matter of course. (*Dhavle, J.*) Sukra Uraon *v.* Manghi Lal Biswanath Sahai Deo. **180 I.C. 423=11 R.P. 515 (1)=5 B.R. 405 (1)=19 Pat. L.T. 280=A.I.R. 1938 Pat. 464.**

——**Ss. 211 and 214**—*Applicability and scope—Rent decree—Execution—Non-joinder of necessary parties—Sale by Revenue Court—Validity—Suit to set aside—Jurisdiction of Civil Court.*

If all the necessary parties are not joined or represented in the proceedings relating to a sale in execution of a rent decree, S. 211 of the Chota Nagpur Tenancy Act will not apply and the Revenue Court has no jurisdiction to order a sale; consequently S. 214 of the Act is no bar to the Civil Court entertaining a suit to set that sale aside. (*Fazl Ali and Varma, JJ.*) Manki Kanak Ratan *v.* Sundar Munda **179 I.C. 834=5 B.R 298=1939 P.W.N. 41=11 R.P. 413=20 Pat.L.T. 346=A.I.R. 1939 Pat. 225.**

——**S. 211**—*Scope—Transferee of holding—Failure to get recorded in landlord's* sherista—*Effect on suit under S.* 211 (2)—*If gives right to landlord to treat transferor tenant as representative of transferee.*

There is nothing in S. 211 of the Chota Nagpur Tenancy Act to show that the failure of the transferee of a holding to get himself recorded in the landlord's *sherista* shall in every case and as a matter of law amount to a representation to the landlord that in any suit which may be brought by him for rent he is to assume that the transferee is represented by the old tenant (transferor). Nor shall such failure defeat the claimant (transferee) in a suit brought by him under S. 211 (2) (corresponding to O. 21, R. 63, C. P. Code). (*Harries, C.J. and Fazl Ali, J.*) Mahamed Murtaza *v.* Cyril Indernath Dey. **19 Pat. 111=12 R.P. 407=185 I.C. 671=6 B.R. 232=A.I.R. 1940 Pat. 482.**

——**Ss. 212 and 214 (b)**—*Deposit beyond* 30 *days—Order setting aside sale—If* ultra vires—*Suit to suit aside order—Jurisdiction of Civil Court.*

Where the deposit for setting aside a sale of a holding held under S. 208 is made beyond the period of 30 days prescribed by S. 212 of the Act, the order accepting the deposit and setting aside the sale is *ultra vires* and without jurisdiction. S. 214 (*b*) is no bar to a suit in the Civil Court to set aside the order so setting aside the sale. The application of S. 212, which is analogous to S. 174 of the Bengal Tenancy Act, is confined to the statutory period of 30 days and a Court passing an invalid order after that period cannot be said to be acting under that section. S. 214 (*b*) does not bar the inherent right of the Civil Court to set aside a decree or order obtained by fraud or passed without jurisdiction. This right is expressly recognized in S. 258 of the Act in relation to orders and decrees passed under the Act. (*Agarwala and Madan, JJ.*) JAINANDAN RAM TEWARI *v.* PURIA URAON. **15 Pat 698=3 B.R. 82=1936 P.W.N. 607=165 I.C. 812=9 R P. 217 (2) =17 Pat.L,T. 673=A.I.R. 1936 Pat. 590.**

——S. 213—Applicability—Rent decree and sale in execution—Suit to set aside on ground of fraud—Decree— Claim by auction-purchaser to compensation—Sustainability. *See* CHOTA NAGPUR TENANCY ACT, Ss. 208, 13-A AND 214. **18 Pat. L.T. 728.**

——Ss. 213 and 258—*Scope—Decree for rent in suit against non-tenant—Sale of holding in execution—Purchase by stranger—Suit by tenant for recovery of holding—If barred—Prior unsuccessful application under S. 213—Effect of—Purchaser's right to order of refund.*

Where a landlord brings a suit against a person, who is not his tenant, and obtains a decree, and the holding is sold in execution of the decree and is purchased by a third person having no knowledge of the fraud alleged to have been practised by the landlord, a suit by the tenant for recovery of the holding is not barred by S. 258, the plaintiff merely claiming what undoubtedly belongs to him. So also, an application by the tenant to set aside the sale under S. 213 is not a bar to the recovery of the property. The purchaser of the holding is not entitled to an order for refund of the purchase price paid by him and withdrawn by the landlord. (*Wort, J.*) SHIB CHARAN *v.* RAGHAB SANTAL. **182 I.C. 446=5 B.R. 745=12 R.P. 13 =A.I.R. 1939 Pat. 171.**

——Ss. 213 and 214—*Scope—Rent sale—Application to set aside—Dismissal—Subsequent suit on ground of want of jurisdiction to sell—If barred.*

S. 213 of the Chota Nagpur Tenancy Act applies to irregularity or fraud in conducting the sale, but has no application to cases where the Court has no jurisdiction to sell. The dismissal of an application under S. 213 of the Act is no bar to a suit under S. 214, on the ground that the sale is void as being without jurisdiction owing to the omission to issue the notice required under S. 190 (2). (*Courtney-Terrell, C.J. and Madan, J.*) BARAIK RAM GOVIND SINGH *v.* CHOWRA URAON. **16 Pat. 632=1938 P.W.N. 78=173 I.C. 644=4 B.R. 315=19 Pat.L.T. 259=10 R.P. 430=A.I.R. 1938 Pat. 97.**

——S. 214—Scope—Suit to set aside sale in execution of *ex parte* rent decree on ground of fraud—Maintainability—Decree—Right of auction-purchaser to compensation. *See* CHOTA NAGPUR TENANCY ACT, Ss. 208, 213-A AND 214. **18 Pat.L.T. 728.**

——S. 215 (3)—*Applications to set aside sale —Order on—Appeal.*

The terms of S. 215 (3) make it clear that orders passed on applications to set aside sales are within the section. An appeal therefore lies in such case. (*Harries, C.J. and Manohar Lall, JJ.*) PRATAP UDAI NATH *v.* SUKHDEO PRASAD. **18 Pat. 649=186 I.C. 291=12 R.P. 481=6 B.R. 324=A.I.R. 1940 Pat. 54.**

——S. 215 (3)—*Construction and scope—Application to set aside sale in execution of rent decree —Order on—Appeal and second appeal—Competency.*

Orders passed on applications for setting aside sales in execution of rent decrees fall within S. 215 (3) of the Chota Nagpur Tenancy Act, and are subject to appeal and second appeal.

Manohar Lall, J.—The Legislature in enacting S. 215, intended to depart from the interpretation put upon similar words in S. 47, C. P. Code, the language of S. 215 (3) of the Chota Nagpur Tenancy Act is wide enough to make an appeal competent in the case of applications for setting aside sales. (*Harries, C.J. and Manohar Lall, J.*) MAHARAJA PRATAP UDAI NATH SHAH DEO *v.* SUKHDEO PRASAD BHAGAT. **18 Pat. 649=186 I.C. 291=12 R.P. 481=6 B.R. 324=A.I.R 1940 Pat. 54.**

——S. 218 (2)—*Rent suit—Preliminary issue if suit barred under S. 11—Decision in favour of plaintiff—Appealability.*

S. 218 (2), Chota Nagpur Tenancy Act, allows an appeal only where the suit had been tried and decided. Where in a rent suit the Deputy Collector decided as a preliminary issue that the suit was not barred under S. 11 of the Act and proceeded with its trial, no appeal lies from his decision as from a decree, for it did not, so far as the Court that made it was concerned, conclusively determine the rights of the parties with regard to any of the matters in controversy in the suit. Only one issue has been decided and it remained to be decided whether the plaintiff was entitled to a decree for rent. The position would, of course, be different, if the Deputy Collector had decided the issue against the plaintiff and dismissed his suit. The plaintiff would then have a right of appeal. (*Saunders, J.*) RAMRACHHYA SINGH *v.* DAMAR SINGH. **8 R.P. 468=161 I.C. 694=A.I.R. 1936 Pat. 356.**

——S. 233—*Construction—"Date of misuse or breach complained of"—Meaning of—Continuing wrong—Erection of huts on agaicultural land—Suit for ejectment—Limitation—Starting point—Suit filed more than two years after erection of huts—If barred—Limitation Act, S. 23.*

There is nothing in the Chota Nagpur Tenancy Act inconsistent with S. 23 of the Limitation Act which defines the period of limitation in the case of continuing wrongs. S. 23 of the Limitation Act would therefore apply to suits under the Chota Nagpur Tenancy Act, where the latter Act is silent as to when time begins to run in the case of continuing wrongs. There can be little doubt that where wrong is capable of being corrected and is not corrected it is a wrong which continues. The erection and maintenance of huts on an occupancy holding, which is not authorised by S. 21 of the Chota Nagpur Tenancy Act, is a misuse of that holding which continues as long as the huts remain standing. That is in the nature of a continuing wrong and the landlord can maintain a suit as long as the misuser continues and within two years after it has ceased. The "date of misuse or breach complained of" in S. 233 of the Chota Nagpur Tenancy Act does not mean the actual commencement of the misuser and time does not run from the date of the erection of the huts. A period of two years can be calculated from any day during which the misuser or breach complained of continued. (*Harries, C.J. and Agarwala, J.*) GAYA PRASAD SINGH *v.* JAGDISH CHANDRA. **188 I.C. 495=6 B.R. 701=1940 P.W.N. 394.**

——**Ss. 257 and 72** (5)—*Scope and applicability—Joint landlords—Each receiving his share of rent by arrangement—Surrender of part of holding to one of landlords entitled to that part—Subsequent settlement of that part by that landlord with another—Validity.*

Although S. 257 requires that when two or more persons are joint landlords, they must act jointly in respect to acts required or authorised under the Act, the section cannot apply where by arrangement between the parties each of the landlords is in receipt of his own share of rent, so that their possession in law is that of co-owners. The fifth sub-section of S. 72, contemplates cases of partial surrender of a holding by arrangement between a *raiyat* and his landlord. There can, therefore, be no objection in law to a surrender of a portion of a holding to the landlords of that portion or to a subsequent settlement of that portion with another by those landlords. (*Agarwala, J.*) RAM RANJAN RAY *v.* HAKU MIAN. **159 I.C. 490 (2)=8 R.P. 284=A.I R. 1936 Pat. 52.**

——**S. 258**—*Appointment of headman under S. 74-A—Deputy Commissioner failing to find existence of custom—Jurisdiction of Civil Court.*

If in appointing a headman under S. 74-A, the Deputy Commissioner omits to decide the existence of custom, the omission does not take away his jurisdiction to appoint a headman. For, the foundation of the jurisdiction of the Deputy Commissioner is the existence of the custom and not the decision that such a custom existed. It is, therefore, competent to the Civil Court to examine whether the foundation of jurisdiction existed, *i.e.*, whether the custom existed. If the Civil Court finds that the custom existed, the order of the Deputy Commissioner cannot be interfered with simply on the ground that he failed to decide a fact which it was necessary to decide before the appointment could be made. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAN BHUMIJ. **15 Pat. 488=162 I.C 582=8 R.P 552=17 Pat.L.T. 445 =1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 258**—*Appointment of headman under S. 74-A—Deputy Commissioner deciding question of limitation wrongly—Jurisdiction of Civil Court.*

S. 258 of the Chota Nagpur Tenancy Act no doubt does not bar a suit in respect of the appointment of a headman by the Deputy Commissioner under S. 74-A of the Act, if it is instituted on the ground of want of jurisdiction. But whether an application under S. 74-A for the appointment of a headman is barred by limitation or not is a matter to he decided by the Deputy Commissioner, and if he decides the question wrongly, the remedy is an appeal to the higher authority, and not a suit in the Civil Court. If a Deputy Commissioner makes an appointment which is out of time, he cannot be said to exceed his jurisdiction and an order passed on a barred application is not a nullity or *ultra vires.* (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAN BHUMIJ. **15 Pat. 488 =8 R.P. 552=162 I.C. 582=17 Pat.L.T. 445= 1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 258**—*Appointment of headman under S. 74-A—Finding by Deputy Commissioner as to custom—If can be questioned in Civil Court.*

If while appointing a headman under S. 74-A of the Chota Nagpur Tenancy Act, the Deputy Commissioner decides that there is a custom of having a headman in the village, that decision cannot be questioned in a Civil Court, and the Civil Court cannot examine the correctness of that finding. (*Macpherson and Mohammad Noor, JJ.*) JAGDISH CHANDRA *v.* SHANKARSHAN BHUMIJ. **15 Pat. 488=162 I.C. 582=8 R.P. 552=17 Pat. L.T. 445=1936 P.W.N. 421=A.I.R. 1937 Pat. 202.**

——**S. 258**—Construction and scope—Decision in suit under S. 87—Subsequent civil suit for possession or reliefs not grantable by Revenue Court—If barred. *See* CHOTA NAGPUR TENANCY ACT, S 87. **15 Pat. 229.**

——**S. 258**—Scope—Order setting aside sale of holding on deposit beyond the period of 30 days —Suit to set aside—Jurisdiction of Civil Court—If barred. *See* CHOTA NAGPUR TENANCY ACT, Ss. 212 AND 214 (*b*). **17 Pat.L.T. 673.**

——**S. 258**—Scope—Sale of holding in execution of decree for rent passed against person not tenant—Suit by tenant for recovery of holding against stranger purchaser—Bar of—Unsuccessful application to set aside sale—Effect of. *See* CHOTA NAGPUR TENANCY ACT, Ss. 213 AND 258. **A.I.R. 1939 Pat. 171.**

——**S. 265**—Scope—Sale by Deputy Commissioner in execution of rent decree—Suit against certified purchaser—Maintainability—If barred by S. 66, C. P. Code. *See* C. P. CODE, S. 66. **18 Pat.L.T. 397=A.I.R. 1937 Pat. 324.**

CHRISTIAN MARRIAGE ACT (XV OF 1872), Ss. 4 and 77—*Scope—Marriage solemnised by Registrar having authority—False declaration as to age of one party and as to residence—If renders marriage illegal and liable to be declared void.*

A marriage solemnised by an official authorised in this respect cannot be declared void under S. 4 of the Christian Marriage Act. The fact that one of the parties induced the Marriage Registrar to solemnise the marriage as the result of a false declaration as to the age of the other party to the marriage and as to their residence, does not render the marriage illegal. (*Leach, C.J. and Varadachariar, J.*) LALA GOKULDAS *v.* JOHU KANTARAJ. **I.L.R. (1938) Mad. 113=174 I C. 195=10 R.M. 674=1937 M.W.N. 1054=46 L.W. 481=A.I.R 1937 Mad. 895=(1937) 2 M.L.J. 590.**

CINEMATOGRAPH ACT (II OF 1918)—Scope—Cinema in city of Calcutta within Corporation limits—Police licence taken for—Further licence from Corporation under Municipal Act—If obligatory. *See* CALCUTTA MUNICIPAL ACT, S. 391. **40 C.W.N. 497.**

CIVIL PROCEDURE CODE (VIII OF 1859), S. 260—Applicability—Auction-purchase made under Code of 1859—Suit to declare benami after Code of 1908—Maintainability. *See* C. P. CODE (V OF 1908), S. 66. **40 C.W.N. 470.**

——**S. 269**—*"Certified purchaser"—Meaning of.*

The words "certified purchaser" in S. 269 of the C. P. Code of 1859, which has to be strictly construed cannot be held to include the heirs of the certified purchaser. (*Rau, J.*) MANIR AHMAD *v.* MUNSHI OBEDAL HAQUE. **40 C W.N. 470.**

——(V OF 1908)—*Arbitration—Interference—Wrong view as to what constitutes misconduct—If a ground.*

The scope of S. 115, C. P. Code, is very limited and the High Court cannot interfere in revision merely because the lower Court has taken mistaken view as to what does or does not constitute misconduct on the part of the arbitrator. (*Puranik, J.*) KESHOLAL *v.* LAXMAN RAO. **1940 N.L J. 393.**

——*Scheme underlying—Body and schedule—Relation between—Conflict—Preference.*

The C P. Code must be regarded a whole and it came into being as a whole as its first section will show. The scheme was to make the body of the Code confer jurisdiction and the schedules to detail the mode in which that jurisdiction is to be exercised. Therefore, if there is any conflict between the body and the schedules the former must prevail. (*Stone, C. J. Grille and Bose, JJ.*) REMDAYAL MUNNALAL *v,* SHEODAYAL **I.L.R. (1939) Nag 250=183 I.C. 128=12 R.N. 43 (2)=1939 N.L.J. 228=A.I.R. 1939 Nag. 186 (F.B.).**

——*Scope of—Provisions, if subject to those of Limitation Act.*

The provisions of the Civil Procedure Code are subject to the provisions of the Limitation Act. Both Acts are general Acts and are *in pari materia.* The two Acts therefore must be read together and must be treated as complimentary of each other. (*Thom, C. J., Iqbal Ahmad and Bajpai, JJ.*) DURAG PAL SINGH *v.* PANCHAM SINGH. **I.L.R. (1939) All. 647=1939 A W.R. (H C.) 498=1939 A L J. 522=12 R A 98=1939 O.L.R. 472=183 I.C. 242=A.I.R. 1939 All. 403 (F.B.).**

——**S. 2**—***Judgment—After preliminary decree, decree-holder filing application for final decree and judgment-debtor filing application for extension of time—Two applications heard together—Diary note rejecting prayer for extension and ordering final decree to be drawn up—If amounts to judgment.***

A preliminary decree for sale was passed in a mortgage suit in 1934. Early in 1935, the Court had before it two applications, one by the judgment-debtor asking for more time to pay off the decretal amount and another by the decree-holder for a final decree for sale. The two applications were heard together and on 8th May 1935 the Judge recorded in the diary a note as follows: "No enlargement of time can be given: Draw up final decree as applied for by the decree-holder." The typed decree form which was filled up did not contain at the bottom the usual note "given under my hand and seal, this day", etc. The Judge signed that form on the reverse and put 29th June 1935 as the date of signature. On 25th June, 1938, the decree-holder applied for the sale of the property.

Held, that the diary note of 8th May 1935, was a judgment within the meaning of S. 2 and the decree which had no date of its own must by virtue of O. 20, R. 7 be held to be dated on the day on which the judgment was pronounced, *i.e.,* 8th May 1935 and hence the execution application of 25th June 1938 was time barred. (*Baguley, J.*) G. M. EUSOOF *v.* S. V. S. T. CHETTIAR FIRM. **1940 Rang.L.R. 72=183 I.C. 894=12 R.R. 119=A.I.R. 1939 Rang. 294.**

——**S. 2 (2)**—Applicability to Agra Tenancy Act. *See* AGRA TENANCY ACT, SS. 249 AND 3, CL. (14). **1938 A.L.J 63.**

——**S. 2 (2)**—"Decree"—Calcutta High Court Original Side Rules, Ch. 26, R. 50—Reference by Registrar—Opinion of Judge on—Appeal. *See* LETTERS PATENT (CALCUTTA) CL. 15. **40 C.W.N. 1264.**

——**S. 2 (d)**—"Decree"—Application for ascertainment of mesne profits under O. 20, R. 12—Order rejecting—If decree. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), SCH. II, ART. 11. **49 L.W. 652.**

——**S. 2 (2)**—*Decree—Appeal memo. stamped after limitation, under an extension of time—Dismissal as time barred.*

Where an appeal presented with insufficient stamp was after the period of limitation stamped with the full fee on an extension of time by the Court, a dismissal of the appeal as time barred is a decree within the meaning of S. 2 (2), C. P. Code. (*Pollock, J.*) SONBA KESHAO SONAR *v.* RODRIGUES. **177 I.C. 505=11 R.N. 142=1938 N.L.J. 155=A I.R. 1938 Nag. 322.**

——**S. 2 (2)**—'Decree'—Conditional decree in pre-emption suit—Subsequent order dismissing suit for default—Appeal. *See* C. P. CODE, S. 115—OTHER REMEDY OPEN. **41 P.L.R. 381.**

——**S. 2 (2)**—Decree—Decision holding that court-fee paid sufficient—Appeal. *See* COURT-FEES ACT, S. 12. **63 C.L.J. 16.**

——**S. 2 (2) and O. 43, Rr. 9 and 11**—*Decree—Dismissal of appeal before admission.*

Obiter.—It is the nature of the order and not the stage at which it is passed that must determine its character as a decree within the meaning of S. 2, C. P. Code. An order dismissing an appeal as being time-barred before it has been admitted or registered is a decree. (*Biswas, J.*) SUDUANSU BHUSAN PANDEY *v.* MAJHO BIBI. **176 I.C. 361=11 R.C. 92=42 C.W.N. 72=A.I.R. 1937 Cal. 732.**

——**Ss. 2 (2) and 148**—***"Decree"—Dismissal of suit—Order directing plaint to stand rejected on default of payment of deficient court-fee within fixed time—Appeal—Time given by appellate Court for payment of court-fee—Payment within such time—Sufficiency—Plaint if to be deemed rejected for non-payment within time fixed by trial Court—Powers of appellate Court to extend time.***

An order rejecting a plaint in case of non-payment of deficient court-fee is a decree as defined by S. 2 (2), C P. Code, and an appeal lies from that order. Where the trial Court, while dismissing a suit, on the merits, directs that on failure of the plaintiff to pay the deficiency in court-fee within a certain time, the plaint should stand rejected, and on appeal the plaintiff makes good the deficiency in court-fee within the time allowed by the appellate Court, it cannot be said that there was no decree on the merits from which an appeal would lie because the plaintiff failed to pay the court-fee within the time allowed by the trial Court. Once the appeal was filed, the power of the trial Court to extend the time for payment under S. 148, C. P. Code, which it could do before the filing of the appeal, is gone, and thereafter, the appellate Court which becomes seized of the case can give an extension, under the powers conferred upon it by O. 41, Rr. 32 and 33, C. P. Code. If the court-fee is paid within the extended time given by the trial Court, there is sufficient compliance with the order for payment of court-fee and the plaint cannot be regarded as having been rejected under the order of the trial Court. (*Ganga Nath, J.*) Kashi Kurmi *v.* Bansraj Kurmi. **174 I.C. 298=10 R.A. 564=1938 A.L.R. 262=1937 A L.J. 1346=1938 A.W.R 13 (H.C.) =A.I.R. 1938 All. 150.**

——**Ss. 2 (2) and 96**—*"Decree"—Essentials of —"Matters in controversy in the suit"—Meaning of—Partition suit by son against father—Alienation of some items of property by father pending suit—Preliminary decree—Application for allotment of alienated properties to father—Order rejecting—Appealability.*

When after the preliminary decree and before the final decree in a partition suit by a son against his father an application is made to the Court praying that certain items of property alienated by the defendant pending suit should be allotted to the defendant so that the alienee may not be disturbed in his possession, an order rejecting that application is not a decree and is not appealable, as it does not deal with a matter in controversy in the suit. (*Mockett and Krishnaswami Ayyangar, JJ.*) Nandesam Chowdari *v.* Balakrishnama Chowdari. **I.L.R. (1940) Mad. 394=50 L.W. 541=1939 M.W.N. 1121=A.I.R. 1939 Mad. 897.**

——**Ss. 2 (2) and 47**—*Decree—Fight between judgment-debtor and decree-holder auction-purchaser—Order—Appeal.*

The case of a judgment-debtor when he is fighting with the decree-holder auction-purchaser falls under S. 47 and an order passed against the judgment-debtor is a decree under S. 2 (2) and as such appealable. (*Stone, C.J. and Puranik, J.*) Mst. Semabi *v* Ganpatrao Yadorao. **I.L.R. (1938) Nag. 583=177 I.C. 643=11 R.N. 155= A.I.R. 1938 Nag 212.**

——**S. 2 (2)**—*"Decree"—Memorandum of appeal—Rejection for non-compliance with O. 41, R. 1—Appealability—O. 43, R. 1.*

It cannot be laid down as a universal proposition that an order rejecting a memorandum of appeal under O. 41, R. 3, C. P. Code, for failure to amend it so as to be in accordance with O. 41, R. 1 is appealable. Only in those cases in which it finally disposes of the disputes between the parties would be appealable as a "decree" O. 43, R. 1 does not provide for an appeal from an order rejecting the memorandum of appeal for non-compliance with O 41, R. 1. (*Wort and Varma, JJ.*) Ramdhari Ahir *v.* Khedu Ahir. **17 Pat. 245=177 I.C. 326=4 B.R. 814=11 R.P. 146=A.I.R. 1938 Pat. 461.**

——**S. 2 (2)**—*"Decree"—Mortgage decree for sale—Application by prior mortgagee under O, 34, R. 12, C. P. Code—Order allowing—If decree—Appeal—Applicant not party to suit—Effect.*

An order passed under O. 34, R. 12, C. P. Code, is not appealable at all. Such an order, though made after full enquiry, cannot amount to a decree as defined by S. 2 (2), C. P. Code, especially when the prior mortgagee who applies for an order under R. 12 is not a party to the suit in which the property has been directed to be sold. (*Horwill, J.*) Thalupullamma *v.* Mangamma.

170 I.C. 932=10 R.M. 248=1937 M.W.N. 353= 45 L.W. 646=A.I R. 1937 Mad. 554.

——**S. 2 (2) and (14)**—*"Decree"—"Order"—Distinction—Dismissal of appeal under O. 41, R. 11 (1) and (2)—Second appeal—Appeal summarily dismissed after hearing appellant—No judgment —Effect—Dismissal—If ceases to be a "decree."*

The essence of the distinction between a decree and order seems to be in the nature of the decision, whether it is an adjudication of a particular kind or not, rather than in the manner of its expression. Since the words "formal expression" appear in both the definitions, S. 2 (2) and S. 2 (14) the presence or absence of a formal expression cannot be the true criterion of the difference between a decree and an order. The dismissal of an appeal under O. 41, R. 11 (1), C. P. Code, is a decree and appealable as such, whereas the dismissal of an appeal under O. 41, R. 11 (2) is not. The dismissal under R. 11 (1) has, so far as the Court pronouncing it is concerned, the finality which is an essential ingredient of a decree as defined in S. 2 (2); and in substance it expresses an adjudication, within that definition to the effect that the appeal is without merit. In dismissing an appeal under R. 11 (1) of O. 41, C. P. Code, the appellate Court is not required by law to write a judgment, though it would be better to give reasons for the dismissal. Even if the appellate Court only says "Heard. The appeal is summarily dismissed," that is sufficient. The dismissal is none the less a decree open to second appeal, provided the other conditions are satisfied. In so dismissing the appeal, the appellate Court must be held to have intended to accept the finding of the trial Court on the question at issue. (*Rowland, J.*) Jamuna Prasad Rai *v.* Rajballam Rai. **169 I.C. 359=3 B R. 558=10 R.P. 9=18 Pat L T. 321=1937 P.W.N. 340=A. I.R. 1937 Pat. 349.**

——**S. 2 (2)**—*Decree—Order amending decree under Ss. 151 and 152—Not appealable—Revision.*

An order of amendment of a decree made under Ss. 151 and 152, C. P. Code, does not in itself amount to a decree and is not appealable. An application for revision is therefore maintainable against the order of amendment. (*Lokur, J.*) Laxman Mahadev *v.* Maruti Rambhau. **184 I.C. 775=41 Bom.L.R. 800=A.I.R. 1939 Bom 389.**

——**S. 2 (2)**—*"Decree"—Order by appellate Court under O. 41, R. 5 refusing to stay execution —Appealability—Ss. 47 and 96.*

No appeal lies from an order passed by an appellate Court under O. 41, R. 5, C. P. Code, refusing to stay execution of the decree under appeal, pending disposal of the appeal. Such an order is not a decree as defined by S. 2 (2), nor is it an order passed by a Court of original jurisdiction within the meaning of S. 96, C. P. Code. It does not also fall under S. 47, C. P. Code, as it cannot be said to have been passed by a Court executing the decree. (*Sen, J.*) Raichand *v.* Tanibai. **180 I.C. 34=11 R.B. 276=40 Bom. L. R. 1198=A.I.R. 1939 Bom. 65.**

——**S. 2 (2)**—*'Decree'—Order discharging defendants—Appealability.*

A lambardar brought a suit against certain persons for recovery of the amount of revenue paid by him to the Government and for a charge on the property in their hands. The Court found that there could be no charge on the property in the hands of some of them and therefore discharged them from the suit.

Held, that the order discharging the defendants from the suit was a final adjudication of the most important point of issue between the parties and therefore amounted to a decree within the meaning of S. 2 (2) and was appealable. (*Vivian Bose, J.*) CHETANLAL PURSHOTTAM *v.* G. S. GUPTA. **175 I.C. 33=11 R.N. 22=A.I.R. 1938 Nag. 233**

——S. 2 (2)—*"Decree"—Order dismissing execution for non-prosecution—Appeal—Revision.*

No appeal lies with reference to an order directing an execution case to be dismissed for non-prosecution. Such an order does not fall within the scope of those sections of the C. P. Code, which relate to appealable orders, nor can it be said to be a decree. Such an order is in the nature of one for dismissal for default and is open to revision. (*S. K. Ghose and Edgley, JJ.*). AMARENDRA NATH MULLICK *v.* BALAI CHAND GHATAK. **162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.**

——S. 2 (2)—*"Decree"—Order rejecting appeal for non-payment of additional court-fee—Appealability—O. 43, R. 1.*

No appeal lies against an order rejecting a momorandum of appeal for non-payment of additional court-fee demanded. Such an order is not a decree as defined by S. 2 (2), C. P. Code; nor is it made appealable under O. 43, R. 1, C. P. Code. The remedy of the party is by way of revision. (*Stone, C.J., Bose and Gruer, JJ.*) BALAJI DHUMNAJI *v.* MST. MUKTABAI. **I.L.R. (1938) Nag. 106=173 I.C. 329=10 R.N. 298=1938 N.L.J. 1=A.I.R. 1938 Nag. 122 (F.B.).**

——S. 2 (2) — *"Decree" — Order rejecting appeal for insufficiency in court-fee without giving time to make up deficiency—Appealability.*

An order rejecting a memorandum of appeal on the ground that it is insufficiently stamped as soon as the deficiency is brought to the notice of the Court and without giving the appellant any time to make up the deficiency is clearly a "decree" as defined by S 2 (2), C. P. Code, and is appealable as such Such a rejection is not a rejection in any of the circumstances specified in any of the clauses of O. 7, R. 11, C. P. Code, in which cases alone R. 13 of O. 7 will apply. (*Dhavle and Agarwala, JJ.*) RAM SAWARI KUER *v.* MOTIRAJ KUER. **1939 P.W.N. 162=17 Pat. 687=19 Pat.L.T. 885=11 R.P. 220=178 I.C. 150 =5 B.R. 59=A.I.R. 1939 Pat. 83.**

——S. 2 (2)—*'Decree'—Order rejecting memorandum of appeal as deficient court-fee was not paid.*

The rejection of a memorandum of appeal on the ground that the deficient court-fee has not been paid is not a decree and no further appeal lies from it. (*Middleton, J.C. and Mir Ahmad. A.J.C.*) MUKARAB KHAN *v.* RAB NAWAZ KHAN, **163 I.C. 462=9 R. Pesh. 3=A.I.R. 1936 Pesh. 140.**

——Ss. 2 (2), 115 and 144—*Decree—Order rejecting application for restitution on ground of limitation if decree and appealable—High Court, power of, under S. 115.*

A rejection of a prayer for restitution under S. 144 on the ground of limitation amounts to a decree, and the order dismissing the application is therefore appealable; as such the High Court has no jurisdiction to interfere under S. 115. (*Lodge, J.*) DEBENDRA NATH SADHU KHAN *v.* RAI RAM PROTAP CHAMARIA. **167 I.C. 167=9 R.C. 651=41 C.W.N. 182=A.I.R. 1936 Cal. 812.**

——S. 2 (2)—*Decree—Order that cross objection abates—If appealable.*

An order that a suit abates is appealable as a decree. That being so, it would seem that an order that an appeal abates is also appealable as a decree and if so there is no reason why an order that the cross-objection abates should not be held to be a decree for the same reasons. (*Stone, C.J. and Clarke, J.*) PURUSHOTTAMDAS *v.* DEOKA RAN. **181 I.C. 411=11 R.N. 459=1938 N.L.J. 399=A.I.R. 1939 Nag. 39.**

——S. 2 (2)—*"Decree"—Order under S. 47—Order allowing amendment of execution petition—Appealability—S. 47.*

Every order in execution under S. 47, C. P. Code, is not a decree within the meaning of S. 2 (2) so as to be appealable. The order to be appealable, must amount to a final adjudication, conclusive as regards the Court expressing it, determining the rights of the parties. It is well settled that no appeal lies from an interlocutory order which is only in the nature of a finding. An order by the executing Court giving the decree-holder leave to amend his execution petition by inserting a prayer for attachment of immovable property on an application made after 12 years from the date of the decree, is only an incidental and interlocutory order and not a final order. An appeal from such an order is incompetent. (*Venkatasubba Rao, J.*) BEERANKUTTY *v.* MAMMU. **164 I C. 217=9 R.M. 96=1936 M.W N. 1220=44 L.W. 99=A.I R. 1936 Mad. 623=71 M.L.J. 256.**

——S. 2 (2)—*'Decree'—Order under O. 21, R. 90—Second appeal.*

An order passed on an application under O. 21, R. 90, C. P. Code, is not a decree, the order being one from which an appeal is provided under O. 43, R. 1 (*j*), and no second appeal lies from such an order. (*Sulaiman, C.J. and Bennet, J.*) DEBI CHARAN LAL *v.* KUSHLAL RAI RATAN LAL. **165 I C. 654=9 R.A. 292=1936 A.W.R. 869=1936 A.L.J. 959=1936 All.L.R. 934=A.I.R. 1936 All. 763.**

——S. 2 (2)—*Decree—Order under O. 21, R. 93—Appealability—Ss 47 and 144.*

An order under O. 21, R. 93, C. P. Code, is not open to appeal. It is not a decree and is not an order falling under S. 47 or S. 144, C. P. Code. (*Broomfield and Divatia, JJ.*) GANGADHAR DHANJISHET *v.* BALWANT KASHIRAO. **I.L.R. (1940) Bom. 370=42 Bom.L.R. 367=A.I.R. 1940 Bom. 210.**

——**S. 2 (2) and O. 22, Rr. 3, 4 and 11**—*Order that cross-appeal has abated—If a decree and appealable.*

An order that a suit abates is appealable as a decree. It would seem that an order that an appeal abates is also appealable as a decree and if so, there is no reason why an order that the cross-objections abate should not be held to be a decree for the same reason. There is no doubt that such an order conclusively determines the rights of the party concerned on his cross-objections. (*Stone, C.J. and Clarke, J.*) PURU-

SHOTTAMDAS *v.* DEO KARAN. **I.L.R. (1940) Nag. 324.**

——**S. 2 (2)** — *Preliminary decree — What amounts to—Partition decree.*

Where a compromise provided for a division of the property according to the respective share of the parties as per their degree of relationship and in effect not only declared the rights of the several parties in the property, but also required further proceedings to be taken before the plaintiffs could get the relief claimed, it was held that it amounted to preliminary decree of partition. (*Zia-ul-Hasan and Yorke, JJ.*) CHINTAMANI TEWARI *v.* BHAGIRATHI. **14 Luck. 223=177 I.C. 556=1938 O.W.N. 916=11 R.O. 52=1938 O.L.R. 430=1938 O.A. 688=A.I.R. 1938 Oudh 229.**

——**S. 2 (2)**—*"Rejection" of a plaint—Meaning of—Order by appellate Court calling on plaintiff-appellant to pay court-fee due on plaint in trial Court—Plaintiff allowed to sue as pauper but appealing paying court-fee—Non-payment of court-fee on plaint—Rejection of appeal—Legality—C. P. Code, O. 7, R. 11 (c).*

"Rejection" referred to in the definition of a decree in S. 2 (2), C. P. Code, is such rejection as is permissible under the Code. Before an order can amount to a "rejection" it must be a rejection authorised by some provision of the Code. If a plaint or a memorandum of appeal is rejected for a cause for which the Code does not empower the Court to do so, it will not be a decree as defined by the Code, though the Court may use the word "reject" in disposing of the suit or appeal. O. 7, R. 11 (*c*), C. P. Code, contemplates only cases in which the court-fee on the plaint or the memorandum of appeal, as the case may be, is not paid; it has no application to a case in which though the court-fee payable on the memorandum of appeal has been paid, the plaintiff appellant has not paid the court-fee on the plaint, having been allowed to sue as a pauper originally, and his suit having been dismissed eventually on the merits. The memorandum of appeal in such a case cannot be said to be written upon paper insufficiently stamped. The appellate Court cannot in such a case reject the appeal for non-payment of court-fee due on the plaint in accordance with an order by it, because it has no power to make the order for payment of that court-fee. (*Niamatullah, J.*) AMBA SHANKAR *v.* MST. SHEOTI. **168 I.C. 676=9 R.A. 666=I.L.R. (1937) All. 484=1937 A.L.R. 389=1937 A.L.J. 171=1937 A.W.R. 113=A.I.R. 1937 All. 280.**

——**Ss. 2 (3) and O. 21, R. 10**—*Scope—"Decree-holder" and "holder of a decree"—Meaning of—If synonymous—Right to execute decree—Decree obtained benami in name of another—Right of real owner to execute.*

There is no provision in the Code of Civil Procedure which allows a person to come forward and claim to execute a decree on the ground that he is the real owner of the decree as being in fact and substance the holder of the decree and the decree-holder mentioned in the decree is a mere non-entity and a benamidar. A person who is not a decree-holder as defined by S. 2 (3), C. P. Code, and who is neither the holder of a decree under O. 21, R. 10, nor a person to whom the decree has been transferred by assignment or by operation of law under O. 21, R. 16, C. P. Code, is not entitled to execute the decree. There is no difference between a decree-holder as defined by S. 2 (3) and the holder of a decree referred to in O. 21, R. 10. (*Harries, C. J. and Fazl Ali, J.*) SATYENDRA NARAIN *v.* WAHIDUDDIN KHAN. **186 I.C. 355=12 R.P. 491=6 B.R. 357=21 Pat.L.T. 146=A.I.R. 1940 Pat. 472.**

——**Ss. 2 (11), 50 and 53 and O. 21, R. 22**—*Decree against Hindu father—Attachment of joint family property in execution—Subsequent insolvency and death of father—Application for execution against sons—Latter, if "legal representatives"—Whole property—If vests in Official Assignee.*

Plaintiff having obtained a money decree against one *J*, attached the joint family properties of *J* and his two sons who constituted a Hindu undivided family. Objections having been raised to other attachments on other properties, plaintiff was directed to file suits to establish her right to attach them. She (plaintiff) then filed a suit against one of the sons *J*. Pending these the firm in which *J* was a partner was adjudicated insolvents, the plaintiff's case being that *J*'s name in that partnership represented the joint family of himself and his two sons. *J* subsequently died, and later plaintiff got a decree in the suit against *J*'s son declaring that the property in that suit was joint family property. Plaintiff then applied under O. 21, R. 22, C. P. Code, to implead the Official Assignee and *J's* sons as his legal representatives and to execute the decree against *J* against them. The sons objected and contended that on the insolvency of *J*, as partner of the firm, the Official Assignee became his legal representative and that they were not liable to be brought on record as his legal representatives.

Held, (1) that the definition of the term "legal representative" in S. 2 (11), C. P. Code, was not exhaustive, as that definition was merely of the ordinary meaning of the term, and that it should be qualified by S. 53 of the Code; and having regard to the provisions of Ss. 50 and 53, C. P. Code, the sons were the "legal representatives" of their father *J*, for the purposes of O. 21, R. 22 and should therefore be brought on record as such for the purpose of execution of the decree against the joint family properties; (2) that on the insolvency of the father *J*, the only property that vested in the Official Assignee was the right, title and interest of the deceased *J*, and that the sons' right, title and interest in the joint ancestral estate did not vest in him, although by suitable proceedings the Official Assignee could avail of their interests in the joint family estate for the benefit of the creditors of the insolvent father; (3) and consequently it was necessary that the sons of *J* should be brought on record as his legal representatives under S. 50 and O. 21, R. 22, C. P. Code, although it would have to be proved as a matter of fact that they hold any property as mentioned in S. 53, C. P. Code. (*Kania, J.*) BAI PREMABAI *v.* JIVANDAS. **167 I.C 203=9 R.B. 281=38 Bom.L.R. 977=A.I.R. 1936 Bom. 456.**

——**S. 2 (11)**—*Executor—When becomes legal representative.*

Ordinarily a grant of probate refers back to the date of the death of the deceased and the executors become the legal representatives from the time of the death. (*Weston.*) KISHAN LAL *v.* KANHAIYA LAL. **1938 A.M.L.J. 91.**

——S. 2 (11)—*Legal representative—Claim as—Position as regards a rival claimant.*

Where a person, not in possession of the property of a deceased person, claims it as the legal representative of that person, the fact that a rival claimant has not taken possession of the property, cannot assist him to claim as legal representative. His duty is to take possession of the estate. (*Wort, J.*) JADUNATH MITRA *v.* ISAR JHA. **178 I.C. 198=5 B.R. 65=11 R.P. 229=A.I.R. 1939 Pat. 47.**

——S. 2 (11)—*Legal representative—Decree against holder of impartible estate for compensation in lieu of specific performance—Death of the holder and devolution of estate on his son—Decree, if executable against him as legal representative.*

Where a decree for compensation in lieu of specific performance is passed against a holder of an impartible estate and on his death the estate devolves on his son, he is legal representative of the deceased judgment-debtor and the decree could be executed against the estate. (*Stone, C.J. and Bose, J.*) RAO BHIMSINGH *v.* GANGARAM. **1940 N.L.J. 275.**

——S. 2 (11)—"Legal representatives"—Meaning of—Joint Hindu family—Death of manager—Surviving coparceners—If legal representatives. *See* NEGOTIABLE INSTRUMENTS ACT, S. 8. **40 Bom.L R. 964.**

——S. 2 (11)—*Legal representative—Member of a joint Hindu family.*

There is no doubt that in a joint Hindu family the law of inheritance does not apply to the joint family property, and on the death of a coparcener the property passes to the remaining coparceners by right of survivorship; but even in a joint family a coparcener may be possessed of separate property which will be governed by the law of succession and in such a case a member of the joint Hindu family can be added as legal representative under S. 2 (11), C. P. Code. (*Thom, C.J., Alsop and Ganga Nath, JJ.*) RAM UGRAHA-JHA *v.* GANESH SINGH. **I.L.R. (1940) All. 153=186 I.C. 542=12 R.A. 412=1940 O.L.R. 132=1940 A.L.J. 32=1940 A.W.R. (H.C.) 45=A.I.R. 1940 All 99 (F.B.).**

——S. 2 (11)—*Legal representative—Mere intermeddling with estate—Sufficiency.*

Mere intermeddling with the estate of a deceased person would not give the intermeddler the status of a legal representative. (*Pollock, J.*) BALKISAN *v.* MST. JATNABAI. **I.L.R. (1939) Nag. 526=177 I.C. 531=11 R.N. 146=1938 N.L.J. 168=A.I.R. 1938 Nag. 298.**

——S. 2 (11)—*'Legal representative'—Person who is not lawful heir.*

Where a mortgage decree-holder has died leaving her daughter as lawful heir and collaterals who are not lawful heirs, the collaterals cannot be considered to be legal representatives of the deceased within the definition of that term given in S. 2 (11) if they are not shown to be in possession, of the property which is the subject of the mortgage. Moreover, even if they are in possession the definition cannot help them. Because a person who has merely managed to obtain unlawful possession of the property of a deceased person should not be entitled to execute decrees in favour of the deceased on the strength of such possession, when he is not the lawful heir. A person who intermeddles with the property of a deceased person has been probably included in the definition of a 'legal representative' in the Civil Procedure Code merely to enable persons who wish to obtain relief against the property to proceed against it in the hands of such a person. This cannot affect the substantive rights of the lawful heirs. A.I.R. 1924 All. 717, Rel. on. (*Bhide, J.*) JAI KISHEN DAS *v.* KARIMUDDIN. **41 P.L.R. 814=A.I.R. 1939 Lah. 321.**

——S 2 (11)—*Legal representative—Scope of the definition—If restricted to legal heir—Coparcener getting property by survivorship—If covered by definition.*

In order to be a legal representative under S. 2 (11), C. P. Code, it is not necessary that a person should be a legal heir of the deceased person. The last portion of the section is wide enough to cover the case of a coparcener who gets property by survivorship on the death of a coparcener who sues or is sued in a representative character. (*Ganga Nath, J.*) GYAN DATT *v.* SADA NAND LALL. **174 I.C. 307=10 R.A. 560=1938 A.L R. 264=1938 A.L.J. 56=1938 A.W.R. (H.C.) 58=A.I.R. 1938 All. 163.**

——S. 2 (11)—*Scope—If controls O. 22, R. 5—Intermeddler—Right to be impleaded in preference to true legal representative.*

When more than one person claim to be the legal representatives of a deceased, the Court under O. 22, R. 5, C. P. Code, is required to decide which of the rival claimants is in fact the legal representative. An intermeddler with the estate, though a "legal representative" as defined by S. 2 (11), C. P. Code, is not entitled to be preferred to a person who is found to be the true legal representative. (*Agarwala, J.*) SURAJ PRASAD *v.* LUKHER KUER. **180 I.C. 812=11 R.P. 540=5 B. R. 495=1938 P.W.N. 803=A.I.R. 1939 Pat. 117.**

——S. 2 (11)—Suit against wrong legal representative—Decree—Binding nature of—Duty of plaintiff in such cases. *See* C. P. CODE, S. 50. **40 P.L.R. 25.**

——S. 2 (12) — *Construction—'Wrongful', meaning of.*

The word 'wrongful' in S. 2 (12) of C. P. Code is used in a special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it, is in wrongful possession as against that party for certain purposes including mesne profits, but not wrongful for all purposes. (*Bose, J.*) RAMNATH HAJARIMAL *v.* MOHANLAL RADHAKISAN. **181 I.C. 106=11 R.N. 424=1939 N.L.J. 21=A.I.R. 1939 Nag. 23.**

——S. 2 (12) —*Mesne profits—Interest—Proper rate.*

When there is no mention as to the rate of interest that should be allowed on the amount of mesne profits, nor is there any stipulation in the contract bearing on the subject the rate is in the discretion of the Court but that discretion should proceed on sound principles. The rate of interest depends on a variety of circumstances, but in the absence of special circumstances, which would justify the Court to award a higher rate of interest, interest at a uniform rate of 6 per cent. per annum is the reasonable rate of interest which should be allowed for the whole period during which the person entitled to mesne profits was deprived of the use of the money which was due to him. In the absence of a statutory provision or a special contract, there is no reason to make any distinction between the rate of interest payable on mesne profits up to the date of delivery of possession and the rate of interest thereafter and there is no valid ground for awarding interest at a higher rate during the period prior to such delivery of possession and at a lower rate thereafter. A.I.R. 1935 P. C. 49, Rel. on. (*Sir Shadi Lal.*) KEDARNATH GOENKA *v.* MAHARAJ KUMAR BABU BAGESHWARI PRASAD SINGH. **64 I. A. 240=16 Pat. 382=168 I.C. 145=1937 O.L. R. 260=1937 A.W.R. 1017=39 Bom.L.R. 782=1937 A.L.J. 1051=41 C.W.N 809=1937 P.W. N. 434=9 R.P.C. 265=65 C.L.J. 374=3 B.R. 470 =46 L.W. 67=1937 O.W.N. 694=1937 A.L.R. 353=31 S.L.R. 360=1937 M.W.N. 712=18 Pat. L.T. 401=A.I.R. 1937 P.C. 143=(1937) 2 M.L. J. 202 (P.C.).**

——**S. 2 (12)**—*Mesne profits—Liability for—Auction-purchaser — Position, with reference to.*

The mere fact that possession was obtained through the instrumentality of the Courts, by an auction-purchaser would not avail either the decree-holder or the auction-purchaser as against persons who were not parties to the decree. So far as they are concerned the rule of *caveat emptor* applies and the auction-purchaser even though a stranger to the decree under which he purchased, would have to yield up possession provided he also was not a party to the decree. That being so the rule about mesne profits could not be otherwise. (*Bose, J.*) RAMNATH HAJARIMAL *v.* MOHANLAL RADHAKISAN. **181 I.C. 106 =11 R.N. 424=1939 N.L.J. 21=A.I.R. 1939 Nag. 23.**

——**S. 2 (12)**—*Possession referable to title as purchaser at revenue sale—Liability for mesne profits.*

A large number of proprietors, who owned specific but undivided shares in a mahal, availed themselves of the provisions of the Bengal Land Revenue Sales Act, with the result that the Collector opened separate accounts with them in respect of their liabilities for the payment of their shares of the land revenue. A large area of the estate, however, remained ijmali or joint share, and the owners of the ijmali share were still jointly liable for the payment of the land revenue in respect of it. In 1901 there was an arrear of land revenue payable in respect of the joint share and the Collector then sold the share by auction. The appellant's father purchased the same at auction and took possession in 1902. Thereupon the respondents with some of their co-sharers in the joint share brought a suit in the Civil Court for the annulment of the sale and for possession of the property sold. They obtained a decree for possession with mesne profits. In 1876 some proceedings for the partition of the mahal were commenced but were not concluded till 1908. The respondents were awarded on partition three villages in lieu of their share in the mahal. The respondents had 6 annas and odd interest in these three villages which were put to sale in 1901 and purchased by the appellant's father and the remaining interest stood to their separate account. The appellant's father on purchase

took possession of the whole of one of the three villages only and not of the other two. In 1915 the appellant was entered as co-sharer in respect of 6 annas share in the three villages, while the respondents were entered as co-sharers in respect of remaining interest. On obtaining the decree in the suit, the respondents sought to execute the decree and obtained possession of the land in 1908. They further sought to recover the mesne profits.

Held, that during the period from 1908 when the partition was completed and the time when the appellant was recorded as co-sharer in 1915, the possession of the appellant of the village in question was referable only to his title as purchaser at the revenue sale and he received profits on that basis only, and not as a trespasser. The appellant was therefore liable to the respondents for the mesne profits of the whole of the village he was in possession during the period mentioned above. (*Sir Shadi Lal.*) KEDARNATH GOENKA *v.* MAHARAJ KUMAR BABU BHAGESHWARI PRASAD SINGH. **64 I.A. 240=16 Pat. 382=1937 A.L.R. 353=168 I.C. 145=1937 O.L.R. 260=18 Pat.L. T. 401=41 C.W.N. 809=1937 P.W.N. 434=9 R.P.C. 265=65 C.L.J. 374=3 B.R. 470=46 L. W. 67=31 S.L.R. 360=1937 M.W.N. 712=1937 O.W.N. 694=39 Bom. L.R. 782=1937 A.W.R. 1017=1937 A.L.J. 1051=A.I.R. 1937 P.C. 143=(1937) 2 M.L.J. 202 (P.C.).**

——**S. 2 (12)**—*Wrongful possession—If implies possession obtained by improper Act.*

It is not necessary that possession in order to be wrongful for purposes of a claim for mesne profits, must have been obtained in consequence of some improper Act. (*Bennet and Verma, JJ.*) TULSI RAM *v.* GOBIND SINGH. **184 I.C. 91=12 R. A. 175=1939 R.D. 292=1939 A.L.J. 433=1939 A.W.R. (H.C.) 344=A.I.R. 1939 All. 529.**

——**S. 2 (17) (e)**—'Public officer'—Agent of Railway Company—Railways Act, S. 131. *See* EVIDENCE ACT, S. 124. **43 C.W.N. 664**

——**S. 2 (17)**—Elected member of Provincial Legislature—If public officer. *See* C. P. CODE, O. 21, RR. 48 AND 46—SALARY OF M.L.A.—LIABILITY TO ATTACHMENT. **69 C.L.J. 267=43 C.W.N. 512.**

——**S. 2 (17) (g) and (h)**—'Public officer'—Court of Wards manager. *See* C. P. CODE, S. 80. **43 C.W.N. 1212.**

——**S. 2 (17) (h)**—Public officer—Liquidator of a Co-operative Society—If one. *See* C. P. CODE, Ss. 80 AND 2 (17) (*h*). **1939 N.L.J. 215.**

——**(Second Amendment Act IX of 1937), S. 3**—*Insolvency case—If a proceeding arising out of suit.*

An insolvency case cannot be described as a suit or any proceeding arising out of it within the meaning of S. 3. (*Mukherjea and Biswas, JJ.*) JNANENDRA KUMAR *v.* AKASH CHANDRA. **177 I. C. 352=11 R C. 233=A.I.R. 1938 Cal. 325.**

——**S. 3 (17)**—Public officer—Liquidator of Co-operative Society appointed by Registrar of Co-operative Societies. *See* C. P. CODE, S. 80. **52 L.W. 131=(1940) 2 M.L.J. 241.**

——**Ss. 4 and 9**—*Money attached by order of Criminal Court—Declaratory suit in Civil Court—Maintainability.*

Where certain Jagir money is attached by a Magistrate for realisation of arrears of maintenance due under an order under S. 488, Cr. P.

Code, a suit in the Civil Court for a declaration that the money attached is not liable to seizure, attachment or sequestration in satisfaction of an order of the Criminal Court is not maintainable, as the Civil Court has no jurisdiction to go into the matter. (*Tek Chand, J.*) NATHA SINGH *v.* MT. BACHINT KAUR. **39 P.L.R. 100=169 I.C. 944=10 R.L. 65=A I.R. 1937 Lah. 367.**

———S. 6—*Scope—Incidental issue in suit as to property of value exceeding pecuniary jurisdiction of Court—Power to try.*

There is no warrant in the Code for saying that a Court cannot try incidentally an issue as to property the value of which is beyond its jurisdiction. All that S. 6, C. P. Code, says is that no Court shall have jurisdiction over suits the value of which exceeds the limits of its pecuniary jurisdiction. It is the valuation of the suit and not of an incidental issue raised by the defence which determines the jurisdiction. (*Mosely, J.*) A.M. K.M. CHETTYAR FIRM *v.* MA SHWE EIN. **169 I.C. 933=10 R.R. 40=A.I.R. 1937 Rang. 219.**

———S. 6—*Scope of—'Suits' if includes proceedings in execution.*

S. 6. C. P. Code, governs the whole Code, that is to say, the word 'suits' means not only all proceedings up to the stage of decree, but includes, proceedings in execution. Its position, appearing as it does under the part headed 'preliminary' indicates that it is designed to govern the whole Code. (*Stone, C.J. and Bose, J.*) NILKANTHRAO *v.* KRISHNARAO. **1940 N.L.J. 244.**

———S. 9—*Bar of civil suit—Burden of proof—Owner of land—Infringement of right by acts done under colour of statute—Suit for declaration—If barred.*

Where person's right as owner of land is invaded by proceedings taken under colour of a statute he is entitled to sue in a Civil Court for a declaration of his right and for an injunction to protect it. Where the statements in the plaint sufficiently comply with the provisions of O. 7, R. 1, sub-Cl. (*f*), C. P. Code, the terms of S. 9, C. P. Code, lay down a general rule in favour of the jurisdiction of a Civil Court and the burden of proof is on the party who maintains an exception to the general rule. (*Venkataramana Rao, J.*) SEESAI ODAYAR *v.* SWAMINATHA IYER. **165 I. C. 508=9 R.M. 266=44 L.W. 334=1936 M. W. N. 900=A I.R. 1936 Mad. 522=71 M.L.J. 227.**

———S. 9—Bar of suit—Right of landlord to recover balance of transfer fee—Suit to enforce—Maintainability—B. T. Act, Ss. 26-J and 188, proviso (1). *See* B. T. ACT, Ss. 26-J AND 188, PROVISO (1). **63 C.L.J. 105.**

———S. 9—*Denial of right of inheritance—Cause of action.*

A suit merely to declare a person an heir does not lie. A.I.R. 1928 Lah. 831, Rel. on. Plaintiff alleged in the plaint that the widow of *A* who upon the death of her husband took only a life tenancy in her husband's property, colluded with defendant 3 and that he had got his name entered in the column of ownership in the Municipal register, as owner of some of the property with the object of depriving the plaintiff of his share in the property of *A* which would come to him after the death of the widow. The plaint further stated that the widow had been asked to admit plaintiff's right of succession on her death but she did not agree and hence the plaintiff had brought the suit for a declaration that the entries in the column of the ownership in the register should be null and void.

Held, that the denial of plaintiff's right of inheritance as evidenced by the entries did not furnish a cause of action and hence the suit was liable to be rejected. (*Dalip Singh and Skemp, JJ.*) GHULAM MOHY-UD-DIN *v.* MT. RUQIYA. **41 P.L.R. 615=A.I.R. 1939 Lah. 158.**

———S. 9—If bars suit against Municipality for recovery of tax illegally recovered. *See* U. P. MUNICIPALITIES ACT, S. 164 AND C. P. CODE, S. 9. **1939 A.W.R. (H.C.) 230.**

———S. 9—*Jurisdiction conferred by—Provincial Legislature, if can take away.*

S. 9, C. P. Code, itself postulates the barring of jurisdiction of Civil Courts by a competent legislature with respect to particular class of suits of a civil nature. It is, therefore, open to a Provincial Legislature to bar the jurisdiction of Civil Courts with respect to particular class of suits, provided in doing so it keeps itself within the field of legislation confided to its charge and does not contravene any provision of the constitution Act. (*Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.*) ATIQA BEGAM *v.* ABDUL MAGHNI KHAN. **188 I.C 586=3 Fed.L.J. (H.C.) 83=1940 A.W. R. (H.C.) 208=1940 A.L J. 274=1940 R.D. 135 =A.I.R. 1940 All. 272 (F.B.).**

———S. 9—Jurisdiction—Mahant of math—Disqualification or removal for bad behaviour—Power of Civil Court. *See* RELIGIOUS ENDOWMENT—MATH. **39 Bom.L.R. 867.**

———S. 9—Jurisdiction of Civil Court—Removal of Mahant from religious duties. *See* C. P. CODE, S. 92. **44 C.W.N. 177 (P.C.).**

———S. 9—*Municipal Committee vested by statute with power to improve drainage—Its act, if can be questioned in Civil Court.*

Where a Municipal Committee is invested by statute with power of executing works for improving the drainage of the town, it is for the Committee to determine as to how the work can best be done, and any act done or intended to be done by it in furtherance of this object can only be questioned in a Civil Court if it is shown that the Committee is not acting *bona fide* or that the act complained of is oppressive, wanton and capricious. (*Tek Chand, J.*) CHATAR BHUJ *v.* MUNICIPAL COMMITTEE, BHAWANI. **172 I.C. 336=10 R.L. 298=39 P.L.R. 480=A.I.R. 1937 Lah. 252.**

———S. 9—*Order of Revenue Courts—Suit to declare as without jurisdiction—If lies.*

No civil suit lies for mere declaration that a decree of a Revenue Court was without jurisdiction. (*Bennet, J.*) JIT SINGH *v.* GHETLU. **182 I.C. 911=12 R.A. 66=1939 R.D. 363=1939 A.L. J. 382=1939 A.W.R. (H. C.) 404=A. I. R. 1939 All. 446.**

———S. 9—*Provision for special remedy—If bars right of suit.*

Where a right of action exists, a suit is maintainable to enforce that right independently of the special remedies provided by the Code. (*Cornish, J.*) RAMAYYA *v.* KOMARAPPA. **160 I.C. 209=1935 M.W.N. 1207=8 R.M. 614=43 L.W. 262=A.I.R. 1936 Mad. 421.**

——S. 9—Revocation of probate—Suit for—Jurisdiction of High Court. *See* LETTERS PATENT (CALCUTTA), CL. 12. **I.L.R. (1940) 1 Cal. 14.**

——S. 9—*Statutory body—Infringements of civil rights of—Remedy—Jurisdiction of Civil Court.*

The District Board in whom the property in respect of public streets, is vested, in however limited a manner, have a right to see that their civil rights in respect of these are not affected by the use of those roads, by persons who have not obtained the necessary authority or permission. As such there is no reason why the District Board should not bring a suit for damage caused to its roads by the unauthorised use. (*Horwill, J.*) PRESIDENT, DISTRICT BOARD, KISTNA *v.* LAKSHMAYYA. **177 I.C. 126=11 R.M. 252=1937 M.W.N. 1223 (2)=A.I.R. 1938 Mad. 227=(1938) 1 M.L.J. 391.**

——S. 9—Suit for a declaration that certain debts shown by a debtor as due to creditors are baseless and fictitious and for an injunction to restrain the alleged creditors from proving their debts before the Debt Conciliation Board—Civil Court—If impliedly barred from entertaining such a suit. *See* PUNJAB RELIEF OF INDEBTEDNESS ACT (VII OF 1934), S. 21 (*a*) (i). **39 P.L.R. 891.**

——S. 9—*"Suit of a civil nature"—Claim by temple archakas to prostrate twice before deity during service—Trustees forbidding archakas to prostrate more than once on pain of dismissal—Suit by archakas—Maintainability.*

A suit by archakas of temple who are hereditary officeholders and temple servants to establish their right to prostrate themselves twice before the deity while performing certain ceremonies as archakas, as they had been doing from time immemorial, is one of a civil nature. The act of the trustee in directing the archakas to prostrate only once and not twice on pain of dismissal is an outrage on their religious sentiment and gives rise to a cause of action for suit. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——S. 9—*"Suit of civil nature"—Claim to* Veda-parayanam *miras in temple with emoluments and honours attached.*

A suit in which a claim is made in respect of a religious office, called *Vedaparayanam* miras to which certain emoluments and honours appertain, is a suit of a civil nature, and can be taken cognizance of by the Courts. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——S. 9—*'Suit of civil nature'—Communal festival in public temple—Suit by members of community in respect of ritual observances—Jurisdiction of Court.*

The Civil Courts have no jurisdiction to decide matters of ritual except in so far as a decision on such matters is a necessary incident to the decision of a civil right. The general rule is that once the general right to worship is conceded or established, the Courts will not endeavour to lay down the ritual which is to be followed, nor will they prescribe the manner in which the worship is to be conducted. Certain members of the Sen-guntha community in a village sued to establish rights known as *Kappu Kattu* and *Diparathana* in a public temple. It appeared that the claim related to certain ritual observances in the cummunal festival, but neither the right to worship nor the right to any office or perquisites attaching thereto was in issue.

Held, that the suit was not a suit of a civil nature and could not therefore be entertained by the Court. (*Wadsworth, J.*) NARAYANA MUDALI *v.* PERIYA KALATHI MUDALI. **185 I.C. 239=12 R.M. 534=1939 M.W.N. 273=49 L.W. 295=A.I.R. 1939 Mad. 494=(1939) 1 M.L.J. 199.**

——S. 9—*Suit of "civil nature"—Dispute as to mode of placing jewel with mark on deity—Suit in respect of—If lies.*

A dispute as to the way in which a particular jewel with a particular mark should be placed on the God or Goddess in a temple, is one in respect of a trivial matter of religious observance and no right of a civil nature is involved in it. A suit in respect of such a matter is not maintainable under S. 9, C. P. Code. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——S. 9—*Suit of a "civil nature"—Dispute as to propriety of placing namam or mark on Godhead—Jurisdiction of Court.*

A question as to whether a particular namam or mark should be placed on the Godhead is at best one pertaining to religious ritual and as such is excluded from the cognizance of a Civil Court. To allow it to be tried would amount to an abuse of the process of the Court. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——S. 9—*Suit of "civil nature"—Right of worship.*

A suit does not cease to be one of a civil nature because in order to decide it, the Court has to decide questions as to religious rites or ceremonies. The right of worship is a civil right which the Court will take cognizance of. (*Venkatasubba Rao and Abdur Rahman, JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——S. 9—*Suit of a "civil nature"—Right to office—Test—Right to lead horse on particular festival in temple—If office or mere honour—Suit in respect of—Maintainability.*

One test which is necessary to constitute an office is a corresponding compellable duty; but if that is absent there is no office but only an honour which cannot be made the subject of a suit by reason of S. 9, C. P. Code. A right to lead a horse on a particular festival in a temple whenever that festival is performed, cannot be held to be a right to an office, when there is no compellable duty on the part of the claimant. (*Leach, C.J. and Somayya, J.*) RAMASWAMI GOUNDAN *v.* LAKSHMANA REDDI. **I.L.R. (1940) Mad. 40=186 I.C. 437=12 R.M. 633=50 L.W. 206=1939 M.W.N. 792=A.I.R. 1939 Mad. 886=(1939) 2 M.L.J. 420.**

——S. 9—*Suit of a "civil nature"—Service in temple and prayer—Right to stand in particular position—Suit to declare—Maintainability.*

It is unquestionable that the Civil Courts in India have no ecclesiastical jurisdiction and that they cannot decide questions of ritual except in so far as the decision of such questions is a necessary incident to the decision of civil rights. It is well established that a right to worship in a particular temple is a civil right and that a right to perform a religious office to which obligations and emoluments are attached is also a civil right. It has been recognised that the Court in adjudicating on a right of worship or a right to a religious office not infrequently is obliged to decide incidentally questions of ritual; but it follows that the Court will not, on a mere pretence that a right to worship has been infringed, arrogate to itself a jurisdiction which it does not possess to prescribe forms of prayer, rights to religious precedence and questions of that nature. The Civil Courts have neither the prayer nor the duty to attempt to draft a prayer book for a temple. A Civil Court cannot also be required to declare the rights of persons to stand in any particular show of the congregation. (*Wardsworth, J.*) Appadorai Ayyangar *v.* Annangarachariar. **183 I.C. 258=12 R.M. 247=1938 M.W.N. 1206=48 L.W. 722=A.I.R. 1939 Mad. 102=(1939) 1 M.L.J. 124**

———S. 9—*Suit of a "civil nature"—Suit to declare right to first honours at a festival in a temple—Maintainability.*

A claim to first honours at a festival in a temple is only a right to a dignity or precedence and cannot be regarded as a right of civil nature, whether it is in a temple or elsewhere so long as it was not attached to an office. A suit in respect of such a right is not maintainable. (*Pandrang Row and Abdul Rahman, JJ.*) Thathachariar *v.* Srinivasaraghava Iyengar. **173 I.C. 986=10 R.M. 654=47 L.W. 459=1938 M.W.N. 18 (2)=A.I.R. 1938 Mad. 334=(1938) 1 M.L.J. 174.**

———S. 9—*Suit of "civil nature"—Temple honours—Right to obtain theertham and honours in particular order of precedence—If subject of civil suit.*

The right to obtain theertham or honours in a particular order of precedence in a temple is not a civil right which can be enforced or declared in a Civil Court. (*Pandrang Rao, J.*) Sri Emberumanar Jeer Swamigal *v.* Hindu Religious Endowment Board, Madras. **166 I.C. 256=9 R.M. 355=1936 M.W.N. 954=44 L.W. 539=A.I.R. 1936 Mad. 973=71 M L.J. 588.**

———S. 9—*Special tribunal appointed by statute—Civil Court's jurisdiction.*

Where a special tribunal, out of the ordinary course, is appointed by an Act to determine questions as to rights which are the creation of that Act, then, except so far as otherwise expressly provided or necessarily implied, that tribunal's jurisdiction to determine those questions is exclusive. (*Roberts, C.J., Dunkley and Braund, JJ.*) H.C. Dey *v.* Bangalee Young Men's Co-operative Credit Society, Ltd. **178 I.C. 674=11 R.R. 259=1939 Rang.L.R. 50=A.I.R. 1938 Rang. 392 (F.B.).**

———S. 9—*Taxation by local self-governing body—Jurisdiction of Civil Court.*

Suits are of civil nature if they are suits between subject and subject dealing with civil rights. A suit for a declaration that the assessment of town-tax by a Panchayat is illegal and *ultra vires* is not between subject and subject but between a subject and a branch of a Local Self-Government and it does not deal with civil rights but it deals with a question of taxation, and as such is not a suit of civil nature and Civil Courts have jurisdiction in a suit of that nature. 27 Cal. 849, Dist. (*Sulaiman, C.J. and Bennet, J.*) Sheo Narain *v.* Town Area Panchayat, Chhibraman. **1935 A.L.R. 1209=1936 A.L.J. 33=1936 A.W.R. 107=159 I.C. 897=8 R.A. 523=A.I.R. 1936 All. 117.**

———S. 9, Expl.—*"Office"—Right to lead horse and hold Kalasum at Amman festival and to receive honours—If office—Absence of financial remuneration or other duties attached—If material—Suit claiming such rights—Maintainability.*

A claim to a right to lead a horse and the right of holding a Kalasam at the time of an Amman festival, by persons who are not temple servants, and to receive as reward for these religious offices the honours, such as ceremonial gifts of pansupari before any other worshippers received them, is a claim to an office within the meaning of the explanation to S. 9, C. P. Code. The fact that the claimant does not receive any remuneration or any financial value or that the office may be in abeyance whenever no festival is being held or that it has no other duties attached to it cannot prevent it from being the performance of the duties of an office. A suit claiming the said rights is therefore maintainable under S. 9. (*King, J.*) Ramalingachi Reddi *v.* Elayaperumal Goundan. **1937 M.W.N. 143 (2)=10 R.M. 381=171 I.C. 684=45 L.W. 384=A.I.R. 1937 Mad. 403.**

———S. 10—*Applicability—Court in which previously instituted suit pending—If should be competent to grant relief claimed in later suit—"Relief claimed"—If refer to earlier suit or later suit.*

For the application of S. 10, C. P. Code, it is necessary that the Court in which previously instituted suit is pending must be a Court of jurisdiction competent to grant the relief claimed in the subsequent suit. The words "relief claimed" in the section should apply to the suit which is to be stayed and not to the earlier suit. (*Pandrang Row, J.*) Somasundaram Chettiar *v.* Venkatasubbayya. **177 I.C. 102=11 R.M. 248=1938 M.W.N 353=47 L.W 525=A.I.R. 1938 Mad. 602=(1938) 1 M.L.J. 873.**

———S. 10—*Applicability—Parties neither same, nor litigating under same title.*

Where the parties to the two series of litigations are not the same and they are not suing under the same title, either of the suits could not be stayed under S. 10, C. P. Code. (*Darling, S.M. and Mehta, J.M.*) Ram Lal *v.* Nawal Kishore. **1938 R.D. 935 (1)=1939 A.W.R. (B.R.) 60.**

———S. 10—*Applicability and scope—"Matter in issue"—Meaning—Suit and appeal concerning same plot of land but in respect of rents of different periods—Stay—If to be granted.*

The provisions of S. 10, C. P. Code, are mandatory in character and when the facts of a particular case involve the operation of that section, the Courts have no other alternative but to give effect to it and stay the suit. The expression "matter in issue" does not mean any matter in issue in the suit but refers to the entire subject-matter in dispute, and not merely to one of the issues, however important it may be for the decision of the suit. Where an earlier appeal and a subsequent suit between the same parties relate to the same piece of land, that fact alone cannot be a ground for stay under S. 10, C. P. Code, when the amount claimed in the later suit is for a different period from that claimed in the former suit out of which the appeal has arisen. The matters in issue are not the same in both and hence S. 10 does not apply. (*Abdur Rahman, J.*) Munuswami Mudaliar *v.* Raghupathi. **50 L.W. 334=1939 M.W.N. 793=(1939) 2 M.L.J. 290=A.I.R. 1940 Mad. 7.**

——**S.** 10—Applicability and scope—Partition proceedings in Revenue Court—Suit in Civil Court as to title—Procedure—Trial when barred. *See* U. P. Land Revenue Act, Ss. 111 and 233 (*k*). **1936 R.D. 128.**

——**S. 10 and Succession Act (1925), S. 295**—*Applicability of S. 10, C. P. Code, to proceedings under S. 295 of the Succession Act—Applications for probate and caveats filed in different Courts on different dates—Which of the rival suits is 'previously instituted'—Test to be applied.*

Where in respect of the same will two applications for probate were made by different persons to different Courts on different dates and caveats were also filed in both Courts on different dates and an application was made by one of the applicants for probate to one of the Courts for stay of the proceedings in that Court. Under S. 10, C. P. Code, it was held that S. 10, C. P. Code, was not in terms applicable to proceedings under S. 295, Succession Act, for they were not 'suits' and that even assuming it applied in principle, it would not be possible as between rival applications for probate, to treat as the date of the institution, the date on which the caveator might have chosen to allow the proceedings to become contentious. It was further held that the only date which could be regarded as the date of institution for the purpose of deciding which of the two rival 'suits' was 'previously instituted' must be the date on which the petition was filed. The principle governing such cases was stated by his Lordship to be that any application which is subsequently converted into a plaint or is to be treated as a plaint and the foundation of a suit must be considered to date back as a plaint to the date on which it was filed as an application. (*Yorke, J.*) *In re* Violet Perterson. **15 Luck. 290=12 R.O. 224=185 I.C 377=1940 O.W.N. 1=1940 O.A. 35=1940 A.W.R. (C.C.) 28=A.I. R. 1940 Oudh 113.**

——**S.** 10—*'Matter in issue'—Meaning of.*

The expression 'matter in issue' in S. 10 of C. P. Code has reference to the entire subject-matter in controversy between the parties, and is not equivalent to 'any of the questions in issue'. The section does not bar the trial of a suit for rent for a period subsequent to that included in the previously instituted suit which is pending, although the same question may be involved in both the suits. A.I.R. 1917 Cal. 248, Foll. (*Abdul Rashid, J.*) Roshan Din *v.* Malan Bibi. **178 I.C. 821=11 R.L. 493=A.I.R. 1938 Lah. 502.**

——**S.** 10—*Pendency of suit—Judgment pronounced but decree not drawn up—Suit, if still pending.*

A suit was referred to arbitration and the arbitrators submitted an award. The Court directed that the award would be made part of the decree. No decree, however, was drawn up as the necessary stamps were not filed.

Held, that the suit was still pending. (*Henderson, J.*) Girish Chandra Sen *v.* Brajalal Sen. **71 C.L.J. 190.**

——**S.** 10—*Scope and effect of—Bar under—Waiver of by parties—Effect.*

The institution of a second suit is not barred by S. 10; all that it says is that the trial of the suit cannot be proceeded with. It is consequently a rule of procedure pure and simple and rules of procedure in civil cases can be waived with the consent of the parties. When the parties expressly ask the Court to proceed along with a subsequent suit, neither side can afterwards turn round and challenge the validity of these proceedings because of S. 10. (*Bose, J.*) Gangaprashad *v.* Mst. Banaspati. **I.L.R. (1937) Nag 6=173 I.C. 124=10 R.N. 280=A.I.R. 1937 Nag. 132.**

——**S.** 10—*"Suit"—Includes appeals.*

Obiter.—In S. 10 which is closely connected with S. 11, "suit" must include appeal. The section refers to suits pending before His Majesty in Council. (*Davis, J.C. and Tyabji, J.*) Badaldas *v.* Gurdinomal. **I.L R. (1940) Kar. 15=186 I.C. 533=12 R.S. 203=A.I.R. 1939 Sind 329.**

——**S. 10 (as amended by Government of Burma Adaptation of Laws Order, 1937)**—*Retrospective effect—Power of Courts in British Burma to stay suits before them by reason of pendency of suits founded on same cause of action in British India.*

According to S. 10, as amended by the Adaptation of Laws Order, 1937, the Courts in British Burma have no power to stay suits before them by reason of the pendency of suits founded on the same cause of action in British India. The amendment to S. 10 being an alteration in the form of procedure has a retrospective effect. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) Arunachalam Chettyar *v.* Valliappa Chettyar. **1938 Rang. L.R. 176=175 I.C. 275=10 R.R. 474=A I.R. 1938 Rang. 130 (F.B.).**

——**S. 11—RES JUDICATA.**

- **Adverse finding.**
- **Applicability.**
- **Arbitration proceedings.**
- **Causes of action different.**
- **Co-defendants.**
- **Competent Court.**
- **Compromise decree.**
- **Conflicting decrees.**
- **Connected appeals, cases or suits.**
- **Consent decree or order.**
- **Constructive** *res judicata.*
- **Co-plaintiffs.**
- **Decision on question of law.**
- **Directly and substantially in issue.**
- **Erroneous decision.**
- **Execution proceedings.**
- *Ex parte* **decree.**
- **Findings.**
- **Former suit.**
- **Heard and finally decided.**
- **Insolvency proceedings.**
- **Jurisdiction.**
- **Landlord and tenant.**
- **Litigating under same title.**
- **Might and ought (***See* **Explanation IV).**
- **Miscellaneous proceedings.**

Mortgages.
Parties and representatives.
Plea of.
Prior decision.
Pro forma defendant.
Representative suit (*See* Explanation VI).
Scope.
Successive suits for same relief.
Explanation IV—Might and ought.
Explanation V.
Explanation VI—Representative suit.

Adverse finding.

——S. 11—*Adverse finding—Decision favourable—Not* res judicata.

A finding adverse to a defendant in a suit cannot be treated as *res judicata* if the suit be dismissed. (*James and Rowland, JJ.*) BAIJNATH SAHU *v.* JAIMANGAL PRASAD SINGH. **164 I.C 851=9 R.P. 139=A I.R. 1937 Pat. 56.**

——S. 11—*Adverse finding—No appeal or cross-objection filed*—Res judicata.

Where a point which was specifically raised in the pleadings was found by the trial Court against the defendant respondent, and no appeal was preferred by him against that finding nor was any cross-objection filed in the appeal brought by the plaintiff, the point is *res judicata* between the parties. (*Zia-ul-Hasan, J.*) BADRUL NISSA *v.* MUZAFFAR HUSAIN. **1937 O.W.N. 429.**

——S. 11—*Adverse finding*—Res judicata.

Where the previous judgment contains an adverse finding against a party but the decree is wholly in his favour, he has no right of redress against the finding by way of appeal, so such a previous finding cannot operate as *res judicata* in a subsequent suit. (*Srivastava, C.J.*) PATESHWARI DIN *v.* SARJU DASS. **171 I.C. 596=10 R.O. 137=1937 O.L.R. 567=1937 O.W.N. 1127=A.I.R 1938 Oudh 18.**

——S. 11—*Adverse finding on one issue against successful party—If* res judicata.

Any issue decided by a Court in favour of the plaintiff whose suit is ultimately dismissed on another ground cannot operate as *res judicata* as against the defendant in a subsequent suit. (*Niamatullah and Rachhpal Singh, JJ.*) PARATHNATH *v.* RAMESHWAR PRATAP SAHI. **177 I.C. 373=11 R.A. 190=1938 A.L.J. 834=1938 A.W. R. (H.C.) 610=1938 A.L.R. 739=A.I.R. 1938 All. 491.**

Applicability.

——S. 11—*Applicability—Assessment proceedings under Income-tax Act*—Res judicata—*Income-tax Officer—If "Court"*.

The doctrine of *res judicata* cannot operate in respect of an assessment to tax made by an Income-tax Officer. The Income-tax Officer is not a Court, and therefore the doctrine has no application. His assessments are, however, final, unless they can be reopened under some provision of the Income-tax Act. (*Leach, C.J., Varadachariar and King, JJ.*) TRICHY TENNORE H. P. FUND, LTD. *v.* COMMISSIONER OF INCOME-TAX, MADRAS. **I L.R. (1938) Mad. 183=1938 M.W.N. 171=173 I.C. 998=10 R.M. 648=5 I.T.R. 703=47 L.W. 24=A.I.R. 1938 Mad. 148=(1938) 1 M.L.J. 130 (F.B.).**

——S. 11—Applicability—Applications under S. 20-A, Madras Estates Land Act. *See* MADRAS ESTATES LAND ACT, S. 20-A. (1939) **2 M.L.J. 292.**

——S. 11—*Applicability to appeals—Connected suit in different Courts—Absence of appeal against decision in one—Effect on appeal from the other.*

The rule of *res judicata* contained in S. 11 applies to appeals as well as to trials in original Courts. Hence, where pending a suit between certain parties in certain Court another suit is instituted in another Court between the same parties and relating to same subject-matter and the decision of latter Court becomes final, there being no appeal from it, an appeal from the decision of first Court is barred by *res judicata*. (*Davis, J.C. and Tyabji, J.*) BADALDAS *v.* GURDINOMAL. **I.L.R. (1940) Kar. 15=186 I.C. 533=12 R.S. 203=A.I R. 1939 Sind 329.**

——S. 11—*Applicability — Construction of statute—Decision on applicability of S. 12-A—Chota Nagpur Encumbered Estates Act—If* res judicata.

The third sub-section of S. 12-A renders void any transaction to which it is applicable, but the question as to whether it applies to a particular transaction entitles the Court to consider the construction of the section and the determination of its applicability rests with the Court. Where the decision of the Court in a previous suit determined that the section had never applied to a transaction a Court in a new suit between the same parties with regard to the same transaction cannot try anew the issue as to its applicability in face of the express prohibition in S. 11 of the Code. A.I.R. 1928 Cal. 777, Ref ; 12 Pat. 147, Rev. (*Lord Thankerton.*) BINDESWARI CHARAN SINGH *v.* BHAGESHWARI CHARAN SINGH. **63 I.A. 53=15 Pat. 203=160 I.C. 68=1936 A.L.J. 104=17 Pat.L.T. 28=8 R.P.C. 140=38 Bom.L.R. 339=62 C.L.J. 521=38 P.L.R. 325=40 C.W.N. 289=1936 O W.N. 127=1936 M.W.N. 321=43 L.W. 159=1936 O L.R. 67=1936 All. L.R. 98=1936 P.W.N. 17=1936 A W.R. 84 (2)=A.I.R. 1936 P.C. 46=70 M.L.J. 122 (P.C.).**

——S. 11—*Applicability—Decision in execution proceedings under decree in one suit—Subsequent suit between same parties—Execution of decree in—Decision in execution under prior decree—If* res judicata.

There is no warrant for holding that there is no *res judicata* in respect of a decision in an execution petition under a former decree when the same matter arises for decision in an execution petition under a subsequent decree between the same parties. In such a case the principle of S. 11, C. P Code, directly applies. (*Wadsworth, J.*) CHINNAPPAYAN *v.* NARAYANA PATTAR. **187 I.C. 852=12 R.M. 761=1939 M.W.N. 1145=50 L.W 677=A.I.R 1940 Mad. 59=(1940) 1 M.L. J. 143.**

——S. 11—*Applicability—Decree against sons on foot of—Mortgage by Hindu—Father—Subsequent suit by latter's sons questioning alienation—If barred by* res judicata.

The decision in a suit against Hindu sons on a mortgage executed by their father upholding the mortgage cannot operate as *res judicata* in a suit by the sons of the defendants in the former suit (grandsons of the alienor) to set aside the mortgage. The effect of holding the decision to be *res judicata* would be that the sons have no right to institute a suit at all questioning the alienation made by their father or grandfather. That clearly is not the law. (*Madhavan Nair, J.*) MUTHU-ranga Chetti *v.* Lakshmipathi Naidu. **162 I.C. 876=8 R.M. 1062=1936 M.W.N. 272=43 L.W. 677=A.I.R. 1936 Mad. 488=70 M.L.J. 627.**

———S. 11—Applicability—Dispute under Co-operative Societies Act—Second award in respect of same debt—If nullity—Bar of *res judicata*. *See* Bihar and Orissa Co-operative Societies Act, S. 48. **21 Pat.L.T. 343.**

———S. 11—Applicability—Foreign judgment—*Res judicata*—Conditions of. *See* C. P. Code, S. 13. **40 Bom.L.R. 77.**

———S. 11—*Applicability—Issues.*

Per *Bhide, J.*—S. 11, C. P. Code, applies not only to the final decision but also to issues. (*Young, C.J., Bhide and Din Mahommad, JJ.*) Masjid Shahid Ganj *v.* Shiromani Gurdwara Parbandhak Committee, Amritsar. **175 I.C. 945=11 R.L. 91=40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B.).**

———S. 11—*Applicability—Judgment obtained by fraud or collusion—Evidence Act, S.* 44.

It is open to any party to show that the judgment was obtained by fraud or collusion or that there was want of jurisdiction and in such case S. 11, C. P. Code, would not apply. (*Sulaiman, C.J. and Bennet, J.*) Parbati *v.* Gajraj Singh. **166 I.C. 624=9 R.A. 431=1937 A.L.R. 61=1936 A.W.R. 1009=1936 A.L.J. 1162=A.I.R. 1937 All. 28.**

———S. 11—*Applicability—Parties not same—No* res judicata.

There can be no *res judicata* when the parties are not the same in both the suits. (*Drake Brockman, S.M. and Knox, J.M.*) Ajudhia Prasad *v.* Udairaji. **1936 R.D. 80.**

———S. 11—*Applicability—Previous suit tried according to summary procedure then in force.*

Per *Bhide, J.*—Where the previous suit was tried according to the procedure then in force, the mere fact that the procedure then in force was of summary character is immaterial for the purposes of S. 11, C. P. Code. (*Young, C.J., Bhide and Din Mohammad, JJ.*) Masjid Shahid Ganj *v.* Shiromani Gurdwara Parbandhak Committee, Amritsar. **175 I.C. 945=11 R.L. 91=40 P.L.R. 319=A.I.R. 1938 Lah. 369 (F.B).**

———S. 11—Applicability—Proceedings under Land Acquisition Act. *See* Land Acquisition Act, S. 31 (2), Proviso. **A.I.R. 1939 Sind 66.**

———S. 11—*Applicability—Second suit for redemption of mortgage—Maintainability—Decree in prior suit by melcharthdar—Non-payment of mortgage money—If bar to second suit by jenmi.*

B held certain property under a marupat executed by his predecessor in title in favour of *A*. *A* afterwards granted a melcharth over the same property. A suit for eviction was filed by both *A* and the melcharthdar in which a decree was passed in favour of the latter that if within three years he paid into Court the value of *B's* improvements *B* should surrender possession of the property to him. Such payment was never made and *B* remained in possession. Subsequently a suit was filed by *A*, the jenmi, to evict *B* and the defence was that the suit was barred by reason of the previous decree in which *A* was a party.

Held, that the decree in the previous suit did not bar the suit by *A* inasmuch as the decree in the previous suit was in favour of the melcharthdar and not of *A* and *A* could not himself execute that decree and that by reason of the melcharthdar failing to execute the decree *A*, jenmi, would not lose his right to redeem. (*King, J.*) Govindan *v.* J. S. DeSilva. **169 I.C. 247=9 R.M. 726=1936 M.W.N. 759=A.I.R. 1937 Mad. 213.**

———S. 11—*Applicability—Suit for rent by landlord against tenant—Plea of partial dispossession and suspension of rent—Decision negativing plea—Subsequent plea in later suit—When barred by* res judicata.

Where in a suit between a landlord and a tenant, a plea is raised by the defendant-tenant that there was partial dispossession or eviction and consequent suspension of rent and found against and negatived by the Court, the rule of *res judicata* has no application in a case of eviction from the same lands subsequent to that suit, so as to bar the tenant from raising the plea in a subsequent suit. But where the tenant's plea in the later suit is that the dispossession pleaded in the prior suit is still continuing in respect of the same lands, the plea cannot be allowed to be agitated by the tenant in the later suit. The rule of *res judicata* will apply in such a case, as there can be no continuance of dispossession of property of which there has been no dispossession according to the prior decision, and the tenant cannot consequently be permitted to go into the question of dispossession. (*Guha and Bartley, JJ.*) Maharaja Jagadish Nath Roy Bahadur *v.* Surendra Prosad Lahiri. **40 C.W.N. 166.**

Arbitration proceedings.

———S. 11—*Arbitration proceedings.*

The word 'suit' in S. 11, C.P.Code, includes arbitration proceedings, and matters which have been fully dealt with in those proceedings could not be reopened in a subsequent suit. 26 C.W.N. 940, Ref. to. (*McNair, J.*) Mayadas Bhagat *v.* Commercial Union Assurance Co., Ltd. **I.L.R. (1937) 1 Cal. 541=169 I.C. 788=10 R.C. 49=41 C.W.N. 193.**

———S. 11—*Arbitration proceedings—Award filed under Arbitration Act*—Res judicata.

It is difficult to see why an award filed under the Arbitration Act should not have the same force with regard to the question of *res judicata* as a decree based on award under Sch. II, C. P. Code. (*McNair, J.*) Bal Krishna Mohta *v.* Brijmohan Biani. **42 C.W.N. 367.**

———S. 11—*Arbitration proceedings—Objection decided in*—Res judicata.

Where objections have been preferred during the arbitration proceedings and disallowed, the principle of finality applies and the same matter cannot be agitated in a separate civil suit. 1926 Sind 42; 1930 Sind 195 and 1928 Sind 20, Rel. on. (*Abdul Rashid and Addison, JJ.*) Damodar Das and Sons, Ltd. *v.* Basheshar Nath. **167 I.C. 730=9 R.L. 541 (2)=A.I.R. 1936 Lah. 865.**

———S. 11—*Arbitration proceedings—Question as to validity of submission—Decision on—If* res judicata *in subsequent suit.*

As the Court has power to hear and decide the question as to the validity of submission, and if it hears and decides the question, the principle of *res judicata* applies and the party aggrieved should not be allowed to re-agitate the same question in a subsequent suit. (*Davis, J.C. and Mehta, A.J.*

C.) ROCHANBAI *v.* MOTUMAL. **31 S.L.R. 55=169 I.C. 623=10 R.S. 10=A.I.R. 1937 Sind 110.**

——S. 11—*Arbitration proceedings—Suit by some residents of village claiming irrigation rights—Reference to arbitration—Award—Decree based on—Subsequent suit by other residents of same village not parties to reference claiming similar rights against same defendants—If* res judicata.

Where a suit by certain residents of a village claiming a right of irrigation in respect of their fields from a particular tank is decided not on contest, but on the basis of an award on a reference by the parties to arbitration, and no one outside the parties to that suit has agreed to refer the matter to arbitration, the decree in such a suit cannot be binding on persons other than those who made the reference, and cannot operate as *res judicata* so as to bar a subsequent suit by other residents of the same village against the same defendants, claiming rights similar to those in the prior suit. (*Niamatullah, J.*) NAMDAR KHAN *v.* NAIMUL KHAN. **169 I.C. 388=1937 A.L.R. 522=10 R.A. 16=1937 A.L.J. 293=1937 A.W.R. 258=A.I.R. 1937 All. 289.**

——S. 11—*Arbitration proceedings—Unregistered award—Omission to raise objection to filing of—Constructive* res judicata.

If an application is made to the Court to file an unregistered award which requires registration, then the Court must reject it. Hence this is one of the ground which can be urged against the filing of an award and if it is not urged and the award is filed, then the question is barred in a subsequent suit on the principle or *res judicata.* (*Bose, J.*) GANGAPRASHAD *v.* MST. BANASPATI. **I.L.R. (1937) Nag. 6=173 I.C. 124=10 R.N. 280=A.I.R. 1937 Nag. 132.**

Causes of action different.

——S. 11—*Causes of action different—Decision when may become* res judicata.

S. 11 does not require that the causes of action in both the suits should be the same for the application of the rule of *res judicata.* The causes of action may be different or the subject-matter may be different, but if the issue involved in both the cases is the same and if it was directly and substantially in issue in the former case between the same parties or between parties under whom they or any of them claim, litigating under the same title, the decision of such an issue in the former case will operate as *res judicata* provided the other conditions laid down in S. 11 are satisfied. (*Stone, C J. and Puranik, J*) SITABAI *v.* HARI. **I.L.R. (1938) Nag. 496=180 I.C. 922=11 R.N. 406=A.I.R. 1938 Nag. 401**.

——S. 11—*Cause of action, different—Prior suit on the footing that a release was of no legal effect—Subsequent suit for damages for breach of covenant of title contained in the same release.*

The plaintiff obtained a release from the Official Assignee in respect of an insolvent's share in a certain property. Bnt a mortgagee of that share of the property brought it to sale and it was bought by a stranger. Thereupon the plaintiff sued the Official Assignee for a refund of sum paid to him as consideration for the release on the ground that the release was of no legal effect. But it was dismissed. The present suit was brought by the plaintiff against the Official Assignee, for damages for breach of covenant of title contained in the deed of release. On a plea that the later suit is barred by *res judicata.*

Held, that the causes of action in the two suits were entirely different and that the second suit was not barred by the rule of *res judicata.* (*Leach, C.J. and Varadachariar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* VEDANARAYANA NAICKER. **177 I.C. 579=11 R.M. 348=47 L.W. 46=1938 M.W.N. 10=A.I.R. 1938 Mad. 221=(1938) 1 M.L.J. 92.**

——**S. 11, O. 2, R. 2**—*Cause of action distinct—Gift of certain property to wife in lieu of dower—Widow remarrying after husband's death—Suit for pre-emption by husband's brother dismissed—Subsequent suit for declaration of title to property on ground of re-marriage of widow and for avoidance of gift—If barred.*

A Mahomedan gifted certain property to his wife in lieu of dower. After the death of the husband the widow remarried and the brother of her husband brought a suit for pre-emption alleging that the transaction was a sale and not a gift. The suit was dismissed. Subsequently he brought a suit for declaration that he had acquired a title to the property on the ground of remarriage of the widow and that the gift was null and void against him.

Held, that as the plaintiff was challenging in his previous suit what the husband had done in relation to the property and as in the subsequent suit he was basing his right of ownership on what had been done by the widow herself, the reliefs in the two suits were based on two separate causes of action and the subsequent suit was not barred either under S. 11 or under O. 2, R. 2.

Held, further, that the plaintiff was debarred from challenging the gift in the subsequent suit as by bringing the suit for pre-emption he should be taken to have consented to the transaction in the eye of the law. A.I.R. 1914 Lah. 460, Foll. (*Din Mohammad, J.*) MT. ALAM KHATUN *v.* HAYAT KHAN. **181 I C. 87=11 R.L. 750=40 P.L.R. 794=A.I.R. 1938 Lah. 492.**

Co-defendants.

——S. 11—*'Co-defendants'—Absence of controversy* inter se—*Joint defence to suit by rival claimant—Inconsistent and alternative pleas raised—Suit dismissed in part—Mention that claim of one defendant is dismissed—If* res judicata *in subsequent suit by one co-defendant against another.*

It is open to co-defendants putting up a joint defence to resist the claim of a rival on any ground which they may be able to prove; and it is open to them to raise alternative and even inconsistent pleas in defence to the suit of the rival claimant. And when there is no point in controversy between the co-defendants *inter se,* and no difference between them on any point, a finding by the Court on a point in favour of one of them and adverse to the other, cannot operate as *res judicata* in a subsequent suit between them. If all that the co-defendants in the prior suit are anxious about is to defeat the claim of the plaintiff, it does not matter to them whether the claim of any one of them is defeated on any ground. The decree which in any way non-suits the plaintiff is for the benefit of both of them, and the mere mention in the judgment that the claim of one of them is dismissed, does not affect his rights as against the other, and cannot operate as *res judicata.* (*Harries and Rachhpal Singh, JJ.*) GANPAT RAI *v.* BHAGWAT DAYAL. **1937 A.W.R. 805=1937 A.L.J. 1141.**

——S. 11—*Co-defendants—Applicability of* res judicata—*Conditions necessary.*

The plea of *res judicata* can prevail, even if the contesting parties in the subsequent suit or those through whom they claim were ranged as co-defendants in the previous suit. But before this plea can prevail, three conditions are necessary to be fulfilled:—(1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. Where in a suit by the plaintiff claiming tenancy rights against defendants 1 and 2, who asserted priority over both the plaintiff and the defendants was impleaded as defendant No. 3, and the Court dismissed the suit on account of the finding that *X* was entitled to succeed to the tenancy rights in suit in preference to both the plaintiff and the defendants, all the above three conditions are fulfilled and the question of *X's* title to succeed to the tenancy rights is, therefore, *res judicata* and cannot be re-opened in a subsequent suit by *X* against defendants 1 and 2. The fact that former suit was dismissed as against defendants 1 and 2 is immaterial, as they could appeal against the decision arrived at in that suit if they wanted to escape its consequences. (*Coldstream and Din Mohammad, JJ.*) GAHRA *v.* MST. PANAH BIBI. **I.L.R. (1938) Lah. 75=40 P.L.R. 1030.**

——S. 11—*Co-defendants—Conflict of interests between co-defendants—Finding necessary issues*—Res judicata.

A proprietor of land brought a suit for ejectment and also another suit for rent against the patta-holder *A* and the shikmi tenant under him *B*, alleging that the patta granted to *A* had expired. *A* contested the claim on the ground that though he had been given a patta, what he really had taken was the right of occupancy. *B* on the other hand contended that the land was his *guzashta* ancestral holding, and that he was not a shikmi tenant of *A* and therefore was not liable to ejectment on the expiry of *A's* lease. The trial Judge held the patta to be a colourable one and negatived *A's* right of occupancy but dismissed the suits on the ground that *B* was the independent shikmi tenant on his own account and not under *A*. Subsequently *A's* assignee brought a suit for rent against *B* claiming that *B* was the shikmi tenant under the occupancy tenant *A*.

Held, that there was conflict of interest and titles between the co-defendants *A* and *B* in the former suits and it was necessary to decide that conflict in order to give the plaintiff in those suits appropriate relief. Though the suits were dismissed, yet *A*'s right of occupancy tenancy, and consequently his right to demand rent from *B*, was definitely negatived, and *A* could have appealed against that decision on the ground that notwithstanding the dismissal of the suits, he was adversely affected by the pronouncement in favour of the co-defendant. He having not done so, the decision in the former suits negativing his

right of occupancy tenancy operated as *res judicata* in the subsequent suit between his assignee and *B*. (*Dhavle, J.*) PARAMESHWAR PANDEY *v.* RAMDHARI. **167 I.C. 141=9 R.P. 380=3 B.R. 276=A.I.R. 1937 Pat. 27.**

——S. 11—*Co-defendants — Conditions necessary.*

The circumstances in which a decision operates as *res judicata* between co-defendants are firstly, that there was a conflict of interest between them; secondly that it was necessary to decide that conflict in order to give the plaintiff the relief which he claimed; and thirdly, the question between the co-defendants was finally decided. Therefore a decision in a former suit in which there was a conflict of interest between co-defendants but it became unnecessary to decide that conflict because the plaintiffs were not given any relief as they failed to establish their title and therefore the question that arose between the co-defendants was not decided, cannot operate as *res judicata* in a subsequent suit. (*Wright, J.*) MA TO *v.* MAUNG E BYU. **A.I.R. 1940 Rang. 136.**

——S. 11—*Co-defendants—Decision not necessary to give plaintiff relief*—Res judicata.

Where in order to give the plaintiffs the relief they claimed, it was not necessary for the Court to decide the question of the liability of the co-defendants *inter se* the decision does not operate as *res judicata* in a subsequent suit between the co-defendants. (*Nanavutty and Zia-ul-Hasan, JJ.*) VIQAR ALI BEG *v.* MOHAMMAD SAADAT ALI KHAN. **1936 O.W.N. 982.**

——S. 11—*Co-defendants—Decision, when* res judicata.

To establish *res judicata* between co-defendants it should be established that there was conflict of interests between co-defendants; that it was necessary to decide that conflict in order to give plaintiff the relief which he claimed; that the question between the co-defendants was finally decided. A.I.R. 1931 P.C. 114, Rel. on. In a suit by *K* for partition against *J* and *X*, *J* who was in possession of the entire property did not put in any appearance and it was decided that *K* was entitled to a certain share in accordance with a particular pedigree table. Thereafter *X* put in applications for their shares under a different pedigree table, whereupon *J* brought a suit for a declaration that *X* would be entitled to those shares only which were in accordance with the pedigree table relied on in *K's* suit, which fact being disputed by *X*, *J* claimed that that point was *res judicata* as between *J* and *X* both being co-defendants in *K's* suit.

Per *Bhide and Dalip Singh, JJ. Skemp, J.*, contra.—*Held*, that the question of preference between the two pedigree tables was neither raised nor decided as between the co-defendants in *K's* suit, nor was it necessary to decide that in that suit, hence decision in *K's* suit, was not *res judicata* in favour of *J* in his suit against *X*. (*Bhide, J., on difference between Dalip Singh and Skemp, JJ.*) RURA *v.* BANTA. **181 I.C. 199=11 R.L. 790=40 P.L.R. 600=A.I.R. 1938 Lah. 227.**

——S. 11—*Co-defendants—Issue decided as between defendants—If* res judicata.

A issued *B*, *B*-1 and *C* for partition of joint family estate held by *B*. The estate was in the name of *B*-1 who was the son of *B*. *B* at first denied any joint estate but later on entered into a compromise with *A* thus admitting the jointness of the estate. The compromise was admitted to Court and a decree was passed on it. In a suit by *C* against *B* and *B*-1 to get his share of property,

Held, that the former decision was *res judicata* as to the jointness of the property because that issue was finally decided as between the co-defendants in that suit. So in the suit by *C*, *B* and *B*-1 or any one claiming through them cannot deny the right of *C* to a share. A.I.R. 1919 Mad. 893; A.I.R. 1932 P.C. 161 and A.I.R. 1931 P.C. 114, Foll. (*Venkataramana Rao, J.*) Soorayya *v.* Sooranna. **168 I.C. 1005=9 R.M. 682=A.I.R. 1936 Mad. 252.**

——S. 11—*Co-defendants—Joint decree passed against some partners in respect of debt contracted by them—Defence that other partners are necessary parties negatived—Question whether debt is partnership debt—If* res judicata *in suit between defendants.*

Where in a suit instituted by a creditor against some of the partners of a firm in respect of a debt contracted by them, a joint decree was passed against them negativing their contention that the other partners were necessary parties to the suit, the decision is not *res judicata* on the question as to whether it was a partnership debt or otherwise in a subsequent litigation between the defendants. (*Mukerjea and Roxburgh, JJ.*) Debesh Chandra Mukherjee *v.* Benoy Krishna. **43 C.W.N. 1214.**

——S. 11—*Co-defendants members of one family—Conflicting interests—Decision as to relationship—Subsequent revenue proceedings—Question as to relationship—If* res judicata.

Where in a civil suit the co-defendants were all members of one family and they had conflicting interests a decision as to the relationship of one of them is *res judicata* in subsequent revenue proceedings as between the members of that family in regard to that question of relationship. (*Mehta, S.M.*) Kamta Ahir *v.* Phagu. **1939 A.W.R. (B.R.) 9=1939 R.D. 82.**

——S. 11—*Co-defendants*—Res judicata—*Absence of conflict of interests between defendants* inter se.

If there is no conflict of interests between the defendants *inter se*, and therefore no question to be decided between them, in order to give the plaintiff relief in the suit, there can be no *res judicata* between co-defendants. (*Leach, C. J. and Varadachariar, J.*) Dhanapala Chetti *v.* Gowr Chand Sowcar. **182 I.C. 312=12 R.M. 48=1938 M.W.N. 938=A.I.R. 1938 Mad. 959=(1938) 2 M.L.J. 775.**

——S. 11—*Co-defendants*—Res judicata—*Conditions.*

For a decision to operate as *res judicata* between co-defendants, there must be a conflict of interest between the defendants; it must be necessary to decide this conflict in order to give the plaintiff the relief he claims and the question between the defendants must have been finally decided. Where all these ingredients are present the finding operates as *res judicata* between co-defendants even if in the former suit the plaintiff's case was dismissed *in toto.* (*Almond, J.C.*) Ghulam Ali Amir Khan *v.* Amir Khan. **179 I.C. 13=11 R. Pesh. 61=A.I.R. 1939 Pesh. 1.**

——S. 11—*Co-defendants*—Res judicata—*Conditions*—Pro forma *defendant not contesting but supporting plaintiff's claim—Dismissal of suit—Decision—If* res judicata.

It is clear that neither the fact that a defendant did not contest but supported the plaintiff's claim, nor the fact that he was merely joined as *pro forma* defendant, nor again the fact that the suit finally ended in a dismissal is a good reason for negativing a plea of *res judicata* between co-defendants if they in fact occupied a position of conflict in the prior suit. (*Pandrang Row and Krishnaswami Ayyangar, JJ.*) Appasami Pillai *v.* Thayammal. **189 I.C. 215=1940 M.W.N. 632=50 L.W. 166=A.I.R. 1939 Mad. 830=(1939) 2 M.L.J. 236.**

——S. 11—*Co-defendants*—Res judicata—*Conflict of interests* inter se—*Necessity.*

In the absence of any controversy specifically raised between the defendants *inter se* the Court should not apply the doctrine of *res judicata* as between co-defendants. (*Stone, C.J. and Niyogi, J.*) Ishakalli *v.* Thakur Prasad. **20 N.L.J. 159.**

——S. 11—*Co-defendants*—Res judicata—*Conflict of interests between defendants* inter se—*Necessity.*

The doctrine of *res judicata* cannot apply between co-defendants unless it is impossible for the plaintiff to get his right without the matter having been tried and decided between the co-defendants *inter se.* A decision operates as *res judicata* between co-defendants provided that (1) there was a conflict of interests between them; (2) it was necessary to decide that conflict in order to give the plaintiff the relief which he claims; and (3) the question between the co-defendants was finally decided. It is not enough if a conflict was merely possible; there must have been an actual conflict between the co-defendants *inter se* before the principle of *res judicata* can apply as between them. Where a defendant allows the suit to proceed *ex parte* and runs away from the claim of the plaintiff, no conflict can arise so far as he is concerned, and there can be no actual decision of any conflict which did not actually arise; there can therefore be no *res judicata.* (*Pandrang Row and Abdur Rahman, JJ.*) Ramaswami *v.* Venkatakrishnayya. **1938 M.W.N. 224 (2)=47 L.W. 374.**

——S. 11—*Co-defendants—When bound by decision.*

If a plaintiff cannot get at his right without trying and deciding a case between the co-defendants, the Court will try and decide the case and the co-defendants will be bound by the decision. But if the relief given to the plaintiff does not require or involve a decision of any case between the co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains. In such a case three conditions are requisite: (1) there must be a conflict of interest between the defendants concerned: (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided. A.I.R. 1932 P.C. 161; A.I.R. 1931 P.C. 114 and *Cottingham* v. *Earl of Shrewsbury,* (1843) 3 Hare 627, Foll. (*Mackney, J.*)

A. L. A. R. CHETTYAR FIRM *v.* A. K. R. M. M. K. CHETTYAR FIRM. **164 I.C. 468=9 R.R. 97=A.I.R. 1936 Rang. 308.**

Competent Court.

——S. 11—*Competent Court—Court deciding prior suit to be competent to try subsequent suit.*

For the bar of *res judicata* under S. 11, C. P. Code, to apply, one of the essential conditions is that the Court which decided the former suit must be competent to try the subsequent Court. (*Noor and Chatterji, JJ.*) KAMLAPATI DEVI *v.* JAGESHWAR DAYAL. **18 Pat. 342=183 I.C. 400=5 B.R. 938=12 R.P. 143=1939 P.W.N. 8=A.I.R. 1939 Pat. 375.**

——S. 11—*Competent Court—Court trying previous suit not competent to try subsequent suit—Finding—If* res judicata.

Where the finding is by a Court not competent to try the subsequent suit it cannot operate as *res judicata*, but the finding creates a paramount duty on the party against whom it is given to displace it. (*D. N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* BRAJENDRA KISHORE RAI CHOUDHURY. **168 I.C. 249=9 R.C. 780=64 C.L.J. 458=A.I.R. 1936 Cal 629.**

——S. 11—*Competent Court—Decision of Tahsildar in suit for arrears of rent—If* res judicata *in subsequent suit for ejectment.*

The decision of a Tahsildar in a suit for arrears of rent does not operate as *res judicata* in a subsequent suit for ejectment. 17 R.D. 314, followed. (*Drake Brockman S. M. and Knox, J. M.*) MT. SURJIA *v.* KALLOO SINGH. **1936 A.W.R. 30=1936 R.D. 1.**

——S. 11—*Competent Court—If refers to territorial jurisdiction.*

Competency of a Court in connection with S. 11, C. P. Code, has no reference to territorial jurisdiction. (*Collister, J.*) RANG LAL *v.* GAJRAJ SINGH. **181 I.C. 80=11 R.A. 549 (2)=1939 A.W.R. (H.C.) 9=A.I.R. 1939 All 202.**

——S. 11—*Competent Court—Insolvency Court—Decision on title to property—If* res judicata.

Where a question regarding the title to certain property of the insolvent has been decided under S. 4, Provincial Insolvency Act, at the instance of a person who submits to it, the finding operates as *res judicata* where the same question is raised in a subsequent suit by the same person for a declaration that it belongs to the insolvent. A.I.R 1932 Cal. 642 and A.I.R. 1929 All. 150 (F.B.), Rel. on. (*Bose, J.*) KAUSHALYABHAI *v.* BAISAKHU. **I.L.R. (1936) Nag. 28=164 I.C. 694=9 R.N. 25=A.I.R. 1936 Nag. 112.**

——S. 11—*Competent Court—Meaning of.*

Section 11 operates to exclude the jurisdiction of a Court to try a subsequent suit only if the first suit was tried by a Court which was competent to try the second or subsequent suit. The competence of a Court is to be determined irrespective of any provision as to the right of appeal from the decisions of that Court, and the competence of a Court and the finality of a decision is not dependent upon whether an appeal was or was not made. A Court may be competent and a decision final within the meaning of S. 11 even if no appeal is made. It is the competing jurisdictions of the original Courts which are to be regarded. (*Davis, J.C. and Tyabji, J.*) BADALDAS *v.* GURDINOMAL. **I.L.R. (1940) Kar. 15=186 I.C. 533=12 R.S. 203=A.I.R. 1939 Sind 329.**

——S. 11—*Competent Court—Prior decision by Court not competent to try later suit—When* res judicata.

Where a suit involving title to certain property has been decided between the parties, it is not open to the defeated party to institute another suit including therein not only the property involved in the prior suit but also a much larger property, in a Court of a higher grade and thereby attempt to get a different decision from that Court on the question of title. In such a case the subject-matter of the previous suit which had been decided adversely against him should be excluded from the later suit and the subsequent suit can only go on with regard to the subject-matter which did not form part of the subject-matter of the previous suit. A party who has lost in one Court cannot be permitted to add causes of action or prayers for reliefs in another suit for the purpose of swelling the valuation of his suit and claim that the decision in the prior suit does not operate as *res judicata*. But if it appears that his subsequent suit proceeds upon a cause of action which did not exist or which he could not have availed at the date of the previous suit, the bar of *res judicata* will not apply. If it is possible to treat the entire cause of action upon which the later suit is founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied upon, then the previous decision will stand as a bar to the extent of the matter involved in the prior suit. (*Mukerji and S.K. Ghose, JJ.*) SEKENDAR ALI MIRDHA *v.* SADARUDDIN BHUNIYA. **40 C.W.N. 174.**

——S. 11—*Competent Court—Prior suit for arrears of rent in Court of Assistant Collector, II class, under Agra Tenancy Act of* 1901—*Decision on proprietary rights—Subsequent suit for ejectment under Tenancy Act* (*III of* 1926) *in Court of Assistant Collector, I class—If* res judicata.

For the application of the rule of *res judicata*, the Court which decided the former suit should have been competent to decide not only the issue which arises in the subsequent suit but the subsequent suit itself. The decision of an Assistant Collector of II class, in a suit for arrears of rent *inter partes* under the Agra Tenancy Act of 1901, holding that the defendant was a proprietor and not a tenant, does not operate as *res judicata* in a subsequent suit for ejectment under S. 82 of the Tenancy Act of 1926 before the Assistant Collector of I class, and does not preclude the latter from referring an issue to the Civil Court and deciding it on the merits. In any case, the Civil Court, to whom the issue of proprietary right is to be referred, is not bound by the decision of the Assistant Collector, II class, in the prior suit for arrears of rent. (*Thom, Ag.C.J. and Niamatullah, J.*) SHEODARSHAN LAL *v.* BALMAKUND. **I.L.R (1938) All. 184=1938 R.D. 43=174 I.C. 62=10 R.A. 537=1938 A.L.R. 229=1937 A.W.R. 1215=1937 A.L.J. 1339=A.I.R. 1938 All. 82.**

——S. 11—*Competent Court—Prior suit in Civil Court for joint possession of holding, mesne profits and declaration of share—Civil Court incompetent to decide and grant first and last reliefs—Subsequent suit in Revenue Court for share of holding—Decision in prior suit—If* res judicata.

In a previous suit in the Civil Court, the reliefs claimed were joint possession of a holding, mesne profits for three years, and a declaration of right to shares to the extent of $\frac{2}{3}$ of the holding. That suit was when the Agra Tenancy Act (II of 1901) was in force. In 1930 after the Act of 1926 came into force, a suit was brought in the Revenue Court under S. 37 of the Agra Tenancy Act of 1926, for division of a holding claiming a two-third share in the holding.

Held, that under Act III of 1926, the Civil Court was not competent to decide the questions involved in the prior suit except the one as to mesne profits, and as that suit was misconceived and brought in a Court which had no jurisdiction to decide two out of the three claims made in it, the decision therein could not operate as *res judicata* in the subsequent suit in the Revenue Court on the question of the extent of the shares. (*Drake Brockman, S.M. and Knox, J.M.*) KESHO SARAN *v.* RAGHUNATH DAS. **1936 R.D. 568.**

——**S. 11**—*Competent Court—Probate Court—Contentious proceedings for letters of administration—Finding as to nearest heir*—Res judicata.

Where in contentious proceedings for letters of administration it has been found that a certain person is the nearest heir of the deceased, that decision is binding in a subsequent suit upon the parties to the earlier proceedings, and those claiming under them. A.I.R. 1930 P.C. 22, Rel. on. (*Mya Bu and Dunkley, JJ.*) U BA LIN *v.* MA SEIN. **164 I C. 743=9 R.R. 136=A.I.R. 1936 Rang. 401.**

——**S. 11**—*Competent Court—Probate Court—Finding as to genuineness or otherwise of will—If* res judicata.

The finding of a Court under the Succession Act with regard to the genuineness or otherwise of a will is conclusive and operates as *res judicata* against the parties affected. 1914 Bom. 8 (F.B.), Foll. (*Mir Ahmad, A.J.C.*) AMIR SINGH *v.* ATTAR SINGH. **161 I.C. 47=8 R. Pesh. 153=A.I.R. 1936 Pesh. 39.**

——**S. 11**—*Competent Court—Property identical in two suits—Increase in its value in the interval—If affects question of* res judicata.

Where property in two suits is identical, the mere fact that its value has arisen in the interval between the two suits and the subsequent suit is, therefore, beyond the pecuniary jurisdiction of the former Court, cannot affect the question of *res judicata.* (*Coldstream and Bhide, JJ.*) SULTAN ASAD JAN *v.* SECRETARY OF STATE. **18 Lah. 100=167 I.C. 867=9 R.L. 567=A.I.R. 1936 Lah. 998.**

——**S. 11**—*Competent Court — Question of status of tenant—Finding of Civil Court—If* res judicata *in Revenue Court.*

The finding of a Civil Court in a suit for possession that the defendant is a sub-tenant of his mortgagor being on a question of tenancy, is not final, but is only a pure *obiter dictum.* It cannot therefore operate as *res judicata* in a suit for ejectment in the Revenue Court. (*Drake Brockman, S.M. and Knox, J.M.*) SUNDAR KOERI *v.* MANGAL RAI. **1936 R.D. 457.**

——**S. 11**—*Competent Court—Rent suit—Variation in the rent—Compromise decree by Tahsildar—If* res judicata *in subsequent suit—Agra Tenancy Act, S.* 47.

A decree or order which sanctions a variation from the recorded cash rent must be the decree or order of a Court of competent jurisdiction. A Tahsildar is not a Court of competent jurisdiction to give any decision as to the rent payable, having regard to the provisions of S. 47 of the Agra Tenancy Act where in a suit for arrears of rent, a compromise is filed providing *inter alia* that the rent payable would be *batai* and not cash rent, an order of the Tahsildar recording the compromise and passing a decree in terms of the compromise is without jurisdiction, especially when the compromise never states the rate at which *batai* should be taken, confers no benefit at all on the tenant, contains no specific admission as to the cash rent recorded being wrong, contains no bargain and makes no change in the papers. Such a decree cannot operate as *res judicata* between the parties in a subsequent suit; and the fact that the tenant has in a subsequent suit remained *ex parte* and allowed a decree to be passed against him on the basis of the compromise decree cannot estop him from challenging the validity of the same in a subsequent suit. (*Darling, S.M. and Bomford, J.M.*) RAJ KUMAR RAI *v.* RAM LAKHAN. **1938 A.W.R. (B.R.) 105=1938 R.D. 169.**

——**S. 11**—*Competent Court—Revenue Court—Decision on question of title—If* res judicata—*Decision without jurisdiction—Effect of.*

It is not the law that the decision of a Revenue Court upon a question of title cannot operate as *res judicata* in a subsequent suit in a Civil Court between the parties. The decision of a competent Revenue Court on a question of title must be regarded as the decision of a Civil Court and can operate as a bar by way of *res judicata* upon the same issue in a Civil Court in a subsequent suit. But if the Revenue Court has no jurisdiction at all to determine the question of title in issue between the parties, the decision cannot be regarded as a final decision and cannot operate by way of *res judicata,* as it is a nullity. (*Harries and Rachhpal Singh, JJ.*) UBAID-ULLA KHAN *v.* ABDUL JALIL KHAN. **I.L.R. (1937) All. 628=10 R.A. 142=1937 R.D. 302=170 I.C. 657=1937 A.L.R. 699=1937 A.L.J. 979=1937 A.W.R. 539 =A.I.R. 1937 All. 481.**

——**S. 11**—Competent Court—Revenue Court—Title to melwaram right—Decision as to—*If res judicata* in Civil Court suit. *See* MADRAS ESTATES LAND ACT, S. 112. **71 M.L.J. 227.**

——**S. 11**—*Competent Court--Settlement Officer—Decision construing Government grant—If* res judicata *in subsequent civil suit—Oudh Settlement Circular No.* 20 *of* 1863.

The decision of a Settlement Officer construing a grant by the Crown and declaring the nature of the grant and the status and rights of the grantee in accordance with Settlement Circular No. 20 of 1863, is not *ultra vires,* and clearly operates as *res judicata* in a subsequent civil suit between the parties or their representatives. (*King, C.J. and Nanavutty, J.*) AMJAD HUSAIN *v.* NAWAB ALI. **161 I.C. 158=8 R.O. 307=1936 R.D. 35=1936 O.W.N. 100=1936 O.L.R. 147=A.I.R. 1936 Oudh 225.**

——**S. 11**—*Competent Court—Small Cause Court—Decision in rent suit—If* res judicata *in regular title suit.*

The decision of a Small Cause Court in a rent suit cannot possibly be allowed to bar a decision in a regular title suit in a case which the Small Cause Court is not competent to decide. (*Jack, J.*) LACHMIRAM KANU *v.* BALADEB PRASAD BHAKAT. **41 C.W.N. 1019.**

——S. 11—*Competent Court—Small Cause Court—Decision on title*—Res judicata.

There is one apparent exception to the rule that the first Court must be a Court competent to try the subsequent suit, and that is where the first Court is a Court of exclusive jurisdiction, its decision on any matter on which it has exclusive jurisdiction is binding on the other Court. An instance of this is a decision by a Revenue Court on a matter on which it has exclusive jurisdiction. Similarly, if a Small Cause Court decides a matter on which it has exclusive jurisdiction, then that decision is binding on subsequent Courts. In a suit for rent the Small Cause Court has no exclusive jurisdiction to decide the question of title. Hence the decision of Small Cause Court on title in suit for rent cannot be *res judicata* in the subsequent suit for rent and for ejectment, because the prayer for ejectment takes the suit away from the jurisdiction of the Court of Small Causes. (*Skemp, J.*) HAYAT MOHAMMAD *v.* BAR GAUSHALA, LYALLPUR. **I.L.R. (1939) Lah. 183=181 I.C. 814=11 R.L. 890=41 P.L.R. 509=A.I.R. 1938 Lah. 811.**

——S. 11—*Competent Court—Small cause and regular suit between same parties heard by same Judge—Separate judgments—Common question—Appeal against original suit—Finding in small causes suit—If* res judicata.

Where a small cause suit and an original suit as between the parties and involving a common question is decided by separate judgments by the same Judge exercising separate jurisdictions and an appeal is preferred against the decision in the original suit, as the Small Causes Court is not competent to try the matters involved in the original suit, there is no *res judicata.* (*Pollock, J.*) KRISHNAJI *v.* ANUSUYA BAI. **183 I.C. 689=12 R.N. 78=1939 N.L.J. 87=A.I.R. 1939 Nag. 130.**

——S. 11—*Competent Court—Suit in Munsiff's Court—Subsequent suit by same plaintiff against same defendant for same relief in Subordinate Judge's Court—Plea of* res judicata*—Contention by plaintiff that former suit not really triable by Munsiff's Court—If open—S. 21—Suits Valuation Act, S. 11—Principle of constructive* res judicata *—Extent and scope of.*

A judgment of a Court without jurisdiction is a nullity and want of jurisdiction cannot be waived. To this fundamental rule there are two exceptions recognized by law: (1) S. 11, Suits Valuation Act, which deals with defects of jurisdiction due to wrong pecuniary valuation, and (2) S. 21, C. P. Code, which deals with a wrong place of suing. These two sections recognise that there may be a waiver on the part of the defendant in regard to the pecuniary or territorial jurisdiction of a Court, as the case may be, and the absence of jurisdiction in such cases would not render the decree a nullity. In other words, there is a distinction between inherent incompetency in a Court and irregular exercise of jurisdiction, the defects contemplated by S. 11 of the Suits Valuation Act and S. 21, C. P. Code, being treated as

mere irregularities which can be waived. The principle of waiver of objection to jurisdiction under these sections extends to execution proceedings also. Under both these sections even in the absence of waiver, that is to say, even if objection is taken in the Court of first instance, there must further be consequent failure of justice before the objection can be given effect to. Where no such objection is taken or where failure of justice has resulted, the decree cannot be impeached either in appeal or in revision or in a subsequent suit; and the decree would operate as *res judicata* in a subsequent suit. An objection which a defendant is precluded from raising is *a fortiori* not open to the party who was the plaintiff in the former suit. Where a plaintiff invoked the jurisdiction of a Court of lower grade on the former occasion and subsequently files a suit for the same reliefs in a Court of higher grade, he cannot escape the bar of *res judicata* in the subsequent suit by pleading that the former suit was tried by a Court which had no jurisdiction to try it. Since the decision in the former can be challenged as incompetent or without jurisdiction, that decree would, if other conditions are satisfied, operate as *res judicata.*

Newsam, J.—Assuming that the former suit, if the plaintiff had valued its property, would have been beyond the penuniary jurisdiction of the Court in which it was instituted and tried, the principle of constructive *res judicata* embodied in S. 11 of the Suits Valuation Act and S. 21, C. P. Code, applies and cannot be evaded. The matters of valuation of a suit and of choosing the place of suing are primarily the province of parties who, within limits, may choose their own forum, *e.g.*, by under-valuing or over-valuing their claim or by suing in one district or in another. The jurisdiction of Court is only artificially limited by minor considerations such as the value of the suit or the place where the cause of action arose. Inherent defects stand on an entirely different footing. Once a party has chosen the forum which shall bear his cause, he must abide by his choice. (*Venkatasubba Rao and Newsam, JJ.*) KAMMARAN NAMBIAR *v.* VALIA RAMUNI. **177 I.C. 91=11 R.M. 240=48 L.W. 679=1937 M.W.N. 1292=A.I.R. 1938 Mad. 257=(1938) 1 M.L.J. 193.**

——S. 11—*Competent Court—Suit instituted in Munsiff's Court—Decision of Chief Court in second appeal—If* res judicata *in later suit—Which is beyond the pecuniary jurisdiction of the Munsiff.*

Where the earlier suit was instituted in the Court of the Munsif and came before the Chief Court in second appeal and the Munsif lacked pecuniary jurisdiction to try the later suit, the decision of the Chief Court in that suit cannot operate as *res judicata* in the later suit. (*Srivastava and Nanavutty, JJ.*) PARTAB BAHADUR SINGH *v.* JAGATJIT SINGH. **12 Luck. 371=1936 O.L.R. 412=164 I.C. 118=9 R.O 40=1936 O.W.N. 784=1936 R.D. 416=A.I.R. 1936 Oudh 387.**

——S. 11—Competent Court—Suit in Revenue Court under S. 77, Madras Estates Land Act—Dismissal on ground of absence of relationship of landlord and tenant—Subsequent suit in Civil Court for declaration of right to resume land—If barred—*Res judicata. See* MADRAS ESTATES LAND ACT, S. 189. **A.I.R. 1937 Mad. 303.**

——**S. 11**—*Competent Court—Suit in Revenue Court under N.W.F. Rent Act (XII of* 1881)—*Decision on proprietary right—If* res judicata *in subsequent suit for ejectment under Agra Tenancy Act of* 1901 *and Act of* 1926.

The N.-W.F. Rent Act (XII of 1881) did not empower the Revenue Courts to decide any question of proprietary right, except incidentally, nor did that Act provide for an ejectment suit of the nature contemplated by the present Agra Tenancy Act of 1926. Revenue Courts have been empowered by the Agra Tenancy Acts of 1901 and 1926 to decide conclusively a question of proprietary right or to have such an issue decided by the Civil Court. The decision of a Revenue Court under Act XII of 1881 on a question of proprietary right in a suit for arrears of rent cannot operate as *res judicata* in a suit for ejectment under the later Acts on the issue of proprietary right, and is no bar to the Revenue Court taking action under the procedure prescribed by Act II of 1901 or under the Act III of 1926. (*Thom, Ag. C.J. and Niamatullah, J.*) Sheodarshan Lal *v.* Balmakund. **I.L.R. (1938) All. 184=1938 R. D. 43=10 R.A. 537=1938 A.L.R. 229=174 I.C. 62=1937 A.W.R. 1215=1937 A.L.J. 1339=A.I R. 1938 All. 82.**

——**S. 11**—*Competent Court—Test—Competency to try subsequent issue—If enough—Large valuation in subsequent suit—Effect of.*

A decree in a previous suit cannot be treated as *res judicata* in a subsequent suit unless the Judge by whom it was made had jurisdiction to try and decide not only the particular matter in issue but also the subsequent suit itself in which the issue is subsequently raised. In spite of a large valuation in the subsequent suit, there would be *res judicata* at least with regard to so much of the property as was dealt with in the previous suit. (*S. K. Ghose and Patterson, JJ.*) Gonesh Chandra Deuty *v.* Rajkumar Deuty. **67 C.L. J. 223.**

——**S. 11**—*Competent Court—Test—Decision of Assistant Collector of second class in rent suit —If* res judicata *in subsequent suit for ejectment before Assistant Collector of first class—Agra Tenancy Act.*

It is expressly provided by S. 11, C. P. Code, that in order that a decision in a former suit may operate as *res judicata* in subsequent suit, it is necessary that the Court which tried the former suit was a Court competent to try the subsequent suit. Mere competency to try the issue raised in the subsequent suit is not enough. Further, it is the competency of the original Court which decided the former suit that must be looked to and not that of the appellate Court in which that suit was ultimately decided on appeal. Again, regard must be had to the jurisdiction of that Court at the date of the former suit and not to its jurisdiction at the date of the subsequent suit. It follows, therefore, that an order in a rent suit of an Assistant Collector of the second class confirmed on appeal first by the Collector and then by the District Judge that the defendant was not a tenant but a proprietor of the land in dispute, does not operate as *res judicata* in a subsequent suit before an Assistant Collector of the first class for ejectment of the defendant under S. 82 of the Agra Tenancy Act, as such a suit could not have been heard and determined by the Assistant Collector of second class who has no jurisdiction under that Act to try a claim for ejectment of a tenant. (*Harries, J.*) Kalyan Das *v.* Sudershan Lal. **166 I.C. 807=9 R.A. 446=1936 A.L.J. 1313=1936 R.D. 547=1936 A. W.R. 1091=1937 A.L.R. 75=A.I.R. 1937 All. 20.**

——**S. 11**—*Competent Court—Test—Prior suit to declare adoption invalid in Munsif's Court—Decree declaring adoption invalid—Subsequent rise in value of properties—Suit for possession after death of widow in Sub-Court—Decision on validity of adoption—If* res judicata—*Specific Relief Act, S.* 43.

In determining the question of competency for the purpose of S. 11, C. P. Code, the Court need not take into account any change in the valuation resulting from a mere rise in the market value if the properties concerned in the two suits are substantially the same, the fact that some years ago they were worth only such an amount as would have brought a suit relating to them within the jurisdiction of a Munsif's Court is no reason for holding a pronouncement of the Munsif's Court in respect of title not final or *res judicata* merely because according to the market-value of the properties on the date of the later suit they are worth more than the limit of the pecuniary jurisdiction of that Court. The reversioners to the estate of one *S*, a Hindu, sued in 1883 for a declaration in the Court of the District Munsiff that an adoption made by *S's* widow was invalid; and the adoption was finally held to be invalid as not having been authorised by *S* or assented to by the Sapindas. Subsequently in 1927, after the death of the widow the reversioners again sued for possession of the properties, which were substantially the same as those concerned in the prior suit; but the properties then being worth more according to the then market-value, the suit was filed in the Subordinate Judge's Court. It was found that after making due allowance for a few items of properties, newly added in the later suit, the suit would be within the limits of the Munsif's jurisdiction if valued as in 1883.

Held, the decision on the validity of the adoption was *res judicata* and that it was not open to the adopted son who was a party to the prior suit to reopen the issue in the later suit; and that apart from S. 11, C. P. Code, the trial of the issue was also barred by reason of the express provisions of S. 43, Specific Relief Act, and that a declaration once obtained should not become futile merely because of some difference in the pecuniary jurisdiction of the Courts concerned. (*Varadachariar and Mockett, JJ.*) Subbayya *v.* Anantaraju Nagayya. **166 I.C. 75=9 R.M. 330 =1936 M.W.N. 1086=44 L.W. 530=A.I.R. 1936 Mad. 951=71 M.L.J. 619.**

——**S. 11**—Competent Court—Transfer of decree of Court of Native State to British Indian Court for execution—Refusal of execution—Decision that decree null as being without jurisdiction—Suit on foreign judgment—If barred. *See* C. P. Code, Ss. 13 and 44. **40 C.W N. 591.**

——**S. 11**—*Competent Court—Trial and decision of issue in former suit—If bars trial of same issue in subsequent suit involving property of larger value.*

If a question arises upon an issue framed in a suit in respect of a property of inconsiderable value which may be dealt with by the Court in which that question arises, and if a decision is arrived at on that question, that decision would not affect property of a much larger value beyond the jurisdiction of that Court when in respect of such property the same question arises in a subsequent suit. So far, therefore, as the trial of an issue is concerned, a prior decision by a Court which had no jurisdiction to try the subsequent suit can never be regarded as operating as *res judicata* when the same issue arises in such subsequent suit. (*Mukerji and S.K. Ghose, JJ.*) Sekendar Ali Mirdha *v.* Sadaruddin Bhuniya. **40 C.W.N. 174.**

Compromise decree.

——S. 11—*Compromise decree—Compromise between certain parties only—Decree based on—Party to suit not party to compromise—Subsequent suit by*—Res judicata.

Where a suit ultimately ends in a compromise, a party to the suit who is not a party to such compromise is not bound by it, and the decree passed thereon, based as it is on the compromise cannot operate as *res judicata* against him in a subsequent suit. (*Fazl Ali and Varma, JJ.*) Manki Kanak Ratan *v.* Sundar Munda. **179 I.C. 834 =11 R.P. 413=5 B.R. 298=1939 P.W.N. 41=20 Pat.L.T. 346=A.I.R. 1939 Pat. 225.**

——S. 11—*Compromise decree—If can operate as* res judicata *in later suit.*

It cannot be said that a consent decree can never operate as *res judicata* in a subsequent suit. It is binding upon the parties and would operate as *res judicata* in a subsequent suit unless there are some special reasons for holding that the compromise and decree were void. (*Zia-ul-Hasan and Hamilton, JJ.*) Pashpat Pratap Singh *v.* Udai Bhan Pratap Singh. **14 Luck. 763=183 I.C. 808=1939 O.A. 674=1939 O.L.R. 558=1939 A.W.R. (C.C.) 153=1939 O.W.N. 809 =12 R.O. 62=A.I.R. 1939 Oudh 269.**

——S. 11—*Compromise decree—Suit in personal capacity for personal relief by limited owners—Compromise—If* res judicata *as against reversioners.*

Where a suit was brought by two daughters of a Hindu father in their personal capacity and for a personal relief, any compromise of that suit, cannot operate as *res judicata* as against the reversioners. (*Bennet and Verma, JJ.*) Har Narain Singh *v.* Nand Ram. **181 I.C. 33=11 R.A. 544=1939 R.D. 61=1939 A.W.R. (H.C.) 27 =1939 A.L.J. 199=A.I.R. 1939 All. 197.**

——S. 11—*Compromise in prior suit—Agreement to pay rent—Subsequent suit for arrears of rent—Right to payment of rent, if can be denied.*

Where in a previous suit for arrears of rent, a compromise is entered into, by which the tenant agreed to pay the plaintiff a certain annual rent, and it had been acted upon, it is not open to the tenant in a subsequent suit for arrears of rent to plead that the plaintiff is not his landlord to whom the rent is payable. (*Darling, S.M. and Mehta, J.M.*) Allahdia *v.* Mani Ram. **1938 R. D. 917.**

Conflicting decrees.

——S. 11—*Conflicting decrees—Prior decision of inferior Court and later decision of superior Court—Latter to prevail.*

When there are two conflicting decisions upon the rights of parties to a litigation, the later decision must prevail particularly when that decision is that of a superior Court. It is the latter decision and not the earlier one of the inferior Court which would operate as *res judicata.* (*Harries and Rachhpal Singh, JJ.*) Ubaid-ullah Khan *v.* Abdul Jalil Khan. **I.L.R. (1937) All. 628=10 R.A. 142=1937 R.D. 302=170 I.C. 657=1937 A.L.R. 699=1937 A.L.J. 979=1937 A.W.R. 539 =A.I.R. 1937 All. 481.**

——S. 11—*Conflicting decrees*—Res judicata.

Where there are two conflicting decrees *inter partes* the later decree must, for purposes of *res judicata,* be taken to prevail. (*Dhavle, J.*) Hira Lal Singh *v.* Matikdhari Singh. **176 I.C. 570 =11 R.P. 88=4 B.R. 741=1938 P.W.N. 502=19 Pat.L.T. 456=A.I.R. 1938 Pat. 359.**

Connected appeals, cases or suits.

——S. 11—*Connected appeals—Common judgment in two appeals—Appeal against one of the appellate decrees—Other, if would operate as* res judicata.

It cannot be said that in every case where two connected appeals are disposed of by a common judgment and an appeal is preferred against only one of the decrees, the other becomes final and operates as *res judicata.* (*Zia-ul-Hasan and Bennet, JJ*) Bankey Lal *v.* Nand Lal. **15 Luck. 126=184 I.C. 771=1939 O.L.R. 657= 1939 A.W.R. (C.C.) 245=1939 O.W.N. 955= A.I.R. 1940 Oudh 45.**

——S. 11—*Connected case—Common trial—Dismissal of one suit and decreeing of the other—Appeal against one decree only*—Res judicata.

A suit was instituted by *A* against *B* for recovery of certain amount. Another suit was instituted by *B* against *A*. The two suits were consolidated and tried together as the issues were practically identical. The Court dismissed *A's* suit but decreed that of *B*. *A* appealed against the decree passed in *B's* suit but did not appeal against decree passed in his own suit.

Held, that the unappealed decree did not operate as *res judicata.* The existence of a contradictory decision was not fatal and it was the later decision of the highest Court that would be binding on the parties. (*Bhide, J.*) Ram Sarup *v.* Sarnu Mal. **177 I.C. 305=11 R.L. 294=40 P.L.R. 198=A.I.R. 1938 Lah. 114.**

——S. 11—*Connected cases—Cross-suits involving same issue—Appeal against decree in one of them alone—Maintainability.*

In cross-suits involving the same issue the party feeling aggrieved by the decision cannot be allowed to appeal against the decree in one of them alone without appealing against the decree in the other. (*Mya Bu and Dunkley, JJ.*) U Ba Lin *v.* Ma E Sein. **164 I.C. 743=9 R.R. 136=A. I.R. 1936 Rang. 401.**

——S. 11—*Connected suits—Common judgment in two suits tried together—Appeal in one only—Decision in other—If* res judicata.

If two suits involving common issues are disposed of one judgment, and an appeal is filed against the decree in one and not from the decree in the other, the matter decided in the latter suit cannot become *res judicata.* The bar of *res judicata* cannot apply to such a case so as to prevent the Court from re-opening the matter decided in the unappealed suit. (*Mukherji and S. K. Ghose, JJ.*) Bahadur Singh *v.* Jyotipupa Debi. **40 C.W.N. 1176=64 C.L.J. 431.**

——S. 11—*Connected suits—Restoration after dismissal for default—Appeal in one suit only—Final order in the other suit—If* res judicata.

Where on the restoration of two connected suits dismissed for default, an appeal against the order restoring the suit is filed in one suit only, the principle of *res judicata* bars the appellate authority from setting aside the order of restoration in one suit when the order in the other suit had become final. (*Bomford, S.M. and Mehta, J.M*) Ayub Ali H. *v.* Shanti Devi. **1939 R.D. 60=1939 A.W.R. (B.R.) 141.**

Consent decree or order.

——S. 11—*Consent decree—Compromise giving effect to prohibited transaction—If operates as* res judicata.

The plea of estoppel by *res judicata* may prevail even when the result of giving effect to it will be to sanction what is illegal in the sense of being prohibited by statute. If the legality of an act is a point substantially in dispute, it may be a fair subject of compromise in Court like any other disputed matter; and a decree passed on such compromise is valid and binding until it is set aside, and will operate as *res judicata.* (*Broomfield and Wadia, JJ.*) Basangouda *v.* Basalingappa. **164 I.C. 703 (2)=9 R.B. 92=38 Bom.L.R. 593=A.I.R. 1936 Bom. 301.**

——S. 11—*Consent decree—Effect of—If* res judicata *as to all findings or only as to conclusion—Subsequent suit in respect of different subject-matter—If barred.*

A consent decree or order is as effective as a decree or order passed on contest, not only with reference to the conclusions arrived at in the suit in which it is passed, but with regard to every step in the process of reasoning on which the conclusion is founded, *i e.*, the findings on the essential facts on which the judgment on the ultimate conclusion is founded. In other words the finding which it was necessary to arrive at for the purposes of sustaining the judgment in the particular case will operate as estoppel by judgment. The fact that the subject-matter in the subsequent suit is different from that in the prior suit does not in any way affect the question of *res judicata.* (*D. N. Mitter and Rau, JJ.*) Secretary of State *v.* Ateendranath Das. **63 Cal. 550.**

——S. 11—*Consent decree—If can operate as* res judicata.

It is not essential in order to create *res judicata* that the matter should have been fought to its conclusion or indeed fought out at all. The Court, if the matter is in any way challenged, should be careful to see that the decree, if by consent, is not vitiated by fraud or otherwise. (*Ameer Ali, J.*) Pashupatinath Seal *v.* Pradyumnakumar Mallik. **63 Cal. 454.**

——S. 11—*Consent decree*—Res judicata—*Conditions—Defendant in prior suit not denying fundamental assertion of right and consenting to decree without raising issue on point—Plea in subsequent suit denying such right—If barred.*

A consent decree cannot, merely because it is a consent decree, prevent the application of the doctrine of *res judicata.* If, as is very often the case, the parties in consenting to the decree, do not really intend that the decree should be the final decision of their disputes, it would not operate as *res judicata.* Where the plaintiff in the prior suit asserted a right to recover certain taxes from the defendant, but the latter did not deny it and did not put the matter in issue, and consented to a decree being passed against him, the defendant must be taken to have admitted the claim of the plaintiff, and it could not be said that he did not intend the decree to decide that dispute once for all in favour of the plaintiff. The admission of a fact fundamental to the decision arrived at cannot be withdrawn, and the defendant in a subsequent suit cannot be permitted to plead his non-liability to pay the taxes. Such a plea is barred by *res judicata* by reason of the prior decision and by virtue of his pleading in the prior suit. (*King, J.*) Venkatachalapathy Iyer *v.* The City Cinema Co., Ltd. **176 I.C. 649=11 R.M. 144=1937 M.W.N. 1281=A.I.R. 1938 Mad. 225.**

——S. 11—Consent order—Appointment of trustee by consent of parties to suit—If bars claim of any claimant in future *See* C. P. Code, S. 92 (1) (*a*) and (*b*). **41 C.W.N. 298.**

Constructive *res judicata.*

——S. 11—Constructive *res judicata. See* Execution Proceedings, *infra.*

——S. 11—*Constructive* res judicata—*Applicability—Consent decree.*

Davis, J.C.—There is no difference within the meaning of S. 11, C. P. Code, between a certain definite and material issue which has been raised, and one which should have been raised. There is no difference in this matter between a consent decree and a decree passed *per invitum.* (*Davis, J.C. and Rupchand, A.J.C.*) Allahbux *v.* Nusserwanji & Co. **29 S.L.R. 455=164 I.C. 43=9 R.S. 30=A.I.R. 1936 Sind 99.**

——S. 11—*Constructive* res judicata—*Applicability—Land acquisition proceedings—Person not party—If affected.*

The doctrine of constructive *res judicata* cannot apply to any person who is not a party to the land acquisition proceedings just as it would not apply to a person who is not a party to a civil suit. The Land Acquisition Act cannot go further than the C. P. Code. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) Gul Mir Khan *v.* Habibulla Khan. **160 I.C. 1010=8 R. Pesh. 148=A.I.R. 1936 Pesh. 29.**

——S. 11—Constructive *res judicata*—Original order of Court allowing mortgagor to be in a portion of the house—Subsequent order to vacate—No constructive *res judicata. See* C. P. Code, O. 40, Rr. 1 and 2 and S. 11. **(1938) 1 M.L.J. 249.**

See also **1937 M.W.N. 1292** (*supra*).

Co-plaintiffs.

——S. 11—*Co-plaintiffs*—Res judicata *between.*

Where no rights of the plaintiffs *inter se* were decided in a former suit which was compromised, no question of *res judicata* arises by virtue of the compromise in a subsequent suit between them. (*Nanavutty, J.*) Mohammad Abdul Haseeb *v.* Zia Uddin Ahmad. **1937 O.W.N. 423.**

——S. 11—*Co-plaintiffs*—Res judicata *between—Contest between them—If necessary.*

An issue may be *Res judicata* between co-plaintiffs as well as co-defendants, and for an issue to be *res judicata* between co-plaintiffs it is not necessary that there must be a real contest between them. When the interests of various plaintiffs are common, and no question of adopting two conflicting positions as between themselves arises, the decision arrived at by the united efforts of all will bind them for ever, especially when the only person concerned in holding the opposite position has had a full right. (*Addison, A.C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. **178 I.C. 302=11 R.L. 440=40 P.L.R. 591=A.I.R. 1938 Lah. 571.**

——**S. 11**—*Co-plaintiffs—Suit by two persons for declaration that certain plots were not* sir *and that they were joint occupancy tenants—Suit decreed—Subsequent suit by one of them against other that he alone is tenant*—Res judicata.

Two persons sued for a declaration that the plots in suit were not *sir* and that they were joint occupancy tenants, and this suit was decreed. Subsequently one of them sued for a declaration against the other that he alone was the tenant.

Held, that the decision in the previous suit did not operate as *res judicata* as the intention of the plaintiffs in that suit was merely to get a declaration that the land was not *sir* but land in which they had acquired occupancy rights. (*Darling, S.M. and Bomford, J.M.*) JOKHU *v.* JOKHAN. **1937 R.D. 256.**

——**S. 11**—*Decision on question of law—Correctness of decision—If material.*

The correctness or otherwise of a judicial decision has no bearing upon the question whether it does or does not operate as *res judicata.* A party taking the plea of *res judicata* has to show that the matter directly and substantially in issue has also been directly and substantially in issue in a previous suit and has been heard and decided. The principle of *res judicata* is not to be ignored merely on the ground that the reasoning whether in law or otherwise of the previous decision can be attacked on a particular point. It is not correct to say that a previous decision on a question of law is not *res judicata* in a subsequent suit. (*Puranik, J.*) SHEORAM *v.* MULCHAND. **I.L.R. 1940 Nag. 181=175 I.C.6 93=11 R.N. 7=A.I.R. 1938 Nag. 195.**

——**S. 11**—Decree for possession in favour of Melcharthdar in prior suit—Subsequent suit in ejectment by Jenmi—If barred. *See* MALABAR COMPENSATION FOR TENANTS IMPROVEMENTS ACT, S. 5 (2). **47 L.W. 236.**

——**S. 11**—Decree on ward—*Res judicata. See* C. P. CODE, SCH. II, PARA. 20. **42 P.L.R. 77.**

——**S. 11**—*Decision directly and substantially in issue—Determination of amount due in mortgagee's suit for possession—Subsequent suit for redemption—Prior decision as to amount due, if* res judicata *in later suit.*

Where in a prior suit by the mortgagee for possession of the mortgaged property, it became necessary to decide as to the amount due on the mortgage and the sum due was in fact determined, it would operate as *res judicata* so far the amount due on the mortgage is concerned, in a subsequent suit for redemption of the mortgage. (*Zia-ul-Hasan and Hamilton, JJ.*) DARSHAN LAL *v.* MUNNU SINGH. **188 I.C. 623=1940 O.L.R. 361=1940 A.W.R. (C.C.) 182=1940 O.A. 354=1940 O.W.N. 391=A.I.R. 1940 Oudh 273.**

Directly and substantially in issue.

——**S. 11**—*Directly and substantially in issue—Adoption by Hindu widow—Suit by adopted son to recover property alienated by widow—Dismissal—Finding that alienation good for widow's lifetime—Suit by adopted son's transferee after death of widow—If* res judicata—*Plea that cause of action arose before widow's death and therefore suit barred by limitation—Competency—If barred by prior decision—Estoppel.*

A, a Hindu having died without issue, his widow *S*, transferred her husband's property in 1877 to one *B*, a cousin of the husband, *B* agreeing to pay her maintenance as long as she lived. In 1900 *S.* adopted a son, *I* who in 1902 brought a suit to recover possession of the property alienated to *B*. The suit was dismissed finally, the High Court in second appeal holding that *I* had no cause of action then to sue and that *B* was entitled to hold the property as long as *S* lived. *I* subsequently sold the property to his natural father who in turn sold it to the plaintiff. *S* died in 1925 and in 1927, plaintiff sued for possession of the property, impleading the natural father of *I* the adopted son *I* and *B* the alienee from the widow, and others. *B* resisted the suit pleading *res judicata* and limitation and adverse possession on the ground that the cause of action arose on the adoption of *I* in 1900 itself.

Held, (1) that the suit was not barred by *res-judicata* by reason of the decision in the prior suit, there having been no decision which would bar *I* or the plaintiff who derived title through him from claiming possession after the death of the widow; (2) that the plea of limitation and adverse possession on the ground that the cause of action arose in 1900 on the adoption of *I*, was barred by *res judicata* by reason of the decision in the prior suit that the cause of action would arise only after the death of the widow, which point was directly and substantially in issue; (3) that the decision in the prior suit, though wrong in law and subsequently overruled nevertheless operated as *res judicata* and was conclusive between the parties; (4) and that the plea of *B* was further barred by estoppel and by the principle that a man cannot be allowed to approbate and reprobate. (*Broomfield and Tyabji, JJ.*) SHANKAR *v.* PRABHAKARDIXIT. **60 Bom. 1008=165 I.C. 987=9 R.B. 192=38 Bom.L.R. 853=A.I.R. 1936 Bom. 402.**

——**S. 11**—*Directly and substantially in issue—Adverse finding on unnecessary issue*—Res judicata—*Rule as to.*

Though a finding on an issue may not be necessary for disposal of the suit, yet if a party invites the decision of the Court on that issue and the Court also considers it necessary to go into it and gives findings thereon, the decision on that issue will constitute *res judicata* in a subsequent suit, provided that the party against whom there was a finding on that issue, would be in a position to carry the matter in appeal. A landlord instituted a suit against his tenant for ejectment and recovery of possession. The tenant denied the lease and title of the landlord and claimed adverse possession. In a previous litigation between them the Court found in favour of landlord as regards the lease, title and adverse possession but dismissed the suit on the ground that the landlord failed to serve a notice on the tenant to quit. The tenant who was not given costs appealed, but the appeal was dismissed on the ground that he raised false pleas.

Held, that the tenant by his appeal invited the appellate Court to give a decision on the question of title and of the lease and that the finding as regards the title, lease and adverse possession and the order relating to costs were related to each other as cause and effect and hence the findings in the previous suit operated and *res judicata* in the subsequent suit by landlord against the tenant for ejectment and recovery of possession. (*Venkataramana Rao, J.*) Kotayya *v.* Subbayya. **168 I.C. 306=1936 M.W.N. 1162=45 L.W. 531 =9 R.M. 561=A.I.R. 1937 Mad. 114.**

——S. 11—*Directly and substantially in issue—Decision of question raised incidentally—If* res judicata.

A question of title raised only incidentally in a previous suit can be re-agitated in a subsequent suit. (*Wort and Fazl Ali, JJ.*) Dalip Narain Singh *v.* Deokinandan Prasad Singh. **182 I.C. 329=5 B.R. 813=12 R.P. 11=A.I.R. 1939 Pat. 519.**

——S. 11—*Directly and substantially in issue—Finding on unnecessary issues—If* Res judicata.

Where, although, all the issues framed in a former suit are decided against the plaintiff yet eventually the decision of the suit is based on the decision of one issue only, it cannot be said that the other matters raised in the suit were directly and substantially in issue or were finally decided and the principle of *res judicata* does not apply. 17 A. 174; 1922 P. C. 241 and 1925 Oudh 386, Ref. to. (*Almond, J.C. and Mir Ahmad, A.J.C.*) Tulsi Das Singh *v.* Yusaf Shah. **161 I.C. 63=8 R. Pesh. 155=A.I.R. 1936 Pesh. 61.**

——S. 11—*Directly and substantially in issue—Finding on unnecessary issue*—Res judicata.

A finding on a question in a prior suit which was unnecessary for the purposes of that litigation, and on which the decision in the prior suit was not based cannot operate as *res judicata* in a subsequent litigation. (*Nasim Ali and Henderson, JJ.*) Hrishikesh Law *v.* Satish Chandra Paul. **170 I.C. 634=10 R.C. 160=A.I.R. 1936 Cal. 203.**

——S. 11—*Directly and substantially in issue—Incidental finding on alternative issue by trial Court—Appellate Court holding that issue did not arise at all*—Res judicata.

When the matter was not directly and substantially in issue in the former suit, an incidental finding by the trial Court in that suit cannot operate as *res judicata* in a later suit especially when the appellate Court, *held*, that the question did not arise at all in the former suit. (*Courtney Terrell, C. J. and Dhavle, JJ.*) Nokhe Lal Jha *v.* Rajeshwari. **3 B.R. 14=1936 P.W.N. 689=165 I.C. 213=9 R.P. 161=17 Pat.L.T. 677=A.I.R. 1937 Pat. 141.**

——S. 11—*Directly and substantially in issue—Landlord and tenant—Decision of question of title —If* res judicata *in later suit as to nature or amount of payment to be made by tenant—Title merely collateral and incidental.*

A previous judgment on title in a suit between a landlord and his tenant cannot operate as *res judicata* in a subsequent suit on the question as to the nature of or the rate of the amount payable by the tenant, when the question of title in the later suit is collateral and incidental to suit and not directly in issue. (*Wort, J.*) Bikan Mahuri *v.* Mt. Bibi Walian. **183 I.C. 763=5 B.R. 983=12 R.P. 189=20 Pat.L.T. 671=A.I.R. 1939 Pat. 633.**

——S. 11—*Directly and substantially in issue—Landlord and tenant—Kabuliyat accepted as genuine in prior suit—Genuineness not in issue in that suit—Finding as to genuineness—If* res judicata—*Its evidentiary value in subsequent suit.*

In a prior suit by the tenant against the landlord, a kabuliyat, executed by the tenant's predecessor and stating the area of land in the possession of the tenant and rent payable by him, was produced by the landlord and it was accepted by the Court as a genuine document. On finding that the subsequent record of rights showed the tenant in possession of area more than that leased to him, the landlord brought a suit for recovery of additional rent for additional area. To prove that the tenant was in possession of excess area, the landlord produced the kabuliyat and contended that the decision as to genuineness of the document was *res judicata*, but the appellate Court refused to consider it at all as it disbelieved the document.

Held, that the question of genuineness of the document not being in issue in the prior suit, the finding as to its genuineness could not operate as *res judicata* in a subsequent suit. The finding however being evidence of the highest value ought to have been considered in the subsequent suit between the same parties, and in not doing so the appellate Court misdirected itself both on facts and law.

Held also, that the document could be taken as an admission by the tenant regarding the area leased and rent payable. (*M. C. Ghose and Mukerji, JJ.*) Administrator-General, Bengal *v.* Sachindra Kumar Roy. **65 C.L.J. 90=171 I.C. 834=10 R.C. 315=A.I.R. 1937 Cal. 237.**

——S. 11—*Directly and substantially in issue—Notice of ejectment by landlord against tenant—Plea of occupancy right by tenant—Decision adverse to tenant—Claim to occupancy of tenant's successors in subsequent proceedings—If barred.*

In answer to a notice of ejectment by the landlord, the predecessor of the appellants' (tenant) pleaded that he was a tenant with a right of occupancy. The Court decided against the tenant upholding the landlord's notice of ejectment. The appellants again claimed the right of occupancy in subsequent proceedings.

Held, that the question having been directly and substantially in issue in the former proceedings and having been decided adversely to the appellant's predecessor, the decision operated as *res judicata* against the appellants in the subsequent proceedings. (*Drake Brockman, S. M. and Knox, J.*) Wajid Khan *v.* Ragho Indra Pratap Sahi Rao. **1936 R.D. 271.**

——S. 11—*Directly and substantially in issue—Observation by Court on point not in issue—Effect of.*

A mere suggestion by the Court in a judgment passed by it on a point which is not in controversy and in respect of which no issue has been framed does not operate as *res judicata* as it has no binding effect. (*Niyogi, J.*) Shankernath *v.* Babulal. **I.L.R. 1936 Nag. 138=164 I.C. 931=9 R. N. 44=A.I.R. 1936 Nag. 148.**

——S. 11—*Directly and substantially in issue—Person in possession of some lands under agreement to lease encroaching upon other lands of same owner—Decision in Land Acquisition proceedings in respect of latter lands—Finding that he is tenure-holder—If* res judicata *in suit in respect of former lands.*

Where a person is in possession of certain lands belonging to another under an agreement to lease, and has also encroached upon other lands of the same owner and is wrongfully in possession of such other lands a finding in Land Acquisition proceedings with regard to the latter land that the person in possession is a tenure-holder cannot operate as *res judicata* in a suit for ejectment with respect to the former lands of which he is in possession under the agreement to lease. (*Harries, C. J. and Manohar Lall, J.*) Shiva Prasad Singh *v.* Mandira Kumari Debi. **21 P.L.T. 277 =A.I.R. 1940 Pat. 438.**

——S. 11—*Directly and substantially in issue—Point not raised in pleadings—Parties joining issues—Decision, if* res judicata.

Where though a point is not properly raised by the plaint but both parties have without protest chosen to join issue upon that point, the decision on that point would operate as *res judicata* between the parties. (*Stone, C. J. and Puranik, J.*) Sitabai *v.* Hari. **I.L.R. 1938 Nag. 496=180 I.C. 922=11 R.N. 406=A I.R. 1938 Nag. 401.**

——S. 11—*Directly and substantially in issue—Previous suit under S. 127 of Oudh Rent Act dismissed on ground that plaintiff cannot sue alone—Subsequent suit for arrears of rent treating defendant as statutory tenant*—Res judicata.

Where a previous suit by the plaintiff under S. 127 of the Oudh Rent Act was dismissed on the ground that the plaintiff was not entitled to bring the suit alone, a subsequent suit by him for arrears of rent against the same defendant treating him as a statutory tenant is not barred by *res judicata.* The question which is directly and substantially in issue in the subsequent suit is whether or not the defendant is a statutory tenant of the plaintiff. This question was never directly and substantially in issue in the previous suit, much less was this question heard and finally decided in that suit which was disposed of on a preliminary point. (*Zia-ul-Hasan, J.*) Mahabal Khan *v.* Mahomed Ahmad Ali Khan. **172 I.C. 647=1938 O.L R. 19=1938 O.A. 31=1938 R.D. 219=10 R.O. 185=1938 A.W.R. (C.C.) 18=1938 O.W.N. 126=A.I.R. 1938 Oudh 54.**

——S. 11—*Directly and substantially in issue—Prior suit alleging partition—Dismissal of suit negativing partition—Later suit on basis of joint status—Plea of partition by defendant—If* res judicata—*Plaintiff raising contradictory contentions—If can invoke rule of* res judicata.

In a prior suit by plaintiff against his brother *V*, for possession of a house he alleged that there was a partition in 1910 between him *V* and another brother *S*, at which the house fell to the share of *S*, who later sold it to plaintiff *V*, admitted that *S* was divided from the family in 1910, but that he and plaintiff remained joint and jointly purchased the house from *S* and that later on at a division between himself and plaintiff the house fell to his (*V's*) share. The suit was dismissed, the Courts finding that plaintiff had not proved his right, the sale deed being in the names of plaintiff and *V*, and that the parties remained joint till 1910. The appellate Court also found that the subsequent partition set up by *V* was false and never did take place. The plaintiff filed another suit in 1926 against *V's* widow for possession of properties on the ground that they had devolved on him by survivorship on *V's* death. The defendant, *V's* widow, pleaded that there was a prior partition 20 years ago between the brothers and that the house fell to the share of *V*.

Held, that the question whether *V* and plaintiff were joint or divided could not be said to have been directly and substantially in issue in the former suit, and that the rule of *res judicata* could not be invoked by the plaintiff whose contentions in the two suits were mutually contradictory. (*King, J.*) Lakshmi Devamma *v.* Rosayya. **A.I.R. 1936 Mad. 988.**

——S. 11—*Directly and substantially in issue—Rent suit*—Ex parte *decree—If* res judicata *as to relationship of landlord and tenant.*

The relationship of landlord and tenant is the very foundation of a degree in a suit for rent and therefore when such a suit has been decreed the Courts must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. It cannot be relegated to the category of matters only indirectly, collaterally and incidentally decided. This principle is true even if the decree passed is an *ex parte* one. Hence in a subsequent suit between the same parties the question of relationship of landlord and tenant is barred by the principle of *res judicata.* (*James and Rowland, JJ.*) Pirthi Singh *v.* Ramsaran Mahto. **3 B.R. 67=1936 P.W.N. 621=165 I.C. 623=9 R.P. 201=17 Pat.L.T. 633=A.I.R. 1936 Pat. 556.**

——S. 11—*Directly and substantially in issue—Rent suit—No dispute as to relationship or rate of rent—Issue as to whether all the plots covered by the* jamas *are included—Decision on—If* res judicata *in subsequent suit by tenant.*

In a rent suit by a landlord against a tenant, there being no dispute as to the relationship of landlord and tenant, or as to the rate of rent or of the period in arrears, an issue as to whether the landlord has included in the suit all the plots of land covered by the *jamas* in question, is only an incidental or collateral issue. The decision on such an issue in favour of the landlord would not operate as *res judicata* in a later suit by the tenant for a declaration that all the lands constitute but one *jama*, because even if the decision on the issue in the prior case had been the other way, and in favour of the tenant, the Court would be bound to decree the suit as there was no dispute as to relationship or rate of rent or period of arrears. (*R.C. Mitter, J.*) Eusuf Mondal *v.* Golapjan. **166 I.C. 1001=9 R.C. 645=62 C. L.J. 517=A.I.R. 1936 Cal. 772.**

——S. 11—Directly and substantially in issue—Rent suit—Plea of non-fixation of rent and of absence of possession—Decree for arrears—If *res judicata* as to status of defendant. *See* AGRA TENANCY ACT, S. 132. **1936 R.D. 538 (1).**

———**S. 11**—*Directly and substantially in issue—Rent suit—Plea that holding comprised further area at fixed rent—Finding upholding defendant's plea—Subsequent suit by landlord for same area as before*—Res judicata.

If the matter in issue was directly and substantially in issue between the parties in the former suit and actually formed the basis of the decision in the former suit, the decision in the former suit would operate as *res judicata* in the subsequent suit. In a suit for produce rent for the area contained in two khatians instituted by certain landlords, the tenants defendants raised the plea that their holding included a futher area of 1½ acres of another plot settled with them and that they occupied a holding of 9 bighas at a cash rent of Rs. 42-14-0. The finding was in favour of the defendants and the suit for produce rent was dismissed. The landlords again instituted another suit for recovery of rent of the same two khatian numbers and the defendants again resisted the suit on the ground that their holding included a further area 1½ acres, and that the same had been settled with them at a total rent of Rs. 42-14-0.

Held, that the decision in the former suit as to the extent and area of the holding was *res judicata* in the later suit. (*Courtney-Terrell, C.J., Fazl Ali, Khaja Mohammad Noor, James and Manohar Lall, JJ.*) JEONANDAN SINGH *v.* JANKI SINGH. **17 Pat. 451=177 I.C. 676=5 B.R. 6=11 R P. 171=1938 P.W.N. 379=19 Pat.L.T. 325=A.I.R. 1938 Pat. 306 (S.B.).**

———**S. 11**—*Directly and substantially in issue—Rent suit—Question of title—Decision—If* res judicata *in subsequent title suit.*

If, in a suit for rent, question of title is raised, not directly, but incidentally, then any decision on the question of title cannot operate as *res judicata* in a subsequent suit between the parties based upon title between them. But if a question of title is raised and has a direct bearing upon the decision of the Court, then a subsequent suit between the parties based on title would be barred by *res judicata* even though the earlier suit be one for rent. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v.* GOPALAKRISHNAMACHARYA. **175 I.C. 866=11 R.B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

———**S. 11**—*Directly and substantially in issue—Suit for rent of land in estate—Plea of rent-free tenure—Finding of rent-free holding—Subsequent suit by purchaser of estate more than 12 years later for rent*—Res judicata—*Adverse possession—Acquisition of rent-free title.*

In 1903, when the Court of Wards was in charge of an estate, a suit was filed to recover rent from the occupant of the land who pleaded that the land had been granted rent-free. The plea was upheld and there was a specific finding that the land was rent-free. In 1932, the person who purchased the estate in Court auction sued the then occupant, a descendant of the prior occupant, for rent.

Held, (1) that the decision in the prior suit operated as *res judicata* on the question of liability to pay rent; (2) that apart from *res judicata*, the judgment was the starting point for adverse possession in favour of the occupant of the land, and he must therefore be deemed to have held the land rent-free for the requisite period to establish his rent-free tenure by adverse possession. (*Wadsworth J.*) ADILAKSHMI DEVAMMA GARU *v.* APPA RAO GARU. **182 I.C. 944=12 R.M. 189=1938 M.W.N. 1134=48 L.W. 701=A.I.R. 1939 Mad. 94=(1938) 2 M.L.J. 934.**

———**S. 11**—*Directly and substantially in issue—Test—Identity of issues or subject-matter.*

The doctrine of *res judicata* does not depend on the identity of the subject-matter of the dispute, but depends on the identity of issues, and the question to be considered is whether the matter in controversy in the later suit was substantially the matter in controversy in the previous suit. (*D.N. Mitter and Rau, JJ.*) SECRETARY OF STATE *v.* ATTENDRANATH DAS. **63 Cal. 550.**

———**S. 11**—*"Directly and substantially in issue"—Test.*

Before a matter can be said to operate as *res judicata* it is necessary, *inter alia*, to establish that the matter was directly and substantially in issue in the earlier suit, and that it was heard and finally disposed of by the Court in the earlier suit. It is, of course, not necessary that before a matter can be said to be *res judicata*, it should form the subject-matter of a definite issue. If the Court can gather from the materials before it namely, the pleadings, the judgment and the decree, that that matter was directly and substantially in issue and formed the basis of the judgment arrived at in the earlier suit, either expressly or by necessary implication, then the principle of *res judicata* would apply. It is difficult to lay down a hard and fast rule as to what matters can be said to be arising directly and substantially. The Court can only look at the manner in which that particular matter is dealt with by the parties themselves, having regard to the course of the litigation, the conduct of the parties and manner in which the Court itself has dealt with it. Where it is impossible to show for want of proper materials as to whether an issue was raised and heard and finally disposed of, or whether it formed the basis of the decree in the suit or that it was necessary for the Court to decide it, the plea of *res judicata* must fail. (*Rangnekar, J.*) JAMBU TAVANAPPA ADAKE *v* GOPALAKRISHNAMACHARYA. **175 I.C. 866=11 R B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

Erroneous decision.

———**S. 11**—*Erroneous decision—Construction of decree or document—If conclusive in subsequent suit.*

Though the construction of a document may for certain purposes be regarded as involving a question of law, a construction once placed on a document by a competent Court before which the question was directly and substantially in issue is conclusive between the parties, and it is immaterial that the property involved in the subsequent suit is not the same as that which formed the subject-matter of the first suit. This principle of finality of construction is equally applicable to decrees, and the interpretation placed by a Court on a decree is conclusive between the parties in a subsequent litigation, even if that interpretation be erroneous in law. (*Varada-*

chariar and Mockett, JJ.) ALAGAPPA CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **1937 M.W.N. 465 (2).**

——S. 11—*Erroneous decision—Decision opposed to provisions of statute*—Res judicata.

The doctrine of *res judicata* is only a form of estoppel, and there can be no estoppel against a statute. If a law prohibits the levy of a sum by a landlord from his tenant, a previous judgment entitling him to recover the same cannot stand in the way of the defence of the defendant denying liability. (*Wort, J.*) BIKAN MAHURI *v.* MT. BIBI WALIAN. **183 I.C. 763=5 B.R. 983=12 R.P. 189=20 Pat.L.T. 671=A.I.R. 1939 Pat. 633.**

——S. 11—*Erroneous decision—Finding based on mistaken view of law*—Res judicata.

The decision in a former suit between the parties, though based on a mistaken view of the law, nevertheless operates as *res judicata* in a subsequent suit. The fact that the finding was based on a wrong view of the law and that the reasons on which the decision was based were unsound does not affect the conclusiveness or binding nature of the decision as to the rights of the parties. (*Broomfield and Tyabji, JJ.*) SHANKAR *v.* PRABHAKARADIXIT. **60 Bom. 1008=165 I.C. 987=9 R.B. 192=38 Bom.L.R. 853=A.I.R. 1936 Bom. 402.**

——S. 11—*Erroneous decision—Point of law*—Res judicata.

An erroneous decision on a point of law is *res judicata* between the parties. (*R. C. Mitter, J.*) RAJMOHAN DAS *v.* SARADA CHARAN CHAUDHURY. **162 I.C. 709=8 R C. 635=40 C.W.N. 627=A I. R. 1936 Cal. 200.**

——S. 11—*Erroneous decision on point of law—Suit for rent by landlord against tenant—Plea of non-liability for additional rent on ground of having planted cocoanut garden—Decision holding cocoanut garden not an improvement and making tenant liable for increased rent—Subsequent suit for rent—Plea of non-liability on ground of cocoanut garden being an improvement—Sustainability*—Res judicata.

Where in a suit for rent by a landlord in respect of certain faslis the tenant pleads that he is not liable for any additional rent on the ground that the holding comprises a cocoanut garden and is the subject of an improvement under S. 3 (4) (*f*) of the Madras Estates Land Act, but the Court rejects the plea holding that the cocoanut garden is not an improvement, the decision on that question of law will operate as *res judicata* in a subsequent suit between the same parties for rent in respect of subsequent faslis, notwithstanding that the view of law holding a cocoanut garden to be not an improvement under the Act is subsequently declared to be erroneous in later decisions of the Court. The principle of *res judicata* on a question of law should, however, be confined to matters which actually existed at the time of the former decision, and therefore areas and trees to which it was not applied at the time of the former decision would be governed by the correct principle of law as laid down in later decisions. (*Beasley, C.J. Ramesam and King, JJ.*) NARAYANA AIYANGAR *v.* SUBRAMANIAN CHETTIAR. **45 L. W. 15=168 I.C. 24=I.L.R. 1937 Mad. 364=1936 M.W.N. 1362=9 R.M. 539=A.I.R. 1937 Mad. 254=(1937) 1 M.L.J. 233 (F.B).**

Execution proceedings.

——S. 11—Execution proceedings—Application for execution rejected before notice to judgment-debtor—*Res judicata. See* LIMITATION ACT, ART. 182 (5). **1936 A.L.J. 571=A.I.R. 1936 All. 467.**

——S. 11—*Execution proceedings—Application by party to suit under O. 21, R. 58—Dismissal as late and as being not maintainable under O. 21, R. 58—Subsequent application under S. 47—If barred — Constructive* res judicata *— Applicability.*

Where a party instead of applying under S. 47, C. P. Code, applies under O. 21, R. 58, C. P. Code, and such application is dismissed as having been filed late and as being under O. 21, R. 58, C. P. Code, he is not barred by the rule of constructive *res judicata* from afterwards filing proper applications under S. 47, C. P. Code. If suits are filed instead of applications, the suits have to be treated only as applications under S. 47. (*Manohar Lall and S.C. Chatterji, JJ.*) G. B. SOLANO *v.* UMESHWARI KUER. **175 I.C. 120=4 B.R. 529=10 R P. 584=19 Pat. L.T. 157=1938 P.W.N. 239=A.I.R. 1938 Pat. 216.**

——S. 11—*Execution proceedings—Application for execution dismissed for default after notice to judgment-debtor—Objection that it was barred by limitation—If can be taken in subsequent application.*

Where on an application made for the execution of a decree, a notice was issued upon the judgment-debtor and there was no appearance on his behalf and no further step was taken by the decree-holder and the application was dismissed for default.

Held, that the fact that the judgment-debtor did not raise any objection that that application was barred by limitation did not preclude him from raising that objection in a subsequent application for execution. (*M. C. Ghose, J.*) SURESWAR PRASAD *v.* MAHARAJ BAHADUR SINHA. **173 I.C. 584=10 R.C. 547=67 C.L.J. 92=41 C.W.N. 1151=A.I.R. 1937 Cal. 581.**

——S. 11—*Execution proceedings—Application for execution of rent decree filed impleading heirs of deceased judgment-debtor—Application dismissed against them on ground they had no assets, deceased having conveyed all his properties in trust—Decree realised from another co-sharer judgment-debtor—Suit by him for contribution against trustees and heirs of deceased—If barred.*

An application for execution of a rent decree making the heirs of one of the judgment-debtors parties was dismissed as against them on the ground that they had no assets of the deceased in their hands, the deceased having executed a deed of trust in respect of all his properties during his lifetime. The decree-holder realised thereafter the amount of the decree from another co-sharer judgment-debtor personally. The latter sued the trustees and heirs of the deceased for contribution and the Court held that the deceased had not divested himself of the ownership of the properties by the deed of trust and the trustees were no better than mere managers and the plaintiff was, therefore, entitled to contribution from the assets in the hands of any one of the defendants either as managers or as heirs of the deceased.

Held, that the suit for contribution was not barred by *res judicata* by reason of the order passed in the execution proceeding dismissing the application against the heirs of the deceased. (*Mukherjea and Roxburgh, JJ.*) RADHA RANI *v.* BRINDARANI. **43 C.W.N. 940.**

——S. 11—*Execution proceedings—Assignment of decree—Recognition after notice to judgment-debtor—Failure to object—Objection at subsequent stage—Competency—Power of executing Court.*

Where notice of the assignment of the decree is given to the judgment-debtor, but he does not appear and does not contest the assignment and the assignment being proved, the Court substitutes the assignee in execution proceedings, the judgment-debtor is precluded from questioning the validity of the assignment at a later stage; it is not open to the executing Court to question the validity of the assignment or to find that the assignment was a collusive affair. (*D. N. Mitter and S. K. Ghose, JJ.*) SAILENDRA KRISHNA CHOUDHURY *v.* HARENDRA KUMAR ROY. **167 I.C. 430=9 R.C. 686=40 C.W.N. 1393=A. I.R. 1937 Cal. 4.**

——S. 11—*Execution proceedings—Certain objection to execution not raised in first application—Such objection raised in appeal from order dismissing such application but not decided—Second application raising such objection—If barred by* res judicata.

Where the judgment-debtor did not raise a certain objection in his application under S. 47, C. P. Code, objecting to the execution of the order against him but raised it in a second application filed by him and also in the grounds of appeal filed by him against the order dismissing the first application but the appellate Court did not go into that objection on the ground that it was pending in the lower Court.

Held, that the second application raising the objection was maintainable and was not barred by the principle of *res judicata*. (*Henderson and Sen, JJ.*) K. G. M. FAROQUI *v.* HABIBUR RAHAMAN CHOWDHURY. **44 C.W.N. 749.**

——S. 11—*Execution proceedings—Constructive* res judicata.

In an execution proceeding the decree-holder cannot adopt a line of attack which was either not taken up during the earlier execution proceedings, or which, if taken, was given up. Where, therefore, the decree-holder admitted in an earlier proceeding that ancestral property was not liable to attachment and sale in execution of his decree, the doctrine of constructive *res judicata* fully applies. (*Abdul Rashid, J.*) LAL MOHAMMAD *v.* KHEM CHAND RADHA KISHAN. **166 I.C. 982=9 R.L. 441=A.I.R. 1936 Lah. 167.**

——S. 11—*Execution proceedings—Constructive* res judicata.

The principles of constructive *res judicata* are applicable to execution proceedings. Thus where the plaintiff makes an application for execution of a decree as a trustee on behalf of the insolvent and Official Receiver and the Court decides that he has no *locus standi*, he cannot come forward and apply for execution on the strength of credentials, which he could very well have relied upon while prosecuting the former application. A.I.R. 1935 Lah. 200, applied. (*Agha Haidar, J.*) PANNA LAL *v.* RAM CHAND. **167 I.C. 354=9 R.L. 485=39 P.L.R. 368=A.I.R. 1936 Lah. 942.**

——S. 11—*Execution proceedings—Constructive* res judicata.

Though S. 11, C. P. Code, does not in terms apply to execution proceedings, the general principles underlying the rule of *res judicata* are applicable to them and the applicability of the rule is not limited to matters which were directly and substantially in issue and were heard and expressly decided in former execution proceedings, but the principle of constructive *res judicata*, as embodied in Expl. 4 of S. 11 is also applicable to such proceedings. If an objection which might and ought to have been taken in the earlier execution proceedings is not so taken and the matter is heard and decided, the party concerned is debarred from raising it in subsequent proceedings. 15 Lah. 869, referred to. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v.* IBRAHIM. **174 I.C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.**

——S. 11—*Execution proceedings—Constructive* res judicata.

Principles of constructive *res judicata* apply in execution proceedings. If a man with eyes open undertakes not to raise any objection of any kind to a certain position on the score of which he has secured a substantial advantage, he should not be allowed to reprobate it in the course of the same proceedings and to re-agitate the matter. (*Din Mohammad, J.*) MUSHARAF HUSSAIN *v.* AGHA MUNAWAR ALI KHAN. **186 I.C. 881=12 R.L. 436=A.I.R. 1940 Lah. 7.**

——S.11—*Execution proceedings—Constructive* res judicata—*Applicability—Conditions of—Failure to raise plea of payment or to object to correctness of amount for which execution is sought—If bar to plea or objection being raised at later stage.*

Caution has to be exercised in applying the principle of constructive *res judicata* to execution proceedings. It can only apply to cases where the Court could not have acted as it did if the judgment-debtor had successfully raised the points which are sought to be held by this principle against him. A Court, in general, cannot order execution unless it is satisfied (*i*) that the petitioner has a right to execute; (*ii*) that the judgment-debtor is liable to satisfy the decree; (*iii*) that the decree is executable; and (*iv*) that it is not barred by limitation. If therefore an executing Court orders execution to proceed it must be presumed to have held that all these conditions are satisfied. If a judgment-debtor with due notice of the proceedings fails to raise any objection on any of these grounds it must be held by the principle of constructive *res judicata* that his failure to do so has the same legal effect as if it had been raised and decided against him. The mere failure of a judgment-debtor to dispute, at the first opportunity, the correctness of the figure or sum for which the decree is sought to be executed would not bar him by the principle of constructive *res judicata* from raising the point in subsequent proceedings or at some later stage of the same proceedings. Failure to raise a plea of payment at a prior stage will not be a bar to the plea being raised at a later stage. (*Beasley, C.J. and Horwill, J.*) BAPANNA *v.* VEN-

GAYYA. 1937 M.W.N. 529=171 I.C. 581=10 R.M. 369=45 L.W. 291=A.I.R. 1937 Mad. 511=(1937) 1 M.L.J. 296.

——S. 11—*Execution proceedings—Constructive* res judicata—*Applicability—Omission to raise objection and order in previous execution making properties liable in execution—If binding in subsequent execution.*

Where a judgment-debtor has failed to raise all his objections, they will be deemed to have been impliedly decided against him, and he is therefore precluded from raising the same objections in a later execution of the same decree. To this extent the doctrine of constructive *res judicata* is applicable to execution proceedings. An order in a previous execution that the decree-holder is entitled to proceed against certain property must be held binding on the parties in subsequent execution proceedings, and it is not open to the judgment-debtor to raise in a subsequent execution the contention that execution against that property cannot proceed. (*Harries, C.J. and Rowland, J.*) BULA BIBI *v.* PARMANANDA DAS. **5 C.L.T. 39.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Application of.*

The doctrine of constructive *res judicata* is applicable to execution proceedings to this extent that where a judgment-debtor fails to raise all his objections to the application in execution made by the decree-holder which he might and ought to have raised and the application is ordered to proceed, all such objections will be deemed to have been impliedly decided against him and he will be precluded from raising the same objections in a later execution of the same decree. (*Harries, C.J. and Rowland, J.*) DULA BIBI *v.* PARMANANDA DAS. **188 I.C. 672=6 B.R. 711=A.I.R. 1940 Pat. 251.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Basis of principle—Order for substitution in place of decree-holder—No notice served on judgment-debtor—Latter, if can challenge order.*

Per *Mitter, J.*—The principle of constructive *res judicata* has been applied to execution proceedings, but the basis on which the principle rests is this, that if a judgment-debtor had an opportunity to prefer a certain objection, he would not be entitled at a later stage of the same execution proceedings or at a later execution proceeding in respect of the same decree, to prefer it if the order that had already been passed be inconsistent with the validity of his objection. If therefore, an order for substitution of a certain person in the place of the decree-holder is passed without notice to the judgment-debtor and in his absence, it is open to the latter to challenge that order, as he had no opportunity of presenting his objections before the order was made. (*Mitter and Khundkar, JJ.*) ANIL KUMAR *v.* JUGAL KISHORE. **43 C.W.N. 374.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Execution application not in accordance with law—Judgment-debtor ignorant of defect and not raising objection—Objection subsequently on discovery of defect—If barred.*

A judgment-debtor, who does not object to the validity of an execution application as being not in accordance with law, is not precluded from raising the objection afterwards on discovery of the defect on the principle of constructive *res judicata.* There is no duty cast on the judgment-debtor, nor upon any party to the proceeding to ascertain by an examination of the records, or otherwise, whether the application is in proper form. It is the duty of the Court to see that it is made according to law. The judgment-debtor is entitled to assume that the Court has done its duty. (*Horwill, J.*) APPAJI CHETTI *v.* GOVINDASWAMY REDDI. **174 I.C. 28=10 R.M. 661=1937 M.W.N. 355=A.I.R 1937 Mad. 760.**

——S. 11—*Execution proceedings— Constructive* res judicata—*Objection not taken at earlier stage of same execution application.*

The rule of constructive *res judicata* applies to execution proceedings. The circumstance that the omission to take the objection was not in a previous application for execution but only at an earlier stage of the same execution application makes no difference. (*Skemp, J.*) BISHAN SINGH *v.* JAISHI RAM. **188 I.C 207=12 R.L. 513=42 P.L.R. 189=A.I.R. 1940 Lah. 161.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Omission to raise plea in bar of execution—When operates as* res judicata *on later occasion in the course of same proceedings—Test—Rule.*

If on an application for execution the decree-holder obtains some relief by way of part satisfaction of the decree, the judgment-debtor should be deemed to have taken, but unsuccessfully, all objections, which, if successful, would have prevented the decree-holder from obtaining satisfaction in part of the decree. Where however, the decree-holder fails to obtain any relief and his application becomes abortive, the judgment-debtor is not debarred from taking any plea which, if successful, would defeat a second application for execution. Where there has been only one application for execution which is still pending, and the judgment-debtor successively objects on various occasions in the course of the same proceedings, an order dismissing the judgment-debtor's objection on one ground and directing execution to proceed cannot be taken to have impliedly decided all such objections as would be fatal to the execution of the decree if they were upheld by the Court. The principle of *res judicata* cannot be extended so far. In the absence of express adjudication, and during the pendency of the same execution proceeding there is nothing to prevent the judgment-debtor from taking any objection which might have been taken on the earlier occasion but was not taken. There is no rule of law which makes it incumbent on the judgment-debtor to raise all possible objections under S. 47, C. P. Code, at a given time. While the Court possesses ample powers to prevent the abuse of its process it must decide all objections under S. 47, C. P. Code, when they are raised if they are not barred by any rule of law. (*Niamatullah and Allsop, JJ.*) ALE RASUL *v.* BALKISHAN. **169 I.C. 997=10 R.A. 92=1937 A.L.J. 482=1937 A.W.R. 409=1937 All. L.R. 613=A.I.R. 1937 All. 446.**

——S. 11—*Execution proceedings—Constructive* res judicata—*Order transmitting decree for execution—Notice of application for transmission not personally served—Absence of declaration of* *due service—Effect—Plea by judgment-debtor in transferee Court of discharge and limitation—If barred by* res judicata*—C. P. Code, O. 5, R. 19.*

An order passed by the Court which passed a decree transmitting it for execution to another Court would operate as *res judicata* if it is passed after due service of notice on the judgment-debtor, so as to preclude the judgment-debtor from raising in the transferee Court pleas of limitation or discharge, etc., which ought to be raised in the transferring Court. In a case where the notice of the application for transmission is not personally served on the judgment-debtor the Court has to make declaration, as required by O. 5, R. 19, C. P. Code, that the notice has been duly served; the omission to make such a declaration is fatal when it is sought to apply the principle of constructive *res judicata* against the judgment-debtor. In the absence of a proper declaration of due service of notice as required by law, no decision can be implied to have been given by the Court on the pleas raised by the judgment-debtor in the transferee Court. *(Pandrang Rao, J.)* PALANIAPPA CHETTIAR *v.* THAIVANAI ACHI. **165 I.C. 59=9 R.M. 206=1936 M.W.N. 1037=44 L.W. 460=A.I.R. 1936 Mad. 812=71 M.L.J. 317.**

——S. 11—*Execution proceedings—Constructive* res judicata*—Plea of limitation.*

The principle of *res judicata* constructively applies to execution proceedings. A judgment-debtor is, therefore, debarred from agitating a question of limitation which he could and should have taken but failed to take in the earlier stages of the proceeding. *(Din Mohammad, J.)* BARKAT RAM *v.* BHAGWAN SINGH. **42 P.L.R. 404=A.I.R. 1940 Lah. 394.**

——S. 11—*Execution proceedings—Constructive* res judicata*—Rule as to—Applicability to restitution.*

Where the execution of the decree has been allowed to proceed without any objection by the judgment-debtor which was open to him and which he had opportunity to make in such proceedings, he is not entitled to raise such objection in subsequent execution proceedings as the principle of *res judicata* debars him from doing so. But the above principle has no application to restitution or even to an application for execution of a portion of the decree. *(Jai Lal, J.)* PUNJAB NATIONAL BANK, LTD. *v.* NANHIMAL JANKI DAS. **163 I.C. 97=8 R.L. 1007=38 P.L.R. 723=A.I.R. 1936 Lah. 246.**

——S. 11—*Execution proceedings— Co-judgment-debtors—Execution against properties of one —Objection by latter—Order overruling—If* res judicata *against others in subsequent execution.*

An order overruling the objections raised by one judgment-detor whose property is sought to be sold in execution does not operate as *res judicata* so as to preclude the other judgment-debtors from raising a similar objection in a subsequent execution application as against their property. *(Wort, C.J. and Manohar Lall, J.)* BANARSI PRASAD *v.* MAHABIR PRASAD SAHU. **177 I.C. 689=11 R.P. 170=5 B.R. 11=1938 P.W.N. 710=A.I.R. 1939 Pat. 41.**

——S. 11—*Execution proceedings—Decision, if a person is a legal representative of judgment-debtor—If* Res judicata.

The doctrine of *res judicata* applicable to execution proceedings does not rest on S. 11 of the Code, and distinctions are sometimes made between positive decisions and mere dismissals for default. Where there was no mere dismissal for default but on the contrary the question whether a certain person was not the representative of the judgment-debtor which was directly raised by him, was dealt with by the Court and decided adversely to him, the decision, whether right or wrong operates as *res judicata* on general principles. *(Wort, Ag.C.J. and Dhavle, J.)* KHARTAR SHAH *v.* SHYAM LAL SINGH. **1936 P.W N. 594=8 R.P. 628=163 I.C. 38=A.I.R. 1936 Pat. 616.**

——S. 11—*Execution proceedings—Decision in previous application on unnecessary issue.*

A finding on an issue which was not necessary for the decision of the dispute in a previous application for execution does not operate as *res judicata* between the parties in a subsequent application for execution of the same decree. *(Skemp, J.)* GOBIND RAM *v.* GURBAKHSH SINGH. **172 I.C. 487=10 R.L. 337=39 P.L.R. 189=A.I.R. 1937 Lah. 638.**

——S. 11—*Execution proceedings—Decision regarding judgment-debtor's liability to arrest—* Res judicata.

The principles of *res judicata* as laid down in S. 11, C. P. Code, constructively apply to execution proceedings. Where on the judgment-debtor failing to avail himself of an opportunity allowed to show cause why he is not liable to be arrested, an *ex parte* decision adverse to him is given by the executing Court, the matter of the liability of arrest is "heard and finally decided" within the meaning of S. 11, and a subsequent objection by the judgment-debtor is barred. *(Din Mohammad, J.)* BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

——S. 11—*Execution proceedings—Decision that house of judgment-debtor is exempt from attachment—Subsequent application to attach that house in hands of legal representative of judgment-debtor—If barred.*

A decision by the Executing Court that a certain house belonging to the judgment-debtor is exempt from attachment under S. 60 (1) proviso Cl. (*c*), C. P. Code, operates as *res judicata* in a subsequent application by the decree-holder for attachment of that house in the hands of the legal representatives of the deceased judgment-debtor. *(Addison and Din Mohammad, JJ.)* GURPARSHAD DEWAT RAM *v.* KISHEN CHAND. **177 I.C. 835=11 R.L. 369=40 P.L.R. 409=A.I.R 1938 Lah. 608.**

——S. 11—*Execution proceedings — Decision that property is saleable—Claim as to right of residence, if can be raised in subsequent execution proceedings.*

Where in prior execution proceedings it was decided that a certain property is saleable, it decides by implication that all the judgment-debtor's rights in it are saleable and operates as *res judicata* so far as subsequent execution petitions are concerned. Hence a claim of a right to residence cannot be raised in later execution petitions. *(D.R. Norman)* ALE RASUL ALI KHAN *v.* BAL KISHAN. **1939 A.M.L.J. 61.**

——S. 11—*Execution proceedings—Different objection at different stage—If can be raised.*

S. N. DAR, B.A. LL.B., Vakil High Court, SRINAGAR (Kashmir)

In the course of the same execution proceedings a different objection can be raised at a different stage thereof. (*Din Mohamed, J.*) Ganga Ram Trust Society *v.* Sundar Lal. **186 I.C. 653=12 R.L. 409=A.I.R. 1940 Lah. 27.**

——**S. 11**—*Execution proceedings—Dismissal for default—If can operate as* Res judicata.

An order in execution proceedings to operate as *res judicata* must decide some question which has been brought before the Court. An order dismissing an execution for default cannot operate as *res judicata* (*Mir Ahmad, A. J. C.*) Ghulam Raza *v.* Mt. Ikbal Sultan. **160 I.C. 835=8 R. Pesh. 132=A.I.R. 1936 Pesh. 41.**

——**S. 11**—*Execution proceedings—Dismissal for default—Omission to raise objection— If* Res judicata *in later application.*

Where no objection is taken, but the application for execution does not fructify being dismissed for default, the judgment-debtor is not debarred by the principle of *res judicata* from raising the objection in a later application. (*Dunkley, J.*) Ma Tin *v.* Ko Ba Thet. **1939 Rang.L.R. 152=184 I.C. 74=12 R.R. 121=A.I.R. 1939 Rang. 245.**

——**S 11**—*Execution proceedings—Dismissal for default or as not pressed—Effect—If* res judicata.

It is settled law that the dismissal of an execution petition for default or on the ground that it is not pressed does not operate as *res judicata* in respect of a fresh application, unless it can be said that there is a decision or adjudication which either directly decides the question on which the parties are at issue or which must be deemed to impliedly decide it on the ground that the order cannot have been made without such an implied decision, the rule of *res judicata* cannot apply and there is no bar in the way of a fresh application being made, if necessary, the very next day with the same prayer. Where the order passed on an execution application is "not pressed. Dismissed with costs"; the only point decided is that the application is to stand dismissed and that the judgment-debtor is to be paid his costs by the decree-holder. The order cannot be construed as meaning that the decree-holder has abandoned his case or has accepted the objection raised by the judgment-debtor so as to debar him from making a fresh application for execution containing the identical prayer. The difference between the dismissal of suits for default and dismissal of execution petition for default must be taken into account. (*Pandrang Row, J.*) Lachiram Santhokchand Ameechand *v.* Tarachand Jayarupji. **166 I.C. 72=9 R M.332=1936 M. W.N. 840=44 L.W. 565=A I.R. 1937 Mad. 289 =71 M.L.J. 490.**

——**S. 11**—*Execution proceedings—Execution application dismissed as not maintainable in form in which it was brought*—Res judicata.

Where an application for execution is dismissed as being not maintainable in the form in which it is brought and the judgment is confined purely to the procedure which has been adopted and does not consider the liability of judgment-debtor, it is not *res judicata* regarding liability of judgment-debtor. (*McNair. J.*) Sudhamoyee Bose *v.* Bhujendra Nath. **172 I.C. 121=10 R. C. 337=A.I.R. 1937 Cal. 226.**

——**S. 11**—*Execution proceedings—Execution application—Judgment-debtor found liable for decretal debt but remedy by suit suggested—Liability of judgment-debtor—If* res judicata *in subsequent suit.*

Where in an execution application, the Court holds that the judgment-debtor is liable for the decretal debt but suggests that the proper remedy of the decree-holder is by way of suit, the liability of the judgment-debtor is *res judicata* in such suit by the decision in the execution proceedings. (*McNair, J.*) Sudhamoyee Bose *v.* Bhujendra Nath. **172 I.C. 121=10 R.C. 337=A.I.R. 1937 Cal. 226.**

——**S. 11**—*Execution proceedings—Failure of judgment-debtor to appear and object—When bar to plea at subsequent stage—Notice affixed—Omission to declare service sufficient—Effect.*

A decree-holder applied for execution of a decree. A notice was ordered on judgment-debtor and later on the notice having been refused and therefore affixed, an order for attachment was passed. Subsequently this execution petition was dismissed as a result of a revision petition against an order for rateable distribution. At this time a previous application for execution was already pending and the judgment-debtors contended that the execution of the decree was barred by limitation. It was contended on the part of the decree-holder that the order of attachment coupled with the judgment-debtor's failure to object to the execution of the decree in subsequent execution, operated as *res judicata.*

Held, that as there was no personal service nor was there any declaration by the Court that there was sufficient service, the order of attachment on non-objection in the subsequent petition could not operate as *res judicata.* (*Pandrang Rao and Menon, JJ.*) Ramanadhan Chettiar *v* Veerappa Chettiar. **173 I.C. 468=10 R.M. 591=A.I.R. 1937 Mad. 84.**

——**S. 11**—*Execution proceedings—Finding in*—Res judicata—*Sameness of subject matter—If necessary.*

A finding in a previous execution proceeding is not *res judicata* in a subsequent execution proceeding, when the subject-matter of both the proceedings is not the same. Consequently a decision in a previous execution proceeding that the judgment-debtor was not proved to be an agriculturist is not *res judicata* in a subsequent execution proceeding, when the properties attached in both the proceedings are different. (*Dalip Singh, J.*) Baldev Singh *v.* Sher Singh. **185 I.C. 609=12 R.L. 306=41 P.L.R. 524=A.I.R. 1939 Lah. 556.**

——**S. 11**—*Execution proceedings—Finding of trial Court not questioned before Appellate Court —If can be questioned in execution proceedings.*

A finding of the trial Court which was not questioned before the Appellate Court, is not open to question in the execution proceedings under the decree. (*Sir George Rankin.*) Har Kishen Das *v.* Satgur Prasad. **32 S.L.R. 401=1938 A.L.R. 175=40 Bom.L.R. 760=1938 A.L. J. 200=4 B R. 365=42 C.W.N. 385=10 R.P.C. 219=178 I.C. 412=1938 A W.R. (P.C.) 67=1938 O.L.R. 127=1938 O A. 87=1938 O.W.N. 138=A.I.R. 1938 P.C. 98 (P.C).**

——**S. 11**—*Execution proceedings—Limitation —Notice issued to judgment-debtor under O. 21,* *R. 22—Judgment-debtor failing to appear—Objection by him on ground of limitation at next date of hearing—Maintainability.*

On an execution petition filed by the decree-holder, the Court issued a notice to the judgment-debtor under O. 21, R. 22, C. P. Code. The judgment-debtor not appearing on the date fixed for his appearance, a further rule was issued for attaching the property fixing another date. On that date the judgment-debtor appeared and made an objection that the execution was barred by limitation. He was then within time to appeal against the order passed on the date fixed for his appearance and also to file a petition for review.

Held, that the Court was within its jurisdiction to entertain the objection on the ground of limitation and that the rule of constructive *res judicata* did not apply to the facts of the case. (*Costello and M.C. Ghose, JJ.*) BAIDYANATH SIL *v.* BEJOY CHANDRA KUNDU. **156 I.C. 604=8 R. C. 10=39 C.W.N. 583=68 C.L.J. 105=A.I.R. 1935 Cal. 306.**

——**S. 11**—*Execution proceedings—Matter not decided on merits.*

Ordinarily, when once a matter has been decided for any reason whatsoever, it should not be re-opened in the same proceedings, but this is merely a rule of procedure and does not amount to a legal bar. The rule of *res judicata* does not come into operation unless the matter which is subsequently decided by a Court is expressly or impliedly decided on the merits in the previous proceedings. (*Jai Lal, J.*) RAJA BALBHADAR SINGH *v.* SHANKAR DAS. **172 I.C. 426=10 R.L. 318=39 P.L.R. 434=A.I.R. 1937 Lah. 211.**

——**S. 11**—Execution proceedings—Mortgage suit—Final decree for sale not in conformity with preliminary decree—Omission to object to terms of latter or to execution thereof—Sale of property confirmed—Subsequent objection by judgment-debtor — Sustainability. *See* C. P. CODE, O. 34, R 5. **1938 P.W N. 776.**

——**S. 11**—*Execution proceedings—Objection under S. 60 (1) (c) dismissed for default—Repetition of the objection in subsequent execution proceedings—If barred.*

In execution of his decree, the decree-holder attached certain houses belonging to the judgment-debtor. The judgment-debtor raised objections on the ground that he was an agriculturist and the houses under S. 60, C. P. Code, were not liable to attachment and sale. He subsequently made a statement that he would pay the decretal amount by a certain date, failing which his objections would stand dismissed with costs. Payment was not made and the objections were accordingly dismissed. Subsequently in the course of the execution proceedings against the same houses he repeated his objections under Ss. 60/47, C. P. Code.

Held, that as in the previous application there was no decision at all of the question whether the houses were exempt under S. 60, C. P. Code, the judgment-debtor was not precluded by the principles of *res judicata* from raising the objections. (*Agha Haidar, J.*) RAMCHAND *v.* CO-OPERATIVE SOCIETY OF KHARAR. **166 I.C. 266=9 R.L. 356=38 P.L.R. 691=A.I.R. 1936 Lah. 930 =A.I.R. 1937 Lah. 265.**

——**S. 11**—*Execution proceedings—Objection under O. 21, R. 58 summarily dismissed—Second objection under S. 47—If competent.*

If an objection purporting to be under O. 21, R. 58, C. P. Code, and treated as such by the Court is summarily dismissed without notice to the opposite side on the ground that it appeared to be collusive, a second objection under S. 47, C. P. Code, is certainly competent, as no question of *res judicata* can arise in such circumstances. (*Bhide, J.*) DAULAT RAM *v.* ANANT RAM. **187 I.C. 165=12 R.L. 444=41 P.L.R. 821=A.I.R. 1940 Lah. 67.**

——**S. 11**—*Execution proceedings—Omission to object to executability of decree by applicant in prior application*—Res judicata.

Where no objection was taken to the executability of a decree by the applicant in a prior application for execution by him, that objection cannot be raised in a subsequent application. (*Skemp, J.*) MST. DURGA DEVI *v.* MATHRA DAS. **166 I.C. 929=9 R.L. 434=38 P.L.R. 580=A.I. R. 1937 Lah. 18.**

——**S. 11**—*Execution proceedings—Omission to oppose substitution of assignee of decree—Judgment-debtor, if precluded from questioning assignee's right to execute.*

The judgment-debtor's omission to oppose the substitution of the assignee of a decree in place of the original decree-holder does not preclude the judgment-debtor from questioning the rights of such assignee to proceed to execution of the decree by reason of any bar imposed by law. 60 Cal. 1181, Ref. to. (*Dunkley, J.*) MA TIN *v.* KO BA THET. **1939 Rang.L.R. 152=184 I.C. 74=12 R.R. 121=A.I.R. 1939 Rang. 245.**

——**S. 11**—*Execution proceedings—Omission to raise objection—When* res judicata.

The principle of S. 11 has been applied to execution proceedings, and judgment-debtors are bound to put forward all defences that would effectually prevent execution against them But as long as no steps are taken against a particular judgment-debtor or his property, there is no reason why he should resist execution of the decree. It would unduly stretch the application of the principle of *res judicata* to execution proceedings, if it were applied to the non-appearance of a judgment-debtor when no relief is claimed against him or against his property. (*Horwill, J.*) SATYANARAYANAMURTHI *v.* MAHESAM. **1937 M.W.N. 361.**

——**S. 11**—*Execution proceedings—Omission to raise plea of limitation*—Res judicata.

An order passed in execution on the question of limitation cannot operate as *res judicata* unless the point has been specifically decided or unless it must be inferred as a matter of necessary implication that a decision has been arrived at that the application for execution was within time. Where an application for execution is made and is finally dismissed as infructuous, it cannot be inferred necessarily that the question of limitation has been decided. (*Niamatullah, Ag.C.J. and Allsop, J.*) COLLECTOR OF BENARES *v.* JAI NARAYAN RAI. **173 I.C. 428=10 R.A 480=1938 A.L.R. 142=1937 A.L.J. 1349=1937 A.W R. 1222=A.I.R. 1938 All. 89.**

——**S. 11**—*Execution proceedings—Order dismissing objection by judgment-debtor to attach-*

ability of land—Continuation of proceedings—Subsequent reversal of order—Res judicata.

Executing Court dismissed the objection of the judgment-debtor and held that the ancestral land in the hands of the son was liable to attachment in execution of decree against deceased father. The proceedings continued and the executing Court began to arrange for the lease of the land. But before it had arranged for the lease, the Punjab Debtors' Protection Act came into force and the executing Court relying on its provisions reversed its decision.

Held, that the order of the executing Court dismissing judgment-debtor's objection was not final and hence it was not precluded from reversing its erroneous order. No question of *res judicata* therefore arose. (*Abdul Rashid, J.*) NAND MAL-DURGA DAS *v.* NAZIR AHMAD. **41 P. L.R. 635=A.I.R. 1939 Lah. 168.**

——S. 11—*Execution proceedings—Order for attachment—Subsequent objection by judgment-debtor under S. 18, Punjab Colonization of Government Lands Act*—Res judicata.

Under S. 11, C. P. Code, which also applies to execution proceedings, even a wrong decision on an issue of law operates as *res judicata*, inasmuch as S. 11 makes no distinction between an issue of fact and an issue of law, especially when there is identity of the matter in issue and also of the cause of action. So where a Judge, in execution proceedings, passed an order for attachment and sale of certain crops of the judgment-debtor and subsequently objection to attachment under S. 18, Punjab Colonization of Government Lands Act, is brought by the judgment-debtor, he is barred under S. 11, C. P. Code, from revising the previous order. (*Agha Haidar, J.*) QURBAN HUSSAIN SHAH *v.* FAZAL SHAH. **173 I.C. 218=10 R. L. 419=39 P.L.R. 718=A.I.R. 1937 Lah. 393.**

——S. 11—*Execution proceedings—Order for execution in presence of judgment-debtor—Judgment-debtor, if can question validity of decree in subsequent proceeding.*

An order for execution of a decree passed in a previous execution proceeding to which the judgment-debtor was a party operates as *res judicata* in a subsequent execution proceeding, and it is not, therefore, open to the judgment-debtor to question the validity of the decree for the first time in the subsequent proceeding. (*Mukherjea, J*) BISWANATH LAHIRI *v.* THE CHATRA-SERAMPUR CO-OPERATIVE CREDIT SOCIETY, LTD. **41 C.W.N. 887.**

——S 11—*Execution proceedings—Order in execution*—Res judicata.

Where a wrong order in execution has become final because an appeal therefrom has been dismissed as time-barred, principles of *res judicata* come into play and that order cannot be set aside in subsequent execution. (*Middleton, J.C. and Mir Ahmad, J.*) AMIR KHAN *v.* KHAIR MOHAMMAD. **178 I.C. 275=11 R. Pesh. 50=A.I.R. 1938 Pesh. 77.**

——S. 11—*Execution proceedings—Order in execution confirmed by High Court—If can be questioned as illegal.*

A party to a proceeding before the execution Court cannot be allowed to question an order passed by that Court in those proceedings as not being in accordance with law, after such an order has been affirmed by the High Court. (*Saunders, J.*) DHANOO LAL *v.* SARDAPAT. **162 I.C. 987=8 R.P. 599=1936 P.W.N. 284=A.I.R. 1936 Pat. 305.**

——S. 11—*Execution proceedings—Orders in—When not* res judicata.

Where no objection to execution is taken and the application for execution does not fructify but is withdrawn and dismissed, no order for execution having been made the judgment-debtor is not debarred by principles of estoppel or *res judicata* from raising the question of limitation at a later stage. (*Roberts, C.J. and Dunkley, J.*) MAUNG MAUNG *v.* V. V. R. CHETTYAR FIRM. **1940 Rang.L R. 82=185 I.C. 70=12 R.R. 178=A.I. R. 1939 Rang. 296.**

——S. 11—*Execution proceedings—Order under O. 21, R. 48—Subsequent application contesting its validity—If barred.*

Where an order under O. 21, R. 48, C. P. Code, directing attachment of judgment-debtor's salary has been made and no appeal is filed assailing the validity of the order, the order becomes final as against the parties and subsequent application contesting the validity of the order of attachment is barred by the general principles of *res judicata*. (*Mya Bu and Dunkley, JJ.*) U NYUN TIN *v.* SAW EU HOKE. **186 I.C. 252=12 R.R. 255=A.I.R. 1939 Rang. 384.**

——S. 11—*Execution proceedings—Plea of adjustment of decree in bar of execution—Rejection on the ground of delay in raising plea—Appeal—Ground of appeal raised but not pressed—Subsequent execution—Plea of adjustment—Bar of* res judicata.

When a plea of adjustment of decree in bar of execution is rejected by the executing Court as having been raised too late, and a ground of appeal regarding the adjustment is raised but not pressed in the appeal, with the result that the order of the executing Court is confirmed by the appellate Court, the judgment-debtor is precludt ed from raising the same plea in a subsequen- execution, on the principle of *res judicata*. (*Verma and Rowland, JJ.*) SAH RADHA KRISHNA *v.* MT. BECHNI DEBI **186 I.C. 187=12 R.P. 456=6 B.R. 302=1939 P.W.N. 716=A.I.R. 1940 Pat. 56.**

——S. 11—*Execution proceedings—Plea of limitation not raised by judgment-debtor—Dismissal of application for default—Subsequent application—Plea of limitation—Competency.*

In a previous proceeding in execution the Court issued a notice under O. 21, R. 22, C. P. Code, fixing the case for hearing on 19—1—1932. The notice was not returned by that date, and the time of return was therefore extended to 26—1—1932. On that date, the application for execution was dismissed for default, the judgment-debtor too not appearing.

Held, that the judgment-debtor was not debarred from raising the objection on another and subsequent occasion that the execution was barred by limitation. (*Guha and Bartley, JJ.*) IBRAHIM MIA DEWAN *v.* JAMIN ALI MORHAL. **40 C. W.N. 510.**

——S. 11—*Execution proceedings—Plea of limitation not raised—Plea, if can be raised in subsequent execution proceedings.*

Even if an execution proceeding be time-barred, the judgment-debtor cannot rely upon that plea, in a subsequent execution proceeding if he failed to do so in the first or in any intermediate proceeding. Where the judgment-debtors were notified of the execution proceedings and they did appear in the proceedings, had opportunity to raise any plea which might have been available to them, and did not raise the plea of limitation, they are debarred to raise a plea of limitation in subsequent proceedings. 8 Cal. 51, Foll.; A. I. R. 1934 Pesh. 64 and A. I. R. 1935 Pesh. 119, Dist. (*Middleton, J.C.*) NAND RAM SHAH *v.* KABUL SHAH. **160 I.C. 448=8 R. Pesh. 111=A.I.R. 1936 Pesh. 9.**

——S. 11—*Execution proceedings—Prior execution case—Judge dismissing objection on ground of vagueness—Application for review dismissed as incompetent—Decision, if* res judicata.

Where in a prior execution case of the same decree, the Judge dismissed the objection by *A* on the ground that it was vague but did not raise the question whether *A* was authorized to appear for *B* in his personal capacity and when *A* subsequently made an application to have his order reviewed, the application was dismissed on the ground that it was incompetent, *A* having no power to represent *B* personally.

Held, that this decision could not operate as *res judicata* in subsequent execution case. It was only the general principles of *res judicata* that applied in execution proceedings and as the order rejecting an application for review was under O. 47, R. 7 (1), C. P. Code, it was not appealable. Hence the question whether *A* was authorized to appear for *B* in his personal capacity could not be said to have been finally decided. (*Addison and Abdul Rashid, JJ.*) ALLAHABAD BANK, LTD *v.* RATTAN LAL. **169 I.C. 854=10 R.L. 44=39 P. L.R. 202=A.I.R. 1937 Lah. 21.**

——S. 11—*Execution proceedings—Question whether decree is declaratory in nature decided against in earlier application*—Res judicata.

The question whether the decree is declaratory in nature and cannot be executed cannot be governed by the principle of *res judicata* as it involves a question of jurisdiction. (*Almond, A.J.C.*) QUTBUDDIN KHAN *v* NAWABZADA SARDAR SADULLAH KHAN. **169 I.C. 942=10 R. Pesh. 12 =A.I.R. 1937 Pesh. 62.**

——S. 11—*Execution proceedings—Rateable distribution becoming final*—Res judicata.

Where an order allowing a claim to rateable distribution is not challenged by way of appeal or any other proceeding and it becomes final, the general doctrine of *res judicata* applies and it cannot be attacked in a subsequent suit. (*Agha Haidar, J.*) MOHAN LAL *v.* SHIB CHARAN DAS. **167 I.C. 910=9 R.L. 569=A.I.R. 1936 Lah. 891.**

——S. 11—*Execution proceedings*—Res judicata—*Applicability.*

The principle of *res judicata* applies to execution proceedings. Where a particular question is raised in the execution proceedings although not decided, the matter becomes *res judicata.* (*Wort, Ag C.J. and Manohar Lall, J.*) MT. SUMITRA KUER *v.* BHAGWAT NARAIN SINGH. **180 I.C. 736=5 B.R. 482=11 R.P. 530=A.I.R. 1939 Pat. 19.**

——S. 11—*Execution proceedings*—Res judicata—*Applicability—Conditions—Order against decree-holder subsequent to sale—If* res judicata *against a purchaser in later proceedings.*

S. 11, C. P. Code, no doubt applies to orders passed in execution proceedings, but such orders would affect only the parties or their privies and not strangers not deriving title from such parties. An order passed against the decree-holder after an auction-sale, to which the auction-purchaser is not a party cannot operate as *res judicata* as against the auction-purchaser in a subsequent proceeding. (*Niyogi, J.*) MADHAO *v.* RAMCHANDRA. **I.L.R. (1939) Nag. 104=11 R.N. 216 =178 I.C. 268=1938 N.L.J. 60=A.I.R. 1938 Nag. 273.**

——S. 11—Execution proceedings—Sale proclamation—Judgment-debtor having knowledge and omitting to object to property being included —Objection after sale—Maintainability. *See* C. P. CODE, O. 21, R. 66 (2). **40 C.W.N. 428.**

——S. 11—Execution proceedings—Settlement of terms of proclamation—Decision on issues raised by parties—*Res judicata. See* C. P. CODE, S. 47. **50 L.W. 578.**

——S. 11—*Execution proceedings—Wrong decision against judgment-debtor on point raised by him—If* res judicata.

Where an objection that the transfer by Rent Court of application for execution to Civil Court was without jurisdiction was agitated and was decided against the judgment-debtors in the earlier execution and an appeal was presented from that decision and failed, it is no longer open to the judgment-debtors to raise it, the principle of *res judicata* being a bar to the contention even though the Court before whom the previous execution was presented may or may not have taken a wrong view of the law. (*Varma and Rowland, JJ.*) INDERJIT NATH SAHI DEO *v.* MAHARAJA PRATAP UDAI NATH SAH DEO. **18 Pat. 378=182 I.C. 821=5 B.R. 830=1939 P.W. N. 641=12 R.P. 74=20 Pat.L.T. 726=A I.R. 1939 Pat. 230.**

Ex parte decree.

——S. 11—*Ex parte* decree—Subsequent suit to declare decree void on ground of want of jurisdiction—If barred—*Res judicata.* **A.I.R. 1937 All 251.**

Findings.

——S. 11—*Findings—Findings not necessary but only incidental—Effect.*

In a suit for letters of administration, an order while affirming the claimant's status as the legal son of the deceased and granting him letters of administration, also incidentally contained a finding that the rival claimant was the legal wife and heir of the deceased. But as the claimant was entitled to 14 annas share and rival claimant to only 2 annas share, the former was entitled to the letters.

Held, that the finding regarding claim of rival claimant was merely incidental and unnecessary to arrive at and was therefore not *res judicata.* All that the Court should have done was to express an opinion that the evidence proved the rival claimant to be the legal married wife of the deceased. (*Mosely and Dunkley, JJ.*) FATIMA BIBI *v.* MA TOKE. **177 I.C. 155=11 R.R. 100= A.I.R. 1938 Rang. 275.**

——S. 11—*Findings — Judgment reversed in appeal—Finding not disturbed—If* res judicata.

A finding in a judgment that a certain party is governed by Hindu Law and not by custom is not *res judicata* in a later proceeding, when on appeal by him the judgment is reversed, although the appellate Court does not specifically disturb the finding. (*Din Mohammad, J.*) JETHU MAL-HARI PARSHAD *v.* TELU. **185 I.C. 232=12 R.L. 282 (1)=41 P.L.R. 596=A.I.R. 1939 Lah. 540.**

——S. 11—*Findings—Suit remanded on appeal for fresh decision—Findings given by Appellate Court—If* res judicata *in subsequent appeal against fresh decision.*

If a suit is remanded on appeal for a fresh decision, it is clearly open to any party dissatisfied with the fresh decision to challenge all points decided at any stage of the suit. Consequently any finding given by the appellate Court ordering remand is not necessarily *res judicata* in a subsequent appeal against the final decision after remand. (*Mitchell, F.C.*) PAINDA KHAN *v.* MAHOMED AZIM KHAN. **18 Lah.L.T. 24.**

Finding on title.

——S. 11—*Finding on title—Decision on ground that defendant has not shown title to resume as against plaintiff—Subsequent suit — Value of prior decision.*

Where in a suit for recovery of possession against the heir of the jagirdar who had resumed it on the ground that the grantee had died without leaving a male heir, the Court while finding that the plaintiff was the owner of the estate and that the defendant had failed to prove that the plaintiff was the sub-jagirdars of the original jagirdars, decided the case on the ground that the defendant had not shown any right to resume as against the plaintiff, and where the defendant subsequently filed a suit in the Revenue Court against the plaintiff for recovery of rent on the ground that he was holding the land as his tenant, it was held that though the previous decision may not operate as *res judicata* yet as the judgment had been admitted in evidence being *inter partes*, it was unnecessary to repeat the reasons given in the prior judgment for holding that the plaintiff was an owner and not sub-jagirdar. (*Sir Shadi Lal.*) GIRWAR PRASAD NARAYAN SINGH *v.* RAMESHWAR LAL BHAGAT. **1938 O.W.N. 242=1938 O.A. 164=1938 A.L.R. 190=19 Pat.L.T. 224=1938 P.W.N. 311=1938 M.W.N. 469=10 R.P.C. 231=4 B.R. 405=173 I.C. 447=1938 R.D. 321=1938 O.L.R. 135=1938 A.W.R. (P.C.) 50.**

Former suit.

——S. 11—*Former suit—Causes of action different—Prior suit relating to ⅓ share in property—Later suit relating to remaining ⅔ share—Questions involved not substantially and directly in issue in prior suit—*Res judicata.

A suit relating to a ⅔ share in property covered by a deed of gift is not barred by *res judicata* by reason of a previous litigation relating to ⅓ share retained by the donor, when the cause of action is distinctly different and the questions involved in the suit were not substantially and directly in issue in the previous suit. (*King, C.J. and Thomas, J.*) JANGU SINGH *v.* JOT SINGH. **1936 R.D. 275=1936 O.W.N. 582.**

——S. 11—*"Former suit"—Final decision in suit pending appeal in another suit—If operates as* res judicata.

The doctrine of *res judicata* so far as it relates to prohibiting the re-trial of an issue, must refer not to the date of the commencement of the litigation, but to the time when the Judge is called upon to decide the issue. The rule of *res judicata* is not limited to the Court of first instance but it applies equally to the procedure of the first and second appellate Courts and indeed, even to miscellaneous proceedings. Where therefore in a suit for ejectment the tenant sets up the title of a third person to the leased property as against the landlord suing him in ejectment, and pending the second appeal from the decision in ejectment suit, a suit between the landlord and such third person decides that the landlord is entitled to leased property and not the third person, such decision is binding on the tenant even though he is not party to such suit, and the tenant is concluded by the decision on title given in such judgment against the third person whose title he pleads in the ejectment suit. (*Venkataramana Rao, J.*) KRISHNAN NAIR *v.* KAMBI. **172 I.C. 268=10 R.M. 443=1937 M.W.N. 299=A.I.R. 1937 Mad. 544.**

——S 11—*Former suit—Two suits between the same parties in different Courts—Decision in one—Revision—Decision in the other becoming final during pendency of revision—If* res judicata *for purposes of revision.*

Judgments coming into existence during the pendency of proceedings by way of appeal or revision are not excluded from the operation of the rule of *res judicata*, if such judgments are allowed to become final. Therefore if a suit is decided between the same parties by a Court establishing the title of one of them to the property in dispute, and such decision has become final, the decision constitutes the question of title *res judicata*, even for the purpose of an appeal or revision from a decree in another suit between the same parties in another Court though the decision relied on as *res judicata* has been given only after the decision appealed against or sought to be revised. (*Varadachariar, J.*) RANGACHARIAR *v.* RANGASWAMI AIYANGAR. **59 Mad. 777=161 I.C. 219 (1)=8 R.M. 803 (2)=1936 M.W.N. 243 (1)=43 L.W. 189=A.I.R. 1936 Mad. 190=70 M.L.J. 223.**

Heard and finally decided.

——S. 11—*Heard and finally decided—Abandonment of claim by plaintiff.*

Where the plaintiffs in a suit abandon their claim, there is no trial of issues arising between the parties and consequently there is no decision which can operate as *res judicata*. To prevent the defendants being harassed unnecessarily a second time on the same cause of action, the law however prescribes that the plaintiff shall not sue again on the same cause of action, unless the suit is withdrawn under O. 23, R. 1, C. P. Code, owing to some technical defect, and the permission of the Court is obtained. (*Bhide, J.*) NAND LAL *v.* MT. LAKMI. **187 I.C. 865=12 R.L. 500=A.I.R. 1939 Lah. 414.**

——S. 11—*Heard and finally decided—Adverse finding against successful party—When* res judicata.

There is really no ground for holding that an adverse finding against a successful party can never be *res judicata*, though a finding on an issue is not *res judicata* if the decree had been made in spite of the finding and not in consequence of it. Even a successful party may be bound by *res judicata*; and a party cannot be permitted to take up two inconsistent positions in Court especially when the one proceeding arises out of the other. The principle of *res judicata* is mutual. A judgment, if binding upon one party, is binding upon both, and not merely as against the person who is defeated in the suit. (*Broomfield and Tyabji, JJ.*) SHANKAR *v.* PRABHAKARDIXIT. **60 Bom. 1008=165 I.C. 987=9 R.B. 192=38 Bom.L.R. 853=A.I.R. 1936 Bom. 402.**

——**S. 11**—*Heard and finally decided—Application for amendment of decree—Dismissal by trial Court on ground of no error—Second appellate Court not deciding the matter, holding that it is concerned with execution—Matter, if* res judicata.

Where the trial Court dismisses an application by the judgment-debtor for amendment of the decree on the ground that there is no error in the judgment or the decree, but the second appellate Court, rightly or wrongly thinking that it is dealing with execution proceedings, disposes of the appeal without deciding the question whether the decree should be amended or not, it cannot be said that it "heard and finally decided" the judgment-debtor's application for amendment of the decree, and the matter is not, therefore, *res judicata.* (*Nanavutty and Zia-ul-Hasan, JJ.*) UMA SHANKAR *v.* MURARI DAS. **13 Luck. 186=167 I.C. 586=9 R.O. 391=1937 O.L.R. 125=1937 O.W.N. 268=A.I.R. 1937 Oudh 246.**

——**S. 11**—Heard and finally decided—Application to set aside *ex parte* decree—Dismissal on ground of want of sufficient cause—Application also wrongly laid—Appeal against decree—Propriety of refusal of adjournment of case—If can be gone into in appeal—Order under O. 9, R. 13—If final and conclusive. *See* C. P. CODE, O. 9, R. 13. **(1937) 2 M.L.J. 666.**

——**S. 11**—*Heard and finally decided—Appeal filed against a decision—Appellate Court deciding suit on a point different from that decided by the lower Court—Refusal to decide any other point—Decision of the trial Court, if* res judicata *in later suit.*

Where a person sued for possession of certain properties as belonging to a Sangat and that he was its representative, and that a document under colour of which the defendant remained in possession was void on account of fraud, undue influence, etc., and where the trial Court while deciding the first point against the plaintiff, decreed the suit on the ground that the deed under which the defendant was in possession was void owing to undue influence, etc., and the appellate Court decided only the later point and refrained from deciding the question as to whether the property belonged to the Sangat or not, a later suit by another representative of the Sangat against the same defendant for possession of the properties on the ground that it belonged to the Sangat is not barred by *res judicata* as the decree of the trial Court merged in that of the appellate Court, and as the latter had disposed of the case on a ground totally different from that of the trial Court, the finding of the trial Court is no bar. (*Zia-ul-Hasan and Yorke, JJ.*) HAR KISHAN DAS *v.* SATGUR PRASAD. **14 Luck. 277=177 I.C. 785=11 R.O. 73=1938 O.L.R. 446=1938 O.A. 746=1938 O.W.N. 962=A.I.R. 1939 Oudh 2.**

——S. 11—Heard and finally decided—Arbitration—Award—Effect of—No finding on particular point of dispute—If entitles parties to reagitate the same. *See* ARBITRATION—AWARD. **1937 A.W.R. 805=1937 A.L.J. 1141.**

——**S. 11**—*Heard and finally decided—Conflicting decisions in same proceedings at different stages—If permissible.*

Where a question is already decided by a Judge and the same Judge subsequently arrives at a contrary decision on the same question in the same proceeding, the reopening of the question is barred by *res judicata.* (*Rowland, J.*) JAGARNATH LAL *v.* LAL BABU. **164 I.C. 282=9 R.P. 104=17 Pat.L.T. 756=1936 P.W.N. 805=A.I.R. 1936 Pat. 447.**

——**S. 11**—*Heard and finally decided—Connected cases—Appeal in one only—Effect—Suit on mortgage after insolvency of mortgagor—Application by Official Receiver to set aside mortgage—Decree in suit and dismissal of application—Appeal by Official Receiver against dismissal of application alone—If* res judicata—*Provincial Insolvency Act, Ss. 4 and 53—Scope.*

Appellant had a mortgage executed by a person who subsequently became insolvent. The mortgage was executed on 9—12—1927 and the mortgagor was adjudicated insolvent in October, 1930. In June, 1931, the appellant sued on his mortgage in the Subordinate Judge's Court, the amount involved in the suit being Rs. 11,200. In August, 1931, the Official Receiver applied in insolvency before the same Judge under Ss. 4 and 53 of the Provincial Insolvency Act to have the mortgage set aside. The Subordinate Judge, in October, 1934, decreed the appellant's suit and dismissed the application of the Official Receiver. No appeal was preferred by the Official Receiver from the decree in the suit, but an appeal was filed in the District Court against the order dismissing the application under the Provincial Insolvency Act. The District Judge allowed the appeal holding that the mortgage was not good against the general body of creditors and overruled the appellant's plea of *res judicata* based on the absence of appeal against the decree in the suit on the ground that the governing litigation was one on the insolvency side and that the Court executing the mortgage decree was bound to give effect under S. 4 of the Provincial Insolvency Act to the decision in the insolvency inquiry.

Held, (1) that there having been a decree of a competent Court on the mortgage which had not been appealed against and had therefore become final, the District Judge ought to have recognised it and given effect to the plea of *res judicata* and dismissed the appeal of the Official Receiver; (2) that the mortgage having been executed more than two years before the date of the insolvency, S. 53 of the Provincial Insolvency Act did not apply, and the only order that could possibly be passed under the Act to set aside the mortgage must be one under S. 4 of the Act; (3) that it could not be held that the subject-matter of S. 4 was one with which the Insolvency Court alone was concerned, and that the existence of insolvency proceedings did not take away the jurisdiction of the ordinary Civil Court; (4) that the

District Judge was not competent to decide an appeal against the mortgage decree as the amount involved was about Rs. 11,200 and an appeal therefrom would only lie to the High Court; and (5) that the subject-matter of the appeal in the Official Receiver's application was already *res judicata*. (*King, J.*) Sevadappa Goundar *v.* Narayanaswami Ayyar. **1940 M.W.N. 365=51 L.W. 429=A.I.R. 1940 Mad. 564=(1940) 1 M. L.J. 647.**

——S 11—*Heard and finally decided—Declaratory suit—Question of plaintiff's title raised in appeal but suit dismissed on other ground—Question of title*—Res judicata.

Where in appeal to the High Court in a declaratory suit, the plaintiff's title is challenged but the High Court dismisses the plaintiff's suit entirely not going into those grounds because it accepts another ground that the procedure of the lower Court is entirely wrong, the question of title became subjudice by reason of the appeal and cannot act as *res judicata* in a subsequent suit. (*Dalip Singh and Skemp, JJ.*) Kartar Singh *v.* Mst. Bhagan. **11 R.L. 395=178 I.C. 60=40 P.L.R. 662=A.I.R. 1938 Lah. 179.**

——S. 11—*Heard and finally decided—Declaratory suit based on title, dismissed on appeal without question of title having been gone into—Question of title—If* res judicata *in subsequent suit.*

Where a suit for a declaration based upon the title of the plaintiff was dismissed on appeal without the question of title having been gone into at all, the question of title is not *res judicata* in a subsequent suit between the parties or their legal representatives, as that question cannot be said to have been heard and finally decided within the meaning of S. 11, C. P. Code, in the former suit. (*Baguley, J.*) Ma Seik *v.* Maung San Pe. **1937 Rang.L.R. 136=173 I.C. 565=10 R.R. 352=A.I.R. 1937 Rang. 421.**

——S. 11—*Heard and finally decided—Decision in*—Qabiz ghair quabiz *proceedings—If* res judicata.

The decision in *qabiz ghair qabiz* proceedings cannot operate as *res judicata*, when the parties are not present and no issues are struck. (*Drake Brockman, S. M. and Knox, J.M.*) Dubari *v.* Shamdeo Misir. **1936 R.D. 44.**

——S. 11—*Heard and finally decided—Decision not on merits—If* res judicata.

The dismissal of an application under Ss. 5 and 30 of Agriculturists Relief Act on the ground that no evidence in proof of the applicant being an agriculturist was produced and not after a consideration of the parties' evidence on the point, is not a bar under S. 11, C. P. Code, to a subsequent similar application. (*Zia-ul-Hasan, J.*) Gopal Das *v.* Puttu Lal. **1939 O.A. 425.**

——S. 11—*Heard and finally decided—Decision on preliminary plea—If* res judicata *as to title.*

Whether a particular plea could be allowed to be raised or not is a question in the nature of a preliminary plea; and a decision on such a question is not a decision on the merits which can be regarded as *res judicata*. The dismissal of a suit on the ground that the plaintiff was not entitled to raise the plea on which he founded the suit, without any enquiry into his title, cannot be taken to be a decision that for all time and in all proceedings between the parties it must be taken that the plaintiff had no title. (*Varadachariar and Pandrang Row, JJ.*) Ariyaputra Naicken *v.* Muthu Chetty. **160 I.C. 753=8 R.M. 713=43 L.W. 116=A I.R. 1936 Mad. 165.**

——S. 11—*Heard and finally decided—Decision under O. 22, R. 5—If* res judicata.

A decision under O. 22, R. 5 that a certain person is not the legal representative of the deceased party is not *res judicata* because this order is not subject to appeal and the matter decided is therefore not finally decided. A.I.R. 1934 Lah. 465, Rel. on. (*Skemp, J.*) Mohammad Khan *v.* Jan Mohammad. **186 I.C. 145=12 R. L. 367=A.I.R. 1939 Lah. 580.**

——S. 11—*Heard and finally decided—Decision under O. 22, R. 5—If* res judicata.

A decision in a summary proceedings under O. 22, R. 5, C. P. Code, that certain persons are entitled to be substituted as personal representatives of a deceased party to a suit is not a final determination of the matter and does not constitute a bar on the ground of *res judicata.* 28 All. 109, Foll.; 24 A.L J. 546, Diss from. (*Harries and Rachhpal Singh, JJ.*) Antu Rai *v.* Ram Kinkar Rai. **58 All. 734=163 I.C. 283=9 R.A. 1=1936 A.L.J. 622=1936 A.W.R. 597=1936 All. L.R. 556=A.I R. 1936 All. 412.**

——S. 11—Heard and finally decided—Decree for cess under Bengal Cess Act—If final on question of defendant's status—*Res judicata* in subsequent suit for ejectment. *See* Bengal Cess Act, S. 41 (2). **21 Pat.L.T. 277.**

——S. 11—Heard and finally decided—Dismissal of suit for *khas* possession—Declaration of plaintiff's title to land and to get rent assessed in properly framed suit—Assessment of rent otherwise than by suit—If precluded. *See* Bengal Land Revenue Settlement Regulation and Regulation IX of 1825. **40 C.W.N. 341.**

——S. 11—*Heard and finally decided—Final judicial pronouncement on issue—Necessity.*

No matter can be said to operate as *res judicata* unless there is a final judicial pronouncement upon it. (*Rangnekar, J.*) Jambu Tavanappa Adake *v.* Gopalakrishnamacharya. **175 I.C. 866=11 R B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

——S. 11—*Heard and finally decided—Findings of lower Court not dealt with by Court of appeal*—Res judicata.

Where a suit is "finally decided" on a particular point by a superior Court, and finding recorded by the Courts below, which has not been dealt with by the Court of appeal would not have the binding effect of *res judicata.* 8 C. 631; 24 C. 616 and 45 C. 442, Rel. on. (*Agha Haidar, J.*) Miran Bakhsh *v.* Mahomed Akram Khan. **164 I.C. 610=9 R.L. 146=A I.R. 1937 Lah. 167.**

——S. 11—*Heard and finally decided—Finding on several issues—Suit disposed of on the basis of finding on one issue—Finding on other issues—If* res judicata.

Merely because the suit fails on one issue and can be dismissed, it cannot be said that the decision of another issue which is raised and decided, is not necessary for the purpose of the decision in the suit. A suit was brought for mesne profits, the right to which depended upon proof of plaintiff's title to certain land. The issue as regards plaintiff's title to the land was raised and decided against him but the suit was dismissed with regard to mesne profits on concurrent findings of fact relating to accounts and the veracity of witnesses. The plaintiff contended in second appeal that the decision with regard to issue relating to title to land was not necessary.

Held, that merely because the suit failed as to mesne profits, on another issue, the decision on the question of title which was raised and decided, as being necessary for the decision of the suit, could not be re-agitated again merely on the ground that its decision was not necessary for the determination of the suit. (*Davis, J.C. and Mehta, A.J.C.*) KARAMCHAND *v.* VALI MUHAMMAD. **31 S.L R. 5=170 I.C. 310=10 R.S. 59=A.I.R. 1937 Sind 157.**

——**S. 11**—*Heard and finally decided—Identical transactions—Decree passed in suit—If bars award of earlier date.*

An award in respect of a certain transaction is barred under S. 11, C. P. Code, by a decree passed in a suit in respect of the same transaction, even though the decree is of a subsequent date to the date of the award. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARI RAM BAL MOKAND. **175 I.C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——**S. 11**—*Heard and finally decided—Insolvency proceedings—Court finding that secured creditor has relinquished his security for benefit of creditors—Order not appealed against*—Res judicata.

Where it has been found as a fact by the Court that a secured creditor has relinquished his security for the general benefit of the creditors and the order has not been appealed against, the question whether the creditor has relinquished the security or not is *res judicata* having been finally and conclusively determined and cannot be re-agitated subsequently. (*Roberts, C.J. and Baguley, J.*) BANK OF CHETTINAD, LTD. *v.* KO TIN. **14 Rang. 529=164 I.C. 1061=9 R.R.175=A.I.R. 1936 Rang. 393.**

——**S. 11**—*"Heard and finally decided"—Issue decided by trial Court but not decided by appellate Court*—Res judicata.

Where in a former suit between the same parties an issue was decided by the trial Court but the appellate Court refrained from deciding it, the issue cannot be deemed to have been finally decided and it can be raised in a subsequent suit between the same parties. (*Cornish, J*) MAHOMMAD ABDUL AZIZ *v.* GULAM JULANI. **176 I.C. 590 =11 R.M. 118=A.I.R. 1937 Mad. 709.**

——**S. 11**—*Heard and finally decided—Issue neither raised nor decided—If* res judicata.

A suit was brought by an inam holder for a declaration that the whole village except certain minor inams and communal porambokes was granted to him. The decree declared the right of the inam holder to the entire village excluding minor inams and communal porambokes. Whether tanks or tank beds were communal porambokes was a question that was neither raised nor decided.

Held, that the decree did not make the title to the tank-beds *res judicata.* (*Venkatasubba Rao and Abdur Rahman, JJ.*) APPA RAO *v.* SECRETARY OF STATE. **181 I.C. 688=11 R.M. 832=1938 M.W.N. 244=47 L.W. 438=A.I.R. 1938 Mad. 193 =(1938) 2 M.L.J. 434.**

——**S. 11**—*Heard and finally decided—Issue raised but not decided*—Res judicata.

M created an equitable mortgage in favour of *N.* Subsequently *M* mortgaged the same property to *K. M* executed another mortgage of the same in favour of *I. N* instituted a title suit against *M* impleading *K* and *I* to enforce his rights under the mortgage. Issue was raised in this suit as to the validity of the mortgage. While the suit was pending *I* purchased the right of *N* on the equitable mortgage and got himself substituted as plaintiff and a compromise decree was passed in terms of compromise against *M*, but the suit was dismissed against the other defendants. Subsequent to this *K* executed a conveyance to *R* who brought a suit to enforce his mortgage and to get a declaration that his rights under it were not subject to the equitable mortgage.

Held, that the compromise decree in the previous suit was no bar to the plaintiff's obtaining a declaration that his mortgage was not subject to the equitable mortgage but on the other hand it helped the plaintiff in obtaining such declaration. (*S. K. Ghose and Patterson, JJ.*) EBRAHIM HAZI *v.* OFFICIAL TRUSTEE. **I.L.R. (1938) 1 Cal. 187=176 I.C. 580=11 R.C. 128=A.I.R. 1937 Cal. 741.**

——**S. 11**—*Heard and finally decided—Judgment set aside in appeal*—Res judicata.

An appeal destroys the finality of the decision of the original Court and the judgment of the original Court is superseded by that of the Court of appeal. Where, therefore, a judgment operating as *res judicata* in a subsequent case is set aside by the appellate Court while the subsequent case is pending in appeal, the matter is not *res judicata* in appeal and the case should be disposed of on the merits. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. **181 I.C. 389=11 R.L. 821=40 P.L.R. 128=A.I.R. 1938 Lah. 232.**

——**S. 11**—Heard and finally decided—Malabar Kanom—Suit for redemption by holder of melcharth—Decree allowed to lapse—Fresh suit by subsequent melcharth holder—Maintainability. *See* MALABAR LAW—KANOM. **51 L.W. 569.**

——**S. 11**—*Heard and finally decided—Mortgage suit—Person holding prior and subsequent mortgages impleaded as puisne mortgagee—No relief claimed in derogation of priority—Decree for sale without adjudicating on priority—Subsequent suit on prior mortgage—If barred*—Res judicata.

The appellant had a usufructuary mortgage dated 30—11—1910, and had also a simple mortgage dated 29—10—1919 over the same property. The respondents had obtained a simple mortgage over the same property on 12—5—1913 and in 1926 they brought an action on that mortgage impleading the appellant as a puisne mortgagee, but no relief was claimed against the appellant in his capacity as a prior mortgagee under the mortgage of 1910. The appellant, however, mentioned in his written statement his prior mortgage of 1910. A decree for sale was passed without any reference to the prior mortgage, and there was no adjudication about his claim as a prior mortgagee. The property was sold in execution and purchased by the respondents. Subsequently the appellant brought a suit on his usufructuary mortgage claiming possession of the property. He claimed that the respondents were liable to pay the amount due to him under the mortgage of 1910. The decree in the former suit was pleaded in bar of the appellant's claim on the ground of *res judicata.*

Held, that the claim was not barred on the principle of *res judicata,* and that in order to sustain the plea of *res judicata* it was necessary for the respondents in their former suit to allege or claim some relief against the appellant as the holder of a prior mortgage and to allege a distinct case in derogation of his priority, and that not having been done, they were not entitled to rely on and invoke the principle of *res judicata.* (*Wort and Varma, JJ.*) SHAIKH TAHIR HUSSAIN *v.* SYED BASIRUL HAQUE. **17 Pat. 180=11 R.P. 209=178 I.C. 33=5 B.R. 46=A.I.R. 1938 Pat. 444.**

——S. 11—*Heard and finally decided*—Obiter dicta.

Where the opinion expressed in a case is really *obiter* for the purposes of that case, that opinion in that case does not operate as *res judicata.* (*Addison and Sale, JJ.*) NARAIN SINGH *v.* WARYAM SINGH. **38 P.L.R. 780=A.I.R. 1936 Lah. 18.**

——S. 11—*Heard and finally decided—Observations made* obiter—*Point arising for decision and actually decided*—Res judicata.

If a point arising in a case has to be decided for the determination of the particular litigation, and is so decided, the observations made *obiter* will not prevent the decision from operating as *res judicata.* The parties are not entitled to reopen the point decided. (*Rowland, J.*) BHUNESHWAR NATH PANDEY *v.* GUDAR NATH PANDEY. **17 Pat. L.T. 356.**

——S. 11—*Heard and finally decided—Order, when final.*

An order is not final until the time of appeal has lapsed or till the appeal has been finally decided. 48 P.R. 1916, Appr. (*Addison and Din Mohammad, JJ.*) JASPAT RAI *v.* KAHAN CHAND. **181 I.C. 389=11 R.L. 821=40 P.L.R. 128=A.I.R. 1938 Lah. 232.**

——S. 11—*Heard and finally decided—Point in issue not raised or decided—If can operate as* res judicata.

In order to operate as *res judicata* there must be an order or decision of a Court on a point in issue. Where no issue on the point has even been raised and the point has not been decided by any Court, the principle of *res judicata* does not apply. (*Zia-ul-Hasan, J.*) SHAHZAD KUNWAR *v.* DEPUTY COMMISSIONER, PARTABGARH. **164 I.C. 466=9 R.O. 72=1936 R.D. 388=1936 O.W.N. 717=1936 O.L.R. 456=A.I.R. 1937 Oudh 43.**

——S. 11—*Heard and finally decided—Prior decision between parties declared not to be* res judicata—*Decision, if* res judicata.

Where a decision between the parties was considered by the Court and declared not to be *res judicata,* the latter decision, even if erroneous in law, operates as *res judicata.* 19 C.W.N. 1280, Foll. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARI RAM BAL MOKAND. **175 I.C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——S. 11—*Heard and finally decided—Rejection of application for a rule—If bars fresh application.*

An application for a rule and its rejection does not make the matter *res judicata* and does not prevent a Court on a subsequent occasion, if the occasion arises, from granting a rule in the interests of justice. (*Wort, J.*) NASIRUDDIN HAIDER *v.* HAKIM MUHAMMAD TAHIR. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

——S. 11—*Heard and finally decided—Rent suit—Issue as to constitution of holding—Decision on—If* res judicata *in subsequent suit as to actual holding.*

A decision in a rent suit in which the constitution of the holding is expressly put in question and pronounced upon would operate as *res judicata* in a subsequent suit between the parties on the question of the actual holding of the tenants. (*Dhavle, J.*) HIRA LAL SINGH *v.* MATIKDHARI SINGH. **19 Pat.L.T. 456=176 I.C. 570=11 R.P. 88=4 B.R. 741=1938 P.W.N. 502=A.I.R. 1938 Pat. 359.**

——S. 11—*Heard and finally decided—Representative suit disposed of under O. 17, R. 3—If* res judicata.

A decision under O. 17, R. 3, C. P. Code, in a previous suit of a representative character and conducted without any negligence is to be deemed to be a decision on merits and such a decision falls within the scope of S. 11 of C. P. Code. (*Bhide, J.*) NILA *v.* PUNUN. **165 I.C. 808=9 R.L. 273=38 P.L.R. 809=A.I.R. 1936 Lah. 385.**

——S. 11—*Heard and finally decided—Second suit for redemption—Usufructuary mortgage—Prior suit for redemption—Preliminary decree—Final decree dismissing suit for non-payment of commission fee—Second suit—If barred.*

A final decree of 1919 a suit for redemption of a usufructuary mortgage which orders the suit to be dismissed owing to non-payment by the plaintiff of the fee payable to the commissioner appointed to take accounts is not one which either in terms or by implication extinguish the right of redemption; although the preliminary decree does provide that on non-payment of the money fixed within the date fixed the right of redemption shall be lost or that the plaintiff shall be debarred from redemption. The actual extinction of the right to redeem is to be effected only by the final decree which is passed in terms laid down by O. 33, R. 8, C.P. Code (as it was in 1919) —unless a decree had been passed in a prior suit under O. 33, R. 8 (2), as in force in 1919, it cannot be said that the mortgage debt is discharged or that the right of redemption is actually lost or extinguished. A second suit for redemption is therefore not barred by *res judicata* in the absence of such a decree under O. 33, R. 8, C. P. Code. (*Pandrang Row and Abdur Rahman, JJ.*) ADINARAYANA CHETTY *v.* SRIRANGACHARIAR. **1940 M.W.N. 404=51 L.W. 666.**

——S. 11—Heard and finally decided—Suit against Hindu father and sons—Son's exonerated and decree passed against father alone—Effect of —Son's shares—If can be proceeded against in execution. *See* HINDU LAW—DEBTS. **(1940) 1 M.L.J. 363.**

——S. 11—*Heard and finally decided—Suit by unregistered firm for price of goods sold and delivered—Dismissal on ground of firm being unregistered—Second suit on same cause of action after registration—If barred.*

For the operation of the principle of *res judicata* it is not enough that the former suit has been heard and determined. The cause of action must be heard and determined. Where therefore a suit was brought by a firm to recover price of goods and was dismissed under S. 69 (2), Partnership Act, on the ground that the firm was unregistered and the second suit was instituted on the same cause of action after the registration of the firm.

Held, that the suit was not barred by *res judicata* as S. 69 (2), Partnership Act, prevented the institution of a suit, and that therefore there was no determination of the subject-matter of the previous suit. (*Pollock, J.*) SONLAL-HANSRAJ *v.* SADASHIV DASARAS KOSHTI. **169 I.C 818=10 R.N. 24=I.L.R. (1937) Nag. 430=A.I.R. 1937 Nag. 146.**

——**S. 11**—Heard and finally decided—Suit decreed—Reversal on appeal and remand—Subsequent rejection for failure to give valuation and pay deficit Court-fee—Fresh suit—If *res judicata*. *See* C. P. CODE, O. 7, RR. 11 AND 13. **40 C.W.N. 1390.**

——**S. 11**—*Heard and finally decided—Suit dismissed against one of two defendants—Decision not appealed against—Decision, if liable to attack on appeal from decree relating to other matters left undecided.*

A decree-holder instituted a suit under O. 21, R. 63, C. P. Code, against father and son for a declaration that the son had a saleable interest in *A*, *B* and *C* properties and that all the three properties were liable to attachment. The suit was dismissed as against the son in respect of all the properties and against the father in respect of *B* and *C* properties. It was held however that suit as regards *A* could proceed against the father only. No appeal was filed against this decision

Held, that the decision was clearly a final adjudication between the parties relating to these matters and was therefore a "decree" as defined in S. 2, Cl. (2), C. P. Code. An appeal from this decree lay under S. 96 of the Code but no such appeal was filed within the period of limitation prescribed by law and therefore the decree had become final and was not liable to attack on appeal from the decree relating to other matters which had been left undecided.

Held, further, that as the suit was a composite suit, relating to different subject-matters in which different reliefs were claimed against the two defendants, it was therefore competent to the Court to decide the dispute relating to the various properties separately. (*Tek Chand and Dalip Singh, JJ.*) SAIN DASS CHAWLA *v.* UJAGAR SINGH. **I.L.R. (1940) Lah. 171=186 I.C. 646=12 R.L. 438=A.I.R. 1940 Lah. 1.**

——**S. 11 and O. 9, R. 8**—*Heard and finally decided—Suit dismissed refusing plaintiff's advocate's prayer for adjournment—Advocate taking no further part in proceedings*—Res judicata.

If an advocate for a plaintiff merely asks for an adjournment on behalf of his client, and, on an adjournment being refused, takes no further part in the proceedings, the plaintiff cannot be held to have appeared within the meaning of O. 9, C. P. Code, and the dismissal of the suit in such circumstances falls within the purview of O. 9, R. 8, C. P. Code, and does not operate as *res judicata*.

(*Panckridge, J.*) BISWA NATH *v.* GOSTO BEHARI. **44 C.W.N. 576.**

——**S. 11**—*Heard and finally decided—Suit for partition of portion of property as co-heir—Appellate Court holding that suit for partial partition did not lie—Subsequent suit for possession of whole property claiming as absolute owner*—Res judicata.

Per *Leach and Spargo, JJ.*—A suit was instituted for partition of a portion of property on the ground that the plaintiff was a co-heir. The suit was decreed but in appeal the Court held that the suit could not be brought for partition of part of the estate only. A subsequent suit was instituted claiming possession of the whole property as an absolute owner.

Held, that the suit was not barred by *res judicata*, as the matter in former suit was not finally decided. (*Dunkley, J.*, on difference between *Leach and Spargo, JJ.*) MA PWA SHIN *v.* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R 1937 Rang. 324.**

——**S. 11**—*Heard and finally decided—Suit for possession on basis of sale deed—Property wrongly described—Dismissal of suit on ground that possession could not be granted without rectification of deed—Subsequent suit for rectification and possession—If barred—O. 2, R. 2.*

In pursuance of an agreement for sale certain property, namely, No. I in a Khewat, a sale deed was executed, which however, owing to a mutual mistake described the property as property No. II in the Khewat. The plaintiff vendee having sued for possession of the property, he was nonsuited on the ground that he could not sue for possession without rectification of the sale. Plaintiff then instituted a suit for rectification of the sale deed and for possession and mesne profits.

Held, (*i*) that the prior suit having been dismissed on the ground of non-maintainability of the same without rectification of the sale deed, and claim for possession not being sustainable at that time, no question was "heard and finally decided" between the parties in the first suit, and the doctrine of *res judicata* did not, therefore, apply; (*ii*) that O. 2, R. 2, C. P. Code, did not also apply, because though both the reliefs to which the plaintiff was entitled arose out of the same transaction, and though it was open to him to claim both in the former suit if he liked, yet they were quite distinct and separate reliefs, which it was not obligatory on the plaintiff to join together in the prior suit, and the second suit was consequently not barred by O. 2, R. 2, C. P. Code. (*Harries and Rachhpal Singh, JJ.*) CHANDRA SARUP *v.* KANHAIYA LAL. **1937 A.L.J. 280=169 I.C. 570=I.L.R (1937) All. 489=10 R.A. 48=1937 A.L.R. 569=1937 A.W.R. 245=A.I.R. 1937 All. 401.**

——**S. 11**—*Heard and finally decided—Suit for possession and mesne profits—Claim to future mesne profits—Omission to award—Absence of direction for enquiry in execution—Second suit for such mesne profits—Maintainability—S.* 47.

The mere omission in suit for possession of immovable property with mesne profits to award the claim for future mesne profits will not be a bar to the maintainability of a second suit for the same either on the ground of *res judicata* or under S. 47, C.P. Code. Where the decree merely declares the right of the plaintiff to mesne profits as from a certain date which is fixed for payment of an amount by him, but no direction is made for an inquiry as to mesne profits, no further proceedings in that suit or in execution could be taken. A second suit for future mesne profits is therefore not barred either on the ground of *res judicata* or on the ground of any supposed bar under S. 47, C. P. Code. (*Varadachariar, J.*) GANGAMMA *v.* MAHABALA BHATTA. **176 I.C. 920 =11 R.M. 191=46 L.W. 676=A.I.R. 1937 Mad. 879.**

———**S. 11**—*Heard and finally decided—Suit for proprietary possession of holding dismissed by Civil Court—Subsequent suit in Revenue Court to eject tenant for illegal sub-letting—If barred.*

Where a suit by a zemindar claiming to be put in proprietary possession of a certain holding was dismissed by the Civil Court, a subsequent suit by him for the ejectment of the recorded tenant under S. 82 of the Agra Tenancy Act on the ground of illegal sub-letting is barred by *res judicata,* the question of proprietary possession having been settled by the decision of the Civil Court. (*Darling, S.M.*) NANNU PRASAD *v.* RAM CHARDRA SINGH. **1937 R.D. 591.**

———**S. 11**—Heard and finally decided—Suit under O. 21, R. 63, redundant by reason of withdrawal of attachment—Dismissal of suit on the ground that matter was one under S. 47—If *res judicata. See* C. P. CODE, O. 21, R. 63. **A.I.R. 1936 Pesh. 41.**

Insolvency proceedings.

———**S. 11**—*Insolvency proceedings—Applicability to.*

The principles of *res judicata* are not confined to suits and exist independently of the provisions of the C. P. Code. They apply to proceedings under the Insolvency Acts. (*Weston, J.*) AJAI PAL *v.* OFFICIAL RECEIVER. **1937 A.M.L.J. 77.**

———**S. 11**—*Insolvency proceedings—Finding by Insolvency Court that a certain firm was a branch of insolvent firm*—Res judicata.

The principle of *res judicata* is that when two parties have litigated with regard to any point before a competent Court, no other Court shall allow the matter to be litigated afresh before it. Where, therefore, in a prior proceeding between the Official Assignee and a third person it was found by the Insolvency Court that a certain firm was a branch of the insolvent firm and the finding was necessary for the decision of the question before it, and such finding was upheld by the High Court on appeal, that finding is *res judicata* as between the parties. (*Mya Bu and Baguley, JJ.*) M. R. M. S. CHETTIAR FIRM *v.* OFFICIAL ASSIGNEE, RANGOON. **14 Rang 652=169 I.C. 491 =10 R.R. 5 (2)=A.I.R. 1937 Rang. 214.**

———**S. 11**—Insolvency proceedings—Official Receiver's objections as to the fraudulent nature of a transfer of a decree not upheld, and final decree passed—Official Receiver, if can later on apply under S. 53 of Provincial Insolvency Act. *See* PROVINCIAL INSOLVENCY ACT, S. 53. **1938 A. W.R. (H.C.) 566=1938 A.L.J. 878.**

———**S. 11**—*Insolvency proceedings—Question of title to property decided by Civil Court—Whether can be raised again before Insolvency Court—Provincial Insolvency Act, S. 4.*

Where a question of title to a certain property was directly and substantially in issue in a previous suit between the parties and had been heard and decided by a Court of competent jurisdiction, it is not open to them to raise the same matter once again on an application under S. 4 of the Provincial Insolvency Act before the Insolvency Court, which has concurrent jurisdiction with ordinary Civil Courts to try questions of title relating to property, alleged to belong to the insolvent. This, of course, is so, not under the provisions of S. 11, C. P. Code, which does not in terms apply as the proceedings before the Insolvency Court are not a "suit" within the meaning of that section, but under the general principles of the rule of *res judicata.* (*Tek Chand, J.*) LAHORI SINGH *v.* OFFICIAL RECEIVER, SIALKOT. **9 R.L. 19=38 P.L.R. 757=163 I.C. 520=A.I.R. 1937 Lah. 4.**

———**S. 11**—*Insolvency proceedings—Question whether certain land belonging to insolvent was exempt from attachment, decided in connection with application for discharge—Decision, if* res judicata *at later stage.*

Where the question whether a certain land belonging to the insolvent was exempt from attachment and sale was decided by the Insolvency Court in connection with an application for discharge, the decision operates as *res judicata* at a later stage of the insolvency proceedings and the question cannot, therefore, be subsequently reopened in an application under S. 68 of the Provincial Insolvency Act. (*Bhide, J.*) KALYAN SINGH *v.* RAM JAS. **39 P.L.R. 744.**

Jurisdiction.

———**S. 11**—*Jurisdiction—Decision on a point of jurisdiction*—Res judicata.

A Court, before whom a cause is brought, has always jurisdiction to decide for itself whether it has jurisdiction to try the suit and its decision thereon is as much *res judicata* in a subsequent suit relating to the same subject-matter as on any other point. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARIRAM BAL MOKAND. **175 I C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

———**S. 11**—Jurisdiction—Omission to raise plea of want of. *See* S. 11, EXPL. IV, *infra.* **A.I.R. 1937 All. 251.**

———**S. 11**—*Jurisdiction—Prior suit for share of profits under S. 108 (15) of Oudh Rent Act and also for canal dues—Decision that both claims could not be joined—No question raised as to jurisdiction of Civil Court—Subsequent suit for canal dues—Defendant, if estopped from questioning jurisdiction of Civil Court.*

Where in previous suit the plaintiff had claimed a share of profits under S. 108 (15) of the Oudh Rent Act and also the canal dues which are claimed in the subsequent suit, and all that was decided in it was that both the claims could not be joined in that suit, and no question of jurisdiction was raised by the defendant in that suit, the defendant is not estopped from questioning the jurisdiction of the Civil Court to try the subsequent suit. (*Srivastava, Ag.C.J.*) KUNJ BEHARI LAL *v.* SANT PRASAD. **13 Luck. 190=167 I.C. 274=9 R.O. 369=1937 O.L.R. 96=1937 R. D. 141=1937 O. W.N. 239=A.I.R. 1937 Oudh 322.**

Landlord and tenant.

———**S. 11**—*Landlord and tenant—Acceptance of decision as to nature of tenancy as regards certain* *plots—Appeal regarding other plots—Bar of* res judicata.

An accepted decision as regards the nature of the tenancy with reference to certain plots only regarding which there is no appeal, would act as a bar to an appeal against the decision as regards other plots, when the same entries in the Revenue Records have to be construed. (*Darling, S.M. and Mehta, J.M.*) PURAN LAL *v.* BALBHADDAR PRASAD. **1938 R.D. 883.**

——S. 11—Landlord and tenant—Decree against landlord—If *res judicata* against tenant. *See* C. P. CODE, S. 11—PARTIES AND REPRESENTATIVES. **1937 M.W.N. 299=A.I.R. 1937 Mad. 544.**

——S. 11—*Landlord and tenant—Landlord's title not denied in first suit for arrears of rent—Denial in subsequent suit—If open.*

Where in a suit for arrears of rent, the tenant does not object to the title of the landholder, it is not open to him, in a suit for arrears for a later period, to raise the plea that the plaintiff was not a landholder. A plea that should have been taken when the matter in issue first arose could not be taken up again when the first matter was decided on the basis of pleadings that were then put forward. This is the essence of the principle of *res judicata*. (*Bomford, S.M. and Mehta, J.M.*) HABIB AHMAD *v.* BHAGWANT. **1939 R.D. 174=1939 A.W.R. (B.R.) 43.**

——S. 11—*Landlord and tenant—Notice of ejectment against non-statutory tenant—Suit to contest—Decree—Effect of—Subsequent ejectment notice by representative of zamindar—Bar of.*

A zamindar having issued a notice of ejectment on his tenant as a non-occupancy tenant under S. 67 (1) (*b*) of the Oudh Rent Act the latter instituted a suit to contest the notice. The suit was decreed and the notice of ejectment cancelled. Some years later the representative in interest of the zamindar sought to eject the successor-in-interest of the prior tenant.

Held, that the cancellation of the notice of ejectment as a result of the previous suit was binding on the present zamindar who was consequently estopped from seeking to eject his tenant on the same ground. (*Darling, S.M.*) PARMAL BISWAS *v.* RATI PAL SINGH. **1938 R.D. 162=1938 A.W.R. (B.R.) 90.**

——S. 11—Landlord and tenant—Proceeding under S. 26 (*j*), B. T. Act—Decision holding tenant liable for transfer fee on particular transfer fee—Subsequent suit by tenant to declare non-liability for transfer fee and to declare holding mukrari—If barred by *res judicata*. *See* B. T. ACT, S. 26 (*j*). **41 C.W.N. 149.**

——S. 11—*Landlord and tenant—Some only of the interested persons litigating—Decision, if binds all.*

When different people are interested in the decision of an issue, and only some care to come forward to contest, the decision when once given is binding on the others interested, as well, who merely watched the result of the litigation. Such persons cannot come forward again to reagitate the whole matter. (*Mehta, J.M.*) KANDHAIYA LAL *v.* LALTA PRASAD. **1938 A.W.R. (B.R.) 332=1938 R.D. 615.**

——S. 11—Landlord and tenant—Suit for ejectment—Tenant pleading the title of third party—Suit between landlord and the third party—Decision given in favour of landlord—If *res judicata*. *See* 'FORMER SUIT' *supra*. **A.I.R. 1937 Mad. 544.**

——S. 11—Landlord and tenant—Suit for rent—Decision regarding nature of holding—Subsequent suit for rent—Erroneous decision on question of law—Whether operates as *res judicata*. *See* ERRONEOUS DECISION ON POINT OF LAW, *infra*. **(1937) 1 M.L.J. 233 (F.B.).**

——S. 11—*Landlord and tenant—Suit for rent in respect of land alleged to be within plaintiff's patti—Suit dismissed—Subsequent suit for rent or alternatively for assessment of fair rent in respect of same land*—Res judicata.

The suit for rent in respect of land alleged to be within plaintiff's patti was dismissed because the fact that land fell within plaintiff's patti was not proved. The plaintiff brought a second suit and claimed rent, or alternatively an assessment of fair rent, in respect of the same land but now alleging that he had a separate patti and the land was within that patti.

Held, that the second suit was barred by *res judicata*. (*Wort, J.*) JAI NARAIN LAL *v.* KASHILAL **163 I.C. 136=8 R.P. 619=17 Pat.L.T. 715=1936 P.W.N. 487=A.I.R. 1936 Pat. 511.**

Litigating under same title.

——S. 11—*Litigating under same title—Decree against widow and attachment—Suit by donee who was also reversioner—Decision as to legal necessity—Subsequent suit as reversioner to set aside sale—If* res judicata—*Divisible cause of action—Extent of bar.*

A widow of a deceased incurred some debts and the creditor obtained a decree and attached deceased's property. A suit was instituted by reversioner claiming release of the property from attachment on the ground firstly because the debts being without legal necessity were not binding on his reversionary interest and secondly because he had become owner of the property in pursuance of a gift in his favour by the widow. Thus the suit was a composite suit by the plaintiff claiming release in both capacities, one as reversioner and another as donee. The issue as to legal necessity was decided against the plaintiff and the suit was dismissed. The property was sold. A subsequent suit by the plaintiff for declaration that the sale was not binding on his reversionary interest as the debts were without legal necessity was held to be barred by *res judicata*. It was further held that if it was possible to treat the entire cause of action upon which the later suit was founded as divisible and if in the earlier suit one of the component parts of the cause of action was relied on, then the previous decision would stand as a bar to the extent of the matter involved in the earlier suit. (*Stone, C.J. and Puranik, J.*) SITABAI *v.* HARI. **I.L.R. (1938) Nag. 496=180 I.C. 922=11 R.N. 406=A.I.R. 1938 Nag. 401.**

——S. 11—Litigating under the same title—Decree for rent against assignee from lessee—Decree not satisfied—Subsequent suit for rent against original lessee—If barred. *See* LEASE—ASSIGNMENT BY LESSEE. **40 Bom.L.R. 497.**

——S. 11—*Litigating under the same title—Different capacities—What is—Different suits by same person as a decree-holder and as a zamindar—Compromise as a decree-holder—If bars suit as zamindar.*

In the eye of the law a person occupies the same capacity so long as he sues or is sued for

for himself and in his own interest. If he sues in one case as a decree-holder and in another as a zamindar that could not make any difference in his capacity which in each case is his individual capacity. The difference is not one of capacity or title as contemplated by S. 11 of the C. P. Code but that of causes of action. That change in capacity or title which alone matters in the eye of the law takes place only when in one case he sues or is sued for himself in his individual capacity and in another as a trustee or a person representing the interest of another. Where a compromise by a decree-holder permitted another to remain in possession of a property, a subsequent suit by the same person as a zamindar claiming recovery of possession of the same property from that other person, cannot succeed, for the compromise puts up a bar of estoppel by agreement. (*Mulla, J.*) Ram Narain *v.* Ram Narain. **180 I.C. 65=11 R.A. 420=1938 A.W.R. (H.C.) 798=1938 A.L.J. 1157=A.I.R. 1939 All. 110.**

——S. 11—*'Litigating under the same title'—Ex-minor—Suit against guardian's legal representative as assignee of bond executed by guardian to Court—Subsequent suit for accounts under S. 37 of the Guardian and Wards Act*—Res judicata.

Plaintiff, a ward who had come of age, obtained from the Court an assignment of the bond executed by her former guardian under S. 34 of the Guardians and Wards Act, filed a suit against the latte 's legal representatives and got a decree. Subsequently she filed another suit against the legal representatives for accounts under S. 37 of the Guardian and Wards Act. Defendants raised the plea of *res judicata*.

Held, that the prior suit was based on a single cause of action under the bond, and the subsequent suit was for accounts under the general statutory right given by S. 37 of the Guardian and Wards Act; the plaintiff was not litigating under the same title, in the first suit the plaintiff suing as assignee of the bond, and in the second the plaintiff suing for herself; and consequently the decision in the first suit cannot operate as *res judicata* in the second suit. (*Barlee and Divatia, JJ.*) Kisandas *v.* Godavaribai. **I.L.R. (1937) Bom. 636=170 I.C. 647=39 Bom.L.R. 351=10 R.B. 111=A.I.R. 1937 Bom. 334.**

——S. 11—*Litigating under same title—First suit setting up purchase from defendant alleging that defendant inherited property from grandfather—Second suit alleging that defendant inherited property from father who obtained it by deed of gift from grandfather.*

It is well settled that the expression "same title" in S. 11, C. P. Code, means same capacity, the test being whether the party litigating is in law same or a different person. Where in the first suit the plaintiff set up his purchase of property from the defendant alleging that the defendant had inherited that property from his grandfather, and in the second suit the plaintiff alleged that the defendant had inherited the property in question from his father who had obtained it under a deed of gift executed in his favour by the defendant's grandfather,

Held, that in both suits the plaintiff occupied the same capacity that of a purchaser from the defendant, and that, therefore, the plaintiff was litigating under the same title in the second suit as that which was set up in the first suit.

Held, further, that the question raised in the second suit was not directly and substantially in issue in the first suit, as in the second suit the matter upon which the plaintiff's claim was founded was the deed of gift executed by the defendant's grandfather in favour of his father, a matter about which there was neither allegation nor traverse in the first suit. (*Khundkar, J.*) Fakir Chandra Biswas *v.* Ekkari Sarkar. **42 C.W.N. 560.**

——S. 11—*Litigating under same title—Former suit by A against trustees of temple that certain property attached to temple belonged to him—Suit decreed in favour of A—Subsequent suit by worshippers of temple against A's heirs—If barred—Plea of collusion in former suit—Onus.*

A suit was brought by *A* against the trustees of a certain temple that certain property attached to the temple belonged to him. The trustees defended the suit on the ground that the title in the property in suit was in the temple. The suit was finally decreed in favour of *A*. Later on, the plaintiffs alleging themselves to be the worshippers of the temple brought a suit against *A's* heirs for a declaration that the property which was the subject-matter of the former suit was the property belonging to the temple. On a contention being raised by *A's* heirs that the former decision operated as *res judicata*, the plaintiffs contended that it was obtained collusively and could not therefore be *res judicata* and also because they were not the successors of the trustees defendants in the former suit,

Held, that the plaintiffs being the worshippers of the temple were persons interested in it and had therefore the *locus standi* to sue to protect the property of the temple from being wrongfully claimed by third persons.

Held also, that though the plaintiffs were not the successors of the defendants in the former suit, the title litigated under in both the suits was the same, as they both claimed the title to the property in the temple. The plaintiffs were therefore litigating under the same title, even though the agency asserting the title in the former suit was different from the one in the subsequent suit. The suit was therefore barred by *res judicata*.

Held, further, that the burden of proving collusion, negligence and want of *bona fides* on the part of the defendants in the former suit lay on the plaintiffs as they asserted that the decision in the former suit was not *res judicata*. (*Tek Chand, J.*) Piare Lal *v.* Sher Gir. **181 I.C. 267=11 R.L. 797=40 P.L.R. 867=A.I.R. 1938 Lah. 499.**

——S. 11—*Litigating under same title—Previous suit against certain persons in personal capacity—Subsequent suit against same persons, as shebaits and managers—Whether barred.*

A decision in a suit for possession and management of a certain estate against certain persons in their personal capacity does not bar a subsequent suit against the same persons as shebaits and managers and in respect of the property of the idol. A.I.R. 1927 P. C. 128, Foll. (*Thom and Iqbal Ahmad, JJ.*) Gopal Das *v.* Sri Thakurji. **A.I.R. 1936 All. 422.**

——S. 11—*Litigating under the same title—Prior suit by Hindu father against son—Decree* *declaring property to be father's self-acquisition —Subsequent suit by father against son and his attaching creditor—If* res judicata.

In a prior suit by a Hindu father against his son there was a decree passed declaring that certain properties were the father's self-aquisitions and that the son had no manner of right or claim over them. A creditor of the son having attached one of the properties involved in the former suit in execution of a decree against the son, the father sued for a declartion against the creditor and the son that the property was his self-acquired property and could not be attached in execution of a decree against the son who had no right therein.

Held, though the creditor was not a party to the prior suit, he must be deemed to claim under the son litigating under the same title, as the son represented all interests in the property in the prior suit, and the bar of *res judicata* would therefore arise so far as the question whether the property was self-acquired was concerned, the issues in both suits being identical.

Held, further, that the rule of law applicable to cases of *jus tertii* might be applied to the case, *viz.*, 'whatever would estop or bar the person whose title is set up must also bar the pleading *jus tertii* whether the estoppel is by record, deed or *in pais*." Since the son was barred, the creditor setting up the latter's title was equally barred and precluded from asserting the son's title by reason of the decree in the prior suit. (*Venkataramana Rao, J.*) VENKATACHARIAR *v.* SOUTH INDIAN BANK. **1937 M.W.N 167=10 R.M. 338 =171 I.C. 369=45 L.W. 495=A I.R. 1937 Mad. 651=(1937) 1 M L.J. 575.**

———S. 11—*Litigating under the same title—Prior suit for redemption of mortgage on basis of purchase from nearest reversioners of mortgagor —Finding that vendors were not competent to sell as another person was nearest reversioner—Latter not party to suit—Dismissal of suit—Subsequent suit impleading also heirs of latter nearest reversioner—If one not between same parties—Mortgagees acquiring rights of heirs of nearest reversioner before second suit—If litigating under different title*—Res judicata.

The appellant brought a suit in 1925 for redemption of a mortgage and recovery of possession of the properties from respondents 1 to 13 to whose ancestor they were usufructually mortgaged by the owner, one *S* who died without issue in 1877. *S's* widow who succeeded to his properties died in 1921. In March, 1925, the appellant purchased the properties from respondents 14 to 16, who were alleged to have inherited in the properties as the nearest reversioners of *S* on the death of his widow. It was on the basis of this purchase that he brought the suit against respondents 1 to 13, impleading also his vendors respondents 14 to 17, as *pro forma* defendants. Respondents 1 to 13 pleaded that the respondents 14 to 16 were not the nearest reversioners competent to sell the properties but that one *P*, an agnate relation of *S*, was the nearest reversioner entitled to succeed after the death of *S's* widow, and therefore the sale by respondents 14 to 16 did not confer title on the appellant. This plea was upheld and the suit was dismissed, the dismissal being confirmed in appeal. *P* was not a party to that litigation. An application by the sons of *P*, who had died in the meanwhile, to implead themselves as respondents in the appeal from the decision of the trial Court dismissing the suit, was dismissed. In 1933, appellant brought another suit, impleading also as parties, the sons of *P*, who were respondents 17 to 20. After the decision in the first suit and before the second suit, respondents 1 to 13 obtained a transfer of all such rights as respondents 17 to 20 might have to the properties.

Held, (1) that the suit did not cease to be a suit between the same parties as the previous suit so far as respondents 1 to 13 were concerned and, that notwithstanding the addition of the new parties, respondents 17 to 20, the suit must be regarded as one between the same parties as the prior suit so far as the really substantial reliefs of redemption and possession, which were prayed for only against respondents 1 to 13, were concerned and therefore the rule of *res judicata* applied; (2) that the fact that respondents 1 to 13 claimed to have acquired the rights of respondents 17 to 20 after the prior suit did not make any difference, and respondents 1 to 13, could not, on that ground, be deemed to be litigating now under a different title so as to exclude the operation of the doctrine of *res judicata*, because it was unnecessary for the respondents 1 to 13 to rely on their purchase from respondents 17 to 20 in any manner or to any extent, as they were in possession, and that the decision in the prior suit that the appellant had no title to redeem the properties as against defendants 1 to 13 was conclusive of the same question in the later suit. (*Patanjali Sastri, J.*) LATCHAYYA *v.* VENKATAPATIRAJU. **50 L.W. 809=1940 M.W.N. 197=A.I.R. 1940 Mad. 201=(1939) 2 M L.J. 836.**

———S. 11—*Litigating under same title—Prior suit in personal capacity—Later suit in capacity of mutwali of endowment—If barred.*

A decision in a prior suit against a party in his personal capacity cannot operate as *res judicata* against him in a later suit by him as Mutawalli of a certain endowment. (*Syed Nasim Ali and Henderson, JJ.*) SITANATH SAHA *v.* MANORANJAN ROY. **68 C.L.J. 293=A.I.R. 1939 Cal. 148.**

———S. 11—*Litigating under the same title—Will conferring life-estate on widow and reversion on son—Suit against widow on promissory note executed in personal capacity—Decree—Attachment of properties willed—Suit by widow to declare trust properties—Decree declaring properties private and liable to attachment and sale—Sale of properties in execution—Death of widow—Suit by son for possession from purchaser in execution—If barred by* res judicata.

Where a widow taking a life-estate in certain properties under the will of her husband files a suit as a trustee and not as executrix, for a declaration that the properties are trust properties and therefore not liable to be attached in execution of a decree passed against her personally on a promissory note executed by her in her personal capacity, and the suit is dismissed on the ground that the properties are private properties burdened with a trust and therefore liable to attachment and sale, the decision cannot operate as *res judicata* in a subsequent suit by her son who is the remainderman under the will, for possession of the properties after the death of the widow from the purchaser in execution of the decree passed against the widow. The widow cannot be said to have litigated under the same title as the remainderman, the son, nor can be the interest of the latter be said to have been adjudicated upon. Further, the nature or extent of the interests of the beneficiaries not having arisen for consideration in the prior suit, the suit by the son, remainderman, was not barred by *res judicata.* (*Burn and Lakshmana Rao, JJ.*) Radha Krishna Chettiar *v.* Narayanaswami Aiyar. **166 I.C. 727=9 R.M. 391=45 L.W. 35=1936 M.W.N. 1154=A.I.R. 1937 Mad. 153=71 M.L.J. 823.**

——S. 11—*Litigating under the same title—Suit by plaintiff in a capacity different from that in prior suit—Matter in issue different—* Res judicata.

Where the capacity in which plaintiff sued in the prior suit was different and the matter directly, and substantially in issue in that case was different from that in the subsequent case.

Held, that the previous decision did not operate as *res judicata.* (*Niyogi and Subhedar, A.J. Cs.*) Yadgar Husain *v.* Muhammad Ibrahim Raza. **31 N.L.R. (Supp.) 202=163 I.C. 179=8 R.N. 299=A.I.R. 1936 Nag 71.**

——S. 11—Litigating under the same title—Suit under O. 21, R. 103 by defeated purchaser—Decree—Delivery of possession — Execution under writ—Report of process-server that well, house and trees not actually delivered—Subsequent application for re-issue of writ—Dismissal —Decision that dispossession alleged took place subsequent to delivery under writ—Fresh suit for possession—*Res judicata. See* Limitation Act, S. 14. **19 Pat.L.T. 250.**

Might and ought.

——S. 11—Might and ought. *See* C. P. Code, S. 11, Expl. (iv).

Miscellaneous proceedings.

——S. 11—*Miscellaneous proceedings— Berar Patels and Patwaris Law—Proceedings in respect of appointment of patel—Finding not based on full and fair enquiry—Subsequent vacancy—Prior finding, if* res judicata.

Where in respect of the appointment of a Patel, in a previous proceeding, a finding against a system of rotation of the office is given without a full and proper enquiry and in ignorance of the amended law on the subject, it cannot operate as *res judicata,* when on a subsequent vacancy the question of rotation is once again raised. (*Roughton, F. C.*) Sakharam Dattaji *v.* Waman Ramachandra. **1938 N.L.J. 171.**

——S. 11—*Miscellaneous proceedings—Case involving different plots of land in different villages —Omission to appeal against decision as regards plot in one village—If* res judicata *as to plots in the other also.*

In a case involving different plots of land in different villages the failure to file an appeal as regards one plot in one village, cannot have the effect of making the whole question *res judicata* in respect of the plots involved. Merely because an appellant disregards his claim in regard to one plot in one village, that is no reason why his claim should be decided against him automatically in another village. (*Drake Brockman, S. M. and Knox, J. M.*) Nageshwar Shah *v.* Bhulai. **1936 R.D. 110 (2).**

——S. 11—*Miscellaneous proceedings—Correction case under U. P. Land Revenue Act*—Res judicata.

A correction case under S. 39 of the U. P. Land Revenue Act cannot operate as *res judicata.* (*Darling S. M. and Bomford, J. M.*) Ram Dayal *v.* Bindeshwari Prasad. **1938 R.D. 121=1938 A.W.R. 72 (B.R.).**

——S 11—*Miscellaneous proceedings—Correction case under S. 42, U. P. Land Revenue Act—* Res judicata—*Subsequent suit for declaration under S. 121 of U. P. Land Revenue Act—Maintainability.*

Where a correction suit filed by a tenant is taken under S. 42 of the U. P. Land Revenue Act, the zamindars being made parties to the suit, and an issue is fixed as to who is in possession the land and in which capacity, a decision in such suit holding the plaintiff to be an occupancy tenant and dismissing the zamindars' objections operates as *res judicata,* and bars a suit by the zamindars under S. 121 of the Act to declare the tenant to be a sub-tenant under them. The zamindars have no shadow of right to re-open the prior litigation which they lost. (*Darling, S. M. and Bomford, J. M.*) Sasti Hajjam *v.* Gauri Hajjam. **1938 R.D. 132=1938 A.W.R. 77 (B.R.).**

——S. 11—*Miscellaneous proceedings— Decision of Asst. Settlement Officer prior to the date of introduction of C. P. Code—If* res judicata *in subsequent proceedings.*

Prior to the introduction of the C. P. Code into Oudh, jurisdiction about the rights to land was of the Courts of revenue. Where an Asst. Settlement Officer has decided about a matter, his decision is *res judicata* in any subsequent suit between the representatives of the original parties. (*Hamilton, J.*) Jadunath Singh *v.* Bisheshar Singh. **178 I.C. 950=1938 O.W.N. 1267 =1939 O.A. 2=1938 O.L.R. 527=11 R.O. 127= A.I.R. 1939 Oudh 17.**

——S. 11—*Miscellaneous proceedings— Decision of Settlement Officer—Cis-Sutlej and Trans-Sutlej territories.*

In Cis-Sutlej and Trans-Sutlej territories, during the period between 1849 and 1865, Settlement Officer was the only judicial authority competent to decide the question of title relating to agricultural land. So the Settlement Officer's decision of the year 1853 on a question of title operates as *res judicata* and that question cannot be re-agitated in Civil Courts. (*Tek Chand and Dalip Singh, JJ.*) Chanda Singh *v.* Prithi Singh. **169 I.C. 847=10 R.L. 47=17 Lah. 787= 39 P.L.R. 141=A.I.R. 1937 Lah. 19.**

——S. 11—*Miscellaneous proceedings—Decision under S. 158, B. T. Act—If* res judicata *in subsequent regular suit.*

A decision under S. 158 of the Bengal Tenancy Act cannot be said to be a decree so as to operate as *res judicata* in a subsequent regular suit between the parties. (*Dhavle, J.*) Hira Lal Singh *v.* Matikdhari Singh. **176 I.C. 570=11 R.P. 88 =4 B.R. 741=1938 P.W.N. 502=19 Pat.L.T. 456=A.I.R. 1938 Pat. 359.**

——S. 11—*Miscellaneous proceedings—Findings in proceedings under S. 30-A of the Oudh Rent Act—Civil suit to declare order, not affecting plaintiff—If barred by* res judicata.

Where certain findings are arrived at by the Deputy Commissioner for the purpose of making an order in what is practically an executive matter under S. 30-A of the Oudh Rent Act, those findings cannot operate as *res judicata* in a subsequent civil suit brought to obtain a declaration that the order of the Deputy Commissioner had no adverse effect upon the right of the plaintiffs and to declare their title to the land in question. (*Yorke, J.*) SITA RAM *v.* CHHEDA. **14 Luck. 416 =179 I.C. 580=1939 O.L.R. 55=1939 R.D. 54=1939 O.W.N. 89=11 R.O. 184=1939 O.A. 300=A.I.R. 1939 Oudh 73.**

——S. 11—*Miscellaneous proceedings—Order in correction of record case—If operates as* res judicata.

A brief and a casual order passed in a correction of records case, without taking any evidence and without considering the nature of the plots, cannot operate as *res judicata* in subsequent proceedings. (*Darling, S.M. and Mehta, J.M.*) BINDHACHAL RAI *v.* MOTI RANI. **1938 R.D. 627 and 675=1938 A.W.R. (B.R.) 282 (2)=1938 A.L.J. (Supp.) 91.**

——**Ss. 11 and 47**—*Miscellaneous proceedings—Order of stay under S. 21 of the Debt Conciliation Act—Appeal held incompetent—Fresh application for execution if barred.*

Where an executing Court stayed proceedings under S. 21 of the Debt Conciliation Act and an appeal therefrom was held incompetent, it is open to the decree-holder to apply afresh for execution. The prior order is not one under S. 47, C. P. Code, and it did not in the least affect the rights of parties and such an order cannot possibly be regarded as having the effect of *res judicata.* (*Niyogi, J.*) HARI SADASHEO *v.* WAMAN VITHAL. **1938 N.L.J. 229.**

——S. 11—Miscellaneous proceedings—Order under Bengal Tenancy Act, S. 26—If *res judicata* on question of status of tenant. *See* BENGAL TENANCY ACT, S. 26-J—ORDER UNDER—EXTENT OF FINALITY. **43 C.W.N. 1046.**

——S. 11—*Miscellaneous proceedings—Prior suit under Agra Tenancy Act of* 1901—*Later suit under Tenancy Act of* 1926—*Change in Law—Bar of* res judicata.

Where the previous suit brought to eject a subtenant was under the old Act of 1901 a second suit brought under the new Act, 1926, in which the law has been changed, is not barred by reason of any decision in the prior suit. (*Darling, S.M. and Bomford, J.M.*) MAHESH SINGH *v.* MT. MOOLA. **1938 R.D. 656=1938 A.W.R. (B.R.) 239=1938 A.L.J. (Supp.) 86.**

——S. 11—*Miscellaneous proceedings—Proceeding not susceptible of appeal—Doctrine of* res judicata.

There is no justification for holding that the doctrine of *res judicata* can have no application as a consequence of a decision in proceedings which are in themselves final in the sense that they are conclusive between the parties, because they are not susceptible of appeal. (*Costello and Panckridge, JJ.*) KRISHNA CHANDRA *v.* MANIKLAL. **I.L.R. (1938) 2 Cal. 418=182 I.C. 69=11 R.C. 888=67 C.L.J. 363=42 C.W.N. 793=A.I.R. 1939 Cal. 169.**

——S. 11—*Miscellaneous proceedings—Proceeding under O. 9, R. 13 to set aside* ex parte *decree on ground of fraud in service of process—Decision in—If* res judicata *in subsequent suit to set aside decree on same ground.*

A decision in a proceeding under O. 9, R. 13, C. P. Code, to set aside an *ex parte* decree on the ground of fraud in the service of process, operates as *res judicata* in a subsequent suit to set aside the decree on the same ground. (*Tek Chand, J.*) GHULAM MAHOMED *v.* MT. BAKHTAWARAN. **172 I.C. 1007=10 R.L. 386 (2)=39 P. L R. 506=A.I.R. 1937 Lah. 614.**

——S. 11—*Miscellaneous proceedings—Proceeding under O. 21, R. 100—Finding of fact in—*Res judicata.

A finding of fact arrived at in a proceeding under O. 21, R. 100, C. P. Code, would not be *res judicata* in a subsequent suit. (*Henderson, J.*) BISWESWAR BANERJEE *v.* NABA KUMAR SINGH. **12 R.C. 442=186 I.C. 98=44 C.W.N. 251=70 C. L.J. 111=A.I.R. 1940 Cal. 16.**

——S. 11—Miscellaneous proceedings—Proceeding under O. 22, R. 5—Decision that certain person is legal representative of deceased party—If *res judicata. See* C. P. CODE, O. 22, R. 5. **169 I.C. 798=1937 O.W.N. 782.**

——S. 11—*Miscellaneous proceedings—Suit by Mahanth in Revenue Court for ejectment of lessees—Prior decision in Civil Court—Leases found to be permanent and unregistered and hence invalid—How far binding on Revenue Courts.*

Where in a civil suit certain leases executed by a Mahanth were declared to be not binding on the successor as they were permanent alienations, and also that as they were unregistered, they were ineffective, in a later suit by the Mahanth's successor in the Revenue Court for ejectment of the lessees, the decision of the Civil Court while so far as the second point was concerned is binding on the Revenue Court, as regards the first point decided it is not so binding. (*Marsh, J.M.*) GORAKH NATHJI *v.* SWAMI NATH LAL. **1938 R. D. 623=1938 A.W.R. (B.R.) 315.**

——S. 11—*Miscellaneous proceedings—Suit for profits under S.* 108 (15) *of Oudh Rent Act—Finding that lambardar was guilty of negligence in not getting rent assessed on ex-proprietary tenancy—If* res judicata *in subsequent suit.*

A finding in a suit for profits under S. 108 (15) of the Oudh Rent Act that the lambardar was guilty of negligence in not getting rent assessed on ex-proprietary tenancy, does not operate as *res judicata* in a subsequent suit for profits between the same parties. (*Hamilton, J.*) MUNIR AHMAD *v.* ABDUL KHALIQ. **1938 R.D. 388=1938 O.W.N. 306=1938 O.A. 478=1938 A.W.R. (C.C.) 34.**

——S. 11—Miscellaneous proceedings—Suit under S. 99 of Agra Tenancy Act—Finding as to status of plaintiff—If *res judicata. See* AGRA TENANCY ACT, S. 99. **1937 R.D. 373 (2).**

Mortgages.

——S. 11—*Mortgage—Successive suits on—Suit for sale—Omission to implead puisne mortgagee of part of property—Second suit for sale against puisne mortgagee—If barred.*

A mortgagee who omits by mistake to implead the subsequent mortgagees of a part of the mortgaged property in his suit for sale is not debarred from afterwards bringing a second suit on the same mortgage against the subsequent mortgagees who have been so left out in the prior suit. (*Sulaiman, C. J. and Bennet, J.*) NANHE LAL *v.* RAM BHAROSE. **174 I.C 315=10 R.A. 557=1938 A.L.R. 265=1937 A.W.R. 648=A.I.R. 1938 All. 115.**

——S. 11—*Mortgage—Successive suits for redemption—If barred.*

The mortgagors brought suits for redemption of their usufructuary mortgages. The suits ended in a decree fixing the amount to be paid by them within a stated time. The payment was not made within that particular time. A suit for redemption was subsequently filed by their successors. It was contended that the right of redemption was extinguished and the suit barred by *res judicata*.

Held, that final decree not having been passed the right of redemption was not extinguished and the suit was not barred by *res judicata*. (*Agarwala and Rowland, JJ.*) JOTI LAL SAH *v.* SHEODHAYAN PRASHAD. **15 Pat. 607=163 I.C. 908=9 R.P. 50=1936 P.W.N. 447=17 Pat.L.T. 564=A.I.R. 1936 Pat. 420.**

——**S. 11 and O. 2, R. 2**—Mortgage—Successive suits on separate and successive mortgages—Maintainability. *See* MORTGAGE — SUCCESSIVE MORTGAGES. **63 C.L.J. 110.**

——**S. 11**—Mortgage—Suit on. *See* C. P. CODE, S. 11, EXPL. IV. **A.I.R. 1937 All. 251.**

——**S. 11**—*Mortgage—Suit on—Preliminary and final decrees passed without any objection by mortgagors—Sale of properties—Suit by mortgagors for declaration that preliminary and final decrees were void for want of jurisdiction, dismissed—Application for personal decree against mortgagors — Question as to jurisdiction—Whether* res judicata.

A preliminary decree was passed in a mortgage suit without any objection by the mortgagor and was followed by a final decree and the decree was transferred by consent to another district for execution, and certain properties were duly sold. The mortgagors instituted a suit for a declaration that the preliminary and the final decrees were null and void by reason of the Court not having inherent jurisdiction to try the suit, but the suit was dismissed. Subsequently an application for a personal decree against the mortgagors was made. The application was made pursuant to the final decree in the mortgage suit. The mortgagors objected *inter alia* that the Court had no inherent jurisdiction to entertain the mortgage suit and therefore had no jurisdiction to pass a personal decree against the mortgagors.

Held, that the effect of the dismissal of the mortgagor's suit was that the question of jurisdiction became *res judicata* between the parties and could not be raised again by the mortgagors or considered by the Court, in any subsequent proceedings in the mortgage suit. (*Page, C.J., Mia Bu and Dunkley, JJ.*) BANK OF CHETTINAD *v.* S.P.K.P.V.R. CHETTIYAR FIRM. **14 Rang. 94=161 I.C. 989=8 R.R. 528=A.I.R. 1936 Rang. 87 (S.B.).**

Parties and representatives.

——**S. 11**—*Parties and representatives—Attaching creditor, if claims under debtor—Decision against debtor's estate—Binding nature.*

An attaching creditor claims only under the debtor and hence is bound by any decree that might be passed against the debtor's estate. The decision in such a suit would operate as *res judicata*. (*D. R. Norman.*) MANNA LAL *v.* MST. MANNA. **1939 A.M.L.J. 51.**

——**S. 11**—*Parties and representatives—Attaching decree-holder—Whether representative of judgment-debtor.*

The share of one *X* in a certain property was sold in execution of a decree after disallowing the objection filed by *X*. After the sale, the plaintiff sought to attach and sell the property in dispute as the share of *X* in execution of his decree against *X*.

Held, that the order disallowing the objection of *X* had become final and binding on him and also on the plaintiff as the representative of *X*, no suit having been filed under O. 21, R. 63, and that in the face of that order and the sale that subsequently took place, *X* had no interest left in the property in dispute and that consequently it was not liable for attachment and sale as that of *X* in execution of the plaintiff's decree. (*Ganga Nath, J.*) RAM JIWAN *v.* INDER BAHADUR SINGH. **163 I.C. 239=8 R.A. 945=1936 A.W.R. 447=1936 All. L.R. 535=1936 A.L.J. 295=A.I.R. 1936 All. 722.**

——**S. 11**—*Parties and their representatives—Decision as to legal representative—If* res judicata.

An order that a certain person shall be brought on record as the legal representative of a decree-holder, is not a decree and does not operate as *res judicata*. (*Pollock, J.*) SULEMAN *v.* ABDUL SHAKOOR. **188 I.C. 292=12 R.N. 328=1939 N.L.J. 577=A.I.R. 1940 Nag. 99.**

——**S. 11**—*Parties and representatives—Decree against landlord—If* res judicata *against tenant.*

A lessee is bound by a judgment given against his lessor in the absence of any fraud or collusion on his part. A lawful judgment, therefore, which deprives the landlord of the estate deprives tenant, of necessity, of his subordinate right. (*Venkataramana Rao, J.*) KRISHNAN NAIR *v.* KAMBI. **172 I.C. 268=10 R.M. 443=1937 M.W.N. 299=A.I.R. 1937 Mad. 544.**

——**S. 11**—Parties and representatives—Ejectment suit and decree under S. 44, Agra Tenancy Act, against uncle—Subsequent suit for declaration of tenant rights by nephew—If barred. *See* AGRA TENANCY ACT (1926), S. 44. **1936 R.D. 119.**

——**S. 11**—*Parties and representatives—Hindu father or manager—Adverse decision against—If* res judicata *against sons or other coparceners.*

A Hindu father or manager sufficiently represents his sons or the other members of the joint family in a suit instituted against the father or manager on a mortgage executed by him. The latter must be considered to be fighting the battles of the entire family, especially where there is no suggestion and nothing to show that the mortgage sued on was not for legal necessity, and the entire family stands to lose or gain by the decision in such a suit. If, therefore, a mistake is made at the stage of final decree, and more property than is mortgaged is wrongly included in the final decree, and objections thereto by the father or manager taken in execution are dismissed, not only the father or manager but the sons and other members are bound by such decision. The suit in a mortgage action continues right up to the time that the final decree is prepared. Consequently a subsequent suit by the sons or other members to recover possession of the excess property included in the final decree and sold in execution is barred by *res judicata*, because the sons or other members must be deemed to have been represented in the former litigation by their father or manager. (*Collister and Bajpai, JJ.*) KAZIM ALI KHAN *v.* OM PRA-

KASH. 172 I.C. 337=10 R.A. 389 (2)=1937 A.L.J. 1095=1937 A.W.R. 841=1937 All.L.R. 952 =A.I.R. 1937 All. 731.

——S. 11—*Parties and representatives—Identity of parties—If essential.*

A judgment to operate as *res judicata* must, among other things, be between the same parties. But merely because a certain person is a party to one suit and is one of a number of persons who constitute the party in a second case, it cannot be said that the parties are the same in both the suits so as to make the decision in the one suit *res judicata* in the other. (*Drake Brockman, S. M.*) SHIB CHARAN *v.* SURAJ PRASAD. **1936 R.D. 345.**

——**S. 11**—*Parties and their representatives—Judgment-debtor's title to particular property found against in earlier suit — Decree-holder attaching same property—Objection—Previous judgment, if* res judicata.

Where a judgment-debtor's title with reference to a particular property was found against him in earlier suit by him for possession of that property, and the decree-holder attaches that identical property in execution of his decree as against the judgment-debtor and another objects that it is not the judgment-debtor's property, the judgment in the earlier suit by the judgment-debtor operates as *res judicata* as between the objector and the decree-holder, for the judgment-creditor or decree-holder must be held to represent his judgment-debtor in respect to the particular property with reference to which his claim was negatived in the earlier suit. (*Collister, J.*) RANG LAL *v.* GAJRAJ SINGH. **181 I.C. 80=11 R. A. 549 (2)=1939 A.W.R. (H.C.) 9=A.I.R. 1939 All. 202.**

——**S. 11**—*Parties and representatives — Plaintiff's suit based on title and possession decreed against defendants* 1 *and* 2—*Appeal filed by defendant No.* 1 *without impleading defendant No.* 2—*Defendant No.* 1 *claiming title by purchase from defendant No.* 2—*Trial Court's finding as to plaintiff's title and possession—If* res judicata *against defendant No.* 1.

A suit filed by the plaintiff claiming to have title to and to be in possession of the suit land was decreed in the trial Court, and defendants Nos. 1 and 2 were restrained by injunction from interfering with his enjoyment of the same. Defendant No. 1, who claimed title to the land by purchase from defendant No. 2, and who had no other basis of title, appealed, but neglected to make defendant No. 2 a respondent to the appeal.

Held, that the decision against defendant No. 2 having become a final decision, operated as a bar to the defendant No. 1's attempt to reopen that decision. In other words, there being no appeal by defendant No. 2 against the trial Court's finding as to the plaintiff's title to and possession of the property, that finding has become *res judicata* against defendant No. 1 who claimed through defendant No. 2. (*Cornish, J.*) RAKKA KUDUMBAN *v.* ARULAYI. **1936 M.W.N. 789=169 I.C. 318=10 R.M. 2=A.I.R. 1937 Mad. 228.**

——**S. 11**—*Parties and representatives*—Pro forma *defendant—Decision in prior suit not granting any relief against him—If* res judicata.

The decision in a prior suit to which certain parties are impleaded as *pro forma* defendants, without any relief being claimed against them cannot operate as *res judicata* as against them in a subsequent suit, when there has been no issue between them and the plaintiff or between them and the principal defendants in the prior suit. (*R. C. Mitter, J.*) RAKHAL DASS ROY *v.* HARIDAS SARKAR. **40 C.W.N. 1208=64 C.L.J. 3.**

——**S. 11**—*Parties and representatives*—Pro forma *defendant—Suit for rent by one co-sharer against tenant impleading other co-sharer as formal defendant—No claim to relief against latter—Latter* ex parte *but supporting tenant—Decree—Subsequent suit on title by latter co-sharer—If barred by* res judicata.

When a person is impleaded as a party to a suit as a formal or nominal defendant and no relief is prayed for against him, any decision in the suit as between the principal parties will not operate as *res judicata* as against the formal defendant in a subsequent suit, though the prior decision might be on a point affecting his interests. *A*, as heir of his father *B*, sued *C*, the tenant, for a third share of the rent of certain sheds on the ground that *B*, had purchased a third share in the sheds in question. He impleaded certain others, namely the other co-sharers as *pro forma* defendants, one of whom was *D*. No relief was claimed against the *pro forma* defendants. *D* did not appear in the suit but gave evidence in favour of *C*, who denied *A's* title as also the relation of landlord and tenant. The Court decided in favour of the purchase by *B* and, holding that there was relationship of landlord and tenant between *A* and *C*, decreed the suit. *D* afterwards brought a suit for a declaration of his right to the same sheds as against *A*, and impleaded *C*, as *pro forma* defendant to the suit.

Held, the decision in the prior suit respecting the purchase of a share in the sheds by *B*, could not operate as *res judicata* against *D*, in the later suit. (*R.C. Mitter, J.*) GAJANAN AGARWALA *v.* HAMIDAR RAHAMAN. **165 I.C. 662=9 R.C. 441 =40 C.W.N. 1205.**

——**S. 11**—*Parties and representatives—Suit by daughter claiming estate as sole daughter—Father found to have executed will in suit by widow to which executors were not parties—Plea by executors setting up will—If* res judicata—*Procedure for revoking will as forgery.*

Where a suit is instituted by a daughter, on the death of her mother, claiming certain property as the sole daughter of her father, on the ground that he died intestate and without any male issue, but it is found during the trial of the suit that the father had executed a will of which probate was taken, a decision in a previous suit to which the plaintiff's mother and the defendants were parties, but in which the executors of the will, as representative of the estate of the testator, were not impleaded, does not operate as *res judicata*, so as to estop the defendants from putting forward the will in defence to the suit. If the plaintiff alleges that the will is a forgery and prays that it should be revoked, she must take recourse to proceedings properly constituted and brought under the testamentary jurisdiction. No decree or decision in proceedings to which the executors are not parties can be binding against them or can obliterate the will. (*Costello and Panckridge, JJ.*) SIVA MOHAN KUNDU *v.*

Bechumoyee Dasi. **168 I.C. 487=9 R.C. 827=A.I.R. 1936 Cal. 585.**

——S. 11—*Parties and representatives—Suit by widow—Decision, if* res judicata *against reversioners.*

A decision in a suit by a widow or a limited owner, in respect of and for the protection of her own rights in certain property, bars a subsequent suit by reversioners in respect of that property even though such a suit may not be of a representative character. 42 I.A. 125 and A.I.R. 1924 P.C. 247, Foll. (*Thom and Iqbal Ahmad, JJ.*) Gopal Das *v.* Sri Thakurji. **A.I.R. 1936 All. 422.**

——S. 11—*Parties and representatives—Title suit against vendor and vendee—Decree holding that vendor had no title—Appeal by vendee impleading plaintiff alone—Vendor not party to appeal—Vendor not appealing—Effect—Finding against vendor—If* res judicata *against vendee so as to bar his appeal.*

Plaintiff filed a suit against defendants 1 and 2, claiming the suit property. The second defendant claiming to be the owner sold it to the 1st defendant who therefore claimed it as the purchaser from the 2nd defendant. The trial Court held that the plaintiff and not the second defendant was the owner and passed a decree in favour of the plaintiff. The 1st defendant appealed impleading the plaintiff alone and without making the 2nd defendant a party to the appeal the appellate Court allowed the appeal and reversed the decree and dismissed the suit. The plaintiff filed a second appeal and the High Court held that the trial Court's decree negativing the 2nd defendant's title became final in the absence of an appeal by the latter and operated as a bar to the 1st defendant's attempt to reopen the decision and that the trial Court's finding on title, not having been appealed against by the 2nd defendant became *res judicata* against the 1st defendant who claimed through the 2nd defendant. The second appeal of the plaintiff was therefore allowed.

Held, in Letters Patent Appeal, that the 1st defendant in assailing the decree of trial Court in appeal must be deemed to do so not only on his own behalf but also on behalf of his vendor, the 2nd defendant, that his success in the appeal would operate not only to his advantage but also to the advantage of the absent party. There was consequently no bar of *res judicata* against the 1st defendant's appeal. 1936 M.W.N. 789, reversed. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Arulayi *v.* Rakka Kudumban. **178 I.C. 717=11 R.M. 489=47 L.W. 467=1938 M.W.N. 450=A.I.R. 1938 Mad. 501.**

Plea of res judicata.

——S. 11—*Plea of* res judicata—*If can be raised for first time in appeal or second appeal.*

The plea of *res judicata* can be raised for the first time in appeal or even in second appeal provided it can be clearly maintained from the undisputed facts on the record. (*Wright, J.*) Ma To *v.* Maung E Byu. **A.I.R. 1940 Rang. 136.**

——S. 11—*Plea of* res judicata—*Availability observation in judgment in earlier litigation that party is prevented from raising such plea.*

If the circumstances of the earlier litigation entitle the defendant to raise the plea of *res judicata,* the observations contained in the judgment of the Court in that litigation that the defendant was prevented from raising any plea of *res judicata* in any subsequent suit would not preclude another Court from considering that plea and examining the circumstances upon which it rests. (*Khundkar, J.*) Fakir Chandra Biswas *v.* Ekkai Sarkar. **42 C.W.N. 560.**

——S. 11—*Plea of* res judicata—*Decree—Evidentiary value.*

The decree is not sufficient evidence to support an estoppel by record. The decree, according to the Code, is only to state the relief granted, or other determination of the suit. It does not afford any information as to the matters which were in issue or have been decided. (*Cornish, J.*) Ram Rao *v.* Honnamma Shedthi. **161 I.C. 748=8 R.M. 866=43 L.W. 676=1936 M.W.N. 124=A.I.R. 1936 Mad. 469.**

——S. 11—*Plea of* res judicata—*How to establish—Decision as to title of person to receive compensation under Land Acquisition Act—If operates as* res judicata.

In order successfully to establish a plea of *res judicata* or estoppel by record it is necessary to show that in a previous case a Court having jurisdiction to try the question came to a decision necessarily and substantially involving the determination of the matter in issue in the later case. Where a dispute as to the title to receive the compensation under the Land Acquisition Act has been referred to a Court, and it has been determined, the matter is *res judicata* and binds the parties in any later suit involving that issue. (*Lord Porter*) Bhagwathi *v.* Ram Kali. **66 I.A. 145=I.L.R. (1939) All. 460=181 I.C. 211=1939 R.D. 285=43 C.W.N. 677=5 B.R. 583=1939 O L.R. 293=11 R.P.C. 217=1939 O.W.N. 543=I.L.R. (1939) Kar. 199 (P.C.)=1939 P.W.N. 775=1939 A.W.R. (P.C.) 58=50 L.W. 66=20 P.L.T. 523=1939 A.L.J. 564=70 C.L.J. 23=41 P.L.R. 638=1939 M.W.N. 894=41 Bom.L.R. 1028=A.I.R. 1939 P.C. 133=(1939) 2 M.L.J. 98 (P.C.).**

Prior decision.

——S. 11—*Prior decision — Construction of will—Suit by one of testator's daughters—Decision that daughters acquired only a life-interest in property—Other daughters not parties to suit—Decision, if* res judicata *in later suit by granddaughters of latter.*

In a suit by *A*, one of the daughters of a testator, the High Court on appeal gave a decision that she acquired under the will only a life-interest in a certain property. The other daughters of the testator, *B* and *C*, were not parties to this suit. The suits filed by *B* and *C* which were pending in the lower Court were disposed of upon the footing of the decision given by the High Court in *A's* suit. In a subsequent suit filed by the grand-daughters of *B*, the question arose whether the plaintiffs were precluded from agitating the question as to whether or not their grandmother acquired an absolute interest in the property.

Held, that although in one sense the decision of the High Court in *A's* suit was not *res judicata* in asmuch as neither the plaintiffs nor their grandmother were parties to that suit, it was a judicial decision given not merely on an analogous set of facts but on a set of facts which were identical with the facts in the present suit and that in the circumstances of the case, it was not open to the plaintiffs to argue that their grandmother acquired anything else but a life interest as regards the property. (*Derbyshire, C.J and Costello, J.*) BIBHA BATI DEBEE *v.* MAHENDRA CHANDRA LAHIRI. **I.L.R. (1937) 1 Cal. 400=173 I.C. 857 =10 R.C. 574=A.I.R. 1938 Cal. 34.**

——**S. 11**—*Prior decision—Decree deciding dispute not given effect to by agreement of parties—Effect of—Decision in suit under S. 9, Specific Relief Act—Effect of.*

A decree for partition obtained in 1919 by *A* against her sister *B* and brother (the parties being Christians) was not executed as the parties had agreed not to take any advantage of the decree and they continued to be in joint possession of the properties as if the decree was not in existence. The parties having fallen out in 1932, *A* successfully instituted a suit under S. 9, Specific Relief Act, to recover possession of the properties, of which she was dispossessed by *B* through her husband and her son. *B* thereafter filed a suit for partition and possession of her share which was contested by *A* as being barred by *res judicata* by reason of the decree in the suit of 1919 and the findings in the suit under S. 9, Specific Relief Act.

Held, that the parties not having given effect to the decree in the suit of 1919 and having continued in joint possession of the properties as per subsequent agreement the second suit for partition was not barred. The decision in the suit under S. 9, Specific Relief Act, operated as *res judicata* only to the extent of the finding given therein that *A* was in possession of the properties on the day she alleged in that suit that she was dispossessed and nothing more, and did not operate as a bar to the second suit. (*Leach, C. J. and Varadachariar, J.*) ABHIRAMI AMMAL *v.* CHELLAMMAL. **182 I.C. 348=12 R.M. 63=A.I. R. 1938 Mad. 287.**

——**S. 11**—*Prior decision—Mortgagee's suit for possession—Amount due to mortgagee fixed by decree—If operates as* res judicata *in subsequent suit for redemption.*

Where a mortgagee sued for possession of the mortgaged property in terms of the mortgage deed and his suit was decreed where by the amount due to the mortgagee was fixed, in default of payment of which the mortgagee was to be put in possession of the mortgaged property, the amount so fixed by the decree operates as *res judicata* in a subsequent suit for redemption by the purchaser of the equity of redemption. (*Zia-ul-Hasan and Hamilton, JJ.*) SHEO KUMAR *v.* MUNNU SINGH. **1940 A.W.R. (C.C.) 340=1940 O.A. 676=1940 O.W.N. 604.**

——**S. 11 and O. 2, R. 2**—Prior decision—Prior suit for rectification of sale deed and for possession of portion of property wrongly shown as exempted from sale—Subsequent suit for possession of property shown as sold in sale deed—Whether barred. *See* C. P. CODE, O. 2, R. 2 AND S. 11. **167 I.C. 414=1937 O.W.N. 252.**

——**S. 11**—*Prior decision—Two suits disposed of at same time—One of them instituted prior to the other—*Res judicata.

Where two suits are disposed of at the same time, there is no prior decision which can operate as *res judicata*, though one of them was filed before the other. (*Darling, S.M. and Bomford, J.M.*) RENUKA RAI *v.* SHYAM DUTT RAI. **1938 R.D. 133=1938 A.W.R. 81 (B.R.).**

Pro forma defendant.

——**S. 11**—Pro forma *defendant—Finding, if* res judicata.

A finding in favour of a party joined as *pro forma* defendant and not a necessary party in previous suit does not operate as *res judicata* in subsequent suit. (*Addison, Ag. C. J. and Din Mohammad, J.*) SIKANDAR *v.* MT. KARAM NISHAN. **182 I.C. 209=11 R.L. 908=A.I.R. 1938 Lah. 842.**

Rent suit.

——**S. 11**—*Rent suit—Question of title—*Res judicata—*Observation in judgment—Title of* pro forma *defendants left open—Effect.*

In a rent suit, it is not absolutely necessary to decide the question of title as between the plaintiffs on the one hand and the *pro forma* defendants on the other in order to give the plaintiffs any relief against the tenants defendants. If an appeal filed by the *pro forma* defendants is dismissed by the appellate Court with the observation that the decision will not operate as *res judicata* on any question of title in any future litigation between the parties, the observation indicates clearly that the Court does not intend to decide the question of title finally. In other words, the rent decree is made operative between the plaintiffs and the tenants defendants with regard to the period in suit leaving the question of title between the plaintiffs and the *pro forma* defendants open. The plaintiffs cannot, therefore, raise the plea of *res judicata* in a subsequent litigation between them and the *pro forma* defendants. (*Mukherjea, J.*) KALIMUDDIN MIA *v.* EAKUTENNESA BIBI. **71 C.L.J. 232=A.I.R. 1940 Cal. 347.**

Representative suit.

——**S. 11**—Representative suit. *See* EXPLANATION VI TO S. 11 (P.C.).

Scope.

——**S. 11**—*Scope.*

S. 11, C. P. Code, is not exhaustive and the bar of *res judicata* operates as much on general principles as on the wording of the section. The *raison d'etre* of the rule is to confer finality on decisions arrived at by competent Courts between interested parties after genuine contest and to allow persons who had deliberately chosen a position to reprobate it and to blow hot now when they were blowing cold before would be completely to ignore the whole foundation of the rule. (*Addison, A.C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. **178 I.C. 302=11 R.L. 440 =40 P.L.R 591=A.I.R. 1938 Lah. 571.**

——**S. 11**—*Scope—General principle of* res judicata—*Decision by competent Court—Such Court not competent to try subsequent suit—Decision, if* res judicata.

S. 11, C. P. Code, applies when two Courts concerned have 'concurrent' jurisdiction; but the general principle of *res judicata* is of wider application. It governs cases where the matter in issue is the same and has been previously decided by a competent Court. Hence, when a Court having jurisdiction to decide certain matter has decided, its decision on that point will operate as *res judicata* when the same matter arises in another suit though the former Court is not competent to try the subsequent suit. (*Bhide, J.*) ISHWAR DUTT CHURAMANI *v.* GENERAL ASSURANCE SOCIETY, LTD. **174 I.C. 761=10 R.L 598=A.I.R. 1937 Lah. 346.**

——S. 11—*Scope—If exhaustive.*

S. 11, C. P. Code, is exhaustive in respect of all cases falling within its terms, and with regard to such cases, the Court is not entitled to travel outside the section and apply the general principles. (*Mukerji and S.K. Ghose, JJ.*) SEKENDAR ALI MIRDHA *v.* SADARUDDIN BHUNIYA. **40 C.W.N. 174.**

——S. 11—*Scope—Nature of plea—Estoppel and* res judicata*—Distinction.*

Davies, J.C.—There is a difference between *res judicata* and estoppel. *Res judicata* ousts the jurisdiction of the Court, while estoppel does no more than shut the mouth of a party. Estoppel means nothing more than that a person shall not be allowed to say one thing at one time and the opposite of it at another time; while *res judicata* means nothing more than that a person shall not be heard to say the same thing twice over; and a plea of *res judicata* can prevail even where the result of giving effect to the plea will be to sanction what is illegal in the sense of being prohibited by statute. (*Davis, J.C. and Rupchand, A.J.C.*) ALLAHBUX *v.* NUSSERWANJI & Co. **29 S.L.R. 455=164 I.C. 43=9 R.S. 30=A.I.R. 1936 Sind 99.**

Successive suits for same relief.

——Ss. 11 and 47—*Successive suits for same relief and between same parties and identical cause of action—Bar of.*

A subsequent suit for the same relief and on the same cause of action and between the same parties as a former suit is barred, being affected by the prohibition contained in Ss. 11 and 47, C. P. Code. (*Macklin and Wasoodew, JJ.*) BHOGILAL *v.* RATILAL. **183 I.C. 482=12 R.B. 103=41 Bom.L.R. 497=A.I.R. 1939 Bom. 261.**

——S. 11, Expl. IV—*Applicability—Execution proceedings.*

Expl. IV to S. 11, C. P. Code, embodying the rule of constructive *res judicata* applies to execution proceedings as well. (*Bose, J.*) LAXMIBAI *v.* SEWAKRAM. **I.L.R. (1936) Nag. 30=165 I.C. 948=9 R.N. 111 (2)=19 N.L.J. 129=A.I.R. 1936 Nag. 123.**

——S. 11, Expl. IV—*Applicability—Execution proceedings.*

The ordinary rules of *res judicata* apply by analogy to execution proceedings. The principle applies to matters falling under Expl. IV to S. 11. Where, therefore a person brought on record as a judgment-debtor in execution of a decree, and served with notice as such, does not raise an objection that the decree-holder is merely a benamidar, his legal representatives brought on record after his death are estopped from raising the objection. (*Mosely and Mackney, JJ.*) K. M. ESOOF *v.* HAMIDA BIBI. **163 I.C. 671=9 R.R. 43=A.I.R. 1936 Rang. 218.**

——S. 11, Expl. IV—*Applicability—Execution proceedings—Omission to raise point decided in suit—Point raised but not decided*—Res judicata.

The doctrine laid down in Expl. IV to S. 11 of the C. P. C. is applicable to execution proceedings and must be applied in execution arising out of the same judgment so as to put an end to the

litigation. If a point is decided in favour of the plaintiff in the suit itself, and the defendant does not raise the point in execution, it operates as *res judicata,* because it must be assumed that though it is not raised, when it can be raised, it must be deemed to be decided by implication in the proceedings in execution where an objection under S. 47, C. P. Code, is raised but not decided, and the execution is allowed, the point is nonetheless *res judicata,* though no decision has been given on the same. (*Wort and Agarwala, JJ.*) MAHADEO PRASAD *v* BHAGWAT NARAIN. **177 I.C. 810=5 B R. 18=11 R.P. 187=1938 P. W.N. 400=A.I.R. 1938 Pat. 427.**

——S. 11, Expl. IV and O. 2, R. 2—*Applicability—Mortgage—Deposit by mortgagor not accepted by mortgagee—Suit by mortgagee—Nature and scope of—Omission to claim excess profits realised by mortgagee—Subsequent suit—If barred.*

Where a mortgagee resists the right of the mortgagor to get a release of the mortgaged property and to give up possession, in cases in which he is in possession, the suit which the mortgagor has to substitute is a suit for redemption. It would still be a suit for redemption if a tender made by the mortgagor has been refused or if a deposit of money by the mortgagor under S. 83, T. P. Act, has been refused by the mortgagee, or if the mortgagee, being in possession, has had his dues satisfied by the amount of the usufruct received by him or where by such receipt he has overpaid himself. Such a suit must include the entire accounts between the parties in relation to the mortgage; the claim of the mortgagor for overpayments to the mortgagee or excess profits received by the latter must also be included, and if they are not included, a subsequent suit in respect of such claims would be barred by reason of S. 11, Expl. IV and O. 2. R. 2, C. P. Code. (*R.C. Mitter, J.*) RAJMOHON DAS *v.* SARADA CHARAN CHAUDHURY. **162 I.C. 709=8 R.C. 635=40 C.W.N. 627=A.I.R. 1936 Cal. 200.**

——S. 11, Expl. IV—*Applicability—Point raised in prior suit.*

The principle of constructive *res judicata* as laid down in Expl. IV of S. 11, C. P. Code, does not apply if the point was actually raised in the prior suit. (*Syed Nasim Ali and Henderson, JJ.*) MIDNAPORE ZEMINDARY CO., LTD *v,* CHANDRA SINGH DUDHORIA. **181 I.C. 674=11 R.C. 828=68 C.L.J. 305=A.I.R. 1939 Cal. 1.**

——S. 11, Expl. IV—*Applicability—Prior suit for declaration of title and possession as owner under sale deed—Dismissal on ground that plaintiff was only* benamidar *and that transaction was only a mortgage and not sale—Subsequent suit by* benamidar *and real owner to enforce mortgage*—Res judicata—*Same parties.*

A brought a suit for declaration that he was owner of certain immovable properties covered by a sale deed and that he was in possession as owner, and also prayed that if, pending the suit, possession was lost, he should be restored to possession. The suit was dismissed on the grounds that *A* was only a *benamidar,* the real owners being *B, C* and *D,* and that the transaction on which the suit was based was not a sale but only a mortgage. Subsequently *A,* along with *B, C* and *D* brought a suit to enforce the mortgage as mortgagees. The defendants raised the plea that the decision in the prior suit operated as *res judicata*.

Held, (1) that though the right sought to be enforced in both the suits was based on the same document, the nature of the two suits was entirely different and the two suits were based on two different titles and constituted entirely different causes of action, and it was not obligatory on the part of the plaintiff in the prior suit to join the two causes of action, though it was permissible; (2) that S. 11, C. P. Code, did not apply and the plea of bar of *res judicata* must therefore fail. (*Kania and Vassoodew, JJ.*) Gurusangappa Basappa *v.* Baslingappa Basappa. **42 Bom.L.R. 470.**

———**S. 11, Expl. IV**—*Constructive* res judicata *—Defendant trying to set aside* ex parte *decree under O. 9, R. 13—Failure to prove want of due service of summons—Defendant, if barred from agitating same question in appeal or revision and* vice versa.

A defendant who has applied under O. 9, R. 13, C. P. Code, for setting aside a decree on the ground that proper service has not been carried out and has failed, is barred from agitating the same point later on in an appeal from that decree or in a petition for revision against the order passing the decree. The order of the Court will stand in his way. Conversely a defendant who has failed in an appeal or revision on that point cannot subsequently have recourse to proceedings under O 9, R. 13, C. P. Code. for decision on it. (*Mir Ahmad, A.J.C.*) Siri Krishan Saigal *v.* Arjan Singh. **160 I.C. 462=8 R. Pesh. 113=A.I.R. 1936 Pesh. 1.**

———**S. 11, Expl. IV**—*Constructive* res judicata—*Doctrine of—When can be invoked.*

In order to invoke in aid the doctrine of constructive *res judicata*, there must be a decision by the Court either in express terms or by necessary implication. So where in an application, the decree-holder wrongly applied for a final decree under O. 34, R. 5 (3), C. P. Code, and also prayed for execution and the Court made an order that, "as final decree has already been passed, the present application is rejected", but passed no order on the prayer for execution.

Held, that there was no decision given by the Court either in express words or by necessary implication on the matter of execution and the order could not operate constructively as *res judicata* against the subsequent application for execution. (*Agha Haider, J.*) Jodh Singh *v.* Bhagwan Das Nanak Chand. **173 I C. 185=10 R.L. 399=39 P.L R. 680=A.I.R. 1937 Lah. 404.**

———**S. 11, Expl. IV**—*Directly and substantially in issue—Framing of issue—If necessary.*

It is not necessary for the purpose of S. 11, Expl. IV, that an issue should be framed to make the point raised by the defendant to be matter in issue. Where the defendant claimed right of way over a plot in suit and made a claim to it in his written statement and the point was argued and decided by the trial Court in his favour.

Held, the right of way claimed by the defendant as against plaintiff was a ground of defence in the suit and must be deemed to have been thus a matter in issue in that suit. (*Cornish, J.*) Mohammad Abdul Aziz *v.* Gulam Julani. **176 I.C. 590=11 R.M. 118=A.I R. 1937 Mad. 709.**

———**S. 11, Expl. IV**—*Former suit as exclusive owner—Subsequent suit as co-sharer for accounts —If barred.*

A person filed a suit as exclusive owner against persons in wrongful possession. This suit being dismissed, he instituted another suit for accounts as a co-sharer. It was contended that he was barred from instituting the subsequent suit for accounts.

Held, that the two suits were brought in different capacities. The right to accounts was not in issue in his former suit and hence the rule of constructive *res judicata* embodied in Expl. IV to S. 11, C. P. Code, was inapplicable to the case. (*Coldstream and Monroe, JJ.*) Vidya Wanti Kaur *v.* Sardar Shahdev Singh. **182 I C. 426=12 R.L. 24=A.I.R. 1938 Lah. 139.**

———**S. 11, Expl. IV**—*Might and ought—Alternative claim—Prior suit on title for possession—Defendants pleading possession as heirs—Dismissal of suit—Later suit for joint possession—Bar of* res judicata.

Where a suit by the plaintiff claiming certain property was dismissed on the defendants pleading that they had succeeded to it as heirs, it is not open to such plaintiff to file a second suit, for joint possession with the defendants, as he ought to have asserted this right in the earlier suit in answer to the defendants' exclusive claim. Not having done so, he is barred from raising it afresh by Expl. IV to S. 11, C. P. Code. (*Puranik, J.*) Abdul Majid Khan *v.* Abdul Ahim Khan. **I.L.R. (1939) Nag. 544=174 I.C. 777=10 R.N. 418.**

———**S. 11, Expl. IV**—*'Might and ought'—Alternative plea inconsistent with main plea—If ought to be raised.*

The question whether an alternative plea ought to have been made a ground of attack depends on the facts of each case. If the alternative plea is inconsistent with the main plea and would thus create confusion it cannot be said that the alternative plea ought to have been raised in the previous suit or application. Application under S. 9, Punjab Debtors' Protection Act, is inconsistent with the plea of the judgment-debtor that property attached is his personal property. Hence, failure of the judgment-debtor to raise the plea under S. 9 in an application based on personal claim, does not debar him from raising the plea subsequently. (*Din Mohammad, J*) Ganga Ram Trust Society *v.* Sundar Lal. **186 I.C. 653=12 R.L. 409=A.I.R. 1940 Lah. 27.**

———**S. 11, Expl. IV**—*Might and ought—Applicability.*

In an application by the receiver under S. 4 of the Provincial Insolvency Act for the possession of the house of the insolvent it was resisted by the son of the insolvent on the ground that his father's debts were incurred for immoral purposes and as such not binding on his share. The son had in a previous suit against the receiver asked for a declaration that the house belongs to him under a family arrangement and an adoption, but it was dismissed.

Held, that the plea of the debts being immoral and not binding on him, might and ought to have been raised by the son in the declaration suit. So it could not be raised in the insolvency proceedings. (*Weston, J.*) Ajai Pal *v.* Official Receiver. **1937 A.M.L.J. 77.**

——**S. 11**—*Might and ought—Available defence not raised*—Res judicata.

Where a person fails to plead a matter in defence in a previous suit, he is barred by *res judicata* from raising the same matter in a subsequent suit. (*Bennet, Ag. C.J. and Verma, J.*) Kanhaiya Lal *v.* Banke Behari. **178 I.C. 66=11 R.A. 249=1938 A.W.R. (H.C.) 596=1938 A.L.J. 940=1938 A.L.R. 808=A.I.R. 1938 All. 542.**

——**S. 11, Expl. IV**—*Might and ought—Earlier suit under S. 57 (d) of Agra Tenancy Act of* 1901, *and later suit under S.* 86 *of Agra Tenancy Act,* 1926—*Non-occupancy character of tenancy—If ought to have been taken in the earlier suit.*

The 'matter which might and ought' to have been made a ground of defence or attack according to Expl. IV to S. 11, C. P. Code, must be matters connected with the cause of action and the issues in dispute between the parties at the time. Where the earlier suit was one under S. 57 (*d*) of the Tenancy Act of 1901 for ejectment on the ground of an illegal transfer and the later suit was one under S. 86 of the Tenancy Act of 1926 for his ejectment as a non-occupancy tenant, the ground of attack in the later suit is not one which ought to have been made in the earlier suit. Hence the later suit is not barred by Expl. IV to S. 11, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) Mackinnon *v.* Sampat Kumar Sinha. **1938 R.D. 4=1938 A.W.R. 16 (B.R.).**

——**S. 11**—*Might and ought—Hindu joint family—Alienee from member of share in one item of family property—Suit for partition—Co-parceners impleaded as defendants—Omission to raise pleas usually open in partition suit—Constructive* res judicata—*Rule—Partial partition.*

There can of course be no compulsory partial partition under the Hindu Law whether at the instance of a member of a joint family or at the instance of an alienee from a coparcener of one item of family property. Though the proper course for an alienee is to sue for partition of all the family properties, the coparceners who may be impleaded in his suit are not bound to insist upon an adjudication in that very litigation of all questions which may properly be agitated in a partition suit between the members of the family. There is nothing to compel the coparceners either to insist on a division being effected *inter se* between themselves or to have all questions in dispute between them settled once for all in the alienee's suit itself. Even in a suit instituted by a coparcener the other parceners might well be content to continue undivided and leave the only one to separate the plaintiff from them. There is no principle of law which prevents the coparceners defendants in an alienee's suit from restricting the scope of the suit to what may be necessary for the grant of the relief claimed by the plaintiff. Where the alienee only claims a division if the particular item in which he has acquired a share, the coparceners who are impleaded are bound to plead only what would be an answer to the claim made by the plaintiff. The fact that they do not raise other pleas which are not necessary in that suit cannot therefore operate as *res judicata* in a subsequent suit by a coparcener for partition. It would also follow that what is actually decided by the decree passed in the suit cannot be reopened at the instance of any of the persons who are parties to that suit or their representatives. A plea of constructive *res judicata* must be determined only with reference to the suit as framed and not with reference to what under the law the suit must have been. (*Varadachariar and Abdur Rahman, JJ.*) Chidambaram Chettiar *v.* Nachiappa Chettiar. **184 I.C. 17=12 R.M. 394=48 L.W. 485=1938 M.W.N. 1092=A.I.R. 1939 Mad. 70.**

——**S. 11, Expl. IV**—*'Might and ought'—House sold in execution of decree against certain members of family—Suit by another member challenging sale on ground that house, on partition of joint family, belonged to him—Suit dismissed—Subsequent suit challenging sale on ground that debts in connexion with which decree was obtained were incurred for illegal purpose—If barred by* res judicata.

Certain house was sold in execution of a decree against certain members of a family. Another member brought a suit challenging the execution sale on the ground that the house could not be sold as it had, on partition of the joint property, fallen to his share. The suit was dismissed. He brought a subsequent suit challenging the same sale on the ground that the debts in connexion with which the decree had been obtained were incurred for illegal purposes and hence the house was not liable to be sold in execution of the decree.

Held, that the relief claimed in the subsequent suit ought to have been raised in the previous suit. The subsequent claim could not be considered to be so dissimilar that its union with the claim in the previous suit would have led to confusion. The suit was therefore barred by constructive *res judicata.* (*Bhide, J.*) Gobind *v.* Narain Singh. **I.L.R. (1938) Lah. 729=181 I.C. 41=11 R.L. 743=40 P.L.R. 556=A.I.R. 1938 Lah. 443.**

——**S. 11, Expl. IV**—Might and ought——Landlord and tenant—Latter advancing moneys and selling goods to former—Understanding to set-off—Rent suit by landlord ignoring arrangement—Tenant if bound to plead and claim set-off—Separate cross suit for moneys due to him—If barred. *See* C. P. Code, O. 8, R. 6. **5 B.R. 296=179 I.C. 828.**

——**S. 11, Expl. IV**—*Might and ought—Mokarari lease by Mohant—Suit by his successor for ejectment of successor of tenant on ground that he is heir of tenant and alternatively that tenant held only life interest—Suit dismissed—Subsequent suit by another Mohant for assessment of fair and equitable rent—If barred by constructive* res judicata.

A Mohant granted a mokarari lease of the property of a deity. His successor instituted a suit against the successor of the tenant for ejectment on two alternative grounds, *viz.*, that he himself was the heir of the tenant and that the tenant held only a life interest. This suit was dismissed. Another succeeding Mohant brought subsequently the present suit for assessment of fair and equitable rent after a declaration that the mokarari lease was void after the death of the grantor.

Held, that the suit was barred by the principle of constructive *res judicata.* (*Jack, J.*) Tikandas Mohunt *v.* Ram Kishore. **43 C.W.N. 437.**

——**S. 11, Expl. IV**—*Might and ought—Mortgage by occupancy tenant to stranger without land-*

lord's consent—Subsequent mortgage to landlord—Suit by stranger mortgagee—Landlord impleaded as subsequent mortgagee—Plea that mortgage void against him—Plea upheld and landlord exonerated—Decree and purchase in execution by mortgagee—Subsequent suit by landlord on his own mortgage—If barred by reason of mortgage not having been set up in prior suit—Election of rights—C. P. Tenancy Act, S. 41 (7).

Appellants who held a mortgage from an occupancy tenant sued to enforce the mortgage impleading as parties to the suit the plaintiffs (respondents) who were the landlords of the mortgagor and who also held a mortgage executed by the mortgagor subsequent to the mortgage in favour of the appellants. The respondents pleaded that the mortgage in suit not having been effected with their consent as required by the C. P. Tenancy Act did not bind them, but they did not set up their subsequent mortgage. They were discharged from the suit the Court declaring that the suit mortgage was ineffectual and not binding on them. The appellants got a decree in execution of which they purchased the property mortgaged. Respondents subsequently sued on their mortgage and impleaded the appellants as defendants as execution purchasers. The latter raised the plea that the respondents having elected between their rights as landlords and their right as subsequent mortgagees in the prior suit, lost their rights to enforce their mortgage.

Held, that it could not be held that the respondents had made an election in the former suit between their rights as landlords and as subsequent mortgagees, their only plea being the invalidity of the prior mortgage as against them, and that their claim in the present suit was to enforce their mortgage as being the prior one, though later in date, as against persons (appellants) who purchased the property subsequent to their mortgage; and that as they were not under any obligation to redeem the mortgage of the appellants, the omission to put forward their mortgage in the prior suit or to offer to redeem the appellants' mortgage was no bar to their suit on their mortgage.

Held, further, that the declaration, in the prior suit about the invalidity of the mortgage against the landlords-respondents did not deprive them of their rights under their mortgage or restrict them only to the course of ejecting the appellants under S. 41 (7) of the C. P. Tenancy Act of 1898. (*Stone, C.J. and Niyogi, J.*) RAMKARAN *v.* KANHAYALAL. **I.L.R. (1937) Nag. 208=170 I.C. 71=10 R.N. 40=19 N.L.J. 290=A.I.R. 1937 Nag. 189.**

——**S. 11, Expl. IV**—*Might and ought—Mortgage suit—Claim to title paramount—Failure to assert—If operates as* res judicata.

In a mortgage suit, a claim by a person claiming by a title paramount to the title asserted by the mortgagee should not be gone into generally. But it is not an invariable and inflexible rule. The claim by title paramount, strictly speaking, connotes that it is a claim adverse both to the mortgagee and the mortgagor. The title paramount that is asserted may be a title derived from the mortgagor or in derogation of his title. If it is the former it must be one prior to the creation of the mortgage. If it is derived subsequent to the mortgage it must be in derogation of the title of the mortgagor and independent of any act of his. In such cases it may be said that the claim sought to be asserted in virtue of such a title would be a paramount claim outside the controversy of the suit, and it is not necessary for a person to assert such a claim in a mortgage, and if he fails to do so he cannot be met by the plea of *res judicata* as he is not bound to assert such a claim. But even in such cases, if he is made a party and his title paramount is sought to be challenged, it is incumbent upon him to have it litigated; if he fails to do so, the bar of *res judicata* will affect him. (*Venkataramana Rao, J.*) NAGAPILLAI *v.* MUTHUSAMI PILLAI. **1937 M.W.N. 60.**

——**S. 11, Expl. IV**—Might and ought—Mortgage suit—Defendant claiming title paramount—If bound to set it up. *See* C. P. CODE, O. 34, R. 1. **A.I.R. 1940 Sind 103.**

——**S. 11, Expl. IV**—Might and ought—Mortgage suit—Plea of paramount title—Omission to raise—If bar to plea in later suit. *See* C. P. CODE, S. 47. **A.I.R. 1936 Mad. 733.**

——**S. 11, Expl. IV**—*Might and ought—Mortgage suit—Transferee from mortgagor before mortgage impleaded as party defendant—Omission to raise plea of want of jurisdiction—Decree* ex parte—*Subsequent suit to declare decree void on ground of want of jurisdiction—If barred—Transferee—If proper party to suit—O. 34, R. 1.*

A person claiming a paramount title may be impleaded as a defendant in a mortgage suit if that paramount title is impugned by the plaintiff mortgagee. There is nothing in the Civil Procedure Code which forbids a mortgagee to implead a person claiming a paramount title to the mortgaged property. Nor is there any reason in law or equity for holding that the question of a prior transferee's paramount title should not be decided in a suit on a mortgage executed after the transfer. The mortgagee can properly implead as a party to his suit any person who impugns his title, such as a prior transferee from the mortgagor. If in such a suit in which the prior transferee from the mortgagor is made a defendant, the latter fails to raise a plea of want of jurisdiction in the Court to decide his title, he cannot afterwards be allowed to set up that plea in a subsequent suit. If an *ex parte* decree is passed against him and becomes final, a subsequent suit by him challenging that decree as not binding on him on the ground that the Court which tried the prior suit had no jurisdiction to try it and that he was not a proper or necessary party to that suit, is barred on the principle of *res judicata.* (*Thom and Allsop, JJ.*) BISHESHWAR DAYAL *v.* JAFRI BEGAM. **1937 A.W.R. 157=1937 A.L.J. 536=169 I.C. 609=10 R.A. 36=1937 A.L.R. 556=A.I.R. 1937 All. 251.**

——**S. 11, Expl. IV**—*Might and ought—Omission to plead—Suit against manager of joint Hindu family in possession of a property as a mortgagee—Failure to plead mortgagee rights—Subsequent suit by representative of the family to enforce those mortgagee rights—Decision in prior suit, if* res judicata.

Where a certain person had been impleaded in a suit as the manager of a joint Hindu family and he fails to put forth certain mortgagee rights in defence by virue of which he was in possession and the suit is decreed against the defendants, a representative of the joint Hindu family could not subsequently sue to enforce the mortgagee rights in respect of that property on behalf of the joint family for the decision in the prior suit operates as *res judicata*. (*Bennet and Verma, JJ.*) BISHAMBAR LAL *v.* BRIJ RATAN LAL. **180 I.C. 658 =11 R.A. 500=1939 A.W R. (H.C.) 84=A.I.R. 1939 All. 203.**

———**S. 11, Expl. IV**—*Might and ought—Omission to raise plea of* res judicata—*Effect.*

Where in an appeal by the plaintiffs from a suit which has been dismissed, although it is open to the defendants to support the order of dismissal on the ground of *res judicata*, they do not do so and the suit is remanded to be heard on merits, they are precluded from raising the plea of *res judicata* subsequently. (*Cunliffe and Henderson, JJ.*) KHAJE HABIBULLA *v* BEPIN CHANDRA. **168 I.C. 375=9 R.C. 811=A.I.R. 1936 Cal. 454.**

———**S. 11, Expl IV**—*Might and ought—Omission to raise question of jurisdiction—Effect.*

In a case where a person fails to appear in the original suit or if he appears but fails to raise the issue of jurisdiction, the decision of the Court will be binding upon him as *res judicata*, and it will not be open to him to re-agitate the same point in another suit. A.I R. 1926 Bom. 481, Foll. (*Rupchand Bilaram, A. J.C.*) EBRAHIMJEE MULLA *v.* BRITISH INDIA STEAM NAVIGATION CO., LTD. **161 I.C. 324=8 R.S. 137=A.I.R. 1936 Sind 34.**

———**S. 11, Expl. IV**—*Might and ought—Party not aware at the time of first suit of the right relied on in second suit—Bar of* res judicata.

In all litigation there are innumerable matters that might be made ground of defence or attack but whether they ought to be so made would depend largely upon the circumstances of each case. The question whether a party had at the time of the previous suit knowledge of the matter relied on in the subsequent suit is of great importance. If he had at the date of the former suit neither knowledge nor means of knowledge of the right relied on in the second suit, the second suit is not barred by the rule of constructive *res judicata* embodied in S. 11, Expl. IV, C. P. Code. (*Khundkar, J.*) FAKIR CHANDRA BISWAS *v.* EKKARI SARKAR. **42 C.W.N. 560.**

———**S. 11, Expl. IV**—*Might and ought—Plaintiff undertaking to give credit for certain amounts—Agreement not to execute decree—Execution in breach of agreement—Judgment-debtor depositing money to prevent execution sale—Suit to recover money so deposited—Maintainability*—Res judicata—*C. P. Code, S.* 47.

In a suit brought by the appellant against the respondent, it was agreed between them that although a decree should be passed against the respondent the decree should not be executed by the appellant decree-holder. A decree was passed and in breach of the agreement, appellant executed the decree and brought the respondent's property to sale. The respondent deposited money to save his property from sale in execution, and then brought an action to recover the amount deposited by him, on the ground that the appellant had not given credit for certain payments which he undertook to give credit for.

Held, (1) that the matters alleged should have been raised as a defence to the action; and failing to do was *res judicata*; (2) that the appellant had executed a perfectly valid decree, and money recovered under a decree or judgment could not be recovered back in a fresh suit or action whilst that decree or judgment remained in force; and (3) that consequently the suit did not lie. (*Wort and Manohar Lall, JJ.*) ABDUL HAMID KHAN *v.* DHANI DUSADH. **16 Pat. 748=173 I.C. 123=4 B.R. 217=10 R.P. 378=18 Pat.L.T. 896=1937 P.W.N. 904=A.I R. 1938 Pat. 41.**

———**S. 11, Expl. IV**—*Might and ought—Question of law not raised in prior suit—Compromise decree—Binding nature.*

Davis, J.C.—If the legality of an act is a point in dispute substantially, it may be a fair subject of compromise in Court like any other disputed matter, and thus become *res judicata*; and if it is abandoned and not put forward by a party, it is not open to him to subsequently raise that question of law, which should have been raised and heard and decided in the prior suit. The matter becomes *res judicata* and cannot be reopened. (*Davis, J.C. and Rupchand, A.J C.*) ALLAHBUX *v.* NUSSERWANJI & Co **29 S.L.R. 455=164 I.C. 43=9 R.S 30=A.I.R. 1936 Sind 99.**

———**S. 11, Expl. IV**—*Might and ought—Question of title—Impossibility of raising in earlier suit—O. 2, R. 2.*

The plaint properties belonged in jenm to the *K* tarwad. They were held on kanom by the *P* tarwad. One *V*, a member of *P* tarwad, assigned the kanom interest to the plaintiff's uncle *S* and later *S* assigned the interest to the plaintiff *A*. After the assignment to *S* by *V*, the *K* tarwad instituted a suit against the karnavan and certain members of the *P* tarwad for arrears of michavaram and got a decree. In execution of that decree, *K* tarwad brought the kanom interest to sale and a member of that tarwad bought it and afterwards assigned that interest to *N*, the present defendant 1. Prior to the assignment by *S* to plaintiff *A*, one *R* was on the land as a tenant, and as *A* suspected that after the Court-sale in execution *R* was colluding with *N* and her assignor, she took the precaution of impleading *N* and her assignor in a suit by her for ejectment against *R*. The plaint in that suit was framed as one on tenancy and not on title. She also took care to claim relief against *N* and her assignor who were defendants 3 and 2 in that suit only on the ground of their having got into possession or attempting to get possession in collusion with the tenant *R*. In the course of the trial of the suit, *A* distinctly stated that she did not want the question of title raised in the suit. The Court found that there was no collusion between the tenant and *N*, but it also found that *N* and her assignor had got into possession of the items now in question after the purchase in execution of the decree in the first suit and dismissed the suit. The plaintiff then instituted the present suit based on title to eject *N*.

Held, that the present suit based on title was not barred by the previous suit as the present suit was not based on the same cause of action as the former suit nor the claim put forward in the present suit was one that might and ought to have been put forward in the former suit.

Held also, that a person who gets into possession in collusion with the tenant in possession is so far as the landlord is concerned placed under the same disability as the tenant from calling his landlord's title in question. Therefore in the former suit *N* having been added only in the position of the tenant, any question of title being raised in that suit is precluded. (*Varadachariar, J.*) Nanikutti Amma *v.* Lakshmiammal. **175 I.C. 925=11 R.M. 20=A.I.R. 1937 Mad. 804.**

——**S. 11, Expl. IV**—Might and ought—Suit against agriculturist—Omission to apply for relief under Agriculturists' Relief Act—Application for relief after Act—If barred. *See* U. P. Agriculturists' Relief Act, S. 30 (2). **1937 A.L.J. 842.**

——**S. 11, Expl. IV**—*Might and ought—Suit by* A *against* B—*Areement that* A *should pay certain sum to* B—*Question of return of some ornaments left open*—B *bringing suit against* A *for recovery of sum agreed on—Omission to plead claim for return of ornaments—Effect.*

In a certain suit by *A* against *B*, it was agreed that *A* should pay a certain sum to *B* and the question of return of some ornaments by *B* to *A* should be decided thereafter. When *B* brought a suit against *A* for recovery of the sum so agreed, *A* pleaded that he had no defence and that he was bound to pay. Thereafter *A* brought another suit against *B* for the recovery of the ornaments. It was contended by *B* that *A* should have raised the defence of the return of the ornaments in the suit by *B* and as he did not do so the suit of *A* was not competent.

Held, that *A* was not bound to raise that defence in the suit by *B* and hence *A's* suit was competent. (*Davis, J.C. and Mehta, A.J C.*) Bagakhan *v.* Monghilal. **170 I.C. 116=10 R.S. 31=A.I R. 1937 Sind 155.**

——**S. 11, Expl. IV**—Might and ought—Suit by prior mortgagee for sale—Omission to claim benefit of S. 101, T. P. Act, as against puisne mortgagee—If bars claim being raised in defence to suit by puisne mortgagee—*Res judicata. See* C. P. Code, O. 2, R. 2. **70 M.L.J. 506.**

——**S. 11, Expl. IV**—*Might and ought—Suit for possession on basis of ostensible sale deed by defendant to plaintiff—Omission to plead that transaction was really mortgage—Plea in later suit—If* res judicata.

No mortgagor can be compelled to ask for redemption if he is not willing to redeem the mortgage, and so long as the mortgage subsists, the mortgagee can recover possession of the mortgaged property. Although the mortgagor in a suit for possession by the mortgagee who claims to be a vendee might urge that the transaction was a mortgage and might ask for redemption, of the mortgage, he is not bound to do so, so as to bar him by the rule of constructive *res judicata*, from raising the plea in a subsequent suit by the mortgagee for a declaration of his title as owner and for possession, as it cannot be held that the question regarding the nature of the transaction is constructively in issue in the first suit for possession. (*Lokur, J.*) Balakrishna *v.* Gaja Jaitya. **184 I.C. 506=12 R.B. 181=41 Bom.L.R. 422=A.I.R. 1939 Bom. 303.**

——**S. 11, Expl. IV**—*'Might and ought'—Suit for possession based on title—Claim for compensation for improvements not set up in defence——Subsequent suit for such compensation—If barred.*

In a suit for possession of land based on title, a claim for compensation for the improvements made by the defendant *ought* to be set up by him in defence. If it is not so set up, a decree for possession passed in the suit would operate as a bar to the further agitation of the question of compensation in a subsequent suit. (*M. C Ghose and Mitter, JJ.*) Majuddin *v.* Langla Sylhet Tea Co. **42 C.W.N. 110.**

——**S. 11, Expl. IV**—Might and ought—Title suit for possession dismissed—Subsequent suit for redemption of mortgage—If barred. *See* C. P. Code, O. 2, R. 2 and S. 11, Expl. IV. **I.L.R. (1940) 1 Cal. 544.**

——**S. 11, Expl. IV**—Mortgage suit—Preliminary decree—Omission to reserve and provide for personal liability—Subsequent application for personal decree—If barred—*Res judicata. See* C. P. Code, O. 34, R. 6. **48 L.W. 758.**

——**S. 11, Expl. IV**—*Mortgage suit—Defendant claiming paramount title—Failure to plead—* Res judicata.

A purchaser of the equity of redemption who is made a defendant in a mortgage suit is not bound to set up in that suit any independent or paramount title that he may claim, when there is nothing in the plaint of the mortgage suit which impugns such title. The omission to set up such title does not, therefore, preclude him from setting it up in a subsequent suit. (*Mukherjea and Roxburgh, JJ.*) Suraj Chandra Mondal *v.* Behari Lal. **I L.R. (1939) 2 Cal. 551=188 I.C. 17=12 R.C. 633=43 C.W.N. 1126=A.I.R. 1939 Cal. 692.**

——**S. 11, Expl. IV**—*Pre-decree compromise not presented to Court in previous suit—Whether can be pleaded in subsequent suit.*

Where parties fail to present to the Court a compromise arrived at between them but proceed with the suit, they are debarred from pleading the compromise in a subsequent suit in view of Expl. IV to S. 11, C P. Code. The compromise must be held to be superseded by the decree in that suit. (*Coldstream and Bhide, JJ.*) Robert Hercules Skinner *v.* R. M. Skinner. **18 Lah. 209=171 I.C. 189=10 R.L. 167=39 P.L.R. 29=A.I.R. 1937 Lah. 537.**

——**S. 11, Expl. IV**—*Previous suit by plaintiff's predecessors claiming partition of whole shamilat—Subsequent suit by plaintiff claiming that certain well and land in shamilat was not liable to be partitioned—If barred by* res judicata.

A suit was instituted by the plaintiff's predecessors in which they claimed that entire shamilat was liable to be partitioned. A subsequent suit was brought by the plaintiff to the effect that certain well and land in the shamilat should be excluded from partition.

Held, that this plea ought to have been raised and made a ground of attack in the previous suit by the plaintiff's predecessors. As it was not so raised, the subsequent suit was barred under Expl. IV to S. 11. (*Addison and Abdul Rashid, JJ.*) Mehar Langah *v.* Mehar Allah Yar. **181 I C. 262=11 R.L. 802=40 P.L.R. 940=A.I.R. 1938 Lah. 671.**

——**S. 11, Expl. IV**—*Rent suit—Denial of relationship—Prior rent decrees between same parties* —Res judicata.

In all cases for recovery of rent the relationship of landlord and tenant is the foundation of a decree and therefore when such a suit is decreed the Court must proceed on the footing that it was a matter necessary to be determined and in fact determined in the earlier rent suit. Where therefore in a rent suit brought by the landlord the tenant denies the relationship of landlord and tenant and pleads that he is a tenant of some other person and it is found that there are many rent decrees against the tenant in favour of the landlord in respect of the holding the decision in previous suits operates as *res judicata* under S. 11, Expl. IV. (*Puranik, J.*) SHEORAM *v.* MULCHAND. **I.L.R. (1940) Nag. 181 =175 I.C. 693=11 R.N. 7=A.I.R. 1938 Nag. 195.**

——**S. 11, Expl. IV**—*Subsequent mortgagee acquiring rights under prior mortgage—Suit by puisne mortgagee impleading him as subsequent mortgagee—Validity of prior mortgage admitted*—Ex parte *decree—Suit on basis of prior mortgagee rights*—Res judicata.

Under the Expl. of O. 34, R. 1, C. P. Code, it is not necessary for a puisne mortgagee to implead a prior mortgagee and he may without impugning such a mortgagee claim to sell the property subject to such a mortgage. Consequently a person who has taken a subsequent mortgage and also possesses prior mortgagee's rights by satisfaction of the decree on the prior mortgage has a dual capacity; he is a necessary party in his capacity as a subsequent transferee but not necessary party in his capacity as a prior mortgagee or as possessing prior mortgagee rights. If, therefore, the validity of the prior mortgage is admitted in the plaint and he has been professedly impleaded as a subsequent transferee there is no reason to require that such subsequent mortgagee must of necessity appear in Court and set up rights under the prior mortgage which is not disputed by the plaintiff. And in the circumstances a decree in such a suit *ex parte* against such subsequent mortgagee does not operate as *res judicata* in a suit on the basis of the prior mortgagee rights as such by satisfaction of the prior mortgage decree (*Sulaiman, C.J., Bennet and Harries, JJ.*) RAM DHAN *v.* CHUNNI KUNWAR. **58 All. 1056=165 I.C. 7=9 R.A. 261=1936 A.L.J. 774= 1936 All.L.R. 917=1936 A.W.R. 653=A.I.R. 1936 All. 578 (F.B.).**

——**S. 11, Expl. IV and O. 2, R. 2**—*Suit by plaintiff for possession of certain shops decreed in respect of one-fourth share—Subsequent suit by him for mesne profits from date of possession to date of suit—Defendant pleading set off in respect of improvements in former suit but withdrawing plea in the end—Same plea, if barred in subsequent suit.*

The plaintiff brought a suit against the defendant for possession of certain shops and the suit was decreed in respect of a one-fourth share in them. The plaintiff obtained formal delivery of possession in pursuance of this decree and also realized mesne profits awarded to him by the decree up to the date of the delivery of possession. Some years after, the plaintiff again brought a suit for recovery of mesne profits from the date of delivery of possession to him in pursuance of the former decree up to the date of the suit. The defendant claimed a set-off in respect of certain sums of money spent by him on the reconstruction and repairs of the shops. In the previous suit also, the defendant raised the

same plea but withdrew it in the end saying that he would bring a separate suit.

Held, that the defendant's plea of set-off in the subsequent suit was not barred either by S. 11 or by O. 2, R. 2, C. P. Code and that it was not incumbent on the defendant to raise the plea of set-off in the previous suit for possession brought by the plaintiff. (*Zia-ul-Hasan, J.*) RADHEY SHIAM *v.* MOHAMMAD NASIR KHAN. **13 Luck. 323=168 I.C. 472=9 R.O. 481=1937 O.W.N. 831=1937 O.L.R. 285=A.I.R. 1937 Oudh 394.**

——**S. 11, Expl. IV**—*Suit brought against step-mother that plaintiff is exclusive owner of certain land dismissed—Subsequent suit that step-mother is entitled to 1/5 share and not to 1/2—If barred.*

On the death of the plaintiff's father, his land passed by mutation to the plaintiff and his step-mother in equal shares. The plaintiff instituted a suit against his step-mother for a declaration that he was the exclusive owner of the land on the allegation that his step-mother had been divorced by his father many years before his death. The Court held that the divorce was not proved and dismissed the suit. The plaintiff sued again for a declaration that his step-mother was only entitled to one-fifth share in his father's land in lieu of maintenance as his widow and not to one-half.

Held, that the ground of action now taken by the plaintiff ought to have been made a ground of attack in the previous suit and that the present suit was barred by Expl. IV to S. 11, C. P. Code. (*Skemp, J.*) MT. JIO *v.* NABI BAKHSH. **18 Lah. 496=175 I.C. 283=10 R.L. 697=39 P.L.R. 829 =A.I.R. 1937 Lah. 872.**

——**S. 11, Expl. V**—*Applicability—Claim made but withdrawn—Effect—If* res judicata.

Expl. V to S. 11, C. P. Code, can be invoked only in respect of any adjudication made by the Court. The fact that the plaintiff who, in the first instance, asks for a decree against the joint family property so far as the interests of the minor sons therein are concerned, subsequently withdraws his claim as against them, can only bring the case under O. 23, R. 1, C. P. Code. The result of such a withdrawal is not to bring in the operation of the rule of *res judicata* embodied in S. 11 but only to entail the statutory penalty enacted in O. 23, R. 1 itself, *viz.*, that no fresh suit can be instituted against those defendants on the same cause of action. (*Varadachariar and Pandrang Row, JJ.*) PERIASWAMI *v.* VAIDHILINGAN PILLAI. **176 I. C. 359=11 R.M. 73=47 L.W. 60=1937 M.W.N. 1313=A.I.R. 1937 Mad. 718.**

——**S. 11, Expl. V**—*Application for personal decree under O. 34, R. 6—Relief not granted—Fresh application, if barred.*

An application under O. 34, R. 6, C. P. Code, is not an application in execution but a substantive original application for a new decree in the suit. The procedure applying to this application would be governed by S. 141, C. P. Code. Where, therefore, a definite application had been made for a decree under O. 34, R. 6 and no prayer was granted by the Court for passing of a personal decree, the provisions of Expl. V, S. 11, C. P. Code, would apply with the result that the relief which was not expressly granted shall be deemed to have been refused. (*Agha Haidar, J.*) DES RAJ *v.* Fasal Karim. **163 I.C. 119=8 R.L. 1014=38 P.L.R. 700=A.I.R. 1936 Lah. 388.**

——S. 11, Expl. V—If controls O. 2, R. 2. *See* C. P. Code, O. 2, R. 2. **A.I.R. 1939 Sind 367.**

——S. 11, Expl. V—*Maintenance suit—Prayer that it should be charged on property not granted—Subsequent suit for such charge—Subsequent suit—If* res judicata.

Where a widow in her suit for maintenance asks that her maintenance should be made a charge on the property left by her husband and the Judge assesses the amount of maintenance but does not charge it on any property, she cannot subsequently ask the Court to declare that she is entitled to recover from the property in suit her maintenance which has fallen into arrears or that which will fall due in the future as it is tantamount to a request to charge the property with her maintenance. (*Almond, J.C. and Mir Ahmad, J.*) Mt. Howani Bai *v.* Devi Dial. **177 I.C. 1005=11 R. Pesh. 44=A.I.R. 1938 Pesh. 68.**

——S. 11, Expl. V—*"Relief"—Prior suit for partition and possession and mesne profits, past and present—Claim to future mesne profits not awarded—Second suit for mesne profits from date of suit or decree in prior suit*—Res judicata.

The "relief" referred to in Expl. V to S. 11, C. P. Code, means relief arising out of a cause of action accrued at the date of the institution of the suit, and such relief does not cover future mesne profits in respect of which the cause of action accrued subsequently to the suit. Where a suit for partition and possession of lands and mesne profits, past and future, has been brought and decided, and the decree fails to award the claim to future mesne profits, a second suit to recover mesne profits from the institution of the first suit or the date of the decree till delivery of possession is maintainable and is not barred by Expl. V to S. 11, C. P. Code. (*Beaumont, C.J., Broomfield and Wassoodew, JJ.*) Gangadhar Gopalrao *v.* Shripad Annarao. **I.L.R. (1938) Bom. 655=174 I.C. 773=10 R.B. 499=40 Bom. L.R. 324=A.I.R. 1938 Bom. 231 (F.B.).**

——S. 11, Expl. VI—*Applicability.*

Certain persons instituted a suit for declaration that the defendant was not authorized to close a thoroughfare used by them from time immemorial. In a previous suit by certain other persons against the same defendant the same right of thoroughfare was claimed. The previous suit was not instituted in the interest of any other person other than the plaintiffs in that suit, nor was any private right claimed by the plaintiffs in that suit in common for themselves and others. The notice enjoined in R. 8 of O. 1, C. P. Code, was not issued.

Held, that a subsequent suit was not barred under either Expl. VI to S. 11 or O. 1, R. 8, C. P. Code. (*Addison and Din Mahomed, JJ.*) Mehr Mahomed Khan *v.* Jamadar Adalat Khan. **18 Lah. 629=39 P.L.R. 707=175 I.C 405=10 R.L. 713=A.I.R. 1937 Lah. 425.**

——S. 11, Expl. VI—*Applicability—Conditions.*

In a representative suit instituted under O. 1, R. 8, C. P. Code, the decision in a former suit does not operate as *res judicata* by force of S. 11, Expl. VI, unless the former suit was instituted in compliance with the above rule, namely, by permission of the Court, the Court giving notice as therein prescribed to all persons interested. There is possibly an exception, where the former suit having been litigated *bona fide* on behalf of the plaintiff and others with a common right, the omission to comply with the rule has been inadvertent, and no injury therefrom has been sustained by the plaintiff, in the second suit. Where, therefore, the former suit had not been instituted or conducted as a representative suit but was fought out by the plaintiffs in their individual capacity, the decision in that suit does not bar a subsequent suit brought in a representative capacity under O. 1, R. 8, C. P. Code. 56 M. 657 (P.C.), Foll. (*Tek Chand, J.*) Magan Nath *v.* Harbans Singh. **163 I.C. 817=9 R.L. 52=A.I R. 1936 Lah. 965.**

——S. 11, Expl. VI—*Applicability—Conditions—Plaintiffs in prior suit guilty of gross negligence—Decision, if* res judicata—*No collusion or want of* bona fides.

The provisions of S. 11 of the Code are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of S. 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from facts. Other factors in Expl. VI to S. 11 being present, the section lays down a condition that the persons must be litigating *bona fide* and the fulfilment of this condition is necessary for the applicability of the section. A representative suit was brought by some persons on behalf of public interest for declaring certain temples public temples and for setting aside alienation of endowed property by the manager thereof. A similar suit was brought some years ago by two persons and the suit was dismissed on the ground that the temples were private temples, and the property endowed to the temples being a private endowment, the alienations thereof were valid. The plaintiffs admitted that they could be deemed to be persons claiming under the plaintiffs in prior suit and the issue in both the suits was the same. It was contended however by them that the finding in the prior suit could not be *res judicata* as against them inasmuch as there was gross negligence on the part of the plaintiffs in that suit in not producing the documents necessary for the decision of the suit in their favour and in not placing their evidence before the Court.

Held, that no case of fraud apart from collusion being suggested, the plaintiffs were bound to establish either that the decree in prior suit was obtained by collusion between the parties or that the litigation by the plaintiffs in prior suit was not *bona fide*. The plaintiffs based their case entirely on inferences to be drawn from alleged gross negligence on the part of the plaintiffs in prior suit. The finding of gross negligence by the trial Court was far from a finding of intentional suppression of the documents which would amount to want of *bona fides* or collusion on the part of the plaintiffs in prior suit. There being no evidence in the suit establishing either want of *bona fides* or collusion on the part of plaintiffs in prior suit, the decision in the prior suit was binding on the plaintiffs as *res judicata*. (*Lord Thankerton.*) Venkata Seshayya *v.* Koteswara Rao. **64 I.A.**

17=I.L.R. (1937) Mad. 263=1937 A.W.R. 42=1937 O.W.N 42=18 Pat.L.T. 27=41 C.W.N. 257=45 L.W. 43=166 I.C. 1=1937 M W.N. 66=9 R.P.C. 135=1937 A.L.J 240=39 Bom.L R. 317=65 C.L.J. 14=1937 O.L.R. 12=1937 P.W.N. 123=3 B.R. 223=1937 A L.R. 54=A.I.R. 1937 P.C. 1=(1937) 1 M.L.J. 113 (P.C.).

——**S. 11, Expl. VI**—*Applicability—Procedure under O. 1, R. 8 not followed in former suit—Decision—If binds persons not parties*—Res judicata.

Where the procedure prescribed by O. 1, R. 8, C. P. Code, has not been taken in a suit, the decision therein cannot be binding on persons who are not actually parties thereto, and cannot therefore operate as *res judicata*, in a suit claiming a similar relief. (*Niamatullah, J.*) Namdar Khan *v.* Naimul Khan. **1937 A.L.J. 293=1937 A.W.R. 258=169 I.C. 388=1937 A.L.R. 522=10 R.A. 16=A.I.R. 1937 All. 289.**

——**S. 11, Expl. VI**—*Applicability—Representative suit—If confined to suit under O. 1, R. 8—Party suing in representative capacity and leading defendant to believe same—If estopped from afterwards denying representative character.*

Expl. VI to S. 11, C. P. Code, is not confined to suits under O. 1, R. 8, but extends to any litigation in which, apart from the rule altogether, parties are entitled to represent interested persons other than themselves. A suit may still be a representative suit within the meaning of S. 11, Expl. VI, though it need not come under O. 1, R. 8. The decree in such a suit will bind not only the plaintiff, but those persons who are absent but are held by the Court to be represented by the person or persons on record. Where a plaintiff allows the defendant to proceed with the suit on the footing that he is suing in a representative capacity, assuming that position and taking the chance of a decree in his favour, clear estoppel arises against the plaintiff to prevent him from afterwards contending in a later suit that he was not suing in a representative capacity in the former litigation. There can be no stronger case of an absolute waiver, or election or conduct rendering it wholly inequitable to permit him to resile from the position adopted by him. (*Rangnekar, J.*) Gurushiddappa *v.* Gurushiddappa. **I.L.R (1937) Bom. 326=169 I.C. 934=10 R.B. 45=39 Bom.L.R. 130=A.I.R. 1937 Bom. 238.**

——**S. 11, Expl. VI**—*Construction — Words "claimed in common for themselves and others"—If govern "public right."*

The words "claimed in common for themselves and others" in S. 11, Expl. VI, C P. Code, govern only the words "private right" and not "public right." The words "public right" stand by themselves. (*Addison and Din Mahomed, JJ.*) Mehr Mahomed Khan *v.* Jamadar Adalat Khan. **18 Lah. 629=39 P.L.R. 707=175 I.C. 405=10 R.L. 713=A.I.R. 1937 Lah 425.**

——**S. 11, Expl VI**—*Construction—Words "claiming in common for themselves and others"—Litigation* bona fide *in respect of public right—Decision, if* res judicata.

The expression "claimed in common for themselves and others" in Expl. VI to S. 11 does not also govern a claim in respect of a public right. A public right always implies that it is enjoyed by the plaintiff in common with others. With regard to such public right if the litigation is *bona fide* on the part of the plaintiff the decision would be *res judicata* against others who claim to be entitled to the right. (*Jai Lal, J.*) Mir Mahomed Khan *v.* Jamadar Adalat Khan. **171 I.C. 866=10 R. L. 244=39 P.L.R 353=A.I.R. 1937 Lah. 70.**

——**S. 11, Expl. VI**—*Decree against Municipality in respect of Government land transferred in trust and vested in Municipality—If* res judicata *in subsequent suit by Government.*

Government land was transferred in trust and vested in the Municipal Committee. According to the provisions of S. 74, Punjab Municipal Act, 1884, the land not only vested but also belonged to the Municipality. A decree was passed against the Municipality granting plaintiffs a declaration that they had obtained indefeasible title by adverse possession of the land.

Held, that the Municipal Committee being constituted a trustee, it represented the title for the time being and the decree obtained against it operated as *res judicata* in subsequent suit by the Government. (*Coldstream and Bhide, JJ.*) Sultan Asad Jan *v.* Secretary of State. **18 Lah. 100=167 I.C. 867=9 R.L. 567=A.I.R. 1936 Lah. 998.**

——**S. 11, Expl. VI**—*Hindu joint family—Suit by member of—Relief claimed for benefit of entire family—Decree, if* res judicata *against minor member.*

Where a member of a joint family acting in the interest of all the members and claiming a relief for the benefit of the entire family institutes a suit which is dismissed, the decree operates as *res judicata* even against a minor member of the family, whether or not he is impleaded in the suit. (*Sulaiman, C.J. and Bennet, J.*) Mustafai Begam *v.* Raghuraj Singh. **169 I.C. 577=1937 A.L.R. 544=10 R A. 28=1936 A.W.R. 1191=A.I.R. 1937 All. 108.**

——**S. 11, Expl. VI**—*Joint Hindu family—Interests of member represented by manager of his branch—Decision in suit if binding on that member.*

Where the interests of a member of joint Hindu family in respect of the matters raised in the suit are represented by the manager of his branch, the decision in the suit would be binding on that member. (*Bhide, J.*) Panna Lal *v.* Ram Richhpal. **A I.R. 1940 Lah. 120.**

——**S. 11, Expl. VI**—*Representative suit — Decision in—When binds persons other than plaintiffs.*

A decision in a representative suit binds all persons other than the plaintiffs expressly named in the plaint only when, (*a*) if the suit relates to a private right, the formalities as laid down in O. 1, R. 8, C P. Code are observed, and (*b*) if the suit relates to a public right, the formalities laid down in S. 91, C. P. Code, are observed. A.I.R. 1933 P. C. 183, Rel. on. (*Addison and Din Mahomed, JJ.*) Mehr Mahomed Khan *v.* Jamadar Adalat Khan. **18 Lah. 629=175 I.C. 405=10 R.L. 713=39 P L.R. 707=A.I.R. 1937 Lah. 425.**

——**S. 11, Expl. VI**—*Representative suits—Action by or on behalf of family—When binds absent or future members.*

An action by or on behalf of a family may result in *res judicata*, but such an action, if it is to bind absent or future members of the family, must be so constituted according to the local rules of procedure or by a representation order or in some other way that all such members can be regarded as represented before the Court. (*Lord Maugham.*) EFFUAH AMISSAH *v.* EFFAUAH KRABAH **162 I.C. 461=8 R.P.C. 257=44 L.W. 73=A.I.R. 1936 P.C. 147 (P.C.).**

——**S. 11, Expl. VI**— *Representative suit—Leave to sue on behalf of others not obtained in prior suit—Later representative suit—If barred.*

Where certain persons brought a representative suit on behalf of a community for establishing their rights connected with a temple and where it was contended that the suit was barred by reason of the decision in an earlier suit brought by certain persons of the same community with reference to similar rights in the same temple it was held that the mere fact that the persons who filed the prior suit belonged to the same community, could not make it a representative suit, and they were only asserting their personal claim and the omission to follow the provisions of S. 30 of the old Code, deprived the decision in that suit of all binding force, so far as people who were not parties to that are concerned. (*Bennet and Verma, JJ.*) NARHARI SHASTRI *v.* BASUDEO NAMBURI. **177 I.C. 653=11 R.A. 205=1938 A.W.R. (H.C.) 500=1938 A.L R. 770=1938 A.L.J. 680=A.I.R. 1938 All. 523.**

——**S 11, Expl. VI**—Representative suit—Suit by Hindu father for benefit of himself and sons—Dismissal on oath taken by defendant—Effect on sons—Fresh suit by latter on same cause of action—*Res judicata. See* OATHS ACT, Ss. 8 AND 11. **40 Bom.L.R. 1005.**

——**S. 11, Expl. VI**—*Representative suit—Suit by reversioner—Finding in—*Res judicata.

A suit brought by a reversioner is for the benefit of all the reversioners entitled to sue and just as any finding given in favour of a reversioner benefits all members of the reversionary body, a finding arrived at against him injures every body concerned. (*Addison, A.C.J. and Din Mahomed, J.*) RAM BHAJ *v.* AHMAD SAID AKHTAR KHAN. **178 I.C. 302=11 R.L. 440=40 P.L.R. 591=A.I.R. 1938 Lah. 571.**

——**S. 11, Expl. VI**— *Representative suit—What is—Suit for some inhabitants of village claiming right of irrigation from certain tank—No evidence that right was claimed for all villagers—Dismissal—Subsequent suit by other villagers claiming same right against same defendants—If* res judicata.

The fact that the relief claimed by a body of persons in the subsequent suit is similar to the relief claimed in a former suit cannot make the former suit a representative suit for purposes of *res judicata.* It is only if the relief claimed in the prior suit is so comprehensive that, if granted, it will confer a benefit on a class of persons including the parties in the subsequent suit that the decision in the former can operate as *res judicata* in the later suit against those not actually impleaded in the former suit. The dismissal of a suit by certain residents of a village for an injunction to restrain the residents of an adjoining village from interfering with the rights of the plaintiffs to irrigate their fields from certain tanks cannot operate as *res judicata* so as to bar a subsequent suit by other residents of that village against the same defendants, for a perpetual injunction to restrain the defendants from interfering with the taking of water from the tanks to their fields, when there is nothing to show that the plaintiffs in the prior suit claimed the right for themselves as well as for all the other residents of the village in question. (*Niamatullah, J.*) NAMDAR KHAN *v.* NAIMUL KHAN. **1937 A.L.J. 293=1937 A.W.R. 258=10 R.A. 16=169 I.C. 388=1937 A.L.R. 522=A.I.R. 1937 All. 289.**

——**S. 11, Expl. VI**—Res judicata—*Requisites of.*

In order to determine whether the former suit operates as a bar by *res judicata* to the present suit, it is necessary to examine carefully not only the form and the substance of the former suit but also the plaint, the pleadings and the judgment thereof and compare them with those of the present suit. Moreover it is necessary to determine whether the former suit was between the same parties or between parties who litigated *bona fide* in respect of a private right claimed in common for themselves and others, *viz.*, the present plaintiffs. The plaintiffs in the former suit must be found to have carried on the litigation *bona fide* and in a representative character on behalf of the plaintiffs in the present suit. MOOLSINGH *v.* SANGIDANSINGH. **1939 M.L.R. 1 (I.K.).**

——**S. 11, Expl. VI**—*Reversioner—Decree obtained by, in declaratory suit—His status as next heir—If* res judicata.

A person who succeeds in obtaining a declaratory decree that an alienation made by the widow of the last male-holder will not affect his reversionary rights need not necessarily be the next person entitled to succeed to the property after the death of the widow, and the matter cannot therefore be taken as *res judicata.* It is, however, clear that he must have been found to be an heir in the declaratory suit, and to that extent the matter is *res judicata* as between the parties. (*Bhide, J.*) KHAN GUL KHAN *v.* KARAM NISHAN. **42 P.L.R. 14=A.I.R. 1940 Lah. 172.**

——**S. 13**—*Foreign Court—Jurisdiction—Submission to—What amounts.*

A resident in British India who files suits in a foreign Court against residents of the foreign state which the foreign Court has jurisdiction to try cannot thereby, by implication, be taken to submit to the jurisdiction of that Court in regard to a later suit against him in that Court where that Court has no jurisdiction. (*Beasley, C. J. and King, J.*) OOMER HAJEE AYOOB SAIT *v.* THIRUNAVUKKARASU PANDARAM. **59 Mad. 918=162 I.C. 904=8 R.M. 1071=1936 M.W.N. 478=43 L.W. 607=A.I.R. 1936 Mad. 552=71 M.L.J. 93.**

——**S. 13**—*Foreign Court—Jurisdiction against absent foreigners—Cause of action if a ground of jurisdiction.*

No territorial legislation can give jurisdiction, which any foreign Court ought to recognise, against absent foreigners who owe no allegiance or obedience to the power which so legislates. The rule is that cause of action is not a general ground of jurisdiction recognised by International Law. The case may be otherwise where the non-resident foreigner is a subject of the same sovereign power which legislates, although even in such a case there must be an express power of legislation conferred by statute. (*R. C. Mitter, J.*) CHORMAL BALCHAND *v.* KASTURI CHAND SERAOGI. **63 Cal. 1033=63 C.L.J. 175=40 C.W.N. 591.**

——S. 13—*Foreign Court—Non-resident foreigner — Submission to jurisdiction — What amounts to.*

If a non-resident defendant appears in a foreign Court, and pleads that that Court has no jurisdiction, and also pleads to the merits, he submits to the jurisdiction of that Court voluntarily. Having taken the chance in that Court he cannot be allowed to turn round and impeach that judgment on the ground of incompetency of the Court passing it when it is sought to be enforced in another country. It may be that he voluntarily submits to its jurisdiction even when he only appears but does not plead to the merits. (*R. C. Mitter, J.*) Chormal Balchand *v.* Kasturi Chand Seraogi. **63 Cal. 1033=63 C.L.J. 175=40 C.W.N. 591.**

——S. 13—*Foreign judgment— Absence of jurisdiction—Submission to jurisdiction— What constitutes—Inference from conduct of defendant during pendency of suit.*

A foreign Court clearly has no jurisdiction to pass a decree against a defendant in a personal action for money where the defendant on the date of the suit is not a resident of the foreign state at all, but a resident of British India. But though a defendant who remains *ex parte* does not, by that mere fact, submit to the jurisdiction of the foreign Court, his conduct both before and after the decree is passed may afford evidence of his submission to jurisdiction and his intention is remaining *ex parte*. Where in a suit in a foreign Court against a defendant residing in British India, the plaintiff effects an attachment before judgment of moneys belonging to the defendant in the hands of a third person, and the defendant writes a letter to the plaintiff praying that he may be allowed to collect a portion of the money and stating that the plaintiff may collect the rest of it, and the defendant therefore allows the suit to proceed *ex parte*, there is a submission to jurisdiction of the foreign Court, and the defendant cannot at the time of execution object to the decree as being without jurisdiction. (*Beasley, C. J. and King, J.*) Oomer Hajee Ayoob Sait *v.* Tirunavukkarasu Pandaram. **59 Mad. 918=162 I.C. 904=8 R.M. 1071=1936 M.W.N. 478=43 L.W. 607=A.I.R. 1936 Mad. 552=71 M.L.J. 93.**

——S. 13—*Foreign judgment—Conditions of validity in British India*—Res judicata—*Operation of.*

Before a foreign judgment can be regarded as having extra-territorial validity, at least one of the following conditions must be satisfied:—(1) The defendant should be a subject of the foreign country; (2) the defendant should be resident in the foreign country at the time when the action is begun against him; (3) the defendant must have been served with process while temporarily present in the foreign country; (4) the defendant in his character as plaintiff in the foreign action must himself have selected the *forum* where the judgment was given against him; (5) the defendant must have voluntarily appeared; or (6) the defendant must have contracted to submit to the jurisdiction of the foreign Court. A foreign judgment may operate as *res judicata* except in the six cases specified in S. 13, C. P. Code, and subject to the other conditions specified in S. 11, C. P. Code. Where the defendant voluntarily submits to the jurisdiction of the foreign Court even if that Court has no jurisdiction over him on the ground of his being a resident of British India, and consents to have a decree made against him, the foregin Court has, upon the well recognised "principle of submission" jurisdiction over him, and any decree made by it would be given not only territorial recognition but extra-territorial recognition also by Courts of all civilised countries. Such a judgment is clearly a judgment of a competent foreign Court, and as such is binding on the defendant unless it is subject to the infirmities specified in S. 13, C. P. Code. (*Rangnekar and Macklin, JJ.*) Mallappa *v.* Raghavendra. **40 Bom.L R. 77=I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=A.I.R. 1938 Bom. 173.**

——S. 13—*Grant of probate and subsequent revocation by foreign Court—Effect of—Proof of will in British India—If precluded.*

A judgment of a foreign Court granting probate of a will is conclusive evidence that the instrument proved was testamentary according to the law of that foreign country. It proves nothing else. The subsequent revocation of that probate by that Court proves no more than that the instrument before it was not testamentary according to the law of that place. Such a judgment cannot be treated as a judgment *in rem* so as to make it incumbent on a Court in British India to hold that the deceased left no will or died intestate. A Court in British India can still hold that the will left by the deceased is true, valid and binding in respect of the properties left by him in British India, the devolution of which is governed by the law of British India; and not by the law of the place where the owner of the properties resided and died. (*Burn and K.S. Menon, JJ.*) Fatma Kani Ammal *v.* Sheik Dawood. **160 I.C. 733=8 R.M. 712=43 L.W. 75=1936 M.W.N. 82=A.I.R. 1936 Mad. 197.**

——**Ss. 13 and 44**—*Scope—Foreign judgment—Decree of Court of Native State transferred for execution to British Indian Court—Powers of latter—Refusal of execution on ground of decree being without jurisdiction—Subsequent suit to enforce—Maintainability*—Res judicata.

The analogy of a transferee Court does not apply in the case of a British Indian Court to which the decree of a Court of Native State is sent for execution under S. 44, C. P. Code. A decree of a Court of a Native State does not cease to be the decree of a foreign Court simply because a notification has been issued under S. 44, C. P. Code. The provisions of the Code relating to transfer of decrees for execution apply only to decrees made by British Indian Courts and transferred to other British Indian Courts. When a notification has therefore been issued under S. 44, C. P. Code, with respect to decrees of a Native State Court, the sole remedy of the plaintiff who has obtained a decree in such Native State, is to apply for execution of his decree and not to institute a suit under S. 13 for its enforcement in British India. Even if it be held that he has two remedies, *e.g.*, to sue under S. 13 or to apply for execution under S. 44, the two are of the same nature and scope and therefore alternative. If he elects the remedy by way of execution, he cannot again sue under S. 13. Further when the British Indian Court to which the decree of the Court of the

Native State is sent for execution refuses execution holding that the decree is a nullity as having not been passed by a Court of competent jurisdiction, such decision is final between the parties and operates as *res judicata* so as to bar a suit on the foreign judgment under S. 13, C. P. Code. The British Indian Court as executing Court has jurisdiction to decide the question whether the Court of the Native State is a Court of competent jurisdiction. (*R.C. Mitter, J.*) CHORMAL BALCHAND *v.* KASTURI CHAND SERAOGI. **63 Cal. 1033 =63 C.L J. 175=40 C.W.N. 591.**

——**S. 13**—Scope—Foreign judgment—Question as to validity of will—Decision by foreign Court—When conclusive in British India—Legatees in British India—If bound. *See* EVIDENCE ACT, S. 41. **40 Bom.L.R 571.**

——**S. 13 (a)**—*Applicability—"Court of competent jurisdiction"—Suit on mortgage in foreign Court—Defendant minor living with husband in British India—Husband appointed guardian* ad litem *failing to appear—Appointment of Court nazir as guardian—Legality—Decree against assets of deceased in hands of defendant—If one passed by Court of competent jurisdiction.*

A Court has no jurisdiction to pass any decree against the property of the mortgagor (by way of a personal decree) situate outside its jurisdiction. A personal decree in a mortgage suit against the legal representative of the mortgagor limited to the assets of the deceased mortgagor cannot be passed so far as such assets are not situate within its own jurisdiction; where the defendant in such a suit in a foreign Court, is a minor daughter of the deceased living with her husband in British India and such defendant does not appear at the hearing an *ex parte* decree passed against her is a nullity. The fact that the foreign Court appoints its own nazir as the guardian *ad litem* of the minor defendant and that such guardian files a written statement contesting the plaintiff's claim would not be sufficient to hold that the defendant submitted to the jurisdiction of the Court. The foreign Court has no jurisdiction to appoint its own nazir as the guardian *ad litem*, when the husband of the minor defendant, who is her *de jure* and *de facto* guardian has never expressed his unwillingness to act as her guardian. The fact that he was originally appointed guardian and failed to appear would not confer jurisdiction on the foreign Court to appoint its own officer as guardian *ad litem*, so long as the husband does not refuse to be guardian, by reason of O. 32, R. 4, C. P. Code. The Court by appointing its own nazir guardian *ad litem* acts against the interests of the minor and against natural justice by indirectly compelling her to appear in the suit by appointing its own officer as guardian *ad litem*. Her appearance is not a voluntary submission to the jurisdiction of the Court. The *ex parte* decree against the minor is a nullity and does not bind the minor, and a suit based on such judgment is not maintainable in British India. (*Lokur, J.*) GAJANAN SHESHADRI *v.* SHANTABAI. **187 I.C. 57=12 R.B. 404=41 Bom.L R. 818=A. I.R. 1939 Bom. 374.**

——**S. 13 (a)**—*Court of competent jurisdiction—Competency—How determined—Test—Law of foreign state or private international law—Jurisdiction in personal action.*

The question whether a foreign Court is a Court of competent jurisdiction within the meaning of S. 13 (*a*), C. P. Code, must be determined, so far as personal actions are concerned, not by the territorial law of the foreign state, but by the rules of Private International Law. A foreign Court has jurisdiction in personal actions in an international sense in the following cases, *viz.*, (1) where the defendant is the subject of the foreign country in which the judgment is obtained; (2) where the defendant is the subject of that foreign country when the action is commenced; (3) where the defendant, in the character of a plaintiff, has selected the former in which he is afterwards sued; (4) where the defendant has voluntarily appeared in the foreign Court and submitted to its jurisdiction; and (5) where the defendant has contracted to submit himself to the foreign forum in which the judgment is obtained. There may be also another class of cases in which the foreign Court would have jurisdiction, *i.e.*, where the defendant has real estate within the foreign jurisdiction in respect of which the cause of action has arisen during his stay within that jurisdiction. Unless a defendant falls within one or other of these possible cases, the foreign Court has no jurisdiction to entertain and decide a personal action against him, and its judgment would not be that of a Court of competent jurisdiction within the meaning of S. 13 (*a*). (*R. C. Mitter, J.*) CHORMAL BALCHAND *v.* KASTURI CHAND SERAOGI. **63 Cal. 1033=63 C.L.J. 175=40 C.W.N. 591.**

——**S. 13 (a)**—*Court of competent jurisdiction—Test of—Power of British Indian Court in suit on foreign judgment.*

Whether a foreign Court is or is not a Court of competent jurisdiction is to be determined by principles of international law. Ordinarily it is not open to the Courts in British India to sit in appeal over a foreign judgment, and to refuse to recognise a foreign judgment because it proceeds on grounds which would not be adequate in British India unless it offends against the rules of S. 13, C. P. Code. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=40 Bom. L.R. 77=A.I.R. 1938 Bom. 173.**

——**S. 13 (a)**—*Foreign Court*—Ex parte *judgment—Defendant not appearing—Executability in British India—Submission to jurisdiction—What amounts to—Defendant owning business in foreign state and filing suits in foreign Court on prior occasions—If submission to jurisdiction.*

If the defendant in a foreign suit has appeared before the foreign Court in the suit, thus recognising the jurisdiction of the Court, he cannot afterwards in proceedings in execution of the decree, taken in British India, be heard to say that the foreign Court had no jurisdiction. But the mere fact that a party has once appeared before the foreign Court in the character of plaintiff is not sufficient to regard him for ever afterwards as having submitted to the jurisdiction of the foreign Court in any subsequent action, by any person or upon any cause of action, which may be brought against him. The fact that a party has got a business in a foreign territory, and has filed suits in the Court of that foreign territory before is no reason for coming to the conclusion that he has submitted to its jurisdiction in respect of a suit instituted against him later on in that Court, in which he never appears at all. The *ex parte* decree passed against him in such a case, although it may be executed against movable or immovable property possessed by him within the limits of the foreign Court's jurisdiction is not executable against him in British India. (*Cornish, J.*) THIRUNAVUKKARASU PANDARAM *v.* PARASURAMA AIYAR. **167 I.C. 13=9 R.M. 444=1936 M.W.N. 1165=44 L. W. 752=A.I.R. 1937 Mad. 97=71 M.L.J. 838.**

——S. 13 (b)—*Applicability—Test—"Given on the merits of the case"—Meaning of.*

The test to determine whether a foreign judgment was given on the merits is to find out whether it was given as a penalty for any conduct of the defendant or whether it is based on a consideration of the truth or otherwise of the plaintiff's case on the evidence. Where the foreign Court has given a decree to the plaintiff not because the defendant was unrepresented or that he did not raise any objection to the plaintiff's claim, but it considered the plaintiff's claim on its merits, and after taking evidence it came to the conclusion that the claim was proved, the suit must be held to have been disposed of on the merits and the defendant cannot get the benefit of the exception contained in Cl. (*b*) of S. 13, C. P. Code. (*Lokur, J.*) GAJANAN SHESHADRI *v.* SHANTABAI. **187 I.C. 57=12 R.B. 404=41 Bom.L.R 818=A.I.R. 1939 Bom. 374.**

——S 13 (b)—*"Merits of the case"—Power of British Indian Court to enquire into.*

One of the objections, among others, to the validity of a foreign judgment is that it was not given on the merits. Under S. 13 (*b*), C. P. Code, the Courts in British India have a right to examine the foreign judgment to see whether it has been given on the merits. The law in India in this respect is more elastic and wider than in England. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **I.L.R. (1938) Bom. 16=174 I.C. 615=10 R.B. 470=40 Bom.L.R. 77 =A.I.R. 1938 Bom. 173.**

——S. 13 (c) and (f)—*Foreign judgment—Validity—Refusal to give effect to valid plea of* res judicata—*Disregard of international law—Effect of.*

A foreign judgment is impeachable for breach of any of the conditions specified in S. 13, C. P. Code; and a foreign judgment which totally disregards the comity of nations or which knowingly and perversely disregards the rights given to a British subject by the law of his country will not, and cannot, be held to be of any effect in British India. A refusal to give effect to a valid plea of *res judicata*, which a British Court would give effect to under the prevailing law in British India and a complete disregard of international law by ignoring "the principle of submission" to jurisdiction which is recognized by all civilized countries would render a foreign judgment of no effect in British India. (*Rangnekar and Macklin, JJ.*) MALLAPPA *v.* RAGHAVENDRA. **I.L.R. (1938) Bom. 16=174 I.C 615=10 R.B. 470=40 Bom. L.R. 77=A I.R. 1938 Bom. 173.**

——S. 15—"Court of the lowest grade"—Meaning of—If includes village Court governed by special Act. *See* LIMITATION ACT, S. 4. (1940) 1 M.L.J. 220.

——S. 17—*Advantage conferred by—When can be availed of.*

Where a plaintiff has two or more causes of action in the suit he can take advantage of the provisions of S. 17, C. P. Code, if the joinder of such causes of action is permitted by the succeeding provisions of the Code, for instance, O. 1, R. 3 and O. 2, R. 3. If he cannot do so and the joinder of the causes of action is had for multifariousness, then the suit cannot be tried in either of the Courts within whose jurisdiction the properties are situate. (*Iqbal Ahmad and Bajpai, JJ.*) SATRUHAN SINGH *v.* COLLECTOR OF GORAKHPUR. **188 I.C. 486=1940 A.L J. 110=13 R.A. 25 =1940 A.W.R. (H.C.) 109=A.I R. 1940 All. 205.**

——S. 17—*Applicability —Conditions—'Courts'—Meaning—Properties situate within the jurisdiction of a British Indian and a foreign Court—Jurisdiction.*

S. 17 of the C. P. Code does not confer jurisdiction on a Court unless the defendants are in possession of some property within the jurisdiction of that Court. Further, it is necessary for the section to apply, that the 'different Courts' should be Courts in British India. Where a suit was for possession of two items of property one of which was within the jurisdiction of a British Indian Court, while the other was within the jurisdiction of a foreign Court.

Held, that a British Indian Court would have no jurisdiction to entertain the suit as regards the item of property situated within the jurisdiction of the foreign Court. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **I L.R. (1937) Bom. 895=174 I.C 116=10 R.B. 426=39 Bom. L R. 1287=A.I.R. 1938 Bom. 121.**

——S. 17—*Applicability—Courts in Berar—C. P. Code, extended to Berar under Indian Foreign Jurisdiction Act* (1890).

The Berars are not within the definition of 'British India' in S. 3 (7) of the General Clauses Act (1897). The Courts in Berar are foreign Courts. The words in S. 17 'within the jurisdiction of different Courts' mean Courts to which the Code applies *pro prio vigore* and as such, the mere fact that the Code has been applied under the Foreign Jurisdiction Act, would make no difference to the application of S. 17 of the Code. (*Broomfield and Macklin, JJ.*) KARUSINGA *v.* NARSINHA. **I.L.R. (1937) Bom. 895=174 I.C. 116=10 R.B. 426=39 Bom L.R. 1287=A.I.R. 1938 Bom. 121.**

——S. 17—*Applicability to Courts established under Bengal, Agra and Assam Civil Courts Act.*

The C. P. Code, including S. 17, extends to Courts established under the Bengal, Agra and Assam Civil Courts Act. (*Sir Shadi, Lal.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **63 I.A. 311=15 Pat. 567=163 I.C. 49 =40 C.W.N. 1061=38 Bom.L.R. 768=44 L.W. 88=8 R.P.C 301=17 Pat.L.T. 461=63 C.L.J. 476=1936 All.L.R. 577=1936 O.L.R. 346=1936 P.W.N. 483=A.I.R. 1936 P.C. 189=71 M.L.J. 60 (P.C).**

——S. 17—*Choice under—When available.*

The choice given by S. 17 can be utilised only if the C. P. Code applies to both the Courts. (*Sir Shadi Lal.*) NRISINGHA CHARAN NANDY *v.* RAJNITI PRASAD SINGH. **63 I.A. 311=15 Pat. 567=163 I.C. 49=40 C.W N. 1061=38 Bom. L. R. 768=44 L.W. 88=8 R.P.C. 301=17 Pat.L.T,** 461=1936 All.L.R. 577=1936 **O L.R. 346=1936 P.W N 483=63 C.L.J. 476=A.I.R. 1936 P. C. 189=71 M.L.J. 60 (P.C.).**

——S. 17—*Suit in respect of house and land in Court within whose jurisdiction house alone is situate—Appeal from decree filed in proper Court—Claim in respect of house abandoned in appeal—Appeal relating only to land which does not lie within jurisdiction of appellate Court—Appeal, if can be heard.*

Where a suit in respect of a house and certain land was filed in a Court within whose jurisdiction the house alone was situate and an appeal from the decree in the suit was filed in the Court to which appeals lie from the decrees of that Court, the fact that the plaintiff abandoned his claim in respect of the house in appeal and the appeal related only to the land which did not lie within the jurisdiction of the appellate Court would not affect the jurisdiction of that Court to hear the appeal. (*Zia-ul-Hasan and Smith, JJ.*) SUNDAR LAL *v.* GUR SARAN LAL. **172 I.C. 637=1938 O A. 34=1938 O.L R. 14=10 R.O. 187=1938 O.W.N. 104=A.I.R. 1938 Oudh 65.**

——Ss. 19 and 20—*Applicability—Wrongful receipt by defendant of money belonging to plaintiff—Suit in respect of—Option of plaintiff—Jurisdiction.*

Where the defendant has, by means of a tort, become possessed of a sum of money at the expense of the plaintiff, the plaintiff may elect to sue either for damages for tort, or for the recovery of the money wrongfully obtained by the defendant; the latter, *i. e.*, an action for money had and received by the defendant to the use of the plaintiff, is based on an implied contract of agency, the defendant being fictitiously assumed to have rightfully received the money as the plaintiff's agent and to have failed to pay it over to his principal, the plaintiff. In the former case jurisdiction would be determined by S. 19, C. P. Code, and in the latter by S. 20. (*Davis, J.C. and Lobo, A. J. C.*) MULSING DOULATRAM *v.* FATEHCHAND ANRAJ. **30 S.L.R. 182=166 I.C. 347=9 R S. 138=A.I.R. 1936 Sind 229.**

——Ss. 19 and 20—*Scope—Suit in tort for wrongful conversion of Hundi—Cause of action—Jurisdiction—Place of suing.*

S. 20 is subject to the limitations of S. 19 of the Code. An action in tort for wrongful conversion of a hundi, is subject to the rule laid down in S. 19, and must be instituted in the Court within the limits of whose jurisdiction the wrongful act is done or the defendants wrongdoers reside or carry on business or personally work for gain. The Court within whose jurisdiction the hundi is endorsed over to the plaintiff will not have jurisdiction to entertain the suit when it is one in tort. If the suit, however, is one for money received upon an implied contract, the position would be different, for in that case S. 20 would determine jurisdiction. (*Davis, J. C. and Lobo, A.J.C.*) MULSINGH DOULATRAM *v.* FATEHCHAND ANRAJ. **30 S.L.R. 182=166 I.C. 347=9 R.S. 138=A.I.R. 1936 Sind 229.**

——S. 20—Banker and customer—Suit by fixed depositor for repayment—Forum. *See* BANKER AND CUSTOMER. **1940 A.W.R. (H.C.) 72.**

——S. 20—*"Carry on business"—Insurance Company having office at* B *making contract of indemnity at* B*—Amount payable thereunder also to be paid at* B*—Sub-agency at* K*—Agent authorized merely to take orders and transmit to* B *for acceptance—If carries on business at* K.

An insurance company having its office at *B* made a contract of indemnity at *B*. The amount to be paid thereunder was also to be paid at *B* only. The company had a sub-agency at *K*. The agent had no power to accept any offer and all he could do was to canvass business which was accepted by the company at *B*. Even where premia were forwarded through him they were accepted by the company at *B*. The agent got commission on the business canvassed by him and nothing more in the shape of office allowance or otherwise.

Held, that the company could not be deemed to carry on business at *K* and hence the Court at *K* had no jurisdiction to try a suit based on a policy issued at *B*. (*Rupchand Bilaram, A.J.C.*) HASI *v.* INDUSTRIAL AND PRUDENTIAL ASSURANCE CO. **167 I.C. 669=9 R S. 202=A I.R. 1937 Sind 17.**

——S. 20—*"Carry on business"—Meaning of—Firm abroad having agent in India—Agent securing orders for firm and looking after its contracts and getting commission on business done by him—Firm—If carries on business in India.*

A firm having an office at a place at which a partner or manager is in control of the business carried on can be considered to carry on business at that place. But if a firm has only an office where business for the firm is done by an agent, the question whether it carries on business at that place depends on the authority and powers of the agent. If the agent has authority merely to take orders and to transmit them to his firm or show samples, it is not carrying on business. If, however, he has power to conclude contracts binding on his principal firm on his own initiative for and on behalf of the firm, that could be sufficient. He must be an agent in the strict and correct sense of the term. Business done through a commission agent or brother or general agent is insufficient and cannot constitute carrying on business as contemplated by S. 20, C. P. Code. An agent who secures orders for a firm abroad and looks after the contracts of the firm, and is remunerated by a commission on the business done by him, is not an agent in the strict and correct sense of the term, and the firm whom he represents cannot be consequently considered as carrying on business at the place where the agent works and does his business. (*Rupchand Bilaram, A.J.C.*) FLEMING SHAW & CO. *v.* BAHADUR & CO. **29 S.L.R. 292=164 I.C. 1015=9 R.S. 83=A.I.R. 1936 Sind 121.**

——S. 20—*Carry on business—Partnership contract by* P *and* D *firms with head offices at Calcutta—*P *firm having branch in Muzaffarpur district—Contract that jute be purchased by* P *at* K *in Muzaffarpur and sold at Calcutta by* D*—Suit by* P *for dissolution and accounts—Jurisdiction of Muzaffurpur Court.*

A contract of partnership was entered into by *P* firm with *D* firm both of whom had their head offices at Calcutta. The *P* firm had a branch in the district of Muzaffarpur; the contract was that jute was to be purchased by the *P* firm at *K* in the Muzaffarpur district; and was to be sent to Calcutta to the *D* firm for sale. A suit for dissolution of partnership and rendition of accounts was instituted in the Muzaffarpur Court by the *P* firm; accounts of partnership, *i.e.*, the accounts of sale and of profit and loss of the business were kept at Calcutta.

Held, that the purchase of jute for the purposes of business could not necessarily be the carrying on of the business of the partnership. Hence there was no place of business of the partnership in Muzaffarpur, but it was at Calcutta where the accounts were maintained. Therefore Muzaffarpur Court had no jurisdiction to try the suit. A.I.R. 1926 Mad. 427, Dist. (*Macpherson and Mahomed Noor, JJ.*) RAGHUNATH RAI RAMBILAS *v.* SURAJMAL NAGARMAL. **160 I.C. 353=8 R.P. 359=A.I.R. 1936 Pat. 6.**

——S. 20—*Cause of action—Agent supplying goods to principal—Suit in respect of—Jurisdiction of Court at agent's place of business.*

The agent is entitled to file a suit for recovery of the amount due to him in respect of the business done by him as agent at the place where he carries on his business. The presumption in such cases is that a part of the cause of action arises in the place where the agent carries on his business as he is required to do a part of the work of agency in that place. Where firm *A* carrying on business at Shikarpur as commission agent of firm *B* at Amritsar, gave instructions to their (*A's*) branch at Duzdap to buy the goods on account of *B* and forward them to *B* on account of firm *A*.

Held, that the firm *A* and not its branch at Duzdap had the right to sue for commission for the goods supplied and hence it was within the competence of *A* firm to file a suit at Shikarpur, where it carried on business and from where it placed the order of *B* as its commission agent. (*Lobo, A. J. C.*) THAKURDAS MULCHAND *v.* UTTAMSING. **173 I.C. 62=10 R.S. 194=A.I.R. 1937 Sind 317.**

——S. 20—*Cause of action—Agreement to pay maintenance—Absence of recital as to place of payment—Suit at promisee's place of residence—Maintainability.*

A suit by a lady against her father-in-law and her husband on a written agreement entered into at Lucknow, to pay her a monthly allowance of Rs. 10 if her husband failed to pay her this allowance in the event of her husband's turning her out, was brought at Khandwa where plaintiff resided.

Held, that Khandwa Court had jurisdiction to entertain the suit against both of them as there was no express agreement to pay her at any particular place and as they were under an implied obligation to find the creditor and pay her where they found her. (*Pollock, J.*) MT. KANIJI JOHRA *v.* RAJA HUSSAIN. **I.L.R. (1937) Nag. 97=167 I.C. 700=9 R.N. 201=A.I.R. 1937 Nag. 39.**

——S. 20—*Cause of action—Contract of insurance against burglary—If arises in place where burglary takes place.*

Where a person gets certain ornaments insured with a company for a certain sum with a guarantee that if the articles be lost by burglary the company should make good such loss or damage not exceeding the sum specified, part of the cause of action for a suit based on the contract arises at the place where the burglary takes place. (*Sulaiman, C.J. and Bajpai, J.*) GUARDIAN ASSURANCE COMPANY, LTD. *v.* SHIVA MANGAL SINGH. **167 I.C. 897=9 R.A. 585=1937 A.L.J. 98=I.L.R. (1937) All. 234=1937 A.L.R. 265=1937 A.W.R. 52=A.I.R. 1937 All. 208.**

——S. 20—*Cause of action—Insurance company having head office at Calcutta—Agent at Erode securing proposal and effecting policy—Policy accepted and money payable at Calcutta—Death of assured at Bangalore—Suit in Court having jurisdiction over Erode—Jurisdiction of latter Court—Cause of action—Where arises.*

An Insurance Company having its head office at Calcutta had an agent at Erode within the limits of the jurisdiction of the Coimbatore Subordinate Judge's Court, whom it authorised to canvass proposals for insurance; but the agent was not authorised to accept any proposal. In the course of his agency he secured a proposal, got the proposal form correctly filled up, and sent it to the head office at Calcutta for disposal. The policy was accepted by the company at Calcutta. The money was payable at Calcutta only. The assured died at Bangalore and his widow sued the company for the policy amount in the Subordinate Judge's Court of Coimbatore within whose jurisdiction was Erode.

Held, (*i*) that until the proposal reached the head office of the company at Calcutta there was no offer, and therefore the offer was made at Calcutta and accepted at Calcutta; and the policy money being also payable at Calcutta the cause of action arose wholly in Calcutta; (*ii*) that though a part of the cause of action arose at Bangalore where the assured died, that did not confer any jurisdiction on the Coimbatore Court; (*iii*) and that no part of the cause of action having arisen at Erode within the jurisdiction of the Coimbatore Court, the latter had no jurisdiction to entertain or decide the suit. (*Cornish and King, JJ.*) BENGAL INSURANCE AND REAL PROPERTY CO., LTD. *v.* VELAYAMMAL. **I.L.R. (1937) Mad. 990=1937 M.W.N. 303=45 L.W. 616=170 I.C. 279=10 R.M. 170=A.I.R. 1937 Mad. 571.**

——S. 20—'*Cause of action*'—*Interpretation.*

The Court must attribute to the expression 'cause of action' in S. 20 (*c*) of the present Code of 1908 the ordinary meaning applied to it, and not confine it within the narrow categories which were specified in the amending Act of 1888 which had been intentionally removed by the Legislature. The words should be understood to mean as defined in the English Courts and accepted in India. (*Sulaiman, C J. and Bajpai, J.*) GUARDIAN ASSURANCE CO., LTD. *v.* SHIVA MANGAL SINGH. **I.L.R. (1937) All. 234=167 I.C. 897=9 R.A. 585=1937 A.L.J. 98=1937 A.L.R. 265=1937 A.W.R. 52=A.I.R. 1937 All. 208.**

——S. 20—"*Cause of action*"—*Meaning—Territorial jurisdiction—Test.*

A cause of action consists of the entire set of facts which gave rise to a claim. It includes everything which, if not proved, gives the defendant an immediate right to judgment. It includes every fact which is material to be proved to entitle the plaintiff to succeed. A liquidator of a Co-operative Credit Society at Midnapore sent a registered letter to a member residing at Alipore demanding money due by the member to the Society. The member instituted a suit in Alipore Court claiming that he had long ago ceased to be a member and was not liable for any debt to the Society. The Alipore Court holding that cause of action arose within its jurisdiction entertained the suit.

Held, that the plaintiff, in order to succeed in the suit, had only to show that the assessment made upon him by the liquidator was wrong. As soon as he had proved it, he would be entitled to succeed. It was not necessary for him to prove that he received a registered letter of demand. The Alipore Court therefore was wrong in holding that there was territorial jurisdiction of Alipore in the suit. The suit should have been laid at Midnapore. (*M. C. Ghose, J.*) Beni Madhab Sikdar *v.* Sarat Chandra Jana. **176 I.C. 221=11 R.C. 54=A.I.R. 1937 Cal. 643.**

——S. 20—*Cause of action—Meaning of.*

The term "cause of action" means every fact which, if traversed, it would become necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It is, in other words, a bundle of essential facts, which it is necessary for the plaintiff to prove before he can succeed in the suit. (*Davis, J.C. and Lobo, A.J.C.*) Mulsing Doulatram *v* Fatehchand Anraj. **30 S.L.R 182=166 I.C. 347=9 R.S. 138=A.I.R. 1936 Sind 229.**

——S. 20—*Cause of action—Promissory note payable on demand—Promissory note handed over to promisee at B—Promisee resident at M—Court at M—Jurisdiction of.*

Where a promissory note, payable on demand, describes the promisee as resident of *M*, but the note is handed over to the promisee at *B*, it cannot be implied in such circumstances that there is any promise to pay at the place of the promisee's residence. As the demand to pay can be made only at *B*, and as the promisor is not bound to pay till such demand is made, no cause of action arises at *M* and therefore the Court at *M* has no jurisdiction to entertain a suit on such a promissory note. (*Pollock, J.*) Jankiram *v.* Bhaulal. **171 I.C. 278=10 R.N. 108=A.I.R. 1937 Nag. 241.**

——S. 20—*Cause of action—Restitution of conjugal rights—Suit by Hindu husband against wife and wife's father—Forum.*

A Hindu husband is entitled to maintain a suit against his wife for restitution of conjugal rights in the Court having jurisdiction at the place where he lives. It is the breach, without lawful cause, of the wife's duty to live with her husband that gives rise to the cause of action, and the fact that the wife has not previously lived with her husband at that place, or that she lives elsewhere or that the marriage which has not been consummated took place elsewhere, makes no difference. The breach is committed at the place where the husband is living as that is the place where the wife should live. But the suit so far as it is against the wife's father for an injunction to restrain him from preventing his daughter to return to the plaintiff, cannot be maintained at the place of the husband's residence, when the father lives beyond the jurisdiction of the Court of that place (*Beasley, C.J. and Stodart, J.*) Venugopal Naidu *v.* Lakshmi Ammal. **59 Mad. 392=161 I.C. 485=8 R.M. 832=43 L.W. 307=1936 M.W.N. 19=A.I.R. 1936 Mad. 288=70 M.L.J. 288.**

——S. 20—*Cause of action—Suit for price of goods supplied—Court disallowing part of claim as arising outside its jurisdiction—Absence of plea of want of jurisdiction—Effect.*

A vendor brought a suit to recover certain amount as due for supply of goods at places within the jurisdiction of the Court. The vendee admitted that the places were within jurisdiction of the Court but denied to have made any purchase. The Court, however, found that a part of the claim arose outside British India and hence disallowed the claim to that extent.

Held, that the Court ought not to have disallowed part of the claim as there was no plea that part of the claim arose outside British India and hence there was no necessity to take evidence on that point. But even assuming that the vendee had chosen to take such plea, the payment made could have been appropriated by the vendor towards part of the claim arising outside British India even at the last moment. Therefore the Court was wrong in disallowing that part of the claim. (*Pollock, J.*) Raghunathji Piroolal *v.* Kisanlal Tulsiram. **168 I.C. 714=9 R.N. 268=A.I.R. 1937 Nag. 94.**

——S. 20—*Cause of action—Suit to set aside decree as having been fraudulently obtained after declaring it illegal, fraudulent and a nullity—Decree obtained at one place—Suit to set aside in another place—Jurisdiction of Court at latter place—Proper forum.*

Plaintiffs who resided and carried on business within the jurisdiction of the Subordinate Judge's Court, at *S* executed a mortgage in favour of the defendants who were residing and carrying on business in Bombay the properties mortgaged being situate in *S*. The defendants sued on the mortgage in the High Court of Bombay and got an *ex parte* preliminary decree. Thereafter, they caused a notice to be sent through their attorney to the plaintiffs, by which the plaintiffs were informed that the Bombay High Court would be moved for certain reliefs in the matter of sale of the mortgaged properties. The plaintiffs received this notice on 15—3—1939 and on 17—3—1939, they instituted a suit in the Subordinate Judge's Court at *S*, for a declaration that the decree obtained by the defendants at Bombay was illegal, fraudulent and a nullity, and was liable to be set aside and for an order to set aside the decree. The Subordinate Judge of *S* returned the plaint for presentation to the proper Court on the ground that he had no territorial jurisdiction to entertain it.

Held, (1) that the receipt of the notice by the plaintiffs on 15—3—1939 was no part of the cause of action for the suit at all, and could not possibly change the venue of trial to *S*; (2) that the cause of action set up in the plaint, *viz.*, the fraudulent obtaining of the decree, was a matter which was done in Bombay; (3) that there being no definite allegation in the plaint which could constitute a cause of action arising at *S*, the Subordinate Judge of *S* was right in returning the plaint, the place where the plaintiffs' cause of action arose being Bombay. (*Rowland and Chatterjea, JJ.*) Sampat Lall *v.* Kaluram Brijmohan. **21 Pat.L.T. 259=A.I.R. 1940 Pat. 444.**

——S. 20—*Commission agency business—Suit by principal against agent—Forum.*

In the case of a commission agency business, a suit by the principal against the agent can be instituted under Cl. (*c*) of S. 20, either where the contract was made or where the accounts are to be rendered and payment is to be made. (*Dunkley, J.*) ANNAMALAI CHETTYAR *v.* DAW HNIN U. **163 I.C. 397 (2)=9 R.R. 9=A.I.R. 1936 Rang. 251.**

——**Ss. 20, 23 and 151**—*Leave granted under S. 20 (b) without notice to opposite party—Objections against such leave—If can be heard.*

Where leave under S. 20 (*b*) is granted without issuing notice to the opposite party, the Court cannot hear objection against such leave by exercising its inherent jurisdiction and pass orders in the ends of justice, as the opposite party can approach the Court for an order under S. 23 (3), which is the proper remedy for him. (*Almond, J.C. and Mir Ahmad, J.*) BHAGWAN DAS *v.* KISHAN CHAND. **174 I.C. 815=10 R.Pesh. 74=A.I.R. 1938 Pesh. 15.**

——S. 20—*Lease—Lands outside Madras City—Lease executed and registered outside—Agreement of lease in Madras and lessor resident in Madras—Place of payment of rent not specified—Intention of parties—Suit in Madras—Maintainability—Contract Act, S. 49.*

If from the circumstances a contract is entered into, it is reasonable to infer that the intention of the parties was that performance was to be in a certain place, that inference should be drawn whether the rule of the English Common Law which requires the debtor to seek the creditor applies or not to India. Under S. 49 of the Contract Act, it is the duty of the promisor when no place is fixed in the contract for the performance of it to apply to the promisee to appoint a reasonable place for performance of the promise and to perform it at such place. Disregard or neglect by him to perform this statutory duty imposed on him cannot better his position. The S. P. G. Mission having its local office in the City of Madras had certain lands in Shiyali taluk in Tanjore District. An agreement for leasing the lands to the defendant was entered into in Madras. The defendant executed a counter-part of lease in favour of the Superintendent of the Mission who resided in Madras and who was described as such in the lease. But the lease deed itself was executed and registered in Shiyali taluk. The rent was fixed in cash. The lease, however, did not fix any specific place where payment was to be made. A suit for rent was instituted in the City Civil Court, Madras, but that Court returned the plaint holding that it had no jurisdiction as the cause of action did not arise in Madras.

Held, that the intention of the parties must have been that the payment of rent was to be made in Madras which was the place where the local office of the Mission was situated and where the Superintendent lived. The cause of action therefore arose wholly or partly in Madras under S. 20 (*c*), C. P. Code, and the City Civil Court had jurisdiction to entertain the suit. (*Pandrang Row, J.*) SOCIETY FOR THE PROPAGATION OF THE GOSPEL *v.* SAMA RAO NAIDU. **182 I.C. 116=12 R.M. 3=1938 M.W.N. 979=48 L.W. 438=A.I.R. 1938 Mad. 977.**

——S. 20—*Leave to sue—Granting of—Considerations.*

The leave under S. 20 (*b*) cannot be given arbitrarily and when the defendants who reside outside jurisdiction do not appear the Court is bound to consider their position before granting leave. This obligation is in no way lessened when they do appear and object and especially when the objecting defendant seems to be the real person against whom the plaintiff wants to proceed. (*Vivian Bose, J.*) DALSUKH NATHMAL *v.* MOTILAL. **182 I.C. 842=12 R.N. 29=A.I.R. 1938 Nag. 262.**

——S. 20—*Leave under—Grant of—Effect—Suit on same cause of action against many defendants—Some resident beyond Court's jurisdiction and one outside British India—Suit instituted after obtaining leave of Court—Decree—Validity—Suit by non-resident foreigner to declare decree void—Competency—Propriety of grant of leave—If can be challenged.*

There is no reason to read Cl. (*b*) of S. 20, C.P. Code, as limited to persons merely residing outside the limits of the territorial jurisdiction of the Court but within British India, when in some respects the Code is to be construed as giving jurisdiction to British Indian Courts even in actions *in personam* as against non-resident foreigners. In the case of suit against a number of defendants, some of whom are not resident within the limits of the jurisdiction of the Court, and one of whom is resident beyond British India, the cause of action being the same as against all of them, where leave has been obtained under S. 20 (*b*) of the C. P. Code to implead them in the suit, the suit is properly instituted against all the defendants including those resident beyond the Court's jurisdiction, and it makes no difference for that purpose whether these latter are residents of British India though outside the local limits of the Court's jurisdiction or are persons residing outside British India. The decree passed in the suit cannot be attacked in a subsequent suit as being void for want of jurisdiction as against the non-resident foreigner. Any argument as to whether the leave was or was not properly granted under S. 20 (*b*), C P. Code, in the particular circumstances is not one which can be advanced in a separate suit attacking the validity of the decree passed in that suit. (*Varadachariar and Horwill, JJ.*) SWAMINATHAN CHETTIAR *v.* SOMASUNDARAM CHETTIAR. **I.L.R. (1938) Mad. 1080=181 I.C. 757=11 R.M. 845=47 L.W. 552=1938 M.W.N. 558=A.I.R. 1938 Mad. 731.**

——S. 20—*Place of suing—Commission agent directed to sell goods—Agent intimating terms of business and asking for custom.*

When a merchant or commission agent sends his quotations or terms of business to other people it is merely an intimation on his part of his readiness to transact business with them on those terms. Where a merchant residing in Hoshangabad District asked, by correspondence, a commission agent in Bombay what his charges were for selling coal and the commission agent wrote a letter stating his charges in detail and saying "let us have your transaction once. Then you shall have reliance on us."

Held, that the letter written by the commission agent stating the terms on which he did business was not an offer but an invitation of offer. The fact that the letter included the words "let us have your transaction once" would not convert it into an offer to be bound by acceptance for there had been no indication up till then what business the merchant residing in Hoshangabad wished to transact. The cause of action therefore did not arise in Hoshangabad District but in Bombay. (*Pollock, J.*) SHYAMSUNDER RAMDAS *v.* ABDUL SATTAR. **173 I.C. 943=10 R.N. 331=A.I.R. 1938 Nag. 186.**

———S. 20—*Place of suing—Promissory note signed at one place—Delivery at another place—Forum.*

A suit was instituted in the Lahore Court by a Bank of Lahore on the basis of a pronote executed by *A*, *B*, *C* and *D*. *A* signed the pronote at Nawansher in the Hazara District and sent it to *C* at Lahore. *B* under *C's* instructions delivered it to the Bank.

Held, that the delivery was made by *B* with implied authority of *A* and therefore Lahore Court had jurisdiction to try the suit against *A*. (*Bhide, J.*) PUNJAB CO-OPERATIVE BANK *v.* LALA ISHAR DAS. **175 I.C. 153=10 R.L. 695=40 P.L.R. 134=A.I.R. 1937 Lah. 800.**

———S. 20—*Principal and agent—Suit for accounts by principal against agent—Cause of action—Place of business of agent or of principal.*

It cannot be laid down absolutely that the principle that the debtor is bound to seek out his creditor and pay his debt is applicable in India even for the purpose of determining the local jurisdiction of a particular Court to entertain a suit. Assuming that that rule of English law either in terms or by analogy could be applied in India, it cannot be extended to a case not arising out of the relationship of debtor and creditor, as for example, a contract of agency. Where a person employs an agent to do acts for him at a particular place, the legitimate inference is that the contract is to be performed at that place. S.213 of the Contract Act cannot be read as laying down that the agent should render accounts at the principal's place. The principal has to demand accounts at the agent's place of business. A suit by a principal against his agent for accounts should therefore be instituted at a Court having jurisdiction over the place of business of the agent. (*Varadachariar, J.*) AUDINARAYANA RAO *v.* LAKSHMINARAYANA RAO. **1940 M.W.N. 254 =51 L.W. 747=A.I.R. 1940 Mad. 588=(1940) 1 M.L.J. 558.**

———S. 20—*Residence—Abandonment— Burden of proof.*

Where a person actually and voluntarily retains his residence at *X* and has not abandoned it, but he occasionally goes to another place for business, the Civil Courts at *X* have jurisdiction to try suits concerning that person. The onus of proving that he has abandoned his residence at *X* lies on him who so alleges. (*Jai Lal, J.*) RAM DAS *v.* LACHHMAN DAS. **169 I.C. 321=9 R.L. 733=A.I.R. 1936 Lah. 853.**

———S. 20—*Suit for accounts against commission agent—Place of suing.*

The general rule is that a suit for accounts against a commission agent must be filed at the place where the commission agent works. (*Tek Chand, J.*) RAM DITTA MAL-SANT LAL *v.* SETH JOT RAM-KIDAR NATH. **188 I C. 299=12 R.L. 518=42 P.L.R. 203=A.I.R. 1940 Lah. 171.**

———S. 20—*Suit against agent for amount due—Cause of action—Where arises.*

An Insurance Company having its office at Lahore appointed certain person working at Meerut as the chief agent for Rajputana and Bundelkhand area. The appointment was made at Lahore and all the payments were to be made at Lahore and all accounts were to be rendered at Lahore. Subsequently disputes arose between the parties and the appointment was cancelled. The company instituted suit at Lahore against the agent for recovery of certain sum due by the agent.

Held, that cause of action arose at Lahore and the Court at Lahore had jurisdiction to try the latter suit. (*Din Mahomed, J.*) LAKSHMI INSURANCE CO., LTD. *v.* B. K. KAULA. **A.I.R. 1940 Lah. 85.**

———S. 20—*Suit against resident of Indian State—Decree, if effective in that State.*

An Indian State, like the Bhopal State, whose Legislature is not subject to the Legislature of British India is a distinct and separate political entity. Such a State is, therefore, a foreign country in relation to British India within the meaning and for the purpose of C. P. Code. S. 20, C. P. Code, gives jurisdiction to British Indian Courts to pass a decree against residents of such a foreign State if the cause of action against them arose within the territorial jurisdiction of such Courts. But the decree has no effect against State subjects within the territorial limits of that State and, should be considered an absolute nullity. It follows, therefore, that a decree passed by a British Indian Court against a subject of the Bhopal State who at the time of the commencement of the suit did not reside or carry on business within the jurisdiction of such Court either personally or through a properly constituted agent and who did not submit to the jurisdiction of such Court is a nullity, and is not enforceable against the defendant in the forum of that state, wherever the cause of action might have arisen. (*Mahomed Ahmad Khan, C. J.*) KESRI SINGH *v.* HAR KUNWAR BAI. **187 I.C. 19.**

———S. 20—*Suit based on loan—Place of suit.*

Where the suit is not based upon the promissory note but the real basis of the suit is the loan in regard to which it was merely incidentally mentioned that a promissory note was executed as collateral security to such transaction, the English doctrine that the debtor must seek his creditor for the purpose of making payment in discharge of the liability is applicable. The creditor has therefore the right of filing the suit in the Court within the territorial limits of which the cause of action accruing from non-payment arises. (*Mya Bu and Mackney, JJ.*) PALANIAPPA CHETTYAR *v.* SUBBIAH CHETTYAR. **172 I.C. 606=10 R.R. 262 =A.I.R. 1937 Rang. 433.**

———S. 20—*Suit on hand-note—Place of suing—Place of contract.*

Cause of action for a suit on a hand-note arises either at the place where the transaction takes place or where it is agreed to be performed. But where it is not urged on behalf of the defendant that he was to repay the loan at any place other than the one where the transaction was made, it may be taken that the money was to be repaid to the plaintiff where the transaction took place. (*Dhavle J.*) BRIJU PANDEY *v.* GANGU AHIR. **182 I.C. 569=5 B.R. 777=12 R.P. 26=A.I.R. 1939 Pat. 294.**

———S. 20—*Suit for dower—Forum — Place where plaintiff resides—Jurisdiction.*

A suit on a contract can be instituted in the Court which has territorial jurisdiction over the place where the contract has to be performed. On the principle that when the creditor is residing in the realm, the debtor must follow the creditor unless there is a different contract between them, the place of performance must be taken to be the place where the creditor resides. The only limitation to the principle is that the creditor must reside within the realm. The above principle of English law is applicable in India. Where therefore a suit for prompt dower by a Mahomedan wife against her husband is instituted in the Court, within whose jurisdiction the wife resides, the place of performance must be taken to be the place where the plaintiff resides and the Court has jurisdiction to entertain the suit. (*R. C. Mitter, J.*) Tulsiman Bibi *v.* Abdul Latif Mia. **63 Cal. 726=161 I.C. 427=8 R.C. 517=40 C.W.N. 392=A.I.R. 1936 Cal. 97.**

——**S. 21**—*Applicability—Execution proceedings.*

S. 21, C. P. Code, applies by virtue of S. 141, to execution proceedings. An objection relating to the territorial jurisdiction of the executing Court cannot be raised, therefore, for the first time in appeal or revision. (*Din Mohammad, J.*) Babu Ram *v.* Hari Ram Daulat Ram. **42 P.L.R. 374.**

——**S. 21**—*Applicability—Objection as to want of jurisdiction in respect of restitution application—If falls under S. 21.*

S. 21, C. P. Code, is applicable only to objections as to want of territorial jurisdiction. It does not apply to cases of want of pecuniary jurisdiction or of exclusive jurisdiction. Where the objection is not as regards want of territorial jurisdiction, but that the Court to which an application for restitution is presented has no jurisdiction in the matter, not being the Court which passed the decree in the suit, and that the Court which passed the decree has exclusive jurisdiction, S. 21, C. P. Code, does not apply. (*Harries and Rachhpal Singh, JJ.*) Skinner *v.* Skinner. **1937 A.L.J. 588=1937 A.L.R. 713=I.L.R. (1937) All. 670=170 I.C. 706=10 R.A. 157=1937 A.W.R. 510=A.I.R. 1937 All. 515.**

——**S. 21**—*Applicability—Suit on original side of High Court—Failure to object to jurisdiction—Effect of.*

S. 21, C. P. Code, can have no application to a suit brought on the original side of the High Court, which for purposes of jurisdiction, is governed not by S. 20, C. P. Code, but Cl. 12 of the Letters Patent. If the Court finds that the conditions of Cl. 12 of the Letters Patent are not satisfied, the High Court would have no jurisdiction and cannot deal with the matter or attempt to apply S. 21, C. P. Code. In a case, therefore, where the High Court has no jurisdiction under Cl. 12 of the Letters Patent, S. 21, C. P. Code, cannot give it jurisdiction; and the omission to raise the objection as to the jurisdiction at the earliest possible opportunity would not preclude the defendant from raising it at the appellate stage. (*Derbyshire, C.J. and Costello, J.*) Maharaja Bahadur of Hathwa *v.* H. E. Beal. **164 I.C. 907=9 R.C. 308=40 C.W.N. 65.**

——**S. 21**—*Applicability—Suit to set aside decree on ground that Court had no territorial jurisdiction—If lies.*

A separate suit would always lie to have a decree set aside or to get it declared a nullity on the ground that the Court passing the decree had no territorial jurisdiction as regards the subject-matter of the suit. The provisions of S. 21, C. P. Code, are inapplicable, as the question does not arise before the Appellate or Revisional Court. (*Mukherjea, J.*) Kumar Sarat Kumar Roy *v.* Dharmadas Bhattacharjee. **174 I.C. 522=10 R.C. 685=42 C.W.N. 375=A.I.R. 1937 Cal. 738.**

——**S. 21**—*Objection to place of suing—If can be allowed in revision.*

An objection as to the place of suing cannot be allowed in a revisional Court where there has not been a consequential failure of justice. (*Abdul Rashid, J.*) G. P. Chatterjee *v.* Dhanpat Mal Diwan Chand. **40 P.L.R. 234.**

——**S. 21**—*Preliminary decree for accounts—Reversal of—Power of appellate Court.*

S. 21, C. P. Code, is no bar to an appellate Court reversing a preliminary decree for accounts passed by a Court of first instance against a commission agent, when the latter Court has done nothing more than deciding the issue of jurisdiction and passing a preliminary decree as a matter of course on the defendant admitting that he is the accounting party as the real trial of the suit is to begin only hereafter when accounts are to be taken. (*Tek Chand, J.*) Firm Ram Ditta Mal-Sant Lal *v.* Firm Seth Jot Ram-Kidar Nath. **188 I.C. 299=12 R.L. 518=42 P.L.R. 203=A.I.R. 1940 Lah. 171.**

——**S. 21**—Principle of—Applicability and scope—Constructive *res judicata* as to jurisdiction of Court—Right of party to challenge jurisdiction of Court chosen by himself. *See* C. P. Code, S. 11. **1937 M.W.N. 1292.**

——**S. 21**—*Scope and effect of—Non-compliance with Ss. 15 to 20—If renders decree a nullity.*

S. 21 of the Code makes it abundantly clear that non-compliance with the provisions of Ss. 15 to 20 is, in no way, fatal to the jurisdiction of the Court, and does not render the decree passed by a Court of competent jurisdiction a mere nullity so as to empower the executing Court to refuse to execute it on that ground. (*Davis, C.J. and Lobo, J.*) Shingomal *v.* Khushaldas Firm. **A.I.R. 1940 Sind 150.**

——**S. 21**—*Scope—Jurisdiction—Trial by Court without jurisdiction—Interference by appellate Court—Prejudice to defendant—Necessity for—Proof of.*

Before an appellate Court will interfere with a decree on the ground of want of jurisdiction of the trial Court to entertain the suit, the defendant must show that he has been prejudiced by the trial being held within the particular jurisdiction and not merely that the objection has been taken at the earliest opportunity. (*Cornish and King, JJ.*) Bengal Insurance and Real Property Co., Ltd. *v.* Velayammal. **I.L.R. (1937) Mad. 990=1937 M.W.N. 303=46 L.W. 616=170 I.C. 279=10 R.M. 170=A.I.R. 1937 Mad. 571.**

——**S. 21**—*Scope and applicability.*

It is an established principle of law that in a case which the Court is competent to try, if the parties without objection join issue and go to trial, the defendant cannot subsequently dispute its jurisdiction upon the ground that there were irregularities in the initial procedure which if objected to at the time would have led to the dismissal of the suit. S. 21, C. P. Code, applies to such a case. But S. 21 has no applicability to a case in which a Court, which has no jurisdiction over the subject-matter of the action, passes a decree which is wholly void and the maxim applies that consent cannot give jurisdiction. (*Subhedar, Niyogi and Staples, A.J.Cs.*) Murlidhar Shrinivas *v.* Gorakhram Sadhuram. **31 N.L.R. (Supp.) 57=161 I.C. 877=8 R.N. 252=A.I.R. 1936 Nag. 1 (F.B.).**

——**Ss. 22 and 23**—*Scope of—Power of High Court to transfer case pending in a Court subordinate to it, to a Subordinate Court of another High Court.*

Ss. 22 and 23, C. P. Code, are concerned with a case where a plaintiff has the choice of two or more Courts in which he may properly institute a suit. In cases to which Ss. 22 and 23 apply, the power to transfer is conferred by S. 22 and the forum to which the necessary application has to be made is provided by S. 23. The High Court has jurisdiction to transfer a suit pending in a Court subordinate to it, to a Court subordinate to another High Court. (*Stone, C.J. and Bose, J.*) Kanhaiyalal Daga *v.* Zumberlal. **1940 N.L.J. 231=A.I.R. 1940 Nag. 145.**

——**Ss. 22 and 23**—*Transfer of suit—Convenience of parties.*

Although the plaintiff has a right to choose the *locus* for the decision of his suit and the exercise of his right should not be restricted except for cogent reasons, yet where two suits between the parties are instituted at two different places and the interests of the majority of the parties are such that the balance of convenience is undoubtedly that the two suits should be tried in the same place and the trial of the suit in the other place would cause so much inconvenience as would amount to an abuse of the process of Court, an application for transfer of suit from such place to the place where the trial of both the suits would be more convenient should be allowed. (*Middleton, J C.*) Lloyds Bank, Ltd. *v.* Rajinder Nath. **160 I.C. 522=8 R. Pesh. 118=A I. R. 1936 Pesh. 5.**

——**Ss. 22 to 24**—*Transfer of suit—Considerations—Balance of convenience.*

In cases of transfer, the convenience of parties is indeed a factor which enters into consideration, but the convenience of both parties have to be weighed and the decision would ultimately turn on the balance of convenience. A plaintiff is the *dominus litis* and he has a right to institute the suit at a place of his choice. Where a defendant wants a transfer, it must be seen whether the considerations of convenience are so overwhelming on the side of the defendant as to override the claims of right. (*Stone, C.J. and Bose, J.*) Kanhaiyalal Daga *v.* Zumberlal. **1940 N. L.J. 231=A.I.R. 1940 Nag. 145.**

——**S. 24**—*Applicability—'Other proceeding' if covers claim under the Encumbered Estates Act—Retransfer after decision, if comes under sub-S. (1) (iii).*

The phrase 'other proceeding' in S. 24, C. P. Code, is sufficiently general to cover the case of the transfer of the disposal of one claim under the U. P. Encumbered Estates Act from the Court of one Special Judge to the Court of another. Further the provision relating to the transfer contained in sub-S. (1) (*iii*) of S. 24 is sufficient to cover the retransfer of the decided case, back to the Special Judge from whose Court it was originally transferred. (*Yorke, J.*) Govind Prasad *v.* Mustafa Begam. **177 I C. 136=11 R. O. 27=1938 A.W.R. (C.C.) 77=1938 O L R. 382=1938 O.A. 621=1938 O.W.N. 775=A.I.R. 1938 Oudh 217.**

——**Ss. 24 and 115**—*Case transferred under—Revision, if lies.*

Where a case is transferred under S. 24, no revision lies from the order of transfer; but if it is found that the application for transfer is not *bona fide* one, the case can be retransferred. (*Bhide, J.*) Kesho Das *v.* N. C. Goyal & Co. **175 I C. 525=10 R.L. 735=39 P.L.R. 654=A.I. R. 1938 Lah. 95.**

——**S. 24**—*Court of Small Causes—Suit instituted in—Transfer to another Court with pecuniary limits less than value of suit—Jurisdiction of latter Court.*

Where a suit instituted in a Court of Small Causes having pecuniary jurisdiction to try it, is transferred under S. 24, C. P. Code, to another Court with Small Cause Court jurisdiction whose pecuniary limit is less than the value of the suit, the latter Court has jurisdiction to try the suit. (*Edgley, J.*) Barada Kanta *v.* Jitendra Nath. **183 I.C. 264=12 R.C. 152=43 C.W.N. 440=A.I. R. 1939 Cal. 345.**

——**S. 24**—*Discretion under—Three suits tried by same Court and decided by one judgment—Two appeals filed before District Judge and one before High Court—Application to transfer all appeals to High Court—If to be granted.*

Where three suits were heard together by the consent of the parties and only one judgment was delivered, but separate appeals were filed, two before the District Judge and one before the High Court, the High Court refused to transfer the appeals before the District Judge to itself because, although many of the grounds in the appeals were the same, one was raised specifically in the appeal before the District Judge and also because no great hardship was to be caused to the parties by allowing the appeals where they were. (*Varma, J.*) Shiva Prasad Singh *v.* Ramjas Agarwala. **163 I.C. 962= 9 R.P. 73 (1) =A.I.R. 1936 Pat. 345.**

——**S. 24**—*Execution proceeding—Transfer of objection proceedings to another Court without transferring execution proceedings—Legality.*

Obiter:—Where in execution of a decree certain property of the judgment-debtor is attached and a third person files an objection to the attachment on the ground that the property belongs to him, the objection can be decided only by the executing Court and therefore the transfer of the objection proceedings alone to another Court without transferring the execution proceedings to that Court is not in accordance with law. (*Bhide, J.*) Kesho Das *v.* N. C. Goyal & Co. **175 I.C. 525=10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.**

——**S. 24**—*Ground for transfer—Judge deciding particular question of fact or law in previous case.*

The mere fact that the Judge had decided a particular point of law in a previous case is no reason for a transfer in a subsequent case; otherwise a Judge would eventually become unfit to decide most cases. If the question is one partly or wholly of fact, still less does there seem to be any reason for a transfer, because the decision will depend upon the evidence in the particular case. A.I.R. 1930 Lah. 176, Foll. (*Pollock, J.*) NATHABAI *v.* BAIJNATH KUNJILAL. **I L R. (1939) Nag. 631=172 I.C. 910=10 R.N. 260=A.I.R. 1938 Nag. 126.**

——S. 24—If controls S. 23 (5) of Bombay Civil Courts Act. *See* BOMBAY CIVIL COURTS ACT, S. 23 (5). **41 Bom.L.R. 892.**

——S. 24—*Jurisdiction—Two suits in Courts of different jurisdictions—Consolidation and trial in superior Court after transfer—Decree—Appeal by party aggrieved by decree in suit of lower value—Forum.*

Two suits for partition of eight annas and two annas shares in the same property were filed by two persons in the Court of First Class Sub-Judge and Second Class Sub-Judge respectively and the Second Class suit was transferred to the Court of the First Class Sub-Judge who framed separate issues but consolidated the two suits and decided them by one judgment and drew up one decree against which the party to the Second Class suit who was not a party to the First Class suit appealed to the Judicial Commissioner's Court.

Held, that the consolidation of the two suits must be considered as one First Class suit, and that there being one decree which could not be divided, there could not be separate forums for appeals relating to a particular finding given in one judgment and decree, and hence the appeal relating to a finding on an issue in the Second Class suit could not be treated as an appeal from the Second Class Court decree which did not exist, and that the appeal was properly filed in the Judicial Commissioner's Court. (*Davis, J.C. and Weston, J.*) TILLUMAL *v.* MICHUMAL. **I.L.R. (1939) Kar. 563=181 I.C. 982=12 R.S. 16=A.I.R. 1939 Sind 128.**

——S. 24—*Power of Chamber Judge—Transfer of proceeding under S. 317, Succession Act.*

Under S. 24 a Judge in Chambers has got jurisdiction to transfer a proceeding under S. 317, Succession Act, to his own Court at any stage and he can *suo motu* examine the accounts filed under that section so as to pass an order under Cl. (4) of that section. (*Young, C.J. and Blacker, J.*) GULATI *v.* REEVES BROWN. **186 I.C. 39=12 R.L. 337=41 P L.R. 872=A.I.R. 1939 Lah. 463.**

——S. 24—*Powers of transfer—Suit filed in Court lacking pecuniary jurisdiction.*

Under S. 24, C. P. Code, a transfer cannot be made from one Court to another unless the suit has in the first instance been brought in a Court having jurisdiction. There is no reason to make a distinction between lack of inherent jurisdiction and lack of pecuniary or territorial or any other kind of jurisdiction in that Court. (*Thomas, C.J. and Zia-ul-Hasan, J.*) KANHAIYA LAL *v.* HAMIDALI. **12 R.O. 243=185 I.C. 467=1940 O.L.R. 16=1940 O.A. 408=1940 O.W.N. 462=1940 A.W.R. (C.C) 207=A.I.R. 1940 Oudh 164.**

——S. 24—*Refusal to transfer by District Court—Further application to High Court—If lies.*

The High Court is given general powers of superintendence over inferior Courts and it is not natural to suppose that the powers given by S. 24, C. P. Code, are exactly parallel in the case of both the District and High Court. Hence where an application for transfer is rejected by the District Court, the High Court can entertain a further application for transfer. (*Davies*). ALE RASUL ALI KHAN *v.* BAL KISHAN. **1939 A.M.L.J. 114.**

——S. 24—Same judgment governing several suits—Appeals filed in some to High Court and in others in District Court--Application for transfer of all appeals to High Court—Separate application and Vakalatnama for each appeal—If necessary. *See* COURT FEES ACT, SCH. II, ART. 1 (*d*). **43 C.W.N 836.**

——S. 24—*Scope—Suit pending in Madras Court of Small Causes—Application to High Court for transfer to City Civil Court for trial along with suit pending in latter Court—Competency—Madras City Civil Court Act, Ss. 3 and 5.*

There is no ground for holding that an application to the High Court for the transfer of a suit pending in the Madras Small Causes Court to the Court of City Civil Judge to be tried along with a connected suit pending in the latter Court is not maintainable under S. 24, C. P. Code. S. 3 of the Madras City Civil Court Act does not bar such transfer. In view of S. 5 of the City Civil Court Act, the City Civil Judge has jurisdiction to try such a suit which may be transferred to his file. (*Pandrang Row and Abdur Rahman, JJ.*) ABDUL KHADER SAHEB *v.* PACHAIYAPPA CHETTY. **I.L R. (1940) Mad 251=188 I C. 680=50 L.W. 634=1939 M.W.N. 1082=A.I.R. 1940 Mad. 9=(1939) 2 M.L.J. 841.**

——S. 24—*Suit filed in Court of Munsif having jurisdiction—Munsif subsequently succeeded by another having no pecuniary jurisdiction to try suit—Power of District Judge to transfer suit.*

Where a suit valued at Rs. 2,500 was filed in the Court of a Munsif having jurisdiction to try suits up to the valuation of Rs. 5000 and that Munsif was subsequently transferred and was succeeded by a Munsif whose jurisdiction was only up to Rs. 2,000, the District Judge has power to transfer the suit to another Court under S. 24, C.P. Code. All that the section requires is that the suit should be pending in a subordinate Court which had jurisdiction at the time the suit was filed. (*Allsop and Ganga Nath, JJ.*) BECHAN MISIR *v.* MARKANDE MISIR. **162 I.C. 903=8 R.A. 911 (2)=1936 A.W.R. 254=1936 A.L.J. 452=1936 All. L.R. 511=A.I.R. 1936 All. 335.**

——S. 24—*Transfer of case—Application made after Court informs Counsel of order before it is pronounced.*

Where the application for transfer of a case was not a *bona fide* one, having been made after the Court informed the Counsel for a party as to the order it was going to pronounce before it was actually signed and pronounced in open Court to the parties, and the record does not show that the party had any real apprehension that the case would not be decided on merits, an order transferring the case under S. 24, C. P. Code, should not be made. (*Bhide, J.*) KESHO RAM *v.* N. C GOYAL & Co. **175 I.C. 525=10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.**

——S 24—*Transfer of case by District Judge—Revision—Re-transfer—Permissibility.*

No revision is competent from an order of a District Judge transferring a case under S. 24, C.

P. Code, but the case could be re-transferred by the High Court under the same section. (*Bhide, J.*) Kesho Ram *v.* N. C. Goyal & Co. **175 I.C. 525 =10 R.L. 735=39 P.L.R. 654=A.I.R. 1938 Lah. 95.**

——S. 24—*Transfer by High Court of mortgage suit or execution — Transferee Court, if should have territorial jurisdiction.*

It is not necessary that a Court to which a suit is transferred in the proper sense of the word (*i.e.*, transferred by the High Court under S. 24 of the Code), should have concurrent territorial jurisdiction and the High Court may transfer a suit to a Court which has pecuniary jurisdiction though it may not have territorial jurisdiction to try the suit. Hence where mortgage suit or execution proceeding is transferred under S. 24 by the High Court to a Court which has otherwise no territorial jurisdiction, the Court can order sale of the property lying outside its local limits. (*Mya Bu and Mosely, JJ.*) U Maung Maung *v.* U Nyo. **189 I.C. 166=A.I.R. 1940 Rang. 133.**

——**S. 24 and Provincial Small Cause Courts Act, S. 35**—*Transfer to Munsif prior to abolition of Small Cause Court—Decision of Munsif—If appealable.*

Where cases are transferred under S. 24, C. P. Code, prior to the abolition of a Small Cause Court, from that Court to a Munsiff, the latter acts with reference to that suit as a Court of small causes and hence his decision therein is not appealable. (*Allsop, J.*) Anant Prasad Singh *v.* Chunnu Tewari. **183 I.C. 426=12 R.A. 132 =1939 A.L.J. 335=1939 A.W.R. (H.C.) 325= A.I.R. 1939 All. 452.**

——S. 24 (a)—"Competent to try and dispose of such suit"—Meaning of—Suit pending in Court of Small Cause—Transfer to City Civil Court—Power of latter to try. *See* Madras City Civil Court Act, Ss. 3 and 5 (1). **1938 M.W.N. 565.**

——S. 24 (2)—*Applicability to execution proceeding—"Suit".*

The word 'suit' where it occurs for the second time in sub-S. (2), S. 24, must be taken to include a proceeding; otherwise parts of the sub-section would be quite meaningless. Where therefore certain execution proceedings are transferred from one Court to another Court, the Court to which the proceedings are transferred may either re-try it or proceed from the point at which it was transferred and an order of the Court to hear the execution application *de novo* is perfectly correct. (*Almond, J. C.*) Habib Gul *v.* Siri Chand Singh. **161 I.C. 54=8 R. Pesh. 157= A.I.R. 1936 Pesh. 56.**

——S. 24 (4)—Applicability — Suit pending before Munsif with small cause powers—Munsif transferred and succeeded by another Munsif with small cause powers for amount less than claim in suit—Suit tried under orders of District Judge by latter on regular side—Appeal from his decree—If lies. *See* Provincial Small Cause Courts Act, S. 35. **168 I.C. 785=A.I.R. 1937 Oudh 398.**

——S. 24 (4) — *Scope — Transfer of Judge invested with Small Cause Court powers but succeeded by one not vested with such powers—Transfer of case to another not having small cause powers, if gives jurisdiction to try such*

case as small cause case—Order passed on transfer if appealable.

S. 24 (4), C. P. Code pre-supposes a transfer from a Court of Small Causes to another and where a Judge invested with powers of a Small Cause Court and trying the case as one of small cause nature, is transferred and succeeded by another who was not vested with powers of a Court of Small Causes, and he transfers the case to another Court under orders of the District Judge and that Court also is not a Court of Small Causes which though it had jurisdiction to deal with a case under the provisions of S. 35, Provincial Small Cause Courts Act, could do so only on the regular side, such a Court cannot be invested with Small Cause Court powers by the mere transfer of the case to it, and any order passed by such a Court must be regarded as having been passed by it in the exercise of its regular jurisdiction and is appealable as such. A.I.R. 1931 All. 574 (F.B.) Foll. (*Coldstream, J.*) Ram Parkash *v.* Hukam Chand Raj Kumar. **167 I.C. 303=9 R.L. 475=A.I.R. 1936 Lah. 883.**

——S. 34—*Applicability — Mortgage decree— Interest from date fixed for payment to date of realisation--Power of Court to award—O. 34— Effect of.*

S. 34, C. P. Code, applies also to mortgage decrees governed by O. 34, C. P. Code, and authorises the allowance of interest upon the decretal amount from the expiry of the date of grace fixed in the preliminary decree until the date of realisation. O. 44 does not in any away exclude the discretion of Court to allow such interest on the decree. Even in a case to which old R. 4 (1) of O. 34, before its amendment in 1929, applies, the Court has got such power. R. 11 of O. 34 as amended in 1929, which in Cl. (*b*) specifically allows "subsequent interest up to the date of realisation" only gives effect to previous judicial decisions. (*Sir George Lowndes.*) Kusum Kumari *v.* Debi Prosad Dhandhania. **63 I A. 114=15 Pat. 210=38 Bom L.R. 349=1936 O.W.N. 283=1936 A.W.R. 204=160 I.C. 285=43 L.W. 268=8 R.P.C. 146=17 Pat.L.T. 89=1936 A.L.J. 108=1936 M.W.N. 308=63 C.L.J. 154=1936 O.L.R 91=1936 A.L.R. 155=1936 P.W.N. 122 =40 C.W.N. 328=A.I.R. 1936 P.C. 63=70 M.L.J. 355 (P.C.).**

——S. 34—*"Decree for payment of money"— Meaning of—Interest on damages—Award of— Discretion of Court.*

The word "money" in the section should not be understood in the limited sense of an ascertained sum of money. The expression "decree for payment of money" is very general and must be construed as including a claim to unliquidated damages, and cannot be restricted in its operation to a claim to liquidated damages. The section leaves the question of granting or refusing interest on damages to the discretion of the Court. (*Mackin and Wassoodew, JJ.*) Bhagwant Genuji *v.* Gangabisan Ramgopal. **42 Bom. L. R. 750.**

——S. 34—*Discretion of Court to award interest.*

Courts are entitled to give interest in their discretion. This can be given under S. 34, C. P. Code, and also under S. 73, Contract Act. (*Bagley and Mackney, JJ.*) Muthukaruppan Chettyar *v.* Annamalai Chettyar. **162 I.C. 352=8 R.R. 558=A.I.R. 1936 Rang. 141.**

———S. 34—*Interest* pendente lite—*Duty of Court.*

Where a claim is held to be proved, there is no reason for refusing to the plaintiff, interest for the period during which recovery was delayed by defendant contesting the suit. (*Weston.*) Raj Mal *v.* Chhagan Mal. **1938 A.M.L J. 39.**

———S. 34—*Interest* pendente lite—*Power of Court to grant.*

Court can grant interest *pendente lite* at the stipulated rate without the plaintiff's asking for it. (*Mohammad Noor and Varma, JJ.*) Apurba Krishna Mitra *v.* Ram Bahadur. **161 I.C. 862=8 R.P. 489=1936 P.W.N. 155=A.I.R. 1936 Pat. 191.**

———S. 34—*Interest* pendente lite—*Right of plaintiff.*

In money suits, the question of interest for the period subsequent to the institution of the suit passes from the domain of contract into that of judgment and the plaintiff cannot as a matter of right claim interest for the period during which the suit has been pending. There is no hard and fast rule that the interest *pendente lite* must be allowed in every case. Every case has to be decided on its merits. (*Mohammad Noor and Varma, JJ.*) Apurba Krishna Mitra *v.* Ram Bahadur. **161 I.C. 862=8 R.P. 489=1936 P.W.N. 155=A.I.R. 1936 Pat. 191.**

———S. 34 (2) — *Applicability — Maintenance decree creating charge and directing payments in future also—Omission to award interest—Effect —Suit for interest in respect of maintenance accruing due in future—Maintainability.*

A decree granting maintenance at a certain rate per month from the date of plaint and also future maintenance and which gives the plaintiff a charge in respect of maintenance on immovable property is none the less a decree for money within the meaning of S. 34, C. P. Code, the fact that it directs the payment of money in the future as well as money immediately rendered due by the decree and that it creates a charge does not render S. 34 (2) inapplicable to it. Where such a decree does not award interest in respect of future maintenance a suit claiming interest in respect of such maintenance is barred by S. 34 (2). (*Pandrang Row and King, JJ.*) Durga Madhava Deo Garu *v.* Rajendra Deo Garu. **11 R.M. 450=178 I.C. 414=1938 M.W N. 309=47 L.W. 327=A.I.R. 1938 Mad. 522=(1938) 1 M. L.J. 437.**

———Ss. 34 (2) and 152—*Scope and effect of— "Accidental slip or omission"—Decree in accordance with judgment—Omission to award further interest—Amendment—Powers of Court.*

Where a decree is in accordance with the judgment, it cannot be held that there has been an accidental slip or omission which would empower the Court to correct it under S. 152, C.P. Code. If the decree is silent as to the payment of further interest, the Court, uuder S. 34 (2), C. P. Code, must be deemed to have refused the same. The Court cannot rectify it in the face of S. 34 (2) even if the decree-holder ought to have had further interest granted and this was accidentally overlooked. (*Leach, C.J. and Patanjali Sastri, J.*) Thirugnanavalli Ammal *v.* Venugopala Pillai. **186 I.C. 468=12 R.M. 644=1939 M.W. N. 1165=50 L.W. 719=A.I.R. 1940 Mad. 29=(1939) 2 M.L.J. 751.**

———S. 35—Applicability — Mortgage suit—Costs—Rule as to—Order making mortgagee liable for costs—Justification for—Right of appeal. *See* C. P. Code, O. 34, R. 10. **(1939) 1 M.L.J. 687.**

———S. 35—*Award of costs—Discretion of Court —Plaintiff not accepting tender of part payment.*

The question of costs is not affected by the fact that the plaintiff had refused to accept a tender of part payment. A creditor is under no obligation to reduce the costs of proceedings for the benefit of the debtor by accepting a tender of part payment and, thus bringing the amount for which proceedings have to be taken, within the jurisdiction of a less costly tribunal. The fact that the tender was subject to no conditions and it was accompanied by a statement that, if accepted, it would be without prejudice to the creditor's claim to sue for the balance, is immaterial. (*Panckridge, J.*) Ismailbhai Rahim *v.* Adam Osman. **I.L.R. (1938) 2 Cal. 337=181 I.C. 539=11 R.C. 816=42 C.W.N. 1023=A.I.R. 1939 Cal. 131.**

———S. 35—*Award of costs—If includes pleader's fees.*

Pleader's fees are costs of the suit and unless pleader's fees are specifically excluded an award of costs of the suit must be taken to include pleader's fees. There is no distinction between awarding costs of the suit and decreeing a suit with costs. (*Weston*) Bhag Chand *v.* Beni Parshad. **1938 A.M.L.J. 47.**

———S. 35—*Costs—Costs of witnesses summoned but not examined—If can be awarded.*

In awarding costs, the Court should not include the costs of witnesses who were summoned but were not examined in Court. (*Jai Lal, J.*) Kherati Lal *v.* Janki Parshad. **164 I.C. 689 (1)=9 R.L. 52=38 P.L.R. 219=A.I.R. 1936 Lah. 681.**

———S. 35—*Costs—Diet money of witnesses summoned but not examined—If can be awarded.*

Where a party had actually paid diet money to the witnesses on certain occasions when the Court could not examine them, there is no justification for disallowing costs incurred in that manner, especially when the summoning of those witnesses had been necessitated by a false plea raised by the opposite party. (*Din Mahomed, J.*) Puranmal *v.* Parmeshri Das. **42 P.L.R. 263=A.I.R. 1940 Lah. 182.**

———S. 35—*Costs—Discretion—Interference in appeal—Dismissal of suit—Disallowance of costs —Defendant raising same plea in suit as he raised in reply to notice of demand—If to be deprived of costs.*

The Court, although holding that the plaintiff was not entitled to any relief, passed an order disallowing costs to the defendants on the ground that they were not entirely free from blame so far as the institution of the suit was concerned. The Court did not hold that the defendant had conducted the defence in a manner so as to disentitle them to their costs. There was evidence on record that the defendants had raised the very objections which they had raised in their letter to the plaintiff prior to suit.

Held, that the order disallowing costs and the observations in the judgment relating to the defendants were not justified. (*Rupchand Bilaram and Mehta, A.J.Cs*) NARAINDAS & Co *v.* DETARAM 162 **I.C. 837=8 R.S. 174=A.I.R. 1936 Sind 52.**

——S. 35—*Costs—Execution for—Advocate of party entitled to—If can apply personally.*

Parties are the recipients of costs and not their pleaders. The duty of an advocate is to file an execution application on behalf of his client. Though he has to sign it in the course of his duties, it is only on behalf of his client. The execution must be in the name of the person to whom costs have been awarded (*i.e.*) the client. (*Davies.*) CHOUTH MAL BROS. *v.* RAM CHANDRA AIRUN. **1940 A M L.J. 18.**

——S. 35—Costs—Personal liability—Order awarding costs against party and making same a first charge on sale proceeds of specific property —Personal liability—If taken away. *See* DECREE —CONSTRUCTION. **1937 M.W.N. 292.**

——S. 35—*Costs—Separate defendants appearing by separate Counsel—Right to separate sets of costs—Rule as to.*

When two sets of defendants in a suit put forward substantially the same defence, but engage separate Counsel merely because they are not on good terms, they cannot get, in the event of their success, separate sets of costs, because the plaintiff should not be made to suffer for the quarrels of the defendants. The Court in such cases will allow only one pleader's fee. (*Norman, J.*) LAL CHAND *v.* RAM BILAS. **1936 A M.L.J. 63.**

——S. 35—*Discretion of Court—Claim found to be substantially false—Defendant's claim for set-off allowed in full—Award of costs to defendant and refusal to plaintiff—Propriety*

Where in a suit for recovery of a certain amount alleged to be due from an employee dismissed from service, the plaintiff's claim has been found to be substantially false and the defendants claim for set-off on account of arrears of pay is allowed in full, the Court is justified in giving defendant his costs and refusing costs to the plaintiff. (*Nasim Ali and Henderson, JJ.*) JITENDRA NATH ROY *v.* JNANADA KANTA DAS. **167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.**

——S. 35—*Discretion of Court—Interference in appeal.*

It is the duty of the appellate Court to interfere with the trial Court's order about costs, where the discretion exercised by it is based on an erroneous view of the law. (*Nanavutty and Zia-ul-Hasan, JJ.*) MATHURA PRASAD *v.* THE DEPUTY COMMISSIONER OF KHERI. **13 Luck 171 =166 I C 928=9 R.O. 351=1937 O.L.R. 77= 1937 O W N. 165=A.I.R. 1937 Oudh 282.**

——S. 35—*Discretion of Court—"Misconduct" of successful party—Right to costs—Proper rule*

Where the plaintiff comes to enforce a legal right and there has been no misconduct on his part—no omission or neglect which would induce the Court to deprive him of his costs—the Court has no discretion, and cannot take away the plaintiff's right to costs. There may be misconduct of many sorts, for instance, there may be misconduct in commencing the proceedings, or some miscarriage in the procedure, or an oppressive or vexatious mode of conducting the proceedings, or other misconduct which will induce the Court to refuse costs. In a suit on a pronote executed by *R* for the benefit of *T's* estate, the plaintiff was not awarded costs, as he had claimed a personal decree against *R's* family and in the alternative against *R's* property, though he was quite aware of the true character of the pronote. The plaintiff failed to establish the case and the Court asked the parties to bear their own costs. The plaintiff appealed claiming costs.

Held, that the plaintiff was guilty of misconduct and under those circumstances should have been made to pay costs of the issue, which was decided against him. He was entitled only to institution fees. (*Rupchand Bilaram and Haveliwala. A.J.Cs*) KUNDANSINGH *v.* KUSHALDAS. **170 I.C. 9=10 R.S. 56=A.I.R. 1937 Sind 159.**

——S. 35—Discretion—Suit by vendor for specific performance—Dismissal on ground of imperfect title of vendor—Costs—Discretion of Court to refuse. *See* SPECIFIC RELIEF ACT, S. 18 (*d*). **1940 M.W.N. 14.**

——S. 35—*Failure of suit on technical ground raised in appeal—Proper order as to costs.*

Where a suit fails on a technical ground taken for the first time in appeal, which if it had been taken earlier would have avoided the waste of time and money, but the suit would in any event have failed because the plaintiff chose a wrong remedy, the circumstances were held to be such that each party should be ordered to bear its own costs. (*Stone, C.J. and Bose, J.*) BADRIDAS *v.* RAJA PRATAPGIR. **188 I.C. 23=12 R.N. 304= 1939 N.L.J. 525=A.I.R. 1940 Nag. 8.**

——S. 35—*"Incident to all suits"—Meaning of —Costs incurred in application for leave to sue— If awardable as costs of suit—Power of Court.*

S. 35, C. P. Code, does not limit the powers of the Court to award only such amounts as are incurred by a party as costs from the institution of the suit to its termination. The words "*incident to all suits*" are wide enough to cover costs incurred by a party before the institution of the suit, but naturally or intimately connected with the suit. Where a receiver appointed by the Court applies for leave to institute a suit and incurs costs, the Court has power to award such costs as costs of the suit. (*R.C. Mitter, J.*) SERMAL DALMIA *v.* MANINDRA LAL. **40 C.W.N. 762.**

——S. 35—*Mortgage suit—Costs—Liability of purchaser of property subject to mortgage.*

Certain property was purchased subject to a mortgage. Subsequently the mortgagee brought a suit on his mortgage. The purchaser, who was in possession of the property, had tried to put off the mortgagee and thus wanted to make as much money out of the delay as he could.

Held, that the purchaser should bear half the taxed costs of the suit. (*Agha Haidar, J.*) SAMPURAN SINGH *v.* DEVI DAYAL. **167 I.C. 65= 9 R.L. 448=38 P.L.R. 896=A.I.R. 1936 Lah. 705.**

——S. 35—*Mortgage suit—Puisne mortgage contesting claim—Liability for costs—Discretion of Court.*

A mortgagee sued on his mortgage, the mortgagor, impleading therein the puisne mortgagees as defendants. The puisne mortgagees contested the claim of the prior mortgagee. In the decree passed in the above suit costs were allowed against all the defendants. It was contended that as it was a mortgage suit costs could not be saddled on the puisne mortgagees.

Held, that S. 35, C. P. Code, is clear that the Court has discretion in the matter of costs. There is no principle of law which make it wrong or improper for a Court to saddle with costs the real contesting defendants to a suit. The discretion is absolute. In a case where the puisne mortgagees, the real contesting defendants, are made liable for costs together with the other defendants, there is nothing improper in law in such an order. A.I.R. 1933 Rang. 335, Diss. (*Young, C. J. and Monroe, J.*) Sital Das *v.* Punjab Sindh Bank, Ltd., Layallpur. **17 Lah. 520=164 I C. 841=9 R.L. 166=38 P.L.R. 1024 =A.I.R. 1936 Lah. 607.**

——S. 35—*Person whose suit is dismissed successful in appeal—Case remanded for retrial—Costs of appeal—Proper order.*

Where a person whose suit has been dismissed by the trial Court is successful in appeal and the appellate Court remands the case for trial in accordance with law, he is entitled to his costs if he ultimately succeeds in the trial Court, but it is fairer order to direct that the costs of appeal in the appellate Court should abide the final result of the suit. (*Mackney, J.*) Surya Nath Singh *v.* Shio Karan Singh. **164 I.C. 133=9 R R. 59 =A.I.R. 1936 Rang. 316.**

——S. 35—Power of Court—Arbitration proceedings—Award—Absence of provision as to fees of arbitrator—Power of Court to award fees to arbitrator. *See* C. P. Code, Sch. II, Para. 13. **I.L.R. (1940) Kar. 34.**

——S. 35—*Scope—Proceedings in muffasil Courts—Proceedings for compulsory winding up of company—Incidental or interlocutory proceeding in—Costs of—Order as to—Jurisdiction of Court—Nature of—Jurisdiction of Taxing Officer and of Court in appeal from Taxing Officer—Distinction—Bombay High Court Rules (Original Side), R. 767—Duty of parties and advocates.*

A Court in the mufassal, when making an incidental or interlocutory order in a larger proceeding, such as compulsory winding up of a company under the Companies Act, has a twofold jurisdiction as regards costs: (*a*) under S. 35, C. P. Code, the discretion to determine by whom and out of what property and to what exent the costs are to be paid, and to give all necessary directions for the purpose; and (*b*) it has also the jurisdiction under R. 767 of the Bombay High Court (O.S.) Rules to "specially direct" that the practitioner shall be entitled to charge and be allowed the fees on a scale other than that set forth in the second schedule to the Rules. But the Taxing Officer in the muffasal has not this twofold jurisdiction in taxing a bill of costs; nor the Judge sitting in appeal over the Taxing Officer the said twofold jurisdiction at that stage; when he sits in appeal to hear objections from the Taxing Officer, he has merely to determine whether the Taxing Officer has rightly taxed the costs in accordance with the rules and practice and the orders that the Court had already made. This distinction must be clearly borne in mind by the Judge and the Taxing Officer in the muffasil. In proceedings in muffasil Courts, the costs of which have to be taxed in accordance with the original side scale in the High Court, the muffasil Courts should make special orders and give specific directions relating to the costs of each order; and they should exercise the twofold jurisdiction under S. 35, C. P. Code, and under R. 767 of the High Court Rules (O.S.) at the time when the particular order (whether incidental to the proceedings or necessitated by an interlocutory application) is being made. The procedure relating to orders about costs followed on the Original Side of the High Court has to be kept in mind by the advocates as well as the Courts, as the duty lies upon the parties and their advocates to apply for directions and orders as to costs, and to make such applications at the proper time. The practice on the Original Side cannot, however, be applied in the muffasil rigorously. (*Barlee and Tyabji, JJ.*) Chhotalal *v.* Someshwar. **173 I C. 489=10 R. B. 337=39 Bom.L.R. 820=A.I.R. 1938 Bom. 10.**

——S. 35—*Several plaintiffs—Separate costs—If can be awarded.*

It is not in any circumstances possible, in a case where there is more than one plaintiff, for such plaintiffs to appear and act separately If any of them is not disposed to act with, and to appear by the same advocate as, the others then the only proper course open is to apply to strike him out as a plaintiff and to add him as a defendant. The plaintiffs are entitled to one set of costs only between them, and one plaintiff cannot ask for his costs to the exclusion of the others or other. "One set" means the amount of the costs which would have been incurred if the parties separately represented had appeared by the same solicitor. (*Braund, J.*) Seedat *v.* Mariam Bibi. **1938 Rang L.R. 252=180 I.C. 841=11 R.R. 437 =A.I.R. 1939 Rang. 108.**

——S. 35—*Suit by executors on legal advice—Absence of malice—Executors, if can be asked to pay costs personally.*

It is not usual to impose the burden of costs on executors or trustees personally, where the litigation is undertaken not maliciously or with the sole desire to annoy the defendant but was considered on legal advice necessary in the interests of the testator's estate and charities. (*Stone, C.J. and Bose, J.*) Jagannath Prasad *v.* B. K. Rai. **1939 N L.J. 421=185 I.C. 210=12 R.N. 141=A.I.R. 1939 Nag. 274.**

——S. 35 (2)—*Disallowance of costs to successful party—Duty to record reasons—Omission to state reason—Effect.*

If a Judge decides that costs shall not follow the event, he is bound under S. 35 (2), C. P. Code, to give his reasons. An order disallowing costs to a successful party for no valid reason cannot be upheld. (*Norman, J.*) Lal Chand *v.* Ram Bilas. **1936 A.M.L.J. 63.**

——S. 35-A—*Applicability—Revision.*

S. 35-A, C. P. Code, does not apply to "Revision". It looks as if the power conferred by that section is intended to be confined to the original hearing of suits and proceedings. Consequently the High Court as a Court of revision has no power to award compensation in respect of the proceedings before it. (*Ameer Ali, J.*) M. S. Cohen *v.* Sirdar Saheb Iqbal Singh. **42 C.W. N. 658.**

——S. 35-A—*Special compensatory costs—If can be awarded in addition to heavy counsel's fee.*

Where such a large sum as Rs. 2,275 have been awarded to the plaintiffs for counsel's fee, it is not proper to award special costs under S. 35-A of the C. P. Code. (*Bennet and Ganga Nath, JJ.*) Gopal Das *v.* Jagannath Prasad. **I.L.R. (1938) All. 370=176 I.C. 118=11 R.A. 53=1938 A.L. R. 552=1938 A.L.J. 390=1938 A.W.R. (H.C.) 209=A.I.R. 1938 All. 266.**

——S. 37—*Applicability—Transferee Court.*

S. 37 has no reference to a Court to which a decree has been transferred for execution. (*Mackney, J.*) M. P. L. Chettyar Firm *v.* S. A. L. L. A. Vanappa Chettyar. **162 I.C. 865=8 R. R. 596=A.I.R. 1936 Rang. 184.**

——S. 37—*Scope—Decree passed by sub-Court of Berhampore and confirmed by Madras High Court prior to constitution of Orissa Province—Execution application after that date—Jurisdiction of Court which passed decree—Order in Council, S. 20—Notification under—Effect of.*

On 1—4—1936, the Province of Orissa was constituted and the Court of the Subordinate Judge of Berhampore became thenceforward a Court within the jurisdiction of that province. The respondent who had obtained a decree against the predecessor-in-title of the appellants in that Court before 1—4—1936, and whose decree had been confirmed by the High Court, Madras, which was the appellate Court then, filed an application after 1—4—1936, in the Court of the Berhampore Subordinate Judge to execute the decree. There was a notification by the Governor-General in Council in exercise of the powers under S. 20 of the Order in Council constituting the Province of Orissa, to the effect that every proceeding pending in a Court other than the High Court in any area transferred to Orissa should be continued as if the said order had not been made.

Held, that as the execution petition was not a pending proceeding, the Berhampore Court ceased to have jurisdiction to entertain it, and that it should therefore be presented to the Court at Chicacole within the Province of Orissa. (*King and Stodart, JJ.*) Beharani *v.* Raghu Behara. **184 I.C. 86=12 R.M. 404=49 L.W. 338=1939 M.W.N. 268=A.I.R. 1939 Mad. 463 =(1939) 1 M.L.J. 340.**

——S. 38—*Court of Deputy Commissioner of Garo Hills—If a 'Court.'*

The Court of the Deputy Commissioner of the Garo Hills is a Court within the meaning of S. 38, C. P. Code. (*Costello, Ag.C.J. and Edgley, J.*) Krishna Prosanna Lahiri *v.* Sarojini Debi. **I. L.R. (1937) 2 Cal. 734=174 I.C. 12=10 R.C. 633 =66 C.L.J. 216=41 C.W.N. 1243=A.I.R. 1937 Cal. 557.**

——S. 38 and O. 21, R. 10—*Court which passed decree—Right to execute decree after transfer.*

There is nothing in S. 38 and O. 21, R. 10 to prevent the Court, which passed the decree, executing the decree, though it has transferred it to another Court for execution and the copy of the decree with a certificate of satisfaction has not been returned to it. (*Davis, J.C. and Weston, J.*) Sunderdas *v.* Kaliandas. **I.L.R. (1940) Kar. 46=186 I.C. 365=12 R.S. 194=A.I.R. 1940 Sind 11.**

——S. 38—*Jurisdiction to execute—Decree by Revenue Court under Chota Nagpur Tenancy Act —Application for transmission to Civil Court—*

Rejection—Subsequent application for execution in Civil Court—Competency.

Appellant obtained a decree for rent under the Chota Nagpur Tenancy Act, but his application for execution was dismissed on the ground that all persons interested in the tenure had not been made parties to the suit. He then applied for a transfer of the decree for execution to the Court of a Munsif, which again was rejected by the Deputy Commissioner. He then applied direct to the Munsif for execution of the decree.

Held, that the Munsif had no jurisdiction under S. 38 to execute the decree, as it had neither been passed by him nor had been transferred to him for execution. (*Macpherson and Fazl Ali, JJ.*) Maharaja Pratap Udainath Sahi Deo *v.* Baraik Lal Sahi. **15 Pat. 439= 165 I.C. 959=9 R.P. 241=18 Pat.L.T. 36=3 B. R. 112=1936 P.W.N. 669=A.I.R. 1936 Pat. 615.**

——S. 38—*Order transferring decree for execution to Deputy Commissioner of Scheduled District—Legality—Certain sections of Civil Procedure Code alone in operation in that District.*

A decree was transferred for execution to the Deputy Commissioner of Garo Hills which was a Scheduled District. Some of the sections and provisions of the C. P. Code relating to execution were in operation in that district and the Deputy Commissioner was the principal Court of Civil jurisdiction. The question having arisen whether the transferring Court had jurisdiction to transfer the decree to such Court.

Held, that the transferring Court had jurisdiction to transfer the decree for execution to the Deputy Commissioner, Garo Hills, and it was not necessary that the whole of the Civil Procedure Code should be in operation there. (*Costello, Ag.C.J. and Edgley, J.*) Krishna Prosanna Lahiri *v.* Sarojini Debi. **I.L.R. (1937) 2 Cal. 734=174 I.C. 12=10 R.C. 633=66 C.L.J. 216= 41 C.W.N. 1243=A.I.R. 1937 Cal. 557.**

——Ss. 38 and 63—*Relative scope—S. 63, if controlled by S. 38—Property attached by different Courts—Superior Court calling up proceedings from inferior Court—Power of superior Court to sell property attached by inferior Court—"Realize such property."*

There is no warrant for holding that S. 63, C. P. Code, does not give jurisdiction to a Court to sell attached property except in execution of its own decree. The jurisdiction of the Court of the highest grade to sell property attached by an inferior Court in execution of a decree, proceedings in which have been called up to the superior Court under S. 63, is necessarily included in the use of the word "realize". "Realize such property" in S. 63 must obviously refer to bringing such property to sale. Nowhere in S. 63 is there any restriction as to how and in what manner and in what petition the Court of highest grade should realize the property; in this respect as in respect of claim petitions S. 68 must be held to override S. 38. S. 38 is after all a general section dealing with execution. It contemplates only one decree-holder and one decree. S. 63 deals with more decree-holders than one and the same property being attached by more Courts than one. Where the facts come within the definition of the situation as given by S. 63, it is obviously S. 63 which must be applied, and S. 63, cannot be controlled or governed by S. 38. (*King and Krishnaswami Ayyangar, JJ.*) VENKATA REDDI *v.* VENKATARATNAM. **I.L.R (1939) Mad. 248=180 I.C. 44=11 R.M. 652=1938 M.W.N. 1098=48 L.W. 664=A.I.R. 1939 Mad. 169=(1939) 1 M. L.J. 112.**

———Ss. 38 and 39—*Sale of property situated outside territorial jurisdiction—Validity—No objection raised by judgment-debtor—Effect—Right of another execution-creditor to execute decree against property sold.*

An executing Court has no jurisdiction to sell property situate outside the local limits of its jurisdiction, and if it so sells, the purchaser acquires no title to it. Although the judgment-debtor, who does not object to the jurisdiction of the Court to sell the property before the sale is confirmed, may be estopped from raising the question that the sale was a nullity, such estoppel does not operate to prevent another execution creditor of the same judgment-debtor from proceeding against that property in execution of his decree. (*Fazl Ali and Manohar Lall, JJ.*) KHIROD CHANDRA GHOSH *v.* PANCHU GOPAL. **18 Pat 670=20 Pat.L.T. 585=5 B.R. 783=182 I.C. 610=12 R.P. 23=1939 P.W.N. 850=A.I.R. 1939 Pat. 532.**

———Ss. 38 and 39—*Transfer of decree—Concurrent execution in two Courts—Permissibility.*

Where a decree is passed by one Court and is transferred to another for execution against the property of judgment-debtor, the decree-holder is entitled to make an application to the former Court for execution by arrest of the judgment-debtor. (*Harries and Ganga Nath, JJ.*) MAKHAN LAL *v.* MST. BHAGWANA KUER. **162 I.C 51=8 R. A 818=1936 A.W.R. 342=1936 All.L.R. 362=1936 A.L.J. 277=A.I.R. 1936 All. 655.**

———S. 39—*Application for transfer of decree for execution—Form of—Application framed as one under O. 21, R. 11 with all requisite particulars—Clerical error in name of judgment-debtor—Effect—Court feeling no difficulty in tracing decree and granting certificate—If one "in accordance with law"—Limitation Act, Art.* 182 (5).

An application for transmission of a decree for execution to another Court under S. 39, C. P. Code, is not required to be in any particular form, unlike in the case of a regular execution application under O. 21, R. 11, C. P. Code. S. 39 only requires that an application should be made to the Court passing the decree to transfer it for execution. If the application gives sufficient particulars of the decree to be transferred so as to indicate precisely the decree which the Court is to transfer, that is sufficient to make the application one in accordance with law within the meaning of Art. 182 (5) of the Limitation Act. Where the application for transfer of the decree is drawn up in the form of an application under O. 21, R. 11, giving all the particulars required by that rule but there is a clerical error in the description of the name of the defendant, *e.g.*, the defendant being described as "Firm Atma Ram" instead of as it should be "Ramchand Atma Ram", such a clerical error will not make the application otherwise than one "in accordance with law", especially when the Court has no difficulty in tracing the decree to be transferred and granting the certificate under S. 39. (*Niamatullah J.*) HAFEEZ UDDIN *v.* RAM CHANDER DAS. **169 I.C. 225=10 R A. 2=1937 A.W.R. 239=1937 A.L J. 278=1937 All. L.R. 493=A.I. R. 1937 All. 397.**

———S. 39—*Application under—Form—Notice to judgment-debtor — Necessity—Requirements of O. 21, R. 11—Compliance with—Necessity.*

S. 39 of the C. P. Code does neither provide that notice to judgment-debtor is necessary, nor prescribe a particular form for an application under that section. Though it is an application in execution proceedings, it is not an application for execution and hence the formalities laid down by O. 21, R. 11 are not necessary for such an application. (*Weston.*) JASRAJ RIKHRAJ *v.* GHISOO LAL **1937 A M.L.J. 113.**

———S. 39—*Copy of decree sent to another Court for execution—Right of decretal Court to proceed with execution.*

The Court that passed a decree can itself proceed with its execution although a copy of the decree has been sent to another Court for execution. (*Baguley, J.*) U MAUNG MAUNG *v.* SHAHUL HAMID. **1939 Rang L.R. 587=186 I.C. 42=12 R.R. 243=A I R. 1939 Rang. 433.**

——— Ss. 39 and 42—*Decree passed in suit excepted from cognisance of Small Cause Court—Transfer to Small Cause Court—Jurisdiction of latter Court to execute—Provincial Small Cause Courts Act, Sch. II, Art. 8.*

A decree made in a suit which is excepted from the cognisance of a Court of Small Causes under Cl. (8) of Sch. II of the Provincial Small Cause Courts Act may be transferred to a Court of Small Causes for execution under S. 39, C. P. Code. Once such a decree is so transferred by a Court of competent civil jurisdiction, the Small Cause Court would, under S. 42, C. P. Code, be entitled to execute it. (*Ghose and Lodge, JJ.*) NANI GOPAL MUKERJI *v.* SRISH CHANDRA NANDI. **I.L.R. (1939) 1 Cal. 233=185 I.C. 300=12 R.C. 353=A.I.R. 1939 Cal. 600.**

———S. 39—*Discretion of Court—Exercise of.*

Section 39 indicates that the Court which passed the decree must apply its mind to the matter when an application has been made by the decree-holder for transfer of the decree to another jurisdiction for execution, and exercise its discretion vested in it by that section in a judicial manner. (*Mitter and Mohamad Akram, JJ.*) MANMATHA PAL *v.* SARADA PROSAD. **187 I.C. 67=12 R.C. 539=A.I.R. 1939 Cal. 651.**

———S. 39—*Execution—Courts to which decree may be transferred for.*

The Court executing the decree must be of a grade competent to entertain the suit itself. The words 'of competent jurisdiction' in S. 39, C. P. Code, mean, of jurisdiction pecuniarily competent to try the suit in accordance with the provisions relating to the pecuniary jurisdiction of Courts and territorially competent to deal with the execution application in accordance with the rules relating to the execution of the decree. (*Stone, C.J. and Bose, J.*) NILKANTHRAO *v.* KRISHNARAO. **1940 N.L.J. 244.**

———S. 39—Order under—Simultaneous execution in two Courts—Order allowing—Notice to judgment-debtor—Necessity—O. 21, R. 6. *See* C. P. CODE, S. 47. **41 Bom.L.R. 481.**

———S. 39—*Scope.*

The provisions of S. 39, C. P. Code, are permissive and not mandatory. (*Costello, Ag.C.J* *and Edgley, J.)* H N. Dutta & Co. *v.* Tarubala Dassi. **174 I.C. 936=10 R.C. 735=A.I.R. 1937 Cal. 570.**

——**S. 39**—Scope—Transfer of decree—Power of transferring Court to execute or to make fresh transfer—If exhausted. *See* Limitation Act, Art. 182 (5). **A.I.R. 1937 Nag. 305.**

——**S. 39**—*Scope—Transfer of execution from one Subordinate Court to another—Procedure.*

Under S. 39, C. P. Code, it is the decree itself which can be transferred for execution. But a Subordinate Court dealing with an execution cannot either of its own motion or at the bidding of another Court, transfer the darkhast or a suit pending before it, unless an order for transfer is duly passed either by the District Court or by the High Court. *(Lakur, J.)* Ningappa *v.* Adiveppa. **186 I.C 372=12 R.B. 324=41 Bom.L.R. 997=A.I R. 1939 Bom. 468.**

——**S. 39**—*Transfer of decree—Certificate, if must be signed by Judge.*

A certificate of transfer of a decree need not be signed by the Judge who passed it. *(Jai Lal, J.)* Shiv Dial Bakhtawar Lal *v.* Kanga & Co. **162 I.C. 489=8 R.L. 908=38 P.L.R. 1101=A.I.R. 1936 Lah. 369.**

——**S. 39**—*Transfer of decree for execution—Transferring Court—If retains jurisdiction.*

Even after the transfer of a decree for execution to another Court, the transferring Court retains jurisdiction over the execution, though for certain specific purposes only. *(S.K. Ghose and Edgley, JJ.)* Amerendra Nath Mullick *v.* Balai Chand Ghatak. **162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.**

——**S. 39**—*Transfer of decree to another Court—When proper.*

Under S. 39, C. P. Code, an order transferring a decree to another Court is not proper when no allegation is made by the decree-holder that the judgment-debtor has property within the jurisdiction of that Court or is residing there, and the Court does not record any other reasons for transferring the decree to that Court. *(Jai Lal, J.)* Chaman Lal *v.* Ram Kanwar Ganesh Das. **41 P.L.R. 186.**

——**Ss. 39 and 42**—*Transfer for execution—Executing Court—Powers—Relief in excess of sum in certificate—Competency to give.*

A Court executing a decree sent to it, has the same powers in executing it, as if it had been passed by itself. It only executes the decree and not the certificate sent by the Court passing the decree. As such it is not bound by any amount mentioned in it. It is the decree itself which is to be the guide in these matters for the executing Court. It is competent to execute it for the amount due though it may be in excess of that mentioned in the certificate. *(Misra, J.)* Mangal Chand *v.* Mt. Dulari Bibi. **178 I C. 740=11 R. A. 333=1938 All.L R 899=1938 A.W.R (H.C.) 667=1938 A.L J. 980=A.I.R. 1938 All. 654.**

——**S. 39**—*Transferee Court—Pecuniary jurisdiction—If must be same as transferor Court.*

The transferee Court contemplated by S. 39, C. P. Code, must be a Court of competent jurisdiction, that is a Court which has the same pecuniary jurisdiction as the transferor Court. *(Nasim Ali and Rau, JJ.)* Ganeshdas Badrinarain *v.* Amuluk Chand Oswal. **187 I.C. 895 =12 R.C. 628=70 C.L.J. 438=A.I.R. 1940 Cal. 161.**

——**Ss. 39 and 49**—*Transferee of decree applying for transfer of decree to another Court for execution—Court, if can go into question of equities under S. 49.*

Where a transferee of a decree applies for the transfer of a decree from one Court to another for execution, the question whether a set-off can be taken into consideration or not, can only arise at the time when a decree is actually being put to execution. The Court to which the application for transfer is made cannot therefore go into the question of equities under S. 49, C. P. Code, and dismiss the application on such ground because the decree will be actually put into execution in the transferee Court if at all the decree is transferred. *(Costello, Ag.C.J. and Edgley, J.)* H.N. Dutta & Co. *v.* Tarubala Dassi. **174 I C. 936 =10 R.C. 735=A.I.R. 1937 Cal. 570.**

——**S. 39 (1)**—*Transfer of decree—Competency of transferee Court—Test—Amount of the decree or original value of the suit.*

There is nothing in the C. P. Code which makes it necessary that the Court to which the decree is transferred for execution should be a Court having a limit of pecuniary jurisdiction which would include the original valuation of the suit. When once a decree has been passed the question of execution of one decree is the same as the execution of another of the same amount and no question of the original valuation of the suit has any real bearing on the question of execution of a decree. It is the value of the decretal amount which determines the importance of the case for the limits of pecuniary jurisdiction. *(Bennet and Varma, JJ.)* Shanti Lal *v.* Jaimini Kuer. **I.L.R. (1940) All. 318=1940 A.W.R (H.C.) 292=189 I.C. 376=1940 A.L.J. 381=A.I.R. 1940 All. 331.**

——**Ss. 39 (1) (a) (b) and (c) and 42**—*Executing Court, powers of—Decree transferred for execution—Immovable properties of defendant lying within transferee Court—Property sold but no report sent under S. 41—Application to transferee Court for arrest of defendant—If made to "proper Court"—Jurisdiction of transferee Court to entertain.*

S. 42, C. P. Code, confers on a Court executing a decree all the powers which the Court which passed the decree has in respect of the decree under execution. Those powers are not in any way limited or restricted by anything contained in S. 39, Cls. (*a*), (*b*) and (*c*) of S. 39 (1) only deal with the circumstances justifying a transfer of the decree and do not necessarily define the powers of the transferee Court. Unless there is, in the order of transfer, any express limitation of the purpose for which the transfer is made, there is no reason to limit the powers of the Court to which the decree is transferred for execution. The mere fact that a decree is transferred to another Court for execution on the ground that the judgment-debtor has immovable property within the jurisdiction of the transferee Court is no ground for holding that that Court, after the sale of those properties has no jurisdiction to entertain an application to execute the decree by arrest of the judgment-debtor, at any rate, when that Court has not sent any report of execution under S. 41, C. P. Code. An application made to the transferee Court for arrest under such circumstances is one made to a "proper Court" within the meaning of Art. 182 (5) of the Limitation Act, so as to be a step-in-aid. (*Varadachariar, J.*) Abdul Hafiz Saheb *v.* Abdul Sukkur Saheb. **176 I.C. 327=11 R.M. 61=46 L.W. 565=1937 M.W.N. 1086=A.I.R. 1938 Mad. 27=(1937) 2 M.L.J. 602.**

——S. 39 (i) (b)—*Transfer of decree for execution—Fresh application to transferee Court—Necessity.*

Where an application for execution is made to the Court which passed the decree, that Court will transmit the same to the Court where the immovable property sought to be sold is situate along with the other papers required by O. 21, R. 5 or R. 6, Civil Procedure Code, and then the latter Court will make an order for sale. It is not necessary in such a case to have a fresh application for execution before the Court where immovable property sought to be sold in execution is situate. (*S. K. Ghose and Edgley, JJ.*) Amarendra Nath Mullick *v.* Balai Chand Ghatak. **162 I.C. 777=8 R.C. 652=A.I.R. 1936 Cal. 267.**

——S. 39 (1) (b)—*Transfer under—Execution in transferee Court—If limited to execution against judgment-debtor who satisfies that condition.*

Where the condition justifying transfer is that set out in S. 39, sub-S. (1) (*b*), the intention of S. 39 is that execution should be limited to execution against the judgment-debtor who satisfies that condition. To hold that a judgment-creditor may obtain an order for transfer on the ground that one judgment-debtor has no property within the local limits of the Court which passed the decree, and has property within the local jurisdiction of another Court, and may then execute the decree through such other Court not against that judgment-debtor but against another judgment-debtor who does not fulfil that condition, is absurd. (*Panckridge, J.*) Chhatrapat Singh *v.* Kharaj Singh. **63 Cal. 1210=168 I.C. 391=9 R.C. 817=A.I.R. 1936 Cal. 521.**

——S. 39 (1) (c)—*Court passing mortgage decree for sale—Power to sell property outside territorial jurisdiction.*

The word 'may' in S. 39, C. P. Code, does not mean 'must', but implies a discretion in the Court. Sub-S. (1) (*c*) of that section does not, therefore, oust the jurisdiction of the Court which had passed a decree for sale in a mortgage suit to sell any portion of the mortgaged property or any independent item situated outside its territorial jurisdiction, it having had jurisdiction to entertain the suit and to pass the decree by reason of part of the mortgaged property or some other items of mortgaged property being within its territorial limits. (*Mitter and Khundkar, JJ.*) Sakti Nath Roy Choudhury *v.* Registered Jessore United Bank. Ltd. **I.L.R. (1939) 1 Cal. 493=70 C.L.J. 47=184 I.C. 786=43 C.W.N. 453=A.I.R. 1939 Cal. 403.**

——S. 39 (2)—*"Competent jurisdiction"—Meaning of.*

The words "competent jurisdiction" in S. 39 (2) refer to territorial and pecuniary jurisdiction to deal with the decree and do not mean competency to try the original suit; otherwise it would follow that where an award had been filed under the Arbitration Act and was sent to a place to which the Arbitration Act did not apply, there would be no Court competent to try the original suit and therefore no Court competent to execute the decree. This could hardly be the meaning or intention of the Legislature. (*Dalip Singh, J.*) Radha Kishan Rup Lal *v.* Bombay Co., Ltd., Amritsar. **I.L.R. (1939) Lah. 551=183 I.C. 241=12 R.L. 105 (1)=41 P.L.R. 774=A.I.R. 1939 Lah. 258.**

——S. 39 (2)—*Transferee Court—Competency to execute—Test.*

The words 'of competent jurisdiction' clearly indicate, that the competence of a Court to execute a particular decree, must be determined by a reference to its competence to try a suit of similar valuation in which the decree sought to be transferred was passed. (*Iqbal Ahmad, J.*) Sita Ram Rai *v.* Madho Prasad. **I.L.R. (1939) All. 97=180 I.C. 403=11 R.A. 459=1938 A.W.R. (H.C.) 763=1938 A.L.J. 1128=A.I.R. 1939 All. 57.**

——S. 39 (d)—*Decree directing sale—Execution by removal of obstruction.*

Provisions of Cl. (*d*), S. 39, have not to be considered at all where the decree directing sale is to be executed not only by sale of property but by removal of obstruction. (*Davis, J.C. and Mehta, A.J.C.*) British India Steam Navigation Co., Ltd., *v.* A.M. Jiwanjee & Co. **30 S.L.R. 290=161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.**

——S. 39 (2) (d)—*Small Cause Court transferring execution application to its regular side—Jurisdiction to proceed against immovable property.*

It is a principle of the interpretation of statutes that where a list of certain circumstances in which a particular act can be done is followed by a general clause, that clause must be interpreted as referring to circumstances *ejusdem generis* as those which have been recited in the foregoing clauses. Sub-cl. (*d*) of S. 39 must be interpreted on these principles and it was not intended by the Legislature that this sub-clause should be utilized in order that a Court should proceed in execution in a matter which was not otherwise permitted by law. The Legislature has provided in various ways that a Small Cause Court shall have no jurisdiction over immovable property. Hence a Small Cause Court cannot by transferring execution application to its regular side under S. 39 confer upon itself jurisdiction to proceed against the immovable property. (*Almond, J.C. and Mir Ahmad, J.*) Sital Ram *v.* Thakur Das. **178 I.C. 127=11 R. Pesh. 47=A.I.R. 1938 Pesh. 70.**

——S. 40—*Decree sent for execution to Court of another province—Law governing such executions.*

Where a decree of a Court of one province is transferred to a Court in another province, for purposes of execution, according to S. 40, C. P. Code, the rules governing executions in the latter province are the rules which would apply to executions of decrees sent from anywhere outside that province. (*Addison and Din Mahomed, JJ.*) Murli Dhar *v.* Basheshar Lal Moti Lal. **I.L.R. (1938) Lah. 264=177 I.C. 487=11 R.L. 330 (2)=40 P.L.R. 14=A.I.R. 1938 Lah. 126.**

——**S. 41**—*Certificate under—Effect of—Certificate sent erroneously and prematurely to Court which passed decree—Transferee Court retaining copy of decree and intending to take further proceedings in execution—Jurisdiction to further execute decree—If ousted.*

The mere sending of a certificate by the transferee Court to the Court which passed the decree, under S. 41, C. P. Code, does not oust the jurisdiction of the transferee Court to further execute the decree. Where the transferee Court retains the copy of the decree and intends to take further proceedings in execution, but prematurely and erroneously sends a certificate under S. 41 to the Court which passed the decree, it cannot be said that it ceases to have any jurisdiction to execute the decree. (*Bennet, J.*) JWALA PRASAD *v.* SRI THAKUR DWARKA DHISHJI. **170 I.C. 28=1937 A.L.R. 641=10 R.A. 102=1937 A.L.J. 393=1937 A.W.R. 385=A.I.R. 1937 All. 474.**

——**S. 41**—*Jurisdiction of the transferee Court—When terminates—Striking off of execution application—Effect.*

S. 41 of the C. P. Code states that the Court to which a decree, is sent for execution *shall certify* to the Court which passed it, not merely that it shall make an order that such a certificate shall be prepared. Where a transferee Court on the application of the decree-holder to strike off the execution in part satisfaction, did order it to be struck off and directed that the result be communicated to the Court which sent the decree, does not thereby put an end to its jurisdiction, for the order does not amount to a certificate as contemplated by S. 41, C. P. Code. (*Bennet and Verma, JJ.*) RAM BABU *v.* SANWAL DAS. **176 I.C. 412=11 R.A. 105=1938 A.L.R. 617=1938 A.L.J. 553=1938 A.W.R. (H.C.) 371=A.I.R. 1938 All 412.**

——**S. 41**—*Requirements — Compliance with—Sufficiency.*

Where a transferee Court dismissed the execution case pending before it and directed that the Court passing the decree should be informed and a certified copy of this order was actually filed in the latter Court together with the decree-holder's petition in which he asked that his decree should be transferred to another Court for execution.

Held, that this was sufficient compliance with the requirements of S. 41, C.P. Code. (*Costello, Ag. C.J. and Edgley, J.*) KRISHNA PROSANNA LAHIRI *v.* SAROJINI DEBI. **I.L.R. (1937) 2 Cal. 734=174 I.C. 12=10 R.C. 633=41 C.W.N. 1243=66 C.L.J. 216=A.I.R. 1937 Cal. 557.**

——**S. 41**—*Scope—Certificate under—What amounts to—Arrangement in transferee Court between decree-holder and judgment-debtor—Time given to latter to pay up certain amount in full satisfaction—Attachment kept alive and decree-holder having liberty to proceed to execute for whole amount on default—Report sent by Court to transferor Court relating true facts—Jurisdiction of transferee Court to execute—If terminates.*

Where the Court to which a decree has been transferred for execution has neither executed the decree nor finally failed to execute the decree, it does not cease to have jurisdiction to execute the decree merely because it sends a report, to the transferring Court of the true facts about an arrangement between the parties under which the

judgment-debtor is given time to pay up an amount to the decree-holder in full satisfaction, the attachment being at the same time being kept alive and the decree-holder being at liberty to recover the full amount by execution on default of such payment. Such a report is not properly a certificate under S. 41, C. P. Code, which would operate to re-transfer the jurisdiction for execution of the decree from the transferee Court to the transferor Court. There is no necessity for a report of this kind at all; it is only if such circumstances as are referred to in S. 41, C. P. Code, exist and a certificate is sent relating those circumstances that the transferee Court does cease to have jurisdiction. (*Niamatullah and Allsop, JJ.*) SHIVA DAYAL MAL *v.* RAJESHWAR PRASAD. **172 I.C. 753=10 R.A. 424=1938 A.L.R. 424=1937 A.W.R. 910=1937 A.L.J. 1168=A.I.R. 1937 All. 766.**

——**S. 41**—*Transferee Court sending certificate of non-satisfaction to central Court—Latter not transmitting it to decretal Court—Application for execution in decretal Court—Maintainability.*

The transferee Court sent a certificate of non-satisfaction to the central Court for communication to the decretal Court. But the central Court did not transmit it to the decretal Court, which it was required to do. An application for execution presented to the transferee Court was returned on the ground that the proper Court to entertain it was the decretal Court, and the application was then presented to the decretal Court.

Held, that the transferee Court had no seisin of the case and the application was maintainable in the decretal Court. (*Mitter and Khundkar, JJ.*) JATINDRA KUMAR *v.* RAMESH CHANDRA. **43 C.W.N. 412.**

——**S. 42**—Executing Court—Powers of—If limited or controlled by S. 39 (1) (*a*), (*b*) and (*c*)—Purpose of transfer—If limits powers of transferee Court. *See* C. P. CODE, SS. 39 (1) (*a*), (*b*) AND (*c*) AND 42, **(1937) 2 M.L.J. 602.**

——**Ss. 42 and 145**—*Execution of decrees against surety—Jurisdiction of transferee Court.*

The transferee Court has jurisdiction to execute the decree against the surety but it should in the first instance issue notice to him to show cause why this should not be done. (*Addison, J.*) RAHIM-UD-DIN *v.* MURLI DHAR. **I.L.R. (1938) Lah. 624=177 I.C. 879=11 R.L. 372=40 P.L.R. 530=A.I R. 1938 Lah. 593.**

——**S. 42**—*Powers of transferee Court—Question of liability under O. 21, R. 50 (2)—Jurisdiction to decide.*

A decree against a firm was transferred for execution to another Court. Decree-holder, wanting to execute the decree against third persons alleged to be liable under the decree, presented a petition to the executing Court under O. 21, R. 50 (2), C. P. Code, for leave to proceed against such other persons.

Held, that S. 42 which conferred powers on Court executing a decree did not confer on the executing Court power to decide questions under R. 50 of O. 21, because R. 50 dealt with determination of the liability of a person before proceedings in execution were commenced. Hence only the Court which passed the decree could decide the question under O. 21, R. 50 (2), and petitions should be presented to that Court and not to the executing Court. (*Almond, J.C.*) MOHAN LAL *v.* Rajput Hosiery Works, Sialkot. **171 I.C. 779=10 R.Pesh. 34=A.I.R. 1937 Pesh. 96.**

——**S. 42 and O. 21, Rr. 95 and 97**—*Property in Karachi Court's jurisdiction sold in execution by Bombay High Court—Decree-holder auction-purchaser obstructed in possession—Decree sent for execution to Karachi Court—Power of Karachi Court to remove obstruction.*

In execution of a decree of the Bombay High Court against a firm certain properties within jurisdiction of the Karachi Court were sold and purchased by the decree-holder. The auction-purchaser was however resisted in possession thereof. The decree was then sent for execution to the Karachi Court.

Held, that once it was proved that removal of obstruction was part of the execution of the decree, the High Court was not debarred from removing it merely because it did not pass the decree or sell the property. (*Davis, J.C. and Mehta, A.J C.*) British India Steam Navigation Co., Ltd. *v.* A. M. Jiwanjee & Co. **30 S.L.R. 290 =161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.**

——**S. 42**—*Small cause decree transferred to Sub-Judge with small cause powers—Application filed for execution against immovable property—Sub-Judge, if exercises small cause or original jurisdiction.*

Where a Small Cause Court decree is transferred for execution to a Subordinate Judge having small cause powers, and the application for execution is primarily an application to execute the decree against the immovable property of the judgment-debtor, the Subordinate Judge in dealing with it acts in the exercise of ordinary jurisdiction and not in the exercise of his small cause jurisdiction, and his order is, therefore, subject to the ordinary rules in respect of appeals as provided by S. 42, C. P. Code. (*Edgley, J.*) Abinash Chandra *v.* Bibhuti Bhusan. **44 C.W.N. 587.**

——**S. 42**—*Transferee Court—Power to consider question of limitation.*

The Court to which a decree is transferred for execution has no jurisdiction to go behind the order transmitting the decree and decide whether the application for transfer was within time or not, and whether the execution of the decree is barred by law by reason of the invalidity of the order of transmission, although such Court is not only competent, but bound to consider whether the application for execution made to itself is in time or not. 14 R. 550, Appr. (*Mya Bu and Mackney, JJ.*) Kannappa *v.* Ishaar Singh. **1937 Rang L. R. 287=173 I.C. 160=10 R.R. 316=A.I.R. 1937 Rang. 477.**

——**S. 42**—*Transferee Court—Power to consider question of limitation.*

Although the executing Court to which a decree has been transferred for execution has jurisdiction to decide whether the application to it is barred by limitation or not, it cannot, in considering the question of limitation, look further back than the order transferring the decree of the Court which passed the decree; for an order transferring a decree is a step-in-aid of execution and consequently provides a starting point for a fresh period of limitation. If the judgment-debtor desires to question the order transferring the decree then the proper course for him is to apply to the transferee Court under O. 21, R. 26, C. P. Code, for a stay of execution to enable him to make the necessary objection in the Court transferring the decree. (*Dunkley, J.*) Arjundas Bisumel *v.* U Ka Ya. **14 Rang. 550=163 I.C. 403=9 R.R. 17=A.I.R. 1936 Rang. 271.**

——**S. 42**—*Transferee Court—Power to stay execution.*

The expression "powers in executing such decree" in S. 42 means "powers in carrying out the purpose of executing such decree." Although an order staying an execution may be passed while a Court is engaged in executing a decree, yet a power to order stay in execution cannot be held to be a power exercised to carry out execution of a decree. Power to stay execution is not included in S. 42. It is the duty of the Court to which a decree has been sent for execution to execute that decree. It has the powers necessary for that purpose, but it certainly has not the power to refuse to execute the decree even for a short period save and except in the circumstances set out in O. 21, R. 26, Civil Procedure Code. The executing Court has no jurisdiction to pass an order purporting to be passed under O. 21, R. 29, staying execution of a decree which has been transferred to it for execution by other Court, merely on the institution of a suit before it by the judgment-debtor for a declaration that the decree passed against him is null and void having been obtained by fraud. 60 Cal. 1119, Diss. from. (*Mackney, J.*) M. P. L. Chettiyar Firm *v.* Vanappa Chettiyar. **162 I.C. 865=8 R.R. 596= A.I.R. 1936 Rang. 184.**

——**S. 44**—Notification under—Decree of Native State—Execution in Burma after separation—Law as to. *See* Government of Burma (Adaptation of Laws) Order, Para. 9 and Government of Burma Act, Ss. 144 and 149. **1938 Rang.L.R. 463=A.I.R. 1938 Rang. 352.**

——**S. 44**—Notification under—Effect of—Decree of Court of Native State transferred to British Indian Court—Position and powers of latter Court—Jurisdiction to decide whether Native State Court is competent to pass decree. *See* C. P. Code, Ss. 13 and 44. **40 C.W.N. 591.**

——**S. 46**—*Money attached under precept—Payment to another decree-holder who attaches it after two months—Validity.*

When money is attached in execution of a decree it cannot be paid over to another decree-holder who subsequently attaches it, but when money is not attached in execution of a decree but it is attached in pursuance of a precept under S. 46, C. P. Code, the effect of which is limited only for two months, after which period the attachment no longer exists, the money attached under a precept can be paid over to anther decree-holder who subsequently attaches it. 161 I.C. 418 =1935 Lah. 914, Reversed. (*Jai Lal, J.*) Gurdial Singh *v.* Khazan Chand. **163 I.C. 374=9 R.L. 13=A.I.R 1936 Lah. 486.**

——**S. 46**—*Object of—Indefinite order making permanent attachment—Validity.*

The object of S. 46 is to attach property of the judgment-debtor in another Court in order to prevent the judgment-debtor from alienating or otherwise dealing with it to the detriment of the decree-holder till proper proceedings for the sale of the property in pursuance of an application for execution can be taken, and it is for this reason that the effect of an attachment in pursuance of a precept is limited to two months and power is given to the Court which passed the decree to extend this period of two months in order to meet contingencies which may arise due to the delay in transferring the decree to the Court to which the precept has been sent. An indefinite order stating that an attachment is made permanently is not one contemplated by S. 46. (*Jai Lal, J.*) GURDIAL SINGH *v.* KHAZAN CHAND. **163 I.C. 374=9 R.L. 13=A.I.R. 1936 Lah. 486.**

——S. 47.

Appeal.
Applicability.
Bar of suit.
Construction.
Defence to suit.
Executability of decree.
Executing Court.
Execution, discharge or satisfaction of decree.
Execution proceedings.
Necessary parties.
Parties and representatives.
Parties to suit.
Question relating to execution.
Question relating to satisfaction.
Representative.
Scope.

Appeal.

——S. 47—*Appeal—Adjournment of sale to enable sanction of Chief Commissioner being obtained—Nature of order—If appealable.*

Where an execution sale is adjourned to enable the sanction of the Chief Commissioner being obtained under S. 17 of the Ajmer Government Wards Regulation, the order is not merely one for stay of execution. It is an order refusing execution unless some condition is complied with and is therefore appealable. (*D. R. Norman.*) BENI PRASAD *v.* SARFRAZ ALI. **1939 A.M.L.J. 85.**

——Ss. 47 and 115—*Appeal—Amendment on application under Ss. 151 and 152—Appeal if lies—Revision, competency.*

Where the order amending a decree for a certain sum is not passed in execution proceedings but on a separate application under Ss. 151 and 152, the application does not fall under S. 47 and no appeal from the order is competent. But the mere fact that the order amending the decree is not itself appealable and the mere fact that an appeal could be presented from the amended decree is no bar to the entertainment of a revision petition of the order in question, if it is passed without jurisdiction. (*Bhide, J.*) MITTER SEN-GANESHI LAL *v.* KALYAN RAI. **178 I.C. 677=11 R.L. 483=A.I.R. 1938 Lah. 4.**

——S. 47—*Appeal—Appeal by judgment-debtor against surety—Competency.*

P obtained a decree against *M*. The amount of decree was paid by *M*. On appeal the decree in favour of *P* was set aside by the High Court and *M* applied to the executing Court praying that *P* should be ordered to repay the amount received by him under the decree. It was also stated that one *B* had stood surety for *P* and that the execution should issue against him also. *B* denied having stood surety for *P*. The executing Court held that he did not stand surety and dismissed the application as against him. *M* did not appeal to the High Court against this decision but *P* went on appeal on the ground that the executing Court should have held that *B* was a surety.

Held, that no appeal was competent on behalf of *P*, the judgment-debtor, as against *B*, the surety. By getting a decision against *B* so far as the question of suretyship was concerned *P* could not compel *M* to take out execution against *B*. (*Abdul Rashid, J.*) MATHRA DAS PURI *v.* ADMINISTRATOR OF LAHORE MUNICIPALITY. **A.I.R. 1939 Lah. 137.**

——S. 47—*Appeal—Application for enquiry as to how much money was due from judgment-debtor—Application referring to S. 151 in the heading—Order on—Appealability.*

The mere fact that an application refers to S. 151, C. P. Code, in the heading is not conclusive and the Court must look to the substance of the application in order to do substantial justice between the parties. An application asking the Court to enquire how much money was due by the judgment-debtor, though purporting to be one under S. 151, is in reality and substance an application under S. 47, C. P. Code, as it relates to a matter touching the discharge or satisfaction of the decree. The order of the executing Court on such an application is, therefore, appealable, especially when the Court does not purport to act under S. 151 and in fact, there is no suggestion in the order that it was acting under the provisions of that section. (*Agha Haider, J.*) BUR SINGH *v.* ANJUMAN DEHI SOHAL. **161 I.C. 21=8 R.L. 662=A.I.R. 1936 Lah. 725.**

——S. 47—*Appeal—Application for transfer of decree—Order on objection opposing transfer.*

An application to the Court which passed the decree for transfer of decree is an application relating to execution of a decree. The Court to which the application for transfer is made does not merely function as a post office but it has judicial duties to perform. It is required by statute to exercise judicial discretion. An objection raised by a judgment-debtor opposing the transfer will be an objection relating to execution of the decree. The words "relating to execution of the decree" used in S. 47, are wide enough to cover the case. An order passed on such objection is an order coming within the scope of S. 47 of the Code and is therefore appealable. (*Mitter and Mohammad Akram, JJ.*) MANMATHA PAL *v.* SARADA PROSAD. **187 I.C. 67=12 R.C. 539=A.I.R. 1939 Cal. 651.**

——S. 47 and O. 21, R. 90—*Appeal—Application to set aside sale compromised on certain terms—Sub-Judge setting aside sale holding that judgment-debtor had complied with terms of compromise—District Judge on appeal setting aside order of Sub-Judge—Second appeal—Maintainability.*

An application by the judgment-debtor for setting aside the sale under O. 21, R. 90 C. P. Code, was compromised on condition that the sale would be set aside without any evidence if the judgment-debtor paid the decretal amount within a certain date and that in case of default by the judgment-debtor, his application would be dismissed and the sale confirmed without any evidence. The Subordinate Judge set aside the sale holding that the judgment-debtor had complied substantially with the terms of compromise. On appeal by the decree-holder auction-purchaser, the District Judge set aside the order of the Subordinate Judge setting a side the sale. He, however, did not confirm the sale but ordered the case for setting aside the sale to be heard on merits as he was of opinion that the compromise was not binding on the judgment-debtor.

Held, that the order of the District Judge was not an order under S 47, C. P. Code, and consequently a second appeal to the High Court was not maintainable (*Nazim Ali and R. C. Mitter, JJ.*) RADHARAMAN SAHA *v.* MAKHOM LAL GANGOLY. **41 C W.N. 890=170 I.C. 917=10 R.C. 207 =A I R. 1937 Cal. 461.**

——S. 47—*Appeal—Application under S. 19, Madras Agriculturists' Relief Act—Order on—Appealability.*

An order on an application under S. 19 of the Madras Agriculturists' Relief Act, made while no proceedings in execution are pending is not appealable. It cannot be considered to be a question under S. 47, C. P Code, in the absence of any execution proceedings. (*Burn and Stodart, JJ.*) SUBBARAIDU. *In re.* **50 L.W. 537=1939 M. W.N. 1160 (1)=(1939) 2 M.L.J. 609 (1).**

——S. 47—*Appeal—Application under S. 20, Madras Agriculturists' Relief Act—Order on—Appealability.*

An order passed on an application under S. 20 of the Madras Agriculturists' Relief Act is not an appealable order under S. 47, C. P. Code. The question which arises under S. 20 is a question which arises between the executing Court and the applicant and not a question between the parties to the suit. (*Burn and Stodart, JJ.*) SWAMINATHA ODAYAR *v.* SRINIVASA IYER. **186 I.C. 424=12 R M. 629=1939 M.W.N. 910=50 L.W. 411=A.I.R. 1939 Mad. 942=(1939) 2 M. L.J. 495.**

[*Note.*—Rules since framed make orders on applications under Ss. 19 and 20 of Agriculturists Relief Act appealable.]

——S. 47—Appeal—Application under S. 23 of Madras Agriculturists' Relief Act—Order on—Appealability. *See* MADRAS AGRICULTURISTS' RELIEF ACT, S. 23. **1939 M.W.N. 735 (2).**

——S. 47—*Appeal—Application under O. 21, R. 2—Order holding that it is time-barred—Appeal.*

An order by the executing Court holding that an application under O. 21, R. 2, C. P. Code, is time-barred, falls within S. 47, C. P. Code, and an appeal therefrom is competent. (*Lokur, J.*) NARAYAN DATTATRAYA *v.* MURLIDHAR PUNAMCHAND. **183 I.C 419=12 R.B. 100=41 Bom.L. R. 417=A.I.R. 1939 Bom. 255.**

——S. 47—*Appeal—Appointment of Commissioner to take accounts in execution—Order giving directions to Commissioner as to taking of accounts—Appealability.*

An order by the executing Court giving directions to a Commissioner appointed in the execution proceedings to investigate and take accounts as to certain amounts payable to the parties and directing him to complete the investigation in the light of the directions given, is not appealable under S. 47, C. P Code. It is in the nature of an interlocutory order and not a final order, and therefore there can be no appeal from it. It is only when the final order is passed after the Commissioner makes his report acting upon the instructions given to him that there can be an appeal. (*Harries, C.J. and Fazl Ali, J.*) PRABHABATI DEBI *v.* LILA SINGH. **12 R.P. 428=185 I.C. 852=6 B.R. 267=20 Pat.L.T. 796=A.I.R. 1940 Pat. 75.**

——S. 47—Appeal—Assignment of decree after its attachment—Assignee applying to execute decree—Objection by attaching creditor who is also the judgment-debtor, under S. 64 and O. 21, R. 53—Order dismissing the objection—Second appeal. *See* C. P. CODE, O. 21, RR 16 AND 53. **1936 A.W.R. 1167=A.I.R 1937 All. 63.**

——S. 47—*Appeal—Attachment — Judgment-debtor claiming attached land as* debutter—*Order on objection—Appealability—O. 21, R. 58—Reversal of order on appeal—Revision.*

O. 21, R. 58, C. P. Code must be held to apply in all cases where the judgment-debtor objects to an attachment not in his personal capacity, but in a representative capacity. Where a judgment-debtor objects to the attachment on the ground that the attached property is *debutter* and that he holds it not in his private or personal capacity, but as *shebait* on behalf of a deity to whom the property has been dedicated in consideration of his performing certain services to that deity, the objection falls under O. 21, R. 58, C. P. Code; and not under S. 47. No appeal therefore lies against the order passed on the objection. If an appeal is entertained against the order and allowed, it is without jurisdiction, and the order on appeal is liable to be set aside in revision. (*James, J.*) BARARI CO-OPERATIVE BANK, LTD. *v.* SINGHESWAR JHA. **163 I C. 397 (1)=9 R P. 5=17 Pat L.T. 810=1936 P.W.N. 195=A.I.R. 1936 Pat. 256.**

——S. 47—*Appeal — Auction-purchaser — If necessary party.*

The auction-purchaser is not a necessary party, in a proceeding arising under S. 47, C. P. Code as between the parties to the suit; nor is his non-joinder in an appeal from an order in such proceedings fatal to it. (*Grille and Niyogi, JJ.*) AZHAR HUSSAIN *v.* MOHAMMAD SHIBLI. **I.L R. (1939) Nag. 548=187 I.C. 791=12 R.N. 309=1939 N.L.J. 270=A.I.R. 1939 Nag. 183.**

——S. 47—*Appeal — Auction-purchaser, if necessary party.*

An objection to attachment under S. 47, C. P. Code, by the legal representative of the judgment-debtor was dismissed and the property was then put to sale and purchased by a third person in auction-sale. In appeal from the order of dismissal of the objection, the auction-purchaser was not added as a respondent.

Held, that the auction-purchaser was not a necessary party to the appeal, as his right came into existence after the matter had been decided by the trial Court. (*Jai Lal, J.*) NABI BAKHSH *v.* IDA. **174 I.C. 320=10 R L. 551=A.I.R. 1937 Lah. 263.**

——S. 47—*Appeal—Award under Co-operative Societies Act—Execution by Civil Court—Proceedings set aside—Order under S. 151, C. P. Code, remitting award for rectification—Appeal—Revision.*

Where the execution proceedings taken in the Civil Court in pursuance of an award under the Co-operative Societies Act are set aside, and the Court passes an order under S. 151, C. P. Code, remitting the award to the arbitrator for rectification of certain errors therein, the order is not one falling under S. 47, C. P. Code, and is therefore not appealable. The order being one which the Court has no jurisdiction to make under the Co-operative Societies Act and the rules framed thereunder, the matter falls under S. 115, C. P. Code, calling for interference in revision. (*Mc Nair, J.*) Nilmani Maity *v.* Kumar Narayan Jana. **164 I.C. 802=9 R.C. 284=40 C.W.N. 89.**

——S. 47—*Appeal—Decision on application under O. 34, R. 5.*

The decision of an executing Court on an application under O. 34, R. 5, C. P. Code, falls within the purview of S. 47, C P. Code, and is appealable. (*Addison and Abdul Rashid, JJ.*) Suraj Bhan *v.* Allahabad Bank, Delhi. **164 I.C. 53 =9 R.L. 75=38 P.L.R. 259=A.I.R. 1936 Lah. 562.**

——S. 47—*Appeal—Decree—Execution for sum less than that mentioned in decree after reduction under S. 15, Bihar Act (IX of 1938)—Appeal—If lies.*

Where the Court refuses to execute the decree for the sum mentioned in it, and proceeds to execute it only after reducing the amount of the decree in accordance with the direction in S. 15 of the Bihar Restoration of Bakasht Lands and Reduction of Arrears of Rent Act of 1938, the matter falls under S. 47, C. P. Code, and an appeal lies against the order. (*Khaja Mohamed Noor and Chatterji, JJ.*) Razaur Rahman *v.* Udit Singh. **18 Pat. 694=20 Pat L.T. 492=1939 P. W.N. 530=185 I.C. 135=12 R.P. 303=A.I.R. 1939 Pat. 570.**

——S. 47—*Appeal—Decree against legal representatives of deceased—Execution against his property—Application under S. 151 by posthumous son to be brought on record as legal representative—Order rejecting—Appeal—Revision.*

Where an application under S. 151 is filed on behalf of a posthumous son of a person, against whose property a decree obtained against his legal representatives is sought to be executed, praying that he should be brought on record as one of the legal representatives of the deceased, and that the sale of the property should be stayed till the application is granted, the question raised in the application does not fall within the purview of S. 47 as it is not a question arising between parties to the suit, and an order refusing such application is not a decree. Hence no appeal lies from it; nor is such order open to revision being merely an interlocutory order and there being no case decided. (*Davis, J.C. and Lobo, A.J.C.*) Esak Haji Abubakar *v.* Jimabai. **30 S.L.R. 170=165 I.C. 305 (2)=9 R.S. 96=A.I.R. 1936 Sind 166.**

——S. 47—*Appeal—Decree-holder directed to file a petition for appointment of guardian of minor judgment-debtor—Failure of decree-holder to comply with order—Dismissal of execution petition—Second appeal.*

An order dismissing an execution petition for failure of the decree-holder to comply with the order of the Court directing him to file a petition and affidavit for appointment of a guardian of a minor judgment-debtor, is one under S. 47, C. P. Code, and a second appeal is competent against such an order. (*Nasim Ali and R.C. Mitter, JJ.*) Brojendra Kishore Roy Chaudhury *v.* Shamserali. **41 C.W.N. 531=I.L.R. (1937) 2 Cal. 127=171 I.C. 435=10 R.C. 268=A.I.R. 1937 Cal 259.**

——S. 47 and Sch. II, para 21 (2)—*Appeal—Decree under Sch. II, para. 21 (2)—Question relating to its execution—Appeal, if lies from decision.*

When a decree passed under Sch. II, para. 21 (2), C. P. Code, is executed, if any question relating to its execution, discharge or satisfaction is raised by any of the parties to the decree, the determination of such a question is a decree within the meaning of the Code, and an appeal is therefore competent from the order deciding the question. (*Nasim Ali and Rau, JJ.*) Brindaban Chandra *v.* Kiran Bala Devi. **44 C.W.N. 231.**

——S. 47—Appeal—Decree under S. 227, Agra Tenancy Act—Execution—Order of Collector in —Appeal—Forum—Commissioner or District Judge. *See* Agra Tenancy Act, S. 227. **1936 R. D. 197.**

——S. 47—*Appeal—Execution—Application by judgment-debtor to raise attachment—Order refusing—Appealability.*

An order refusing an application by the judgment-debtor to raise the attachment effected in execution is appealable as a decree, as the question decided is one relating to the execution, discharge or satisfaction of the decree under S. 47, C. P. Code. The fact that the order is passed not on the execution petition itself but on an application by the judgment debtor does not make any difference. (*Pandrang Row, J*) Palaniappa Chettiar *v.* Thaivanai Achi. **165 I C. 59=9 R. M. 206=1936 M.W.N. 1037=44 L.W. 460=A.I. R. 1936 Mad 812=71 M.L J. 317.**

——S. 47—*Appeal—Insolvent judgment-debtor—Annulment of adjudication—Execution by creditor—Objection by person appointed under S. 37 of the Provincial Insolvency Act to take charge of properties—Order on—Appeal and second appeal.*

Quaere:—Whether an appeal or second appeal lies against an order on objections to the execution of a decree against the judgment-debtor raised by the person in whom the properties are vested by the Court under S. 37 of the Provincial Insolvency Act on the annulment of the adjudication of the judgment-debtor? (*R. C. Mitter, J.*) Abdul Latif *v.* J. R. Percival. **I.L.R. (1937) 1 Cal. 264=166 I.C. 509=9 R.C. 546=40 C.W.N. 1229=A I.R. 1936 Cal. 573.**

——S. 47—*Appeal—Matter in issue between decree-holder and judgment-debtor—Order on—Appealability.*

Where a decree-holder who attaches the surplus profits of a ghatwal estate raises objections to certain items in the estimate of receipts and expenditure of the estate, the question is one between the decree-holder and the judgment-debtor, falling under S. 47, C P. Code, and an order passed on such objections is appealable. (*Rowland and Chatterji, JJ.*) Bansidhar Shroff *v.* Ashutosh Deo. **180 I.C. 8=5 B.R 344=11 R P. 436=1939 P.W.N. 86=A.I.R. 1939 Pat. 242.**

——S. 47—*Appeal—Mortgage bond—Provision for instalment payment—Default clause giving mortgagee right to sue for whole amount in case two consecutive instalments be kept in arrears—Default—Suit for defaulted instalments only—Decree—Sale—Objection that sale should not be* *subject to remaining instalments—Order on—Appealability.*

Where in execution of a decree obtained by a mortgagee for two overdue instalments under a mortgage deed which provides for instalments and contains a default clause giving the mortgagee a right to sue for the whole amount in case of default in payment of two consecutive instalments, the mortgaged property is put up for sale, if the mortgagor raises an objection that the sale cannot be held subject to the remaining instalments of the mortgage debt, that is a dispute between the parties arising out of execution and affecting the substantial rights of the judgment-debtor, and the order on such objection is therefore appealable. (*Wadsworth, J.*) Subbayya *v.* Venkatasubbayya. **50 L.W. 775=1939 M.W.N. 1239=A.I.R. 1940 Mad. 296=(1939) 2 M.L.J. 932.**

——**S. 47**—*Appeal—Order accepting security tendered by judgment-debtor and directing stay of execution.*

Where the execution Court accepts a hypothecation bond tendered by the judgment-debtor as sufficient security in spite of the objection of the decree-holder, and directs stay of execution proceedings as ordered by the High Court, the order of the executing Court is not a final order, but merely in the nature of an interlocutory order and does not come within the purview of S. 47, C. P. Code, and no appeal, therefore, lies against such an order. (*Nanavutty and Smith, JJ.*) Suraj Mohan Dayal *v.* Sarup Narain. **164 I.C. 424=9 R.C 67=1936 O.W.N. 664=1936 O.L.R. 450=A.I.R. 1936 Oudh 369.**

——**S. 47**—Appeal—Order allowing amendment of execution petition—If "decree"—Appealability. *See* C. P. Code, S. 2 (2). **71 M.L.J. 256.**

——**S. 47**—*Appeal—Order bringing legal representatives of deceased decree-holder on record in execution—Appealability.*

An order on application in execution to bring the legal representatives of a deceased decree-holder on record falls under S. 47, and is appealable and provisions of O. 22, Rr. 12, 3 and 4 are not applicable (*Davis, J.C. and Tyabji, J.*) Gopibai *v.* Chuhermal. **I.L.R. (1939) Kar. 509=183 I.C. 717=12 R.S. 71=A.I.R. 1939 Sind 234.**

——**S. 47**—*Appeal—Order directing issue of warrant for arrest of judgment-debtor.*

An order issuing a warrant for the arrest of a judgment-debtor is an order passed under S. 47, C. P. Code, and is appealable as a decree. A.I.R. 1924 Lah. 360, Rel. on. (*Skemp, J.*) Sardar Khan *v.* Sundar Singh. **169 I.C. 613=10 R.L. 25=39 P.L.R. 690=A.I.R. 1937 Lah. 706.**

——**S. 47**—*Appeal—Order directing judgment-debtor to be sent to civil jail.*

To arrest and send a judgment-debtor to a civil jail is one of the modes of executing a decree, and hence the order to send the judgment-debtor to jail on failure to give security comes within the purview of S. 47 and is therefore appealable. (*Ba U, J.*) Tan Kyin Hin *v.* Ahmed Jamal. **164 I.C. 459=9 R.R. 103=A.I.R. 1936 Rang. 367.**

——**S. 47 and O. 34, R. 4**—*Appeal—Order directing sale of mortgaged properties in particular order—If appealable.*

The question whether an order regulating the order in which the mortgaged properties are to be sold is an appealable one was held by the Court to be one in which there was divergence of judicial opinion and the question was left undecided at it was unnecessary for the decision of the case. (*Iqbal Ahmad and Verma, JJ.*) Karimul Rahman Khan *v.* Saraswati Sugar Syndicate, Lahore. **I.L.R. (1939) All. 150=182 I.C. 493=12 R.A. 23=1939 A.W.R. (H.C.) 17=1939 A.L.J. 53=A.I.R. 1939 All. 314.**

——**S. 47**—*Appeal—Order directing security for stay of delivery of possession pending appeal—Order by executing Court accepting security—If appealable.*

The question whether an appeal lies against an order of a Subordinate Court accepting the security for stay of delivery as sufficient can arise only if the order is passed by the Subordinate Court *suo motu* as a Court of execution, and not when the order is passed on a direction from the appellate Court. (*Fazl Ali and Madan, JJ.*) Anand Das *v.* Ram Bhusan Das. **3 B.R. 663=18 Pat L.T. 621=170 I.C. 139=10 R.P. 86=1937 P.W.N. 216=A.I.R. 1937 Pat. 380.**

——**S. 47**—*Appeal—Order disallowing plea of limitation.*

An order disallowing a plea raised by the judgment-debtor that the execution petition is barred by limitation is an appealable decree under S. 47, C. P. Code. (*Beasley, C.J. and Stodart, J.*) Rama Rao *v.* Sree Ramamoorthy. **164 I.C. 670=9 R.M. 162=1936 M.W.N. 575=44 L.W. 486=A.I.R. 1936 Mad. 801=71 M.L.J. 388.**

——**S. 47**—*Appeal—Order for repayment of purchase-money to auction-purchaser under O. 21, R. 93, on sale being set aside—Appealability.*

An order on an application by the auction-purchaser under O. 21, R. 93, C. P. Code, for repayment of the purchase-money to him when the sale has been set aside does not fall under S. 47; it is not a question between the parties to the suit or their representatives relating to the execution, discharge or satisfaction of the decree, as it has no legal effect on the rights and liabilities as between the decree-holder and the judgment-debtor. Hence the order is not one which is appealable. (*Leach, C.J. and Somayya, J.*) Ramaswami Chettiar *v.* Meyyappan Servai. **188 I.C 187=12 R.M. 810=50 L.W. 159=1939 M.W.N. 700=A.I.R. 1939 Mad. 740=(1939) 2 M.L.J. 353.**

——**S. 47**—*Appeal—Order of restitution under inherent powers—Order between parties and relating to execution—Appealability.*

An order passed under the inherent powers of the Court is not *per se* appealable. But if the order is in fact an order passed on an application made by one party to the suit as against the other and relates to the execution, discharge or satisfaction of the decree in the suit, it falls under S. 47 and for that reason it is appealable. S. 47 only provides for the procedure and the *forum* whereby a decision has to be reached. It does not give the Court the powers by virtue of which the Court decides; those powers have to be sought elsewhere in the C. P. Code, either under S. 144 or S. 151. An order for restitution under S. 144 falls under S. 47 and is appealable. 'Similarly an order under S. 151 for something analogous to restitution made as between the parties would also fall under S. 47 and be subject to appeal. S. 47 must be held to cover all cases of restitution. (*Wadsworth, J.*) Ramireddi *v.* Satyam. **167 I.C. 356=**

9 R.M. 446=1936 M.W.N. 503=43 L.W. 773=A.I.R. 1936 Mad. 636.

———S. 47—*Appeal—Order on application under O. 21, R. 95 by decree-holder auction-purchaser.*

An order passed on an application under O. 21, R. 95, C. P. Code, by a decree-holder auction-purchaser is an order under S. 47, C. P. Code, and appealable as such. 53 Cal. 781 (F.B.), Foll. (*Agha Haidar, J.*) KINAD DEV *v.* PARTAP SINGH. **169 I.C. 242=9 R.L. 728=38 P.L.R. 621=A.I.R. 1937 Lah. 145.**

———S. 47—*Appeal—Order purporting to be under S. 47, but wrongly made—Matter not falling under section—Appeal—If barred.*

An order which purports to be made under S. 47, C. P. Code, though it is wrongly made as being on a plea which ought not to be entertained in execution, is still an order under S. 47, and therefore is appealable. (*Mockett and Horwill, JJ.*) SETHURAJAN *v.* GURUSWAMI PATHAR. **I.L.R. (1937) Mad. 834=1937 M.W.N. 227 (2)=170 I.C. 86=10 R.M. 131=45 L.W. 401=A.I.R. 1937 Mad. 509=(1937) 2 M.L.J. 37.**

——S. 47—*Appeal—Order refusing execution and directing the filing of a fresh application—Appeal.*

An order directing an applicant to file another execution while refusing to execute the decree as asked, is undoubtedly appealable as a decree under S. 47, C. P. Code, and that right of appeal is not taken away merely because execution is subsequently filed and unsatisfied. (*Middleton, J.C. and Almond, A.J.C.*) KRIPAL SINGH *v.* SYED ASHRAF ALI SHAH. **160 I.C. 812=8 R. Pesh. 130=A.I.R. 1936 Pesh. 46.**

———S. 47—*Appeal—Order refusing to execute decree—Appeal, if can be filed by agent competent to execute decree.*

Where an agent of the decree-holder is competent to execute the decree, he is entitled to have any objection to execution removed either in the executing Court or in the appellate Court. He is, therefore, competent to appeal from an order refusing to execute the decree. (*Jai Lal, J.*) BASANTI DEVI *v.* OFFICIAL RECEIVER. **164 I.C. 463=9 R.L. 130 (2)=A.I.R. 1936 Lah. 508.**

———S. 47—*Appeal—Order rejecting objection questioning legality of issue of warrant—No appeal filed against the order—Appeal against order in execution which has nothing to do with such objection, on the ground that warrant was illegal—Maintainability.*

Where an objection under S. 47, C. P. Code, questioning the legality of the issue of a second warrant of attachment was rejected by an order passed on the back of the application, but the judgment-debtor did not file any appeal against that order, an appeal by him directed against the order of the Court in the execution case which has nothing to do with such objection, on the ground that the issue of a second warrant of attachment without a fresh application for execution was illegal, is not maintainable. (*Srivastava and Thomas, JJ.*) HAFIZ ABDUL RAZZAQ HAJI *v.* BINI MADHO BASANT RAI. **161 I.C. 393 (1)=8 R.O. 320=1936 O.L.R. 173=1936 O.W.N. 47=A.I.R. 1936 Oudh 240.**

———S. 47—*Appeal—Order setting aside sale—Notice received by Civil Court under S. 34, Bengal Agricultural Debtors Act immediately after execution sale—Sale set aside under S. 151.*

Where a Civil Court receiving a notice under S. 34 of the Bengal Agricultural Debtors Act immediately after the judgment-debtor's property had been sold in execution, passes an order purporting to be made under S. 151, C. P. Code, to the effect that the sale should be set aside the order in effect is essentially an order which ought to be made under S. 47, C. P. Code, and is, therefore, appealable. (*Edgley, J.*) NIBARAN CHANDRA *v.* SK. BELATALI. **43 C.W.N. 419=A.I.R. 1939 Cal. 334.**

———**S. 47 and O. 21, R. 53**—*Appeal—Order setting aside sale at instance of rival decree-holders—A and N, decree-holders of G, attaching mortgage decree obtained by G against R—Property sold in execution of A's decree against G—N objecting to A's execution—Sale set aside by Court—Appeal against said order by A—If competent.*

A and *N*, decree-holders, attached in execution of their decrees against *G*, the mortgage decree obtained by *G* against *R*, and property mortgaged was sold in execution of *A's* decree against *G*, but later on *N* objected to the execution of *A's* decree on certain grounds and the Court set aside the sale. *A* appealed against the order setting aside the sale to the District Judge but the appeal was dismissed by the Court on the ground that no appeal lay inasmuch as the question was one between rival decree-holders and so no appeal was competent as the order could not fall within the provisions of S. 47.

Held, that inasmuch as *A* attached the mortgaged decree obtained by *G*, he was the representative of *G* in mortgage decree in view of O. 21, R. 53. The order setting aside the sale, even though arrived at by the Court on objection raised by *N*, the rival decree-holder, and thus the question though between rival decree-holders was one that affected the judgment-debtor *R*, and it was therefore one between parties to the suit within the meaning of S. 47, and hence appeal against the order setting aside the sale was competent. 11 C.W.N. 403, Dist. (*D. N. Mitter, J.*) HARI KISHEN RATHI *v.* GOPESHWAR DEGHURIA. **171 I.C. 517=10 R.C. 282=A.I.R. 1937 Cal. 177.**

———S. 47—*Appeal—Order setting aside sale for want of attachment—Second appeal—If competent.*

An order setting aside a sale on the ground that the executing Court had on jurisdiction to sell the property without attachment, in the first instance, falls under S. 47 and a second appeal is competent against such an order. (*Bhide, J.*) MATAB MAL JINDA SHAH *v.* DARYA RAM GURANDITTA. **164 I.C. 140=9 R.L. 91=A.I.R. 1936 Lah. 573.**

———S. 47—*Appeal—Order setting terms of sale proclamation—Appeal—Decision on rights and liabilities of parties with regard to execution—*Res judicata—*Omission to appeal—If can be objected to at later stage.*

It is well established that the mere settlement of the terms of a proclamation of sale, where no dispute between the parties as to their rights or liabilities is decided judicially, cannot be deemed to be an order under S. 47, C. P. Code, from which an appeal would lie. But it is equally well-settled that when at the stage of settling the terms of the proclamation the parties put into issue a question affecting their relative rights and liabilities with regard to execution, and this matter is heard and decided, that decision is a judicial decision, and the parties will not be allowed in the course of execution to canvass the same matter again. The party aggrieved by that order must take it up in appeal, and if he does not do so, he cannot be heard to raise the matter at a later stage. (*Wadsworth, J.*) Namasivaya Mudaliar *v.* Srinivasa Iyengar. **50 L W 578=1939 M W N 1148=A.I.R. 1940 Mad. 54=(1939) 2 M.L.J. 782.**

——S. 47—*Appeal—Order refusing stay of execution—Revision, if competent.*

An order staying or refusing to stay execution of a decree upon the ground that execution is or is not barred by some special law is subject to appeal as a decree. An application in revision filed against an order refusing to stay execution is, therefore, misconceived. (*Edgley, J.*) Abinash Chandra *v.* Bibhuti Bhusan. **44 C.W.N. 587.**

——S. 47—*Appeal—Order staying or refusing to stay execution under Bengal Agricultural Debtors' Act.*

The question whether the execution of a decree is or is not barred, whether temporarily or permanently, by reason of some special law as (*e g.*) by the Bengal Agricultural Debtors Act—is a question within S. 47, C. P. Code, and its determination is accordingly a decree within the meaning of S. 2 (2) of that Code. It follows that an order staying or refusing to stay execution upon the ground that the execution is or is not barred by the special law in question is subject to appeal as a decree. (*Nasim Ali and Rau, JJ.*) Nafar Chandra Sardar *v.* Kalipada Das. **I.L.R. (1940) 1 Cal. 393=188 I.C. 483=13 R.C. 1=44 C.W.N. 364=A.I.R. 1940 Cal. 257.**

——S. 47—*Appeal—Order that executing Court had jurisdiction to hear objection application of judgment-debtor.*

If an order passed in execution proceedings decides a question relating to the rights and liabilities of the parties with reference to the relief granted by the decree, it falls within the scope of S 47 and is a decree. But orders that are merely incidental and refer to the conduct of the proceedings are not within the section. The decision, that the executing Court had power to hear the objection application of judgment-debtor under S. 47, is an order which finally and conclusively determines, so far as the Court passing such order is concerned, a very important and substantial right which, according to the decree-holder, the Court had no jurisdiction to make. The decision is one of substance and is not an ordinary interlocutory order, or one merely incidental to the conduct of the proceedings. The assumption of the jurisdiction where the Court has no jurisdiction is a decision which can be said to be more important than any other decision except a decision on the merits. It follows that the order is one which is appealable under S 2 (2) and S. 47, C.P. Code. (*Addison and Ram Lall, JJ.*) Lloyds Bank, Ltd., Lahore *v.* Mt. Rehmat Bibi. **183 I.C 697=12 R.L. 129=41 P L.R. 555=A.I.R 1939 Lah. 177.**

——S. 47—*Appeal—Order transferring decree to another Court under S. 39.*

An appeal lies under S. 47, C. P. Code, from an order under S. 39 transferring a decree to another Court for execution, as the order is one relating to the execution of the decree though itself is not an order executing the decree. (*Jai Lal, J.*)

Chaman Lal *v.* Ram Kanwar Ganesh Das. **41 P.L.R 186.**

——S. 47—Appeal—Order under S 11, Bihar Money-Lenders Act *See* Bihar Money-Lenders Act, S 11. **1940 P.W N. 492.**

——S 47—*Appeal—Order under S. 39, allowing simultaneous execution in two Courts—Appeal—Notice to judgment-debtor—If condition precedent to validity of order.*

A mere order transmitting a decree for execution to another Court may be said to be a purely ministerial order, but an order which amounts to the grant of a certificate and allows simultaneous execution proceedings to go on in more than one Court is not a mere ministerial order. Such an order is a judicial order falling under S. 47, C. P. Code, and is appealable. Such an order cannot be made without notice to the judgment-debtor and without hearing him under O. 21, R. 6, C. P. Code. (*Divatia, J.*) Lakshman Hari *v.* V. G. Virkar **183 I.C. 333=12 R.B. 81=41 Bom.L.R. 481=A.I.R. 1939 Bom. 258**

——S. 47—*Appeal—Order under O. 21, R. 16.*

An order passed under the provisions of O. 21, R. 16 is an order determining a question between the judgment-debtor and the representative of the decree-holder because it determines the right of a representative of the decree-holder to execute the decree. This is a question falling within the provisions of S. 47 of the Code and is therefore a decree under the provisions of S. 2. An appeal therefore lies from the order and an application in revision is incompetent. (*Dunkley, J.*) Maung Khin Maung *v.* S. K. R. Karuppayya Pillai. **186 I.C. 322=12 R.R. 261=A.I.R. 1939 Rang. 376.**

——S 47—*Appeal—Order under O. 21, R. 66—Appeal—Decision as to—Whether sale is to be held by Court or Collector—If judicial order or administrative act.*

Proceedings held under O. 21, R. 66, C. P. Code, in relation to the proclamation of sale are not orders falling under S. 47, and are therefore not appealable; but an order as to whether a sale is to be held by the Court itself, or by the Collector on the ground of the judgment-debtor being an agriculturist, is a judicial order relating to the execution of the decree, and as such falls under S. 47, and an appeal lies therefrom. (*Lokur, J.*) Mahadeo Sunder Mehta *v.* Khanderao Sitaram. **186 I.C. 61=12 R B. 290=41 Bom.L.R. 1166=A.I R. 1939 Bom 526.**

——S. 47—*Appeal—Order under O 21, R. 66 overruling objection to sale of entire property—Appealability.*

An order under O. 21, R. 66, C. P. Code, overruling the objection of the judgment-debtor that only part of the property should be sold is not an interlocutory order, but one against which an appeal lies. (*Norman.*) Garji Das *v.* Surajmal. **1936 A.M.L J. 13.**

——S. 47—*Appeal—Order under O. 21, R. 66, C. P. Code, refusing to direct value of property to be stated in sale proclamation—If decree.*

An order refusing to direct the value of the property to be stated in the sale proclamation under O. 21, R. 66 is not a decree and is not appealable. Nor, is it a "judgment" within the meaning of cl. 15 of the Letters Patent. (*Beaumont, C. J. and Lokur, J.*) Charandas Vasanji *v.* Dossabhoy Maganlal. **I.L.R. (1939) Bom,** 389=182 I.C. 409=12 R.B. 12=41 **Bom.L.R. 328=A.I.R. 1939 Bom. 182.**

——S. 47—Appeal—Order under O. 21, R. 93—Appealability. *See* C. P. CODE, S. 2 (2). **42 Bom. L.R. 367.**

——S. 47—*Appeal—Order under O. 21, R. 93—Appeal and second appeal—Competency.*

An order on an application by an auction-purchaser under O. 21, R. 93. C. P. Code, for refund of the sale price is subject to appeal and second appeal (*Horwill, J.*) RAMASWAMI CHETTIAR *v.* MEYYAPPAN SERVAI. **172 I.C. 468=10 R.M. 460=46 L.W. 280=1937 M.W.N. 749=A.I.R. 1937 Mad. 779.**

——**S. 47**—*Appeal—Party impleaded in one capacity—Objections by, in other capacity—If fall under S. 47—Order on—Appeal or separate suit.*

Where the impleading of a party in a suit was in one capacity and questions (claims) are raised in execution objecting to the decree in another capacity, they are not matters falling under S. 47 and should be decided in a regular suit and no appeal lies against an order in execution, or in other words the capacity in which a party is impleaded has got to be looked to in applying S. 47, the only exception to this rule being where the question is raised by a person as legal representative when, though there is apparently a different capacity, the question should be settled in execution. Similarly, if a party is impleaded in a mortgage suit by reason of one capacity, and if he has got other points which he wishes to raise in another capacity but was not impleaded in the latter capacity, these other points could not only be not raised in the suit as is well recognised, but could not be raised even in execution proceedings, because the capacity would then be different and should be agitated only in a regular suit. If a claim is made it will be in the nature of a claim petition by a stranger and there cannot be an appeal, but only a regular suit should follow 2 P.L.J. 219, Foll.; 42 C. 440, 14 M.L.J. 377 and 23 Mad. 118, Rel. on. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

——S. 47—*Appeal—Person dismissed as unnecessary party to suit—Subsequent addition in execution as legal representative of judgment-debtor—Claim in own right to property sold in execution—Order on—Appeal.*

Where, on the death of the judgment-debtor, a person who was dismissed from the suit as being an unnecessary party is brought on record as the judgment-debtor's legal representative, and that person claims to be entitled to the property sold in execution as his own in his own right, the question can be determined by the executing Court. An order by the executing Court on that claim refusing to determine the question of title is appealable. (*Cornish, J.*) PEER BATHUMMAL BEEVI *v.* MEERAMMAL BEEVI. **167 I C. 113=9 R. M. 424=1936 M.W.N. 1369=44 L.W. 698=A.I. R. 1937 Mad. 108=71 M.L.J 725.**

——S. 47—*Appeal—Question between auction-purchaser and judgment-debtor—Former, if can appeal.*

An auction-purchaser is the representative of the judgment-debtor and therefore any question arising between him and the judgment-debtor cannot be said to be one between the parties to the suit or their legal representatives within the meaning of S. 47 and therefore the auction-purchaser has no *locus standi* to maintain an appeal as from a decree passed under the provisions of S. 47. (*Agha Haidar, J*) SADHU MAL KHAZANA MAL *v.* DEVI CHAND. **173 I.C. 505=10 R.L. 450=A.I.R. 1937 Lah. 347.**

——S. 47—Appeal — Rateable distribution—Order allowing in respect of money paid into Court by surety for judgment-debtor—Appealability. *See* C. P. CODE, S. 73. **41 Bom.L.R. 176.**

——S. 47—*Appeal — Rateable distribution—Order as to.*

A decree-holder purchased the property of his judgment-debtor in execution of his decree. By the amount of his bid the entire amount of his decree was satisfied and he paid into Court the excess of the bid over the decretal amount. After the auction but before the excess amount was deposited in Court or the auction sale confirmed, another decree-holder of the same judgment-debtor made an application for a rateable share in the assets to be realised in execution of the decree of the first decree-holder. The Court held that he was entitled to a rateable share in the full price.

Held, that the order of the Court must be deemed to have been passed only under S. 73, C. P. Code, and not under S. 47 of the Code and consequently no appeal lay. (*Jai Lal, J.*) ROSHAN LAL *v.* SHIV DAS MAL. **162 I.C. 309=8 R.L. 878 (1)=A.I.R. 1936 Lah. 181.**

——Ss. 47 and 73—*Appeal—Rateable distribution—Order as to.*

An order under S. 73 determining the question of rateable distribution as between rival decree-holders in which the judgment-debtor has no interest does not fall under S. 47 and is not appealable. (*Mya Bu and Baguley, JJ.*) AGA M. SHERAZEE *v.* R. M. P. M. CHETTIAR FIRM. **169 I.C. 644=10 R.R. 24=A.I.R. 1937 Rang. 134.**

——S. 47—*Appeal — Rateable distribution—Order as to, under S. 73—Appealability.*

Where an order of rateable distribution under S. 73, C. P. Code, involves questions which affect not only the various decree-holders *inter se*, but affects also the judgment-debtor, the order falls under S. 47 read with S. 73, C. P. Code, and is therefore appealable (*Lokur, J.*) NINGAPPA *v.* ADIVEPPA. **186 I.C. 372=12 R.B. 324=41 Bom. L.R. 997=A.I.R. 1939 Bom. 468.**

——S. 47—*Appeal — Rateable distribution—Order by executing Court—Appeal—Maintainability—Revision.*

Where the executing Court sells the property attached and proceeds to decide the claims of decree holders and the essence of the order is one which determines the rights of the decree-holders *inter se* and rateably distributes the assets available amongst them, the order is one under S. 73 and not under S. 47, and no appeal lies against it and as the party aggrieved by it has a remedy provided by S. 73 (2), the High Court will not interfere in revision. (*Almond, A.J.C.*) HEM RAJ *v.* BALU RAM AND SONS. **160 I.C. 892 =8 R. Pesh. 134=A.I.R. 1936 Pesh. 52.**

——Ss. 47 and 73—Appeal—Rateable distribution—Question as to *locus standi* of decree-holder's agent. *See* C.P. CODE, Ss. 73 AND 47, **A.I.R. 1938 Pesh. 63.**

——S. 47—*Appeal — Rateable distribution—Question between rival decree-holders as to right to—Order on—Applicability.*

A question relating to a dispute between rival decree-holders in regard to the right to rateable distribution, in which the judgment-debtor is not interested, is not one which arises under S. 47, C. P. Code, and the decision thereon is not, therefore, appealable. (*Madhavan Nair and Burn, JJ.*) Viswanatham Krishtiah *v* Venkata Reddy. **59 Mad. 399=160 I.C. 573=8 R. M. 669=1936 M.W.N. 44=43 L.W. 31=A.I.R. 1936 Mad. 136=70 M L.J. 33.**

——S. 47—Appeal—Reference to arbitration in execution — Jurisdiction — Difference between arbitrators—Decision by Court as umpire—Legality—Appealability. *See* C. P. Code, Sch. II. **38 Bom.L.R 1303.**

——S. 47—*Appeal — Right of — Test—Final decree for sale in mortgage suit—Order by District Court in execution directing sale of properties outside district—Order, if appealable.*

The true test to be applied in determining the appealability of an order is whether the order is a decree within the meaning of S. 2 (2). A determination made under S. 47, in order that it would be tantamount to an order which amounts to a decree within meaning of S. 2 (2), must affect the rights of parties with regard to all or any of the matters in controversy. Where in a suit on mortgage a final decree for sale was passed and the District Court, in execution, passed an order directing the sale of mortgaged properties situate within the jurisdiction of other District Courts.

Held, that the order directing the sale of the mortgaged properties situated in the other districts did not affect the rights of the parties at all, because the primary order for sale of the mortgaged properties was in the final decree for sale, and, therefore, whether such properties were liable to be sold or not was not a matter in controversy before the Court at the time when it directed the sale. The order therefore did not amount to a decree and hence was not appealable. It could not be interfered with in revision also. A.I.R. 1924 All. 808, Rel. on. (*Mya Bu and Mackney, JJ.*) L. A. R. Lutchumanan Chettyar *v.* Haji Ismail Noor Mohammad. **171 I.C. 636=10 R.R. 169=A.I R. 1937 Rang. 157.**

——S. 47—*Appeal—Second appeal—Dismissal of appeal in execution under O. 41, R. 11 (1)—Suit of Small Cause nature not exceeding Rs. 500 in value—Second appeal, S. 102.*

Though the dismissal of an appeal from an order in execution, under O. 41, R. 11 (1), C. P. Code, is a decree and is open to second appeal, if the suit in execution of whose decree the appeal arises is a suit of a small cause nature, of the value not exceeding Rs. 500. a second appeal is barred under S. 102, C. P. Code. (*Rowland, J.*) Jamuna Prasad Rai *v.* Rajballam Rai. **18 Pat. L.T. 321=1937 P.W.N. 340=169 I.C. 359=3 B. R. 558=10 R.P. 9=A.I.R. 1937 Pat. 349.**

——S. 47—Appeal — Second appeal — Order under O. 21, R. 90. *See* C. P. Code, O. 21, R. 90. **163 I.C. 765=17 Pat.L T. 712.**

——S. 47—*Appeal—Surety—Question raised by as to executability of decree—Decision on—Appeal.*

S. 145, C. P. Code, puts the surety on the same footing as an original party to the suit; and if S. 145 and S. 47, C. P. Code, be read together, the inquiry of the Court into a question raised by the surety as to the executability falls under S. 47, C. P. Code, and the decision thereon is appealable. Even if S. 145 does not in terms apply, as for instance where the surety is not personally liable but the money which he has deposited as security is sought to be made liable, the surety has an equal right of appeal. (*Horwill, J.*) Rangaswami Chetti *v.* Narayana Iyengar. **176 I.C. 964=11 R.M. 207=1937 M.W.N. 1259 =A.I.R. 1938 Mad. 215.**

Applicability.

——S. 47—Applicability—Application for refund of excess recovered—If relates to execution discharge or satisfaction of decree. *See* C. P. Code, Ss. 144, 151 and 47. **A.I R. 1939 Nag. 101.**

——S. 47—*Applicability—Application to set aside sale on ground of material irregularity—Decree-holder, purchaser—Rule applicable—If falls under S. 47.*

S. 47, C. P. Code, though very wide in terms and includes in one sense all questions relating to execution, discharge or satisfaction of the decree, ought not to be applied in such a way as to render redundant other provisions contained in the Code. An application to set aside an execution sale which in terms and in fact and substance falls under O. 21, R. 90, cannot be regarded as an application under S. 47, though the decree-holder himself is the purchaser. It is only when an application to set aside the sale, as between the decree-holder and the judgment-debtor, does not fall under O. 21, Rr. 89, 90 and 91, that it will come within the purview of S. 47. (*Iqbal Ahmad and Bajpai, JJ.*) Harindra Nath *v* Bhola Nath. **170 I.C. 559=10 R.A. 167=1937 A.L R. 724=1937 A.L.J. 288=1937 A.W.R. 262=A.I.R. 1937 All. 407.**

——**S. 47**—*Applicability—Claim on ground that certain decree is not binding on claimant—If one to be decided in execution.*

Where property is claimed not under or in execution of a decree, but the claim is for delivery of property on the ground that the decree is not binding on the claimant the question is one that cannot be tried in execution, and therefore S. 47 has no application. (*Burn and Lakshmana Rao, JJ.*) Thangachami Naicker *v.* Veerappa Chettiar. **173 I.C. 90=10 R.M. 509=A.I.R. 1937 Mad. 268.**

——S. 47 — *Applicability — Dispute between heirs of judgment-debtor—Decree satisfied.*

Where the dispute is between persons claiming in their own right and as heirs of a judgment-debtor, and is raised after the decree is satisfied, the question is not one falling under S. 47 of the C. P. Code. (*E. Weston.*) Gopal Lal *v.* Mithan Lal. **1937 A.M.L.J. 80.**

——S. 47—*Applicability—Dispute between two decree-holders—Second appeal.*

S. 47, C. P. Code, applies to a dispute between two decree-holders who are parties to the suit, and a second appeal is, therefore, competent. (*M.C. Ghose, J.*) Jagadamba Loan Co., Ltd. *v.* Satyendra Chandra Ghose. **I.L.R (1938) 1 Cal. 175=173 I.C. 516=10 R.C. 532=41 C.W. N. 1248=A.I R. 1937 Cal. 730.**

——**S. 47 and O. 21, R. 2** (3)—*Applicability—Instalment decree with default cause—Applica-*

ion for execution—Plea of payment—Burden of proof—Payments alleged beyond 90 days—If can be recognised—Decree-holder—If bound to prove default.

When no payment or adjustment of a decree has been certified under O. 21, R. 2, C. P. Code, and the decree-holder applies for execution of his decree for the entire amount due under the decree, the executing Court has to assume that there has been no payment or adjustment and cannot after the lapse of the period of 90 days prescribed by Art. 174 of the Limitation Act permit the judgment-debtor to plead any adjustment or payment. The fact that the decree is an instalment decree with a default clause does not take the case out of O. 21, R. 2 (3) or bring it under S. 47, C. P. Code. If the holder of the instalment decree applies for execution, it must be taken that his case is that default has been made, and the judgment-debtor must prove payment. As this has to be done in the executing Court, O. 21, R. 2 (3) comes into play, and the judgment-debtor cannot evade it by invoking S. 47. It is not open to the executing Court to recognise payments made beyond 90 days. (*Dhavle and Varma, JJ.*) DARSAN ALI *v.* SURAJ MAL. **17 Pat. 128=180 I.C. 319=11 R.P. 491=5 B.R. 471=1938 P.W.N. 393=19 Pat.L.T. 428=A.I.R. 1938 Pat. 465.**

——— S. 47—*Applicability—Maintenance decree in favour of Hindu widow declaring her right to maintenance and declaring charge on property—Executability—Separate suit to enforce charge by sale—If necessary.*

Where a decree has been passed declaring the right of a Hindu widow to maintenance and also declaring that the maintenance be a charge on the joint family properties, it is not necessary for the widow to bring a separate suit to enforce the charge by sale of the properties. When the decree for maintenance has the effect of a decree for sale, the decree-holder is entitled to proceed to execution without any further action. If the charge is created by the decree in the action then a separate suit would be necessary to enforce the charge by way of sale of the properties charged. But when the charge has arisen not by reason of the decree made on the maintenance action but under the Hindu Law, bringing the action for the declaration of the right to maintenance and obtaining a decree to that effect would result in the decree having the effect of a decree for sale of the charged property; and it is not at all relevant what language was used by the Court declaring the charge to exist. No separate suit is therefore necessary to enforce the charge. (*Wort and Varma, JJ.*) SAH RADHA KRISHNA *v.* BECHNI DEBI. **172 I.C. 234=1937 P.W.N. 830=10 R.P. 319=18 Pat.L.T. 834=A.I.R. 1937 Pat. 654.**

——— S. 47—*Applicability—Mortgage decree—Application for sale—Death of mortgagor—Objection by legal representative that property belonged to him—Objection if falls within S. 47—Proper remedy.*

The mortgagee after the passing of the final decree applied for sale. During the pendency of the application the mortgagor died. His legal representative who was then brought on record raised an objection to the sale on the ground that the mortgaged property belonged solely to him and that the mortgagor had no right, title or interest therein.

Held, that the objection did not fall within the purview of S. 47. The objection being to the validity of the decree itself the proper remedy was by way of separate suit. (*Dunkley, J.*) RAMASWAMY CHETTYAR *v.* U TUN THA. **1940 Rang.L.R. 402=A.I.R. 1940 Rang. 161.**

——— S. 47—*Applicability—Mortgage decree—Objection by legal representative of judgment-debtor based on independent title.*

There is a clear distinction between a money decree and a mortgage decree in cases where the legal representative of the judgment-debtor raises an objection which was not open to the judgment-debtor but which is based on an independent title of the legal representative. In the case of money decrees it is for the executing Court to determine how the decretal amount is to be recovered from the judgment-debtor and which property, if any, has to be sold in execution of the decree. In the case of mortgage decrees the method of recovery is determined by the trial Court, and forms a part and parcel of the decree itself. Any claim by the judgment-debtor or his legal representative that certain property is not liable to sale in execution of the mortgage decree is a claim challenging the validity of the decree and such a claim even though based on his own independent title, cannot be entertained by the executing Court under S. 47 but must be put forward by means of a separate suit. (*Addison and Abdul Rashid, JJ.*) LLOYDS BANK, LTD., LAHORE *v.* MT. REHMAT BIBI. **I.L.R. (1939) Lah. 493=186 I.C. 168=12 R.L. 371=41 P.L.R. 533=A.I.R. 1939 Lah. 178.**

[Reversing A.I.R. 1939 Lah. 51.]

——— S. 47—*Applicability—Mortgage suit—Question of paramount title—Omission to raise—Subsequent suit—Plea of paramount title—If barred.*

In a mortgage suit some of the defendants claimed paramount title in the mortgaged property by claiming for themselves occupancy rights. Such question of title cannot be decided in mortgage suit, and it is no duty of the defendants to raise such question. When in a later suit between the parties the same question was again raised, it was contended that S. 47, C. P. Code, is a bar to such suit because this question could only be decided in an execution proceeding.

Held, that the question can be decided in a separate suit. The bar of S. 47 can only apply to cases where there is a duty to raise the question in the earlier proceedings. The duty to raise the question in the earlier proceedings and the bar in the later suit are co-extensive and each complements the other. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

——— S. 47—*Applicability—Objection by judgment-debtor to an order of attachment—Remedy—Application under S. 47 or an appeal.*

Where a judgment-debtor objects to an order allowing the application for attachment of movables as illegal, an application under S. 47, C. P. Code, can be entertained. He need not file an appeal against the order. (*S. K. Ghose, J.*) AZIZ RAHAMAN MOLLA *v.* BEPIN BEHARI MUKHERJEE. **174 I.C. 589=10 R.C. 687=66 C.L.J. 57=A.I.R. 1938 Cal. 162.**

——**S. 47 and O. 21, R. 58**—*Applicability—Objection by legal representative that property is his own—If falls under S. 47—Appeal.*

Where a decree is passed against the assets of a certain person in the hands of his legal representative, and the legal representative makes an objection that the assets in question belong to her personally, the objection should be treated as one under S. 47, C. P. Code and not as one under O. 21, R. 58. Accordingly, an appeal lies from the order dismissing the objection, but no regular suit is maintainable. (*Bennet, J.*) Badri Prasad v. Mst. Janki Shiva Prasad. **167 I.C. 394=9 R. A. 531=1936 A.W.R. 1270=1937 A.L.J. 13=1937 All.L.R. 187=A.I.R. 1937 All. 97.**

——**S. 47 and O. 21, R. 58**—*Applicability—Objection by sub-tenant to attachment of rent payable by him to judgment-debtor—Rejection—Appeal or revision.*

An objection by a sub-tenant to the attachment of the rent payable by him to the judgment-debtor, is an objection by a third party and is covered only by O. 21, R. 58 and does not come under S. 47, C. P. Code. Hence it is not appealable but only revisable under S. 252 of the Tenancy Act. (*Darling, S.M. and Bomford, J. M.*) Ramchandra v. Raghunath Singh. **1938 R.D. 175 =1938 A.W.R. 42 (B.R.).**

——**S. 47**—Applicability—Order confirming sale set aside—Application by auction-purchaser for compensation for improvements. *See* C. P. Code, Ss. 151, 144 and 47. **A.I.R. 1940 Lah. 59.**

——**S. 47** *Applicability—Order refusing to stay execution—Appeal, if lies.*

When an Amending Act changes the phraseology of the old Act it must, as a rule, be assumed that the Legislature was intending to make some change. Questions relating to stay of execution are no longer within the purview of S. 47. Hence no appeal lies from an order staying or refusing to stay execution of a decree. (*Baguley and Mosely, JJ.*) Chidambaram Chettyar v. Somasundaram Chettyar. **1938 Rang.L.R. 580=177 I.C. 942=11 R.R. 186=A.I.R. 1938 Rang. 317.**

——**S. 47**—*Applicability—Plaintiffs against whom suit was dismissed filing claim in execution of decree passed against others—Claim dismissed for default—No appeal filed—Right to reagitate question by suit or otherwise.*

A suit was dismissed as against the plaintiffs and decreed as against certain others. The decree-holders took out execution of the decree. The plaintiffs filed a claim case alleging that the property attached by the decree-holders included property belonging to them and not belonging to the judgment-debtors. The claim case was dismissed for default and an application for its restoration was also dismissed. The plaintiff instituted a suit for a declaration that certain of the properties attached in execution were not liable to attachment and sale in execution of that decree. The lower Court held that S. 47, C. P. Code, was a bar to the suit as the matter in dispute was a matter relating to the execution of the decree and as the plaintiffs were parties to the suit which that decree had been passed. It, however, treated the plaint as an application under S. 47 and held in favour of the plaintiffs that the properties were not liable to sale. On appeal, setting aside the order,

Held, that the claim case had been rightly held by the Court below to have been in fact an application under S. 47, that the plaintiffs, therefore, on the dismissal of their claim case had a remedy open to them by way of an appeal from the order under S. 47, and that as they did not avail themselves of that remedy, they were not entitled to reagitate the question. (*Agarwala and Varma, JJ.*) Bhan Kumar Chand v. Ajhodhya Prasad Singh. **159 I.C. 960=8 R.P. 316=A.I.R. 1936 Pat. 268.**

——**S. 47**—*Applicability—Question relating to delivery of possession to auction-purchaser.*

The question relating to the delivery of possession of the property purchased by an auction-purchaser is not a question relating to the execution, discharge or satisfaction, of the decree and hence such a matter does not come under S. 47, C. P. Code. (*Wort, Ag. C.J. and Manohar Lall, J.*) Sugan Mal Bothra v. Puran Mall Marwari. **177 I.C. 692=5 B.R. 8=11 R.P. 173.**

——**S. 47 and O. 21, R. 2**—*Applicability and scope—Payment to decree-holder out of Court by one judgment-debtor—Execution by decree-holder by sale of properties of another—Application by latter to set aside sale on ground of satisfaction of decree by former judgment-debtor—Limitation—Period of 90 days—If can be enlarged—Limitation Act, Art. 174.*

A judgment-debtor who pays out of Court is not at liberty to plead in the executing Court that the decree-holder has been guilty of fraud in failing to have the payment recorded, because Cl. (2) of rule 2 of O. 21, C. P. Code, enables him to protect himself by having the payment recorded. An omission on the part of the decree-holder to certify a payment, even if he may have promised to do so, does not entitle the judgment-debtor to get over or overrule the 90 days limitation under Art. 174 of the Limitation Act, for making an application under O. 21, R. 2 (2), C. P. Code, and to secure an investigation of the same matter by invoking S. 47, C. P. Code. The position is the same whether the decree is only against one judgment-debtor or against several, and one of the judgment-debtors who does not pay cannot be in a stronger position to assail the execution proceedings on the ground of payment by another than the one who does pay. Consequently, where the decree-holder executes the decree against one judgment-debtor by sale of his properties, an application by that judgment-debtor to have the sale set aside on the ground that the decree has been satisfied by the payment made by another judgment-debtor, is governed by O. 21, R. 2, C. P. Code, and Art. 174, Limitation Act, and the 90 days rule of limitation applies. The applicant cannot seek to invoke S. 47, C. P. Code. A party who is already barred under O. 21, R. 2, C. P. Code, cannot move for the same relief under S. 47, C. P. Code. (*Macpherson and Dhavle, JJ.*) Harihar Prasad Singh v. Bhubneshwari Prasad Singh. **15 Pat. 422=162 I.C. 849=8 R.P. 588=1936 P.W.N. 267=17 Pat.L.T. 195=A.I.R. 1936 Pat. 270.**

——**S 47**—*Application under O. 21, R. 22—If falls under S. 47.*

Application under O. 21, R. 22 falls under S. 47 and can be enquired into by the executing Court. (*Mosely and Dunkley, JJ.*) S.T.R.M. Firm *v.*

Andathal. **178 I.C. 118=11 R.R. 199=A.I.R. 1938 Rang. 292.**

Bar of suit.

——**Ss. 47 and 145**—*Bar of suit—Adjustment of decree—Suit for declaration by surety—Maintainability.*

Where a decree is sought to be executed against a surety for non-appearance of the judgment-debtor and the surety makes an application under O. 21, R. 2, C. P. Code, to the executing Court that an adjustment had taken place between the decree-holder and the judgment-debtor and therefore he is discharged from the liability but the application is dismissed without going into merits on the ground of limitation, the surety can bring a suit for declaration that the decree cannot be executed against him in view of the adjustment; such suit is not barred by S. 47, C. P. Code, as a surety, unlike a judgment-debtor, is a party to the suit or execution proceedings only for the limited purpose of appeal in view of S. 145 of the Code. (*Tek Chand and Abdul Rashid, JJ.*) Dewan Chand *v.* Pindi Das. **I.L.R. (1938) Lah. 140=175 I.C. 480=10 R.L. 724=39 P.L.R. 872 =A.I R. 1937 Lah. 658.**

——**S. 47**—Bar of suit — Agreement before decree to give credit to certain payments and not to execute decree if passed—Breach—Execution —Deposit of money to save sale in execution— Suit to recover money deposited—Maintainability —*Res judicata. See* C. P. Code, S. 11, **18 Pat.L. T. 896=A I.R. 1938 Pat. 41.**

——**S. 47**—*Bar of suit—Adjustment of decree by next friend of minor decree-holder without sanction of Court—Suit to set aside—Maintainability — Proper remedy — S.* 151 *and O.* 47, *R.* 1.

Where an order recording a compromise or an adjustment of a decree effected by next friend of a minor, without the sanction of the Court, during the execution of a decree in favour of the minor, is sought to be set aside on the ground that compromise has been obtained by fraud, S. 47 bars a fresh suit for setting aside the adjustment and the proper remedy is by an application for review or by invoking the inherent jurisdiction of the Court. Such an application comes under S. 47 and the Court has power to take action under S. 151 independently of O. 47, R. 1. (*Rowland and Varma, JJ.*) Lal Babu *v.* Rang Bahadur Singh. **3 B.R. 94=165 I.C. 857=9 R.P. 226= 17 Pat.L.T. 743=1936 P.W.N. 565=A.I.R. 1936 Pat. 506.**

——**S. 47**—*Bar of suit—Application for temporary alienation of judgment-debtor's land—Mortgage created and mortgagee given possession —Decree recorded as fully satisfied by mortgage —Subsequent suit by decree-holder against mortgagee—If barred.*

In execution of his decree the decree-holder applied for a temporary alienation of the land of the judgment-debtor. The land was attached and a reference was made to the Collector. A mortgage was created and the mortgagee given possession; but neither the executing Court nor the Collector realized the mortgage money from the mortgagee. On application of the judgment-debtor, the decree was recorded as completely satisfied by the creation of a valid mortgage even though the mortgagee tried to back out from the transaction. Subsequently the decree-holder filed a regular suit against the mortgagee for the money. It was contended by the mortgagee that the suit was barred by S. 47.

Held, that the mortgage was in the nature of a judicial hypothec which had satisfied completely the decree. If either of the parties to this hypothec wanted to enforce its rights against the other, the remedy was obviously by a regular suit and not in execution of the decree to which the mortgagee was not a party and which was already judicially satisfied. The decree having been held to have been satisfied, the question between the decree-holder and the mortgagee could not possibly be said to be one "relating to the execution, discharge or satisfaction of the decree". This being so, no question of bar by S. 47 could arise. (*Tek Chand and Abdul Rashid, JJ.*) Anjuman Imdadi Bank *v.* Ujagar Singh. **181 I.C. 55=11 R.L. 736=40 P.L.R. 569=A.I.R. 1938 Lah. 214.**

——**S. 47**—*Bar of suit—Assignment of decree —Application by assignee under O.* 21, *R.* 16— *Objection that assignment not valid—Order recognising assignment and allowing execution—Suit to declare assignment sham and collusive—Maintainability.*

The objection that the transfer of a decree by the decree-holder is not valid, but collusive and sham, and that the transferee is therefore not a representative of the decree-holder as there has been vesting in him of the decree, must be raised and decided by the Court in the application by the transferee under O. 21, R. 16, C. P. Code, for permission to execute the decree. When the objections are determined and execution is ordered on recognition of the transfer, that is a decree within the meaning of S. 47, C. P. Code. A separate suit for a declaration that the assignment is a sham and collusive transaction is barred under S. 47, C. P. Code. (*Venkataramana Rao, J.*) Venkataramayya *v.* Venkataramayya. **176 I.C 628=11 R.M [135=1937 M.W.N. 1043 =A.I R. 1938 Mad. 78.**

——**S. 47**—*Bar of suit — Attachment before judgment—Claim or objection by defendant— Order on—If one under S. 47—Suit to set aside— If barred—O.* 38, *R.* 8—*Applicability.*

The operation of O. 38, R. 8, C. P. Code, is not confined to claims preferred by persons who are not parties to the suit. An objection raised by a defendant to an attachment before judgment also falls under R. 8 of O. 38. A decision on such objections is not final and can be challenged in a separate suit filed within the time limited. Such a decision, even where the claim is by the defendant, does not fall under S. 47, C. P. Code, so as to bar a separate suit, because S. 47 can come into play only when there is an application for execution pending before the Court. (*Thom and Iqbal Ahmad, JJ.*) Ahmad Ali Khan *v.* Anand Sarup. **1937 A.W.R 587=1937 A.L.J 705=171 I C. 409=1937 A.L.R. 843=10 R.A. 262=A.I.R. 1937 All 635.**

——**S. 47**—*Bar of suit—Auction sale—Decree-holder purchaser in mortgage suit—Application for possession—Question as to what passed under the sale—If one under S.* 47.

A question between the auction-purchaser who is also the decree-holder in a mortgage suit and the judgment-debtor in that suit as to what passed under the auction sale and arising in an application by the auction-purchaser for possession of the property sold should be held to be not a question between the parties to the suit in which the decree was passed or their representatives and relating to the execution, discharge and satisfaction of the decree or to the stay of execution thereof. (*Sulaiman, C.J., Thom and Allsop, JJ.*) KEDAR NATH *v.* ARUN CHANDRA SINHA. **I L R. (1937) All. 921=172 I.C. 57=10 R.A. 360=1937 A.L.J. 889=1937 All. L R. 923=1937 A.W.R. 937=A.I.R. 1937 All. 742 (F.B).**

———S. 47—*Bar of suit—Auction sale—Decree-holder purchaser — Remedy for recovery of possession.*

The execution proceedings do not in fact terminate on a sale being confirmed in favour of a decree-holder auction-purchaser, and the mere fact that the decretal amount has been set off against the purchase money does not necessarily mean that the decree is finally satisfied and the execution proceedings have terminated. The decree-holder continues to be a party to the suit and a remedy for recovery of possession of the property purchased by him in the execution of the decree is still a remedy relating to the execution, discharge and satisfaction of the decree and a separate suit for the same does not lie. 1925 Pat 478 and 43 M. 107 (F.B.), Foll.; 1 P L. J. 232; 3 P.L J. 571; 1918 Lah. 204; 31 All. 82 (F.B.); 1924 Bom. 429 (F.B.) and Mulla's C. P. Code, 8th Edn., p. 139, not foll. (*Fraser, J.C. and Saad-ud-din Khan, A.J.C.*) HUKAM CHAND *v.* MIR HASSAN. **A.I.R. 1936 Pesh. 85.**

———S. 47—*Bar of suit—Auction sale—Suit by decree-holder auction-purchaser for possession.*

Where a decree-holder, who is himself the auction-purchaser at a Court sale held in execution of his decree seeks to get possession of the purchased property, he does not do so in execution of his decree but by virtue of the title acquired as purchaser, his claim based on such title not relating to the execution, discharge or satisfaction of the decree and the provisions of S. 47 therefore not preventing his instituting a suit for possession. (*Addison and Ram Lall, JJ.*) SARDAR MAL *v.* KARYAR SINGH. **I.L.R. (1939) Lah. 295=183 I.C. 475=12 R.L. 118=41 P.L.R. 546=A.I.R. 1939 Lah. 211.**

———S. 47—*Bar of suit—Auction sale—Suit by decree-holder purchaser for possession—If barred.*

A separate suit by a decree-holder auction purchaser for the possession of the property purchased is competent and is not barred by S. 47, C. P. Code. The decree-holder auction-purchaser does not seek to get possession in execution of his decree but by virtue of his being declared an auction-purchaser at the auction sale. (*Abdul Qayoom, C.J. and Kichlu, J.*) MEHDA BAT *v.* MOHI-UD-DIN. **41 P.L.R. J. & K. 71.**

———S. 47—*Bar of suit—Award on arbitration—Court merely passing order directing award to be filed—No judgment passed in accordance with award—Effect—Suit for relief in respect of matters covered by award—If barred—Plaintiff treating order as decree and executing in part—Effect—If estopped from contending that there is no executable decree.*

Where there is no judgment according to an award made in arbitration and no decree following thereon, but there is only an order which simply directs that the award should be filed without incorporating the terms of the award in the order, the order is not executable as a decree, though it is styled as a decree. A separate suit for relief in respect of the matters covered by the award is not barred under S. 47, C. P. Code. The fact that the plaintiff treats the order as a decree and files an application to execute it and also obtains some relief by way of execution though not exactly in terms of the decree, does not bring S. 47, C. P. Code, into operation, because there is no document which in law can operate as a decree in terms of the award, which alone would bar a separate suit. Nor would the fact that the plaintiff erroneously treats the order as a decree and executable as such, and obtains some relief disentitle or estop him from contending subsequently that he has been mistaken in treating it as a decree if in law it did not amount to such. There can be no estoppel against a statute and the doctrine of approbate and reprobate cannot apply. It applies only to the conduct of parties, and the conduct of the parties is immaterial when the question of the legality of a document is concerned. (*Divatia, J.*) GANESH SHANKERBHAT *v.* GANGABAI. **181 I. C. 608=11 R.B. 347=41 Bom.L R. 170=A I.R. 1939 Bom. 114.**

———S. 47—*Bar of suit—Compromise embodied in decree—Suit to enforce compromise—Maintainability.*

The plaintiff instituted a suit against the defendant for a declaration of his title to a moiety share of a certain estate purchased by the latter. The suit culminated in a compromise which was made the basis of a decree. Under the compromise the defendant was declared the full owner of the estate but he was to grant a *mourashi* lease in respect of the 8 annas share of the same to the plaintiff. As the defendant did not execute the *mourashi* patta, the plaintiff brought a suit for specific performance.

Held, that the compromise sought to be enforced was within the scope of the previous suit and hence came within the operative part of the decree that was passed therein, that the remedy of the plaintiff was by way of execution of that decree and that, therefore, the suit was barred under S. 47, C. P. Code. (*Mukerjea and Latifur Rahman, JJ.*) RABINDRA NATH ROY *v.* DHIRENDRA NATH ROY. **186 I.C. 673=12 R.C. 509=43 C.W. N. 1007=70 C.L.J. 286=A.I.R. 1940 Cal. 82.**

———S. 47—Bar of suit—Compromise not an adjustment under O. 21, R. 2—Separate suit on—If lies. *See* C. P. CODE, O. 21, R. 52 AND S. 47—ADJUSTMENT. **1939 A.M.L.J. 21.**

———S. 47—*Bar of suit—Contract to sell property—Attachment of property—Subsequent sale —Suit by vendee for declaration of title—If barred—"Representative."*

Where subsequent to a contract to sell certain property, it is attached by a decree-holder of the vendor and the sale in pursuance of the contract takes place, the vendee is not representative of the judgment-debtor within the meaning of S. 47, and, as such, a suit by him (vendee) for a declaration that the property is not liable to attachment is not barred by S. 47. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **I.L R. (1936) Nag. 172=166 I.C. 950 (2)=9 R.N. 152=A.I.R. 1936 Nag. 163.**

——S. 47—*Bar of suit—Cross-suits—Agreement to take decrees for equal amounts and to set-off each against other and to refrain from execution—Decrees passed accordingly—Subsequent execution by one party—Suit by other for damages—If barred.*

Plaintiff filed a suit against the defendant for arrears of rent due to him. The defendants filed another suit against the plaintiff in the same Court for amounts due on a promissory note executed by the plaintiff in favour of the defendants. Consent decrees were passed on both the suits for equal amounts as a result of an agreement between the parties to the effect that the amount due on each was to be equalised, and the amounts of the two decrees should be set off against each other and that no execution proceedings should be taken by either party against the other. The plaintiff acted up to the agreement and did not execute his decree. But the defendants, just a day before the expiry of limitation for execution, applied to execute the decree and realised the full amount from the plaintiff, who was not in a position to set up the pre-decree agreement by reason of 90 days having elapsed from the date of the agreement, as under O. 21, R. 2, C. P. Code, the adjustment could not be recognised after the expiry of the period of limitation for certifying the adjustment. Plaintiff thereupon filed a suit against the defendants for damages.

Held, that the agreement between the parties was not merely one not to execute the decree, but that in effect each should take the amount of the decree obtained against him as payment towards the deceee obtained by him and satisfaction entered thereon. The moment the decrees were obtained by each against the other, they operated as payment of each against the other, and there was an obligation to enter up satisfaction. Since there was a breach of that obligation, a suit for damages would lie, whether the obligation be viewed as an implied promise or one arising under the provisions of O. 21, R 2, C. P Code. S. 47, C. P. Code, was no bar to such a suit. (*Venkataramana Rao, J.*) MADHAVA SAHU *v.* SATRUGHANA SAHU. **186 I.C. 606=12 R M. 658 =1939 M.W.N. 447=49 L.W. 360=A.I.R. 1939 Mad. 499=(1939) 1 M.L J. 473.**

——**S. 47**—*Bar of suit—Declaration that property is not liable to be sold—Party against whom no relief is asked or given, if can sue for.*

A party against whom no relief is either asked for or given cannot sue for a declaration that certain property is not liable to be sold in execution of the decree as it is not the property of the judgment-debtor. S. 47 is a bar to such a suit. He can only make an application under that section. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH. **I.L R. (1938) 1 Cal. 280=178 I C. 540=11 R.C. 367=42 C.W.N. 87=A.I.R. 1938 Cal. 113.**

——S. 47—*Bar of suit—Decree declaratory—Declaration of joint liability of plaintiff and defendant for debt without direction for payment—If bars fresh suit.*

Where a decree merely declares the joint liability of the plaintiff and the defendant in respect of a certain debt without any direction for payment of any sum of money by the one to the other, it is incapable of execution. S. 47, C. P. Code, is no bar in such a case to a fresh suit between the parties to work out their rights. (*Mitter, J.*) DHIRENDRA NATH CHOUDHURY *v.* HARENDRA NATH CHOUDHURY. **64 C.L.J. 55.**

——S. 47—*Bar of suit—Decree passed against person in representative capacity—Omission by him to raise in execution objection in his own capacity regarding property—Subsequent suit—If barred.*

Where a decree is against a person in a representative capacity and proceedings have been taken under it to obtain execution against the property in his representative character, he is a party to the suit with respect to any question which may arise between him and the other parties relating to the execution of the decree. Hence, when a decree has been passed against a person in his representative capacity, he should, in execution proceedings, in his own capacity, raise any objection with regard to the property against which the decree is being executed. If he has failed to do so his subsequent suit for declaration that his share in the property is not affected by the decree is barred by S 47. (*Wright, J.*) R. M. S. V. CHETTYAR FIRM *v.* MA OHN MYAING. **187 I.C. 254=12 R.R. 313=A.I.R. 1940 Rang. 27.**

——**S. 47**—*Bar of suit—Decretal amount realised twice over by decree-holder and his assignee—Suit by judgment-debtor to recover extra amount realised—If barred.*

Where after the assignee of the decree had received the entire decretal amount, the decree-holder also realised the decretal amount from the judgment-debtor who was thus made to pay the same sum twice over, a suit by the judgment-debtor claiming refund of the extra amount realized from him is not barred under S. 47 (1), C. P. Code. (*Addison and Din Mohammad, JJ.*) SARAB SUKH *v.* PREM DATT. **18 Lah. 162=171 I C. 91=10 R L. 157 (2)=39 P.L.R. 904=A.I.R. 1937 Lah. 465.**

——**S. 47**—*Bar of suit—Decree-holder auction-purchaser dispossessed by judgment-debtor after conclusion of execution proceedings—Suit by him for possession against judgment debtor—Maintainability—Defendant, if can alter nature of case by his defence.*

Where a decree-holder purchases certain property belonging to the judgment-debtor in a sale held in execution of his own decree but is dispossessed by the judgment-debtor after the execution proceedings have concluded, a subsequent suit by the decree-holder for possession against the judgment debtor cannot be said to fall within the scope of S. 47, as the matter in dispute does not relate to execution or satisfaction of the decree, having arisen after the satisfaction of the decree. The defendant cannot alter the nature of the case by the defence which he chooses to make. The provisions of S. 47 preclude him from raising in a separate suit a defence which opens such a question as is referred to in S. 47. A.I.R. 1929 Cal. 247 and A.I.R. 1931 Rang. 117 (F.B.), Rel. on. (*Mackney, J.*) KO TAIK ON *v* N. S. A. R. FIRM. **164 I C. 260 (1)=9 R.R. 72=A.I.R. 1936 Rang. 298.**

——S.47—*Bar of suit—Dispute between decree-holder and judgment-debtor—Dispute with stranger—Distinction.*

Section 47 is a bar to a regular suit if the object of that suit is to decide a question between a decree-holder purchaser and the judgment-debtor. But where the object of the suit is to settle dispute between decree-holder purchaser and persons other than the judgment-debtor, S. 47 cannot be a bar, and it is no objection to say that there was no delivery under O. 21, R. 96. There is no rule of law which says that there must be some kind of delivery. The only rule of law is one requiring that all disputes between the decree-holder purchaser and the judgment-debtor should be settled in execution proceedings, and only indirectly this rule of law involves the need for obtaining some delivery under Rr. 95 and 96. But if the dispute itself is not as against the judgment-debtor but against some other persons the need for delivery as against the other persons goes and there is no bar to a regular suit. All that is obligatory on the decree-holder purchaser is the pursuit of a proceeding for obtaining delivery to have an outstanding dispute between him and the judgment-debtor. 26 Mad. 740 and 28 Mad. 87, Dist. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I.R. 1936 Mad. 733.**

——**S. 47**—*Bar of suit—Excess delivery—Restoration—Remedy if in executing Court.*

No separate suit can lie for the recovery of lands taken by the decree-holder in excess of the terms of the decree; if the decree-holder has been put in possession of excess land by the officer of the Court executing the decree, it is but just and proper that the executing Court itself must undo the wrong by ordering the decree-holder to restore it back under S. 47. (*Digby, J.*) CHAGANLAL *v.* MIRZA YAD ALI. **179 I.C. 529=11 R.N. 301=A.I.R. 1938 Nag. 276.**

——**S. 47**—*Bar of suit—Execution sale—Purchase by decree-holder—Failure to take delivery of possession—Property held by tenant of judgment-debtor from before attachment—Surrender by tenant to judgment-debtor after sale—Subsequent lease by judgment-debtor to another—Suit for possession by decree-holder's assignee against judgment-debtor and tenant—Maintainability.*

A decree-holder purchaser cannot of course institute a suit for recovery of possession from the judgment-debtor or some one who stands in the shoes of the judgment-debtor, and his remedy is confined to three years. But where the property sold in execution has been held by a tenant under the judgment-debtor from before the date of attachment of the property in execution, and subsequent to the sale the tenant surrenders the property to the judgment-debtor who again leases it to another, the decree-holder purchaser who has not obtained either actual or symbolical possession after the execution sale, or his assignee can maintain a suit for possession against the judgment-debtor and his tenant. S. 47, C. P. Code, does not bar such a suit, because the judgment-debtor by the surrender does not obtain possession in the same capacity as he held it at the time of the execution sale. (*Leach, C.J., Wadsworth and Krishnaswamy Aiyangar, JJ.*) KRISHNA IYER *v.* SUBRAMANIA IYER **I.L.R. 1939 Mad. 456=1939 M.W.N. 427=180 I.C. 855=11 R.M. 752=49 L.W. 243=A.I.R. 1939 Mad. 369 =(1939) 1 M.L.J. 468 (F.B.).**

——**S. 47**—*Bar of suit—Fraud in respect of application under O. 21, R. 89—Suit to set aside—sale—Maintainability.*

A suit to set aside an execution sale on the ground of fraud in respect of an application under O. 21, R. 89, C. P. Code, is barred by S. 47, C. P. Code. The matter is really within the provisions of S. 47 and could only be decided under that section and not by a separate suit. (*Bhide, J.*) RAM CHAND *v.* SHAMAS DIN. **178 I.C. 594=11 R.L. 481=40 P.L.R. 615=A.I.R. 1938 Lah. 690.**

——**S. 47**—*Bar of suit—Judgment-debtor executing trust deed for benefit of creditors appointing plaintiff as trustee—Plaintiff added as party but not substituted in execution case—Trust property purchased by defendants in execution sale—Suit by plaintiff for declaration of title and possession—If barred—Trustee, if representative of judgment-debtor.*

A debtor, after a money decree was obtained against him by a creditor, executed a trust deed for the benefit of his creditors whereby he appointed the plaintiff as trustee of his entire estate for paying off his debt. In the petition for execution of the decree, the plaintiff was added as a judgment-debtor along with the author of the trust but was not substituted in his place. No notice was served upon the plaintiff and he was not aware of this execution case at all. The trust properties were thereafter attached in execution of the decree and were purchased by the defendants who obtained delivery of possession through Court. The plaintiff instituted a suit for a declaration that his title was not in any way affected by the sale at which the defendants purchased and he also prayed for possession.

Held, that the plaintiff was not a representative of the judgment-debtor as the suit in which the decree was obtained did not relate to any property and the trust was created before attachment, that the question of the plaintiff being the representative of the judgment-debtor was neither raised nor determined in the execution proceedings and that, therefore, the suit was not barred under S. 47, C. P. Code. (*Nasim Ali and Henderson, JJ.*) HIMANSU KUMAR *v.* HASEM ALI KHAN. **181 I.C. 854=11 R.C. 862=42 C.W.N. 1131=A.I.R. 1938 Cal. 818.**

——**S. 47**—Bar of suit—Mortgage by Hindu father—Preliminary decree—Death of father—Sons impleaded as legal representatives—Sons not permitted to question existence or binding nature of debt—Final decree—Sale in execution—Purchase by mortgagee and possession—Suit by sons for possession impeaching mortgage, decree and sale—Maintainability. *See* HINDU LAW—DEBTS. **1939 M.W.N. 918.**

——**S. 47**—*Bar of suit—Mortgage decree—Execution—Party failing to raise question of paramount title—Sale in execution—Separate suit claiming paramount title—Maintainability.*

A party to a mortgage decree can raise the question of paramount title in proceedings in execution of that decree; and when he does not raise it in the execution proceedings leading up to the sale of the property, he is precluded from raising that question afterwards in a separate suit. A subsequent suit by such party claiming paramount title to the property sold is barred under S. 47, C. P. Code. (*Madhavan Nair and*

Stodart, JJ.) Chinnathayee *v.* Lakshmi Achi. **163 I.C 619=9 R.M. 37=1936 M.W.N. 449=43 L.W. 740=A.I.R. 1936 Mad. 675=71 M.L.J. 511.**

——S. 47—*Bar of suit—Mortgage decree—Execution sale—Suit for declaration of invalidity on ground of wrongful and fraudulent inclusion of properties not comprised in the mortgage—Maintainability.*

The question whether a sale in execution of a mortgage is valid and binding or not is clearly a question relating to execution arising between the parties to the mortgage suit, and as such should be determined by the Court executing the mortgage decree and not by a separate suit at all. Consequently a suit for declaration that the sale is not valid and binding on the ground that the mortgagee fraudulently and wrongfully caused to be sold properties which were not included in the mortgage and which could not lawfully be sold in execution, is not maintainable and is barred under S. 47, C. P. Code. (*Derbyshire, C. J. and Costello, JJ.*) Sarada Churn *v.* Prativa Sundari. **40 C.W.N. 428.**

——**S. 47**—*Bar of suit—Mortgage suit—Application for final decree—Objection by judgment-debtor alleging payment—Objection dismissed and final decree passed—Suit for declaration by judgment-debtor that decree should not be executed—If barred.*

In a mortgage suit, the decree-holder made an application for final decree. The judgment-debtor brought an objection that he had made payment in satisfaction of the debt. The objection was disallowed and a final decree was passed. Thereupon the judgment-debtor filed a suit for declaration that he had made payment to the decree-holder and hence the decree should not be executed.

Held, that the declaration that the decree should not be executed was barred by S. 47, C. P. Code.

Held also, that if the payment had been actually made the judgment-debtor had *prima facie* cause of action to recover it by suit as money paid under mistake. (*Almond, J. C. and Mir Ahmad, J.*) Haji Habib Gul *v.* Gopi Chand Singh **174 I.C. 295=10 R. Pesh. 61=A.I.R. 1938 Pesh. 12.**

——**S. 47**—*Bar of suit—Objection by legal representative of judgment-debtor in personal capacity—Dismissal of—Right of suit—C. P. Code, O. 21, Rr. 58 and 53.*

If a person has two capacities, there is no reason why he should be limited to one. If a representative of a judgment-debtor claims the property which the decree-holder seeks to sell in execution as his personal property, there is no reason why he should be limited to the objection under S. 47, C. P. Code. He is entitled to adopt the procedure laid in O. 21, R. 58, and if he fails in the claim case, to bring a suit under O. 21, R. 63. (*Wort and Agarwala, J.*) Lachhmi Lal *v.* Sriniwash Ram Kumar. **5 B R. 238=179 I. C. 538=11 R.P. 388=A.I R 1939 Pat. 354.**

——**S. 47**—*Bar of suit—Order recording satisfaction of decree on petition of adjustment—Suit to rectify petition of adjustment—Maintainability—Limitation.*

A suit by the decree-holder for rectification of a petition of adjustment, in which a mistake has crept in and upon which an order recording satisfaction of the decree has been passed, is maintainable and not barred by the provisions of S. 47, C. P. Code. To such a suit the limitation applicable is that prescribed by Art. 96 of the Limitation Act. (*Guha and Bartley, JJ.*) Abdul Sattar Choudhury *v.* Abdul Rusan. **165 I C. 756=9 R.C. 457=40 C.W.N. 914=A.I R. 1936 Cal. 400.**

——**S 47**—*Bar of suit—Partition suit in joint Hindu family—Compromise decree—Land left in common pending another litigation—Property lost to family subsequently and money acquired in its stead—Division of money among sharers—Separate suit—Maintainability.*

Where a compromise decree in a partition suit between the members of a Hindu family provides that a certain item of property about which there is a pending litigation should for the time being be retained in common and undivided and that after the determination of the said litigation, the same should be divided specifically according to the respective shares of the parties, and subsequently in the litigation it ultimately turns out that the family loses the property, but instead the family gets money which is taken out by some of the parties, a suit by the other parties to recover their shares is not barred by S. 47, C. P. Code. The decree contemplates the division by metes and bounds of specific immovable property, but after the decree, the property is lost, and money was acquired in its stead, and thus cannot be partitioned in execution of the decree. Hence a separate suit is not barred under S. 47. (*Lokur, J.*) Laxman Manjunathaya *v.* Venkatrao. **41 Bom.L.R. 836=185 I.C. 13=12 R.B. 222=A.I. R. 1939 Bom. 386.**

——**S. 47**—*Bar of suit—Person obtaining property of another agreeing to pay his decretal debt—Right of decree-holder to proceed against him by way of execution application.*

Where certain persons obtain possession of certain properties on relinquishment by a female limited owner, expressly agreeing to pay certain decretal debt due against her, they are, upon the principles of justice, equity and good conscience, bound to pay the decretal debt in execution of the decree. There is no necessity on the part of the decree-holder to take recourse to a separate suit to establish the contractual liability in view of the scope of S. 47, C. P. Code. They can proceed by way of an application under S. 47. The decree-holder, although stranger to the contract which is to his benefit is entitled to enforce the agreement to his benefit apart from the position that the party concerned accepted liability in the matter of satisfaction of the debt due to the decree holder. 62 C.L.J. 55, Rel. on. (*Guha and Bartley JJ.*) Bhujendra Nath Biswas *v.* Sushamoyee Basu. **166 I C. 786=9 R.C. 624=40 C.W.N. 601=63 C. L.J. 25=A.I R. 1936 Cal. 67.**

——**S. 47**—*Bar of suit—Pre-decree compromise—Whether can be pleaded in execution—Suit for declaration of rights on basis of compromise—Maintainability.*

The executing Court can only go into matters relating to the execution, discharge or satisfaction of the decree which arise after the decree came into existence and result in its discharge or satisfaction and not into a pre-decree compromise which is not embodied in the decree and which practically nullifies the decree. Such a compromise could not, therefore, be pleaded as a bar in execution proceedings and a separate suit for declaration of rights on the basis of the compromise is maintainable. (*Coldstream and Bhide, JJ.*) ROBERT HERCULES SKINNER *v.* R. M. SKINNER. **39 P.L.R. 21=18 Lah. 171=170 I.C. 245=10 R. L. 89=A I.R. 1937 Lah 507.**

—— **S. 47**—*Bar of suit—Property purchased by decree-holder in execution—Suit by him or by purchaser from him for possession—Maintainability.*

S. 47, C. P. Code, bars a suit by a decree-holder for possession of the property purchased by him in execution of his own decree against the judgment-debtor or any one claiming under him, and the bar is equally applicable to a purchaser from the decree-holder. The Code provides that if the property is in the possession of the judgment-debtor or any one claiming under him the decree-holder purchaser must obtain actual delivery of possession under O. 21, R. 95, but if it was in the possession of a tenant entitled to be in occupation of the same he must obtain symbolical possession under O. 21, R. 96. Where this is not done within three years from the date when the sale became absolute, a suit for possession is not maintainable in view of the bar of S. 47. (*Venkataramana Rao, JJ.*) SUBRAMANIA IYER *v.* KRISHNA IYER. **1936 M.W.N. 325=8 R M. 1057=162 I.C. 856=A.I. R. 1936 Mad. 571.**

—— **S. 47**—*Bar of suit—Purchase in execution—Obstruction to delivery by parties to suit and by strangers—Suit by purchaser—If barred.*

Where a purchaser of land in execution while taking possession is obstructed by certain persons, some of whom were parties to the suit and who claimed occupancy rights therein, in so far as such a dispute was raised by the parties to the suit, the question should be decided in execution proceedings, but as to others who were not parties to that suit, a regular suit must be the only remedy and S. 47 is no bar. (*Ramesam and Cornish, JJ.*) VENKATAKRISHNAYYA *v.* VENKATANARAYANA RAO. **169 I.C. 456=10 R.M. 43=A.I. R. 1936 Mad. 733.**

—— **S. 47**—*Bar of suit—Refusal to recognize assignee decree-holder—Separate suit to declare right—If barred.*

Where in an application under O. 21, R. 16, C. P. Code, the executing Court refuses to recognize the assignee decree-holder, on the objection of the judgment-debtor, the dispute is between a transferee of the decree-holder and the judgment-debtor and is fully covered by the provisions of S. 47, C. P. Code, and hence a separate suit to declare the assignment valid is barred. (*Grille, J.*) BALCHAND *v.* KACHRU. **I.L.R. (1939) Nag. 54=176 I.C. 445=11 R.N. 58=1938 N.L.J. 117 =A.I.R. 1938 Nag. 267.**

—— **S. 47**—*Bar of suit—Representative—Purchaser from auction-purchaser at sale in execution of money decree—Application for delivery—Obstruction by purchaser in execution of money decree in another small cause suit—Dismissal of application—Suit for possession—Bar of.*

The second plaintiff had a mortgage over the property of a joint Hindu family consisting of an adult and two minor members. He sued on the mortgage and got a decree on 23—1—1928, in execution of which the property was put up for sale and purchased by the second plaintiff himself on 1—5—1931. He got delivery in execution of the property except one item, with regard to which he was obstructed by the defendant; and an application by the second plaintiff for removal of resistance was dismissed. On 6—9—1931, second plaintiff sold all his rights to the first plaintiff, who on 17—10—1931 applied for removal of the obstruction of the defendant with regard to the one item which had not been delivered to the second plaintiff. But that application was also dismissed on 6—1—1932. The defendant who was the obstructor claimed title to the item in dispute under a purchase in execution of a small cause decree obtained by a stranger against the adult member only of the joint family, who was one of the mortgagors against whom the second plaintiff had obtained the mortgage decree. The defendant's purchase was on 20—1—1930, before the sale in execution of the mortgage decree, but after the decree in that suit, while the small cause decree in execution of which the defendant purchased was passed on 3—5—1928, after the mortgage decree. The laintiffs instituted a suit against the defendant for recovery of the item, which had not been delivered to them in execution.

Held, that the first plaintiff was a representative of the auction-purchaser, and the defendant was a representative of the mortgagors, and the matter being covered by S. 47 (1), C. P. Code, the suit was barred

Held, further, that the plaintiff should, however be given leave to treat the suit as an application under O. 21, R. 95, C. P. Code, in view of S. 47 (2), C. P. Code, there being no obstacle by way of limitation or otherwise, on payment of additional court-fee, if that be required. (*Gentle, J.*) PADALINGA MUDALIAR *v.* ARUMUGHA MUDALIAR. **1939 M.W.N. 857=A.I R. 1939 Mad. 944=(1939) 2 M.L.J. 415.**

—— **S. 47**—*Bar of suit—Sale, in between the order for and the actual attachment—Purchaser's claim under O. 21, R. 58 upheld—Separate suit to declare that property liable to attachment and sale —Maintainability.*

Where after an order for attachment but before the actual attachment, the property sought to be attached is transferred by a sale deed to a third person and the purchaser thereupon preferred a claim under O. 21, R. 58, C. P. Code and the property was released from the attachment by the executing Court, it is certainly open to the decree-holder to file a separate suit to get it declared that the property is liable to be attached and sold in execution of his decree and it cannot be said that such a suit is barred by S. 47, C. P.Code. (*Bennet, and Verma, JJ.*) BANSRAJ PANDEY *v.* RAM LAL PANDEY. **I.L.R. (1939) All. 354=181 I.C. 817= 11 R.A. 614=1939 A W.R (H.C.) 197=1939 A.L. J. 221=A.I.R. 1939 All. 264.**

—— **S. 47**—Bar of suit—Second suit for same relief and on same cause of action and between same parties—Maintainability. *See* C. P. CODE, Ss. 11 AND 47. **41 Bom.L.R. 497.**

—— **S. 47**—*Bar of suit—Suit for possession by decree-holder auction-purchaser against judgment-debtor and another—Latter claiming to have purchased property from judgment-debtor before attachment.*

S. 47, C P. Code, can only apply where a dispute arises between the parties to the suit; it does not apply where the contest is between the parties to the suit and also a stranger. A suit by the decree-holder auction-purchaser for possession of property against the judgment-debtor and another person who claims that he had purchased that property from the judgment-debtor before the attachment proceeding is, therefore, not barred by the provisions of that section. (*Sen, J.*) Badan Chandra Barwa *v.* Ramjiban Sohanlal. **44 C.W.N. 827.**

———S. 47—Bar of suit—Suit for possession and mesne profits—Claim for future mesne profits—Omission to grant —No direction as to inquiry into mesne profits—Second suit for such mesne profits. If barred. *See* C. P. Code, S. 11. **46 L. W. 676.**

———S. 47—*Bar of suit—Suit for possession of land—Execution barred—Second suit—Maintainability—Land on river bank subject to annual inundation during rainy season by reason of flooding of river—If dispossession of defendant, or constructive possession of plaintiff.*

A decree obtained by a person for possession of land, which is left unexecuted by leaving the defendants in possession until the execution of the decree is barred by limitation, bars a second suit for possession by reason of S. 47, C P. Code. The fact that the land is on the banks of a river which spills over its bank during the annual rainy season in times of flood and makes agricultural operations impossible during the period of inundation, is no ground for holding that there is any dispossession by *vis-major* of the defendants or that the plaintiff at that time enjoys constructive possession such as would give him a right to institute a new suit so as to get over the bar of S. 47, C. P. Code. The decree for possession cannot be satisfied unless the plaintiff gets actual possession of the land, and it is only if the land becomes derelict that it would be unnecessary to apply for execution. (*James and Chatterji, JJ.*) Jugal Kishore Prasad Singh *v.* Manaka Singh. **180 I.C. 76=5 B.R. 330=11 R.P. 442=A.I.R. 1939 Pat. 260.**

———S. 47—*Bar of suit—Suit for possession by mortgagee decree-holder auction-purchaser.*

The mortgagee decree-holder does not have a right to possession of the property ordinarily speaking and therefore an application for possession of the property by the auction-purchaser even though he happens to be the decree-holder himself is not in the same capacity and the auction-purchaser must therefore remain the decree-holder. This being so such application must be taken to be made by the right accruing to him for possession by virtue of that sale. Therefore if a party claiming under the judgment-debtor resists the auction-purchaser, the question neither relates to the execution, discharge or satisfaction of the decree, nor is it between the parties to the suit in the sense that the parties arrayed against each other are representatives in interest of the decree-holder and judgment-debtor or *vice versa* respectively in the original suit. Therefore it would follow that a suit by the auction-purchaser for possession of the property is not barred by reason of the provisions of S. 47. (*Dalip Singh and Sale, JJ.*) Abdul Ghani *v.* Lala Lal Chand. **A.I.R. 1940 Lah. 230.**

———S. 47—*Bar of suit—Suit on sale but decree as on mortgage—Defendant failing to pay amount decreed and plaintiff put in possession as per decree—Subsequent suit by defendant for possession alleging satisfaction of mortgage out of income—Maintainability.*

Where in a suit on the basis of a sale, the Court held that the transaction was a mortgage and not a sale and passed a decree directing that defendant should pay a certain amount with interest to plaintiff within a certain time and in default, the plaintiff to be put in possession of the property and the plaintiff was so put in possession, a subsequent suit by the representatives of the defendant for possession on the ground that the former plaintiff was in possession as usufructuary mortgagee and that the amount due has been paid off out of the income, is not maintainable inasmuch as the claim relates to the execution of the former decree. (*Pollock, J.*) Pandari *v.* Digambardas. **1940 N.L.J. 331.**

———S. 47—*Bar of suit—Transfer by defendant* pendente lite—*Decree against defendant—Enforcement against transferee—Remedy—Execution—Separate suit—If barred—"Representative."*

A transferee of the defendant *pendente lite* is a representative of the defendant, and a decree in the suit passed against the defendant-transferor must be enforced against the transferee in execution and not by a separate suit. A separate suit is barred by S. 47. (*Beaumont, C.J. and Wassoodew, J.*) Gopal Sattu *v.* Dnyanu Maruti. **I.L. R. (1938) Bom 649=177 I.C. 499=11 R B. 96=40 Bom L.R. 512=A.I.R 1938 Bom. 367.**

———S. 47—*Bar of suit—Wrong inclusion of property in sale certificate—Remedy—Suit for correction, if lies.*

Where in a suit on a mortgage of a share of a property, another sharer is added as the legal representative of the deceased mortgagor and in execution of the decree, the share of the other person also is included in the proclamation of the property to be sold and in fact was sold without any objection by that person either at the time of the proclamation of sale or its confirmation, he cannot thereafter file a regular suit to correct the sale certificate. His remedy was only by objections in the execution Court. (*Bennet and Verma, JJ.*) Rahim Bukhsh *v.* Kishen Lal. **I L.R. (1939) All. 385=183 I.C. 415=12 R.A 127=1939 A.L.J. 211=1939 A.W.R. (H.C.) 242=A.I.R. 1939 All. 368.**

Construction.

———S. 47—*Construction—Liberal construction.*

S. 47 should be liberally construed and the decree-holder should get his relief as expeditiously as possible. 19 Cal. 683 (P.C.), Foll. (*Mohammad Noor and Varma, JJ.*) Narottam Das *v.* Krishna Prasad. **15 Pat. 545=162 I.C. 830=8 R.P. 580=1936 P.W.N. 473=17 Pat.L.T. 434=A.I.R. 1936 Pat. 289.**

Defence to suit.

———S. 47—*Defence to suit—If also barred.*

S. 47, C P. Code, bars both a suit and defence. The section debars a party to the suit or his representative from raising otherwise than in the execution proceedings any question of the class described in the section which arises between himself and the other party to the suit. He cannot raise it either as a plaintiff or as defendant in any separate suit between himself and the other party or his representative. (*Zia-ul-Hasan, J.*) Ram Sarup Singh *v.* Buddhu Lal. **1939 O.A.**

518=1939 A.W.R. (C.C.) 94=1939 O.W.N. 653.

Executability of decree.

——S. 47—*Executability of decree—Objection to executability of decree as being incompetent—If open.*

A puisne mortgagee against whom a personal decree has been passed, behind his back, when there was no prayer for a personal decree in the plaint, can in execution take an objection to the executability of such a decree under S 47, within 30 days of the sale of the property of the puisne mortgagee, and relief cannot be refused to him (*Mohammad Noor and Rowland, JJ.*) BILAT ROUT *v* MAHBUB SAFI **162 I C. 867=8 R.P. 592=1936 P.W.N 281=A.I R. 1936 Pat. 303.**

——S. 47—Executability of decree—Scheme decree under S. 92—Executability. *See* C. P. CODE, S. 92. **A.I.R. 1937 Mad. 326.**

Executing Court.

—— S. 47—*Executing Court—Description of property in decree incorrect—Amendment—Power of executing Court—Refusal by Court passing decree to amend—Appealability—C.P. Code, S.* 151 *and O.* 43, *R.* 1.

Where the description of property directed to be sold by a mortgage decree is incorrect, in the decree itself, the executing Court has no power to amend or rectify it. It is only the Court which passed the decree that can correct the mistake in the exercise of its inherent power under S. 151, C. P. Code. If it corrects the mistake and amends the decree, the amended decree is appealable, but if it refuses to do so, the order of refusal is not a decree and is not appealable. Nor would an appeal lie against the order under O. 43, R. 1, as it is not one of the orders mentioned in that rule. (*Lokur, J.*) KRISHNAYA PARBHAYA *v.* MEGHRAJ PAPARAM. **I.L.R (1939) Bom. 708=186 I.C. 70 =12 R.B. 292=41 Bom L.R. 1170=A.I.R. 1940 Bom. 10.**

——S. 47—Executing Court—Duty of—Objection by debtor on ground that purchase by decree-holder of part of mortgaged property after decree on mortgage has proportionately discharged decree debt—If can be raised. *See* MORTGAGE—DECREE ON. **A.I.R 1936 Cal 537.**

——S. 47—*Executing Court—Order of full satisfaction—Subsequent order vacating order of satisfaction—Absence of notice to judgment-debtor—Effect.*

Where the Court executing a decree disposes of the execution case on full satisfaction making an order of full satisfaction of the decree, it has no jurisdiction to vacate that order without notice to the judgment-debtor. (*Guha and Lodge, JJ*) DURGA CHARAN DAS *v.* CHAIRMAN OF THE LABANGA SAMABAI SAMITY. **162 I.C. 135=8 R C. 570=40 C.W.N. 143=62 C.L.J. 372=A.I.R. 1936 Cal. 171.**

——S. 47—Executing Court—Powers of—Amendment of decree more than three years after passing—Execution application within three years of amendment—If barred—Power of executing Court to look into nature of amendment or necessity for same. *See* LIMITATION ACT, ART. 182 (4). **18 Pat.L.T. 18.**

——S. 47—*Executing Court—Powers of—Attachment under O.* 21, *R.* 52—*Dispute as to right to money attached between decree-holder and judgment-debtor—Jurisdiction to decide—Executing Court or custody Court*

Under the proviso to O. 21, R. 52, when a dispute as to title or priority arises between the decree-holder and a third party as regards money in the custody of a Court other than the executing Court, then the custody Court shall determine that dispute. When, however, the dispute is between the decree-holder and the judgment-debtor, the matter has to be decided by the executing Court under S. 47. C. P. Code, and not by the custody Court. (*Bose J.*) NANDKUMAR *v.* KALURAM. **19 N.L J. 287.**

—— S. 47—*Executing Court—Powers—Contract as to rights and obligations under decree—Enforceability—Bar of separate suit.*

The C. P. Code contains no general restriction of the parties' liberty of contract with reference to their rights and obligations under the decree and if they do contract upon terms which have reference to and affect the execution, discharge or satisfaction of the decree the provisions of S. 47 involve that questions relating to such terms may fall to be determined by the executing Court. A fair and ordinary bargain for time in consideration of a reasonable rate of interest, cannot be regarded as an attempt to give jurisdiction to a Court to amend or vary the decree. It has its effect on the parties' rights under the decree and the executing Court under S. 47, C. P. Code, has jurisdiction to ascertain its legal effect and to order accordingly. It is not possible to regard O. 20, R. 10 as excluding any possibility of the parties coming to a valid agreement for time, to which the Court under S. 47, will have regard. Such agreements or bargains may take different forms. If it appears to the Court acting under S 47 that the true effect of the agreement was to discharge the decree forthwith in consideration of certain promises by the debtor, then no doubt the Court will not have occasion to enforce it in execution proceedings but will leave the creditor to bring a separate suit on the contract. If, on the other hand, the agreement is intended to govern the liability of the debtor under the decree and to have effect upon the time or manner of its enforcement. It is a matter to be dealt with under S. 47, C. P. Code. In such a case to say that the creditor may perhaps have a separate suit is to misread the Code, which by requiring all such matters to be dealt with in execution discloses a broader view and functions of an executing Court, (*Sir George Rankin.*) OUDH COMMERCIAL BANK. LTD. *v* BIND BASINI KUER. **66 I.A 84=14 Luck. 192=I.L R (1939) Kar. 136 (P.C.)=11 R.P.C. 176=69 C.L J. 317=50 L W. 39=1939 A.L.J. 481=41 Bom.L .R 708=1939 P.W.N. 784=1939 M.W N 692=1939 O.W.N. 313=43 C.W N. 501 =180 I C. 378=1939 R.D 208=1939 O.L.R. 187 =1939 O A 352=1939 A.W.R. (P.C.) 43=5 B. R. 476=A.I.R. 1939 P.C. 80=(1939) 1 M.L.J. 652 (P.C.).**

——S. 47—Executing Court—Powers of—Decree against karnavan of Malabar tarwad—Executability against tarwad—Power of executing Court to determine. *See* MALABAR LAW—TARWAD. **1939 M.W.N. 1229.**

—— S. 47—*Executing Court—Powers of—Decree against minor—Question whether minor was properly served or represented—If can be gone into.*

It is not open to an executing Court to sit in judgment over the Court which passed the decree which has to be executed. It cannot, except in certain limited cases, conduct inquiries as to whether the decree was properly passed. If on the face of the record it is clear that some illegality has been committed the executing Court can refuse to execute the decree. But where there is nothing to show that there has been such illegality the executing Court has to presume that the decree was properly made, and take the decree as it stands and execute it. Where a decree made on an award in arbitration against a minor contains nothing on the face of it to show that the minor was not served or properly represented in the arbitration proceedings, the executing Court has no power to hold an inquiry as to whether the minor was served or represented, and cannot refuse to execute the decree on the ground that he was not served or properly represented or on the ground that the minor cannot be made liable. If the minor is not really liable his remedy lies elsewhere. (*Horwill, J.*) VILLUPURAM URBAN CO-OPERATIVE BANK *v.* BALASUBRAMANIA MUDALI. **178 I C. 808=11 R.M. 500=1938 M W.N. 567 =48 L.W. 285=A.I.R. 1938 Mad. 809=(1938) 2 M.L.J. 186.**

——S. 47—*Executing Court—Powers of—Plea by judgment-debtor that he is a minor and was wrongly impleaded as major—If open—Power of executing Court to entertain plea and inquire into.*

S. 47, C. P. Code, is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. An executing Court cannot entertain an objection to the execution of the decree against a minor on the ground that the decree was passed against him who was impleaded as a major. Where the judgment-debtor appears in execution and asserts that he is a minor, he is in fact saying that he was not a party to the decree, and the executing Court is precluded from making an enquiry under S. 47, C. P. Code. The proper remedy in such cases is by way of suit. (*Mockett and Horwill, J.*) SETHURAJAN *v.* GURUSWAMI PATHAR. **I.L.R. (1937) Mad. 834=1937 M.W N. 227 (2)=45 L.W. 401 =170 I.C. 86=10 R.M. 131=A.I.R. 1937 Mad. 509=(1937) 2 M.L.J. 37.**

——S. 47 and O. 32, R. 1—*Executing Court—Powers of—Validity of decree—Power to question—Case of no jurisdiction—Dismissal of suit on behalf of alleged minor with costs—Plaintiff really a major—Procedure to be followed—Decree for costs—If executable.*

Ordinarily a Court executing a decree cannot go behind the decree and has no power to entertain any objection as to the validity of the decree or as to legality of the character of the decree, but that is only true in a case when the Court passing the decree had got jurisdiction to pass it; but where the Court passing the decree was inherently incompetent to pass the decree and had absolutely no jurisdiction to pass it, its decree is a nullity and no question of validity of the decree arises in such a case. Where a suit is brought by guardian on behalf of an alleged minor, the Court which was dealing with such a case if it found that the plaintiff had attained majority more than three years prior to the suit, has no jurisdiction to proceed with the suit as it was not properly brought and should have either dismissed it, or allowed the plaintiff to amend the plaint and file it as major. But without doing so, if the Court dismisses the suit with costs, the decree for costs against the plaintiff, cannot be executed as the Court has no power to pass a decree against the plaintiff who strictly was no party to the proceedings before it. Costs ought to have been awarded against the guardian. (*Zia-ul Hasan and Yorke, JJ.*) SURAJ BAKHSH SINGH *v.* PHALDAN SINGH. **177 I.C. 69=11 R.O. 20=1938 O.A. 612=1938 O.L.R. 369=1938 O.W.N. 779=A.I.R. 1938 Oudh 213.**

——S. 47—Executing Court—Power to go behind decree—Decree for instalments—Subsequent consent decree for instalments coupled with hypothecation—Execution—Plea that contract of security and hypothecation is without consideration and unenforceable—Competency. *See* C. P. CODE, O. 20, R. 11 (1) AND (2). 18 Pat. 719.

——Ss. 47 and 68—*Executing Court—Transfer to Collector for execution—Objection to sale on ground of fraud—To which Court to be made.*

S. 68, C. P. Code, does not state that the Collector shall become the Court executing the decree. The Court executing the decree remains the Court which sends the decree for execution to the Collector and the powers conferred by the C. P. Code on the Court executing the decree remain with that Court and do not pass to the Collector. Hence the question whether a sale in execution of a decree was brought about by fraud, being a question relating to execution, discharge or satisfaction of a decree within the meaning of S. 47, C. P. Code, can be entertained by an executing Court even though the decree had been transferred to the Collector under S. 68, C. P. Code, and the sale had been confirmed. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RADHA RAWAN PRASAD *v.* RAJENDRA PRASAD. **14 Luck. 213=177 I C. 77=11 R.O 21=1938 O.A. 598= 1938 O.L.R. 371=1938 O.W.N. 758=A.I.R. 1938 Oudh 188.**

Execution.

——Ss. 47 and 48—*Execution—Adjustment of decree during—Power of Court to recognise—Revival of execution application—Test.*

On an application for execution of a final decree for sale, a date was fixed for sale. But on a day prior to the one so fixed the parties agreed upon an arrangement of payment by instalments and that in case of default in payment, the whole amount was to become recoverable by sale. The compromise or arrangement was presented to the Court with a prayer for the postponement of execution. The execution was accordingly postponed. There was subsequently default in the payment of instalments and an application for execution was presented more than 3 years after the date of the default. It was contended that executing Court could not recognize the arrangement and that the execution application was barred by limitation. It was held that the executing Court had jurisdiction to recognize such an arrangement and that the subsequent execution application was really one in continuation and was a revival of the first application and that hence no question of limitation arose.

Held, further, the mere fact that the Court ordered a case to be struck off does not show that the application came to an end, nor does the fact that an application is on the usual tabular form suggest that it is a fresh application. The question whether an application is a fresh application or is merely one to revive the previous execution proceedings, has always to be decided upon the circumstances of each case and in each case the substance of the matter must prevail over the form of the application. *(Iqbal Ahmad, Bajpai and Ismail, JJ.)* Mahendra Rao *v.* Bishambhar Nath. **I.L.R. (1940) A. 377=188 I.C. 323=13 R.A. 1=1940 A.L.J. 301=1940 A.W.R. (H.C.) 281=A.I.R. 1940 All. 270 (F.B.)**

Execution, discharge or satisfaction.

——S. 47—Execution, discharge or satisfaction—Application for final decree in mortgage suit—Objection to sale on ground that property mortgaged is inalienable—Competency. *See* C. P. Code, O. 34, R. 5. **46 L.W. 544=A.I.R. 1937 Mad. 918.**

——S 47—*Execution, discharge or satisfaction—If controlled by O. 21, R. 19.*

O. 21, R. 19, C. P. Code, cannot and should not be taken to be applicable and exhaustive in regard to questions arising for consideration under S. 47 of the Code relating to execution, discharge or satisfaction of decrees. *(Guha and Bartley, JJ.)* Bank of Dacca, Ltd. *v.* Gour Gopal Saha. **I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602=65 C.L.J. 74=A.I.R. 1936 Cal. 409.**

Execution proceedings.

——S. 47—Execution proceedings—Judgment-debtor not bound to raise all possible objections at a given time—Duty of Court to decide all objections raised. *See* C. P. Code, S. 11—Execution proceedings. **1937 A.L.J. 482=A.I.R. 1937 All. 446.**

——S. 47—*Execution proceedings—Order for transfer of decree made* ex parte—*Judgment-debtor's right to prefer objections.*

The judgment-debtor can prefer objections under S. 47, at any stage of the execution proceedings. Those objections have to be determined on their merits, unless a particular objection had been adjudicated upon by the Court earlier, or unless the judgment-debtor is debarred from agitating the particular objection. Hence, where the objection, namely that the decree ought not to have been transferred to another Court as the judgment-debtors had properties within the jurisdiction of the Court which passed the decree sufficient to satisfy the decree, had not been adjudicated upon at a previous stage of the proceedings and the order of transfer was made *ex-parte,* and without giving judgment-debtors an opportunity to contest the decree-holder's prayer for transfer, the Judge ought to consider the objection on its merits. *(Mitter and Mohamad Akram, JJ.)* Manmatha Pal *v.* Sarada Prasad. **187 I.C. 67=12 R.C. 539=A.I.R. 1939 Cal. 651.**

Necessary parties.

——S. 47—Necessary parties—Auction-purchaser if necessary party to appeal—*See* S. 47, Appeal—Auction-Purchaser.

——S. 47—*Necessary parties—Revision against order dismissing objection to attachability of property—Auction-purchaser—If necessary party.*

An auction-purchaser is not a necessary party to an application for revision filed against an order dismissing an objection of the judgment-debtor to the attachability of the property. *(Addison, J.)* Inayat *v.* Kartyar Singh. **41 P.L.R. 288=A.I.R. 1939 Lah. 256.**

Objection as to saleability of property.

——S. 47—*Objection as to saleability of property—When could be raised.*

An objection by a judgment-debtor as to the saleability of his property in execution could be raised under S. 47, C. P. Code, at any time prior to sale of the property and even if made later, it would be within time, if made within 30 days from date of sale under Art. 166 of Limitation Act. *(Gruer, J.)* Maroti *v.* Kisanlal, **180 I.C. 553=11 R.N. 367=1938 N.L.J. 389=A.I.R. 1938 Nag. 558.**

Parties and representatives.

——S. 47—*Parties and representatives—Attachment of undivided interest of judgment-debtor before his death—Subsequent dismissal of execution case followed by its restoration—Revival of attachment—Nephews of judgment-debtor in possession of property as survivors—Whether legal representatives of judgment-debtor.*

Where the undivided interest of a deceased judgment-debtor was attached in execution before his death and subsequently the execution case was dismissed for want of prosecution but was, however, restored, the effect of the order setting aside the order of dismissal is to revive the attachment which ceased when the order was made dismissing the execution case for default. If the nephews of the judgment-debtor who are the survivors of the family are in possession of the property which by reason of the revival of attachment is not theirs, they are intermeddling with the estate of the deceased judgment-debtor and, therefore, are his representatives within the meaning of S. 47, C. P. Code. *(Wort, J.)* Rameshwar Prasad Singh *v.* Basdeo Singh. **8 R.P. 332=160 I.C. 119=1936 P.W.N. 14=A.I.R. 1936 Pat. 126.**

——S. 47—*Parties and representatives—Auction-purchaser—If representative of judgment-debtor—Right to intervene in further execution by decree-holder.*

Where property is sold in execution of a mortgage decree for a price mentioned in the C form, the auction-purchaser (though stranger) can, in a fresh application for execution of the decree for further interest against the same property by issue of a fresh C form, intervene under S. 47, he being a representative of the judgment-debtor as regards the liability of the land for a second sale. *(Gruer, J.)* Trimbak Laxman *v.* Baliram Pandusa. **I.L.R. (1937) Nag. 156=168 I.C 221=9 R.N. 244=A.I.R. 1937 Nag. 59.**

——S. 47—*Parties and representatives—Auction-purchaser of property pending suit on mortgage—Whether representative of mortgagor.*

An auction-purchaser of a half share of zamindari property in execution of a simple money decree during the pendency of a suit by the mortgagee of such property, is a representative of the mortgagor, and can properly be impleaded as a party in the execution proceedings of the decree passed on the mortgage. *(Harries and Ganga Nath, JJ.)* Ram Autar Sahu *v.* Bate Krishna,

163 I.C. 926=9 R.A. 101=1936 A.L.J. 541=1936 All.L.R. 670=1936 A.W.R. 422=A.I.R. 1936 All. 479.

——S. 47—*Parties and representatives—Auction-purchaser under money decree—Subsequent sale of same property in enforcement of charge under security bond for satisfaction of prior decree—Rights of prior purchaser.*

When a money decree is being executed against a property given in security for the satisfaction of a decree, it is not being executed as a simple money decree but as a decree against the property on which it is a charge. Hence where such property is subsequently purchased by another decree-holder in execution of his money decree, the property is transferred to him only subject to the charge and hence in execution proceedings by the former decree-holder against such property, the purchaser decree-holder should be present as he is a representative of the judgment-debtor within S. 47, C. P. Code, so that he may be given an opportunity to redeem the property by paying off the amount due to the prior decree-holder. (Case-law discussed.) (*Mohammad Noor and Varma, JJ.*) Narottam Das *v.* Krishna Prasad. **15 Pat. 545=162 I.C. 830=8 R.P. 580=17 Pat. L.T. 434=1936 P.W.N. 473=A.I.R. 1936 Pat. 289.**

——S. 47—*Parties and representatives—Execution of decree by attaching creditor—Objection by transferee decree-holder—If comes within S. 47.*

One *M* obtained a preliminary decree for sale of the property covered by the security bond. The judgment-debtor *F* obtained a decree against *M* in respect of certain costs and attached *M's* decree. *M* transferred his decree to *R*. Subsequently *F* applied for execution of the decree which he had attached in execution of his own decree against *M*. *R* put an objection to *F's* application for execution.

Held, as transferee of original decree-holder *M*, *R* represented *M*, and his objection therefore came within the scope of S. 47, C. P. Code. A.I.R. 1937 All. 63, Rel. on. (*Nanavutty and Smith, JJ.*) Faqir Bakhsh *v.* Mt. Mariyan. **13 Luck. 237=168 I.C. 154=9 R.O. 445=1937 O.L.R 224=1937 O.W.N. 519=A.I.R. 1937 Oudh 365.**

——S. 47—*Parties and representatives—Execution of decree stayed on judgment-debtor executing security bond — Another decree-holder attaching property covered by bond and purchasing it in execution—If representative of judgment-debtor.*

The execution of a decree passed in favour of *C* was stayed on the judgment-debtor executing a security-bond. *B*, another decree-holder, attached the property covered by the bond along with other properties belonging to the judgment-debtor, and purchased it in execution, subject to the charge created by the bond. *C* then applied for the sale of the property covered by the security bond and prayed that *B* might be added as a party to the execution proceeding.

Held, that *B* should be added as a party to the execution case, as he is a representative of the judgment-debtor within the meaning of S. 47, C. P. Code. (*Nasim Ali and Mitter, JJ.*) Upendra Lal Pal *v.* Binod Lal Pal. **43 C.W.N. 1100.**

——S. 47—*"Parties and their representatives"—Hindu widow—Suit against by husband's creditor for recovery of debt out of estate—Surrender of whole estate by widow in favour of daughters pending suit—Subsequent decree against widow—Attachment and sale of estate—Suit by daughters to declare property not liable to attachment and sale—If barred.*

A transferee of the interest of a party before a decree is passed against him or in his favour is not a representative of that party within the meaning of S. 47, C. P. Code. Where a Hindu widow pending a suit against her by a creditor of her husband to recover the debt from the estate in his hands, surrenders the entire estate in favour of her daughters and a decree is subsequently passed against the widow, the daughters are not the representatives of the widow within the meaning of S. 47, so as to bar a suit by them for a declaration that the property is not liable to attachment and sale in execution of the decree against the widow. (*Sen, J.*) Shivu Shidda Chaugula *v.* Lakmichand Tulajaram Kothari. **187 I.C. 96=12 R.B 412=41 Bom.L.R. 1007=A.I.R. 1939 Bom. 496.**

——S 47—*Parties and representatives—Insolvent judgment-debtor—Annulment of adjudication—Person in whom properties are vested by Court—If "representative" of judgment-debtor—Objection to execution of decree against insolvent—If under S. 47.*

Obiter.—Where an order adjudicating a judgment-debtor as an insolvent is annulled and a person is appointed by the Court under S. 37 of the Provincial Insolvency Act and an order is made vesting the properties of the debtor in him, an objection by such appointee to an execution petition by a creditor does not fall under S. 47, C. P. Code, as he is not a "representative" of the judgment-debtor within the meaning of S. 47. (*R. C. Mitter, J.*) Abdul Latif *v* J. R. Percival. **I.L.R. (1937) 1 Cal. 264=166 I.C. 509=9 R.C. 546=40 C.W.N. 1229=A.I.R. 1936 Cal. 573.**

——S. 47—*Parties and representatives—Mortgage suit—Original attaching creditor of mortgaged property impleaded as party—Death of—Failure to bring legal representatives on record—Legal representatives sought to be impleaded in execution proceedings—Permissibility.*

Where in a suit on a mortgage, a person impleaded as a party, by reason of his having attached the mortgaged property in execution of a money decree dies and no steps are taken to bring his legal representatives on record, but it is sought to implead them as judgment-debtors in the execution proceedings, they are entitled to be discharged from the array of the judgment-debtors in the execution proceedings of the mortgage decree. A.I.R. 1934 All. 1027, Foll. (*Agarwala and Varma, JJ.*) Dular Chand Ram *v.* Kamakhya Narain Singh. **159 I.C. 1073=8 R. P. 320=A.I.R. 1936 Pat. 110.**

——S. 47—*Parties and representatives—Mortgagee decree-holder purchasing property—If representative of mortgagor.*

One *U* executed a mortgage in favour of a firm. On remarriage of *U* his son filed a suit for partition. Later on, the firm filed a suit for sale of the property mortgaged to it, obtained a decree and purchased the property. Meanwhile the son of *U* got a decree in the partition suit and applied for its execution. When the Commissioner went on to make the division the firm objected pointing out that it had purchased the property. The Court disallowed the objection by asking the firm to file a separate suit,

Held, that by buying the title of *U* in execution arising under the mortgage suit, the firm stepped into the shoes of *U* and thereby became his representative. The firm, as the representative of *U* was entitled to come for settlement of the question whether the partition decree left anything at all to the partition as between *U* and his son. The firm therefore came under S. 47 and the executing Court should not have referred the firm to a separate suit. (*Baguley and Mosely, JJ.*) A. L. A. CHETTYAR FIRM *v.* MAUNG PO TAW. **1938 Rang.L.R. 583=177 I.C. 435=11 R.R. 128=A.I.R. 1938 Rang. 250.**

———S. 47—*Parties and representatives—Occupancy holding--Purchaser at certificate sale- Right to object to execution sale of holding under mortgage decree.*

The purchaser of an entire occupancy holding at a certificate sale under the Public Demands Recovery Act for arrears of rent is not a representative of the occupancy tenant within the meaning of S. 47, C P. Code, such purchaser has therefore no *locus standi* to intervene in proceedings in execution of a decree on a mortgage of a part of the holding by the tenant, and object to the sale of the holding in execution. (*Macpherson and Fazl Ali, JJ.*) MT JAMUNI *v.* BHOLARAM. **15 Pat. 414=3 B.R 53=1936 P.W.N. 710=165 I.C. 574=9 R.P. 181=17 Pat.L.T. 650=A.I.R. 1936 Pat. 561.**

———S. 47—*Parties and representatives—Purchaser from judgment-debtor during attachment —If representative of judgment-debtor.*

A purchaser from a judgment-debtor of property belonging to him during its attachment is a representative of the judgment-debtor within the meaning of S. 47, C. P. Code. (*Ghose, J.*) DHIRENDRA NARAIN GHOSE *v.* BASANT KUMAR DAS. **43 C.W.N. 1091.**

———S. 47—*Parties and representatives—Purchaser of mortgaged property pending suit on mortgage—If representative of judgment-debtor —Question as to delivery of possession between him and decree-holder purchaser if relates to execution—Separate suit—Bar of—Limitation.*

Persons who purchase mortgaged property pending a suit on the mortgage are representatives of the judgment-debtor-mortgagor, and if a question arises between them and the decree-holders-purchasers as to the delivery of possession of the mortgaged property, that is a question relating to the execution of the decree under S. 47, C. P. Code, and a separate suit is barred. Such a suit brought about 4 years after the delivery proceedings must be held barred by limitation, because, if treated as an application under S. 47, C. P. Code, it is clearly barred by limitation. (*Burn, J.*) LAKSHMINARAYANA *v.* HANUMAYYA. **171 I.C. 925=10 R M 410=1937 M.W.N. 232=46 L.W. 683=A.I.R. 1937 Mad. 580.**

———S. 47 — *Parties and representatives— Receiver of the properties of the judgment-debtor —Objection to attachment of moneys in h s hands —Order allowing—Appealability—C. P. Code, O. 21. R. 58.*

A receiver of the estate of the judgment-debtor is not a representative of the judgment-debtor under S. 47, C. P. Code. When the receiver objects to the attachment of moneys in his hands, the objection falls under O. 21, R. 58, C. P. Code, and not under S. 47. No appeal therefore lies from an order allowing the objection and raising the attachment. (*Davis, J.C. and Mehta, A. J. C*) GHANSHAMDAS *v.* SHIVALDAS. **30 S.L.R. 288=160 I.C. 383=8 R.S. 126=A.I. R. 1936 Sind 2.**

———S. 47—*Parties and representatives—Second mortgage pending first mortgagee's suit—Whether representative of mortgagor.*

A person in the position of a second mortgagee who has obtained his mortgage during the pendency of the suit by the first mortgagee, is a representative of the mortgagor, and can be impleaded as a party in the execution proceedings of the decree passed on the first mortgage. (*Harries and Ganga Nath, JJ.*) RAM AUTAR SAHU *v.* BATE KRISHNA. **163 I.C. 926=9 R.A. 101=1936 A.L.J. 541=1936 All.L.R. 670=1936 A.W.R. 422=A.I.R. 1936 All. 479.**

———S. 47—*Parties and representatives—Transfer of mortgaged property pending foreclosure suit—Transferee, if representative in-interest of mortgagor judgment-debtor—Mortgagee decree-holder, if can proceed to execute decree against transferee.*

Where the mortgagor transfers the mortgaged property pending the suit for foreclosure on the mortgage and the transferee takes actual possession of the same, the mortgagee-decree-holder on the making of the final decree can proceed to execute the decree against the transferee for recovery of possession of the property transferred to him inasmuch as the transferee is on account of the transfer *pendente lite*, a representative-in-interest of the mortgagor judgment-debtor and is bound by the decree passed against him. (*Sir Shadi Lal.*) PARMESHARI DIN *v.* RAM CHARAN. **31 S.L.R. 652=169 I.C. 657=41 C.W. N. 1130=46 L.W. 198=1937 O.W.N. 708=18 Pat.L.T 615=1937 O.L.R. 409=1937 P.W.N. 628=1937 A.L.R. 643=1937 A.W.R. 834=10 R. P.C. 53=3 B.R 733=39 Bom.L.R. 1019=1937 A.L.J. 1376=A.I.R. 1937 P.C. 260=(1937) 2 M. L.J. 359 (P.C.).**

———S. 47—*Parties and representatives—Transferee from mortgagor after mortgage decree— Transferee questioning in execution validity both of mortgage and of decree—If representative of judgment-debtor—Order allowing execution to proceed—Second appeal.*

A transferee from mortgagor after the mortgage decree, who questions in the execution proceeding the validity of the mortgage and also of the decree in the mortgage suit is a representative of the judgment debtor. Accordingly an order by the appellate Court allowing the execution to proceed falls within the purview of S. 47, C. P. Code, and a second appeal by the transferee against that order is competent. (*S. K. Ghose, and Mitter, JJ.*) RASHBEHARI DAS *v.* MAHINDI PAL. **173 I.C 634=10 R.C. 551=67 C.L.J. 7=41 C.W.N. 1162=A.I.R. 1937 Cal. 565.**

———S. 47—*Parties and their representatives— Who are included—Their position, if similar to that of shebait.*

The term 'representatives 'occurring in S. 47, C. P. Code, includes not only legal representatives in the sense of heirs, executors or administrators, but also representatives in interest, that is any transferee of the decree-holder's or judgment-debtor's interest, who so far as such interest is concerned is bound by the decree. A legal representative is not a mere figure head as the shebait is. He is one to whom the rights and obligations of the deceased are transmitted. He is a real party to the suit, though he represents the rights and liabilities of a deceased person. A shebait on the other hand is a nominal party who is in Court as the representative of an ideal person, namely, the idol. The idol, it is that is the real party in the eye of the law. (*Grille and Niyogi, JJ.*) AZHAR HUSSAIN *v.* MOHAMAD SHIBLI. **I.L.R. (1939) Nag. 548=187 I.C. 791=12 R.N. 309=1939 N.L.J. 270=A.I.R. 1939 Nag. 183.**

——S. 47—*Parties and representatives—Widow added as legal representative of judgment-debtor—Widow objecting to sale on the ground that it was given to her in dower—If entitled.*

Where a widow was added along with the sons as legal representatives of a deceased judgment-debtor her position is that of a representative of the dead judgment-debtor and it remains the same even when she claims that the property which had been attached and sold did not belong to the judgment-debtor but in fact belonged to her, having been given to her in dower. Being a party to the proceedings she had every right to object to the sale under S. 47, C. P. Code (*Mir Ahmad, A.J.C.*) BIPI ROSHAN JAN *v.* KAHAN CHAND GOBIND RAM. **10 R. Pesh. 53=173 I.C. 704=A.I.R. 1937 Pesh. 82.**

Parties to suit.

——S. 47—*Parties to suit—Decree-holder and assignee—Suit relating to validity of assignment—If competent.*

A dispute between an assignee and the decree-holder is not a dispute between the parties within the meaning of S. 47, C. P. Code, and a separate suit relating to the validity of the assignment of the decree is competent. The assignee is, therefore, not barred under the provisions of that section, from urging in a suit in which his assignment is being challenged that his assignment was valid, even though the executing Court had decided against him. (*Addison and Din Mohammad, JJ.*) SORAB SUKH *v.* PREM DATT. **18 Lah. 162=171 I.C. 91=10 R.L. 157 (2)=39 P.L.R 904=A.I.R. 1937 Lah. 465.**

——S. 47—*Party to suit—Exonerated defendant.*

S. 47 does not apply unless the question arises between the parties to the suit in which the decree was passed or their representatives and relates to the execution, satisfaction or discharge of the decree. A defendant who was not a necessary party would not be a party to the suit within the meaning of S. 47 if he is exonerated without his claim being adjudicated upon. (*Burn and Lakshmana Rao, JJ.*) THANGACHAMI NAICKER *v.* VEERAPPA CHETTIAR. **173 I.C. 90=10 R.M. 509=A.I.R. 1937 Mad. 268.**

——S. 47—*Parties to suit—Mortgage suit—Some of defendants sued in personal capacity and as shebaits—Decree passed against them in personal capacity—Suit dismissed against them as shebaits—Such defendants, if parties to suit—Objection by them to sale on ground that property is debutter—Maintainability.*

In a mortgage suit, some of the defendants were impleaded both in their personal capacity and as shebaits of an idol. The Court passed a decree against them in their personal capacity and dismissed the suit as against them as shebaits, without deciding the issue raised by them as to the validity of the mortgage. They filed an objection under S. 47, C. P. Code, to the execution sale on the allegation that all the properties were debutter.

Held, that the question raised by them was one relating to execution and as they in their capacity as shebaits were by virtue of the Explanation to S. 47, parties to the suit, their objection to the sale was maintainable. (*Mitter and Khundkar, JJ.*) SAILENDRA KUMAR *v.* BRAJA GOPAL. **43 C. W.N. 371.**

——S. 47—*Parties to suit—Person against whom no relief was either prayed for or granted.*

Section 47 speaks of parties to suit and so applies to persons who are made parties though as against them relief is neither asked for nor granted by the decree. (*Nasim Ali and Mukherjea, JJ.*) NIRODE KALI ROY CHOUDHURY *v.* RAI HARENDRA NATH. **I.L.R. (1938) 1 Cal. 280=178 I.C. 540=11 R.C. 367=42 C.W.N. 87=A.I.R. 1938 Cal. 113.**

——S. 47—*Party to suit—Prior mortgagee's suit impleading puisne mortgagee—Claim against latter abandoned and suit dismissed against him—Objection by latter to sale—If falls under S. 47—"Party"—Puisne mortgagee's encumbrance—If to be mentioned in sale proclamation.*

The prior mortgagee instituted a suit impleading his mortgagors and the puisne mortgagee. The latter resisted the suit. The prior mortgagee abandoned his claim and suffered it to be dismissed so far as the puisne mortgagee was concerned. He obtained a compromise decree against the mortgagors for sale. Later on he sought to put up the property for sale without any reference to any right or claim of the puisne mortgagee. The latter objected that the property put up for sale was his property and could not be sold in execution of prior mortgagee's decree. It was contended on behalf of the prior mortgagee that the puisne mortgagee not being a judgment-debtor had no *locus standi* to contest the application; and secondly that the application was not maintainable as it was not an application relating to the execution, discharge or satisfaction of the decree, but one going to the root of the decree itself,

Held, that the puisne mortgagee was still a party to the suit notwithstanding that it was dismissed against him.

Held also, that the puisne mortgagee's objection was to the whole decree and did not come within S. 47, C. P. Code.

Held, further that when the prior mortgagee put his decree into execution, the puisne mortgagee's encumbrance was a matter which ought to be mentioned in the sale proclamation. (*James and Rowland, JJ.*) SONU LAL *v.* RAMNANDAN SINGH. **3 B.R. 32=165 I.C. 317=9 R.P. 171=1936 P.W.N. 581=A.I.R. 1936 Pat. 552.**

——S 47—*Parties to suit—Proper party against whom no relief is claimed—Objection by him in execution dismissed—Right of suit.*

A person against whom no relief is claimed but who has been impleaded as a proper party, must be deemed to be a party to the suit for the purposes of S. 47, C. P. Code, though he is not a judgment-debtor. If, therefore, an objection by him to the execution of the decree against a certain property is dismissed, his remedy is by way of appeal. He cannot institute a suit under O. 21, R. 63, C. P. Code, although his objection was dismissed under O. 21, R. 58. (*Abdul Rashid, J.*) Malak Chand *v.* Hari Chand Kishen Chand. **183 I.C. 816=12 R.L. 140=41 P.L.R. 126=A.I.R. 1939 Lah. 207.**

———**S. 47**—*Parties to suit—Property held by judgment-debtor claimed to be wakf—Question as to—If one between parties.*

The question as to whether the property held by a judgment-debtor, which is sought to be sold in execution of a decree is wakf property, in which the judgment-debtor has no beneficial interest, is a question arising between parties to the suit in which the decree was passed and can be determined in execution proceedings. (*Tyabji, J.*) Hemraj Radhowji *v.* Shahbhan. **179 I.C. 692=11 R.S. 148=A.I.R. 1939 Sind 22.**

Question relating to execution.

———**S. 47**—*Question relating to execution—Attachability of the property.*

The question as to whether a particular property is liable to be attached and sold for satisfaction of the decree, is a question relating to the satisfaction of the decree. It cannot be said that the section contemplates that the question must relate to the execution of the decree as between the attaching decree-holder on the one hand and the objecting defendants on the other. (*Nasim Ali and Mukherjea, JJ.*) Nirode Kali Roy Choudhury *v.* Ray Harendra Nath. **I.L.R. (1938) 1 Cal. 280=178 I.C. 540=11 R.C. 367=42 C.W.N. 87=A.I.R. 1938 Cal. 113.**

———**S. 47**—*Question relating to execution—Decree against assets of deceased—Objection that attached property was not an asset of the deceased—If one under S. 47.*

Where in the case of a decree against the legal representatives in respect of the assets of a deceased, a purchaser from such legal representatives after the attachment of the property, objects to its attachment in execution of the decree against the legal representatives, on the ground that it was not part of the assets of the deceased, he is raising a question which relates to the execution of the decree in the suit, which clearly falls under S. 47, C. P. Code. (*Grille and Niyogi, JJ.*) Azhar Hussain *v.* Mohammad Shibli. **I.L.R. (1939) Nag. 548=187 I.C 791=12 R.N. 309=1939 N.L.J 270=A.I.R. 1939 Nag. 183.**

———**S. 47**—*Question relating to execution—Decree-holder taking possession of property not covered by decree—Application by judgment-debtor for restoration of possession—If competent.*

If the decree-holder takes into possession under the decree some property in excess of what has been granted to him by the decree, it will be a matter relating to execution. Where, therefore, by the decree cultivating rights in *sir* lands were expressly excluded and yet in execution of his decree the decree-holder has taken possession of the judgment-debtor's cultivating rights in *sir* lands, the judgment-debtor can apply under S. 47, C. P. Code, for restoration of possession of those rights. (*Puranik, J.*) Anandrao *v.* Bendu. **I.L.R. (1939) Nag. 521=173 I.C. 563=10 R.N. 312=A.I R. 1938 Nag. 193.**

———**S. 47**—*Question relating to execution*—Ex parte *order of transfer of decree—Objection filed by judgment-debtor without filing appeal—Maintainability—Order on objection—Appeal.*

There is nothing in the law which precludes a judgment-debtor from filing an objection against an *ex parte* order of transfer of decree under S. 47, C. P. Code, although he did not file an appeal against that order in time. This objection is an objection relating to the execution of the decree as it is an objection relating to the first step in execution. An order overruling the objection is an order under S. 47 and is consequently appealable. (*Nasim Ali and Rau, JJ.*) Ganeshdas Badrinarain *v.* Amuluk Chand Oswal. **187 I.C. 895=12 R.C. 628=70 C.L.J. 438=A.I.R. 1940 Cal. 161.**

———**S. 47**—*Question relating to execution—Movables—Release from attachment—Return of property—If can be decided by a separate suit.*

Where a car was attached in execution of a decree and subsequently as a result of an agreement between the parties, the car was released from attachment, the matter of the return of the car is patently a question relating to the execution of the decree arising between the decree-holder and the judgment-debtor and has therefore to be determined by the Court executing the decree and not by a separate suit. Further a Court attaching a car is bound to give the owner every aid in recovering it when the attachment has been removed. (*Norman, I.C.S.*) Suraj Mal *v.* Kailash. **1939 A.M.L.J. 25.**

———**S. 47**—*Question relating to execution—Objection that scheme sanctioned under S. 153, Companies Act, is a bar to execution of decree.*

An objection by the judgment-debtor that a scheme sanctioned by the Court under S. 153 of the Companies Act has superseded the decree which has, therefore, become incapable of execution, relates to the execution or discharge of the decree and consequently comes within S. 47, C. P. Code. (*Nasim Ali and R.C. Mitter, JJ.*) Mahiganj Loan Office, Ltd. *v.* Behari Lal Chaki. **41 C.W.N. 406=65 C.L.J. 361=I.L.R. (1937) 1 Cal. 781=10 R.C. 239=171 I.C. 198=A.I.R. 1937 Cal. 211.**

———**S. 47**—*Question relating to execution—Payment prior to decree—If can be enquired into in execution.*

Where a payment made prior to a decree, is pleaded in bar of execution, the executing Court cannot go into that question as it is not one relating to execution, discharge or satisfaction of a decree. In putting forward such a claim the judgment-debtor is asking the Court to embark on an enquiry whether the decree to be executed is the decree as passed by the Court or as modified by parties. (*Pollock, J.*) Bhaskar Dattatraya *v.* Nilkanth Dattatraya. **177 I.C. 673=11 R.N. 159=1938 N.L.J. 148=A.I.R. 1938 Nag. 265.**

———**Ss. 47 and 68**—*Question relating to execution—Sale by Collector—Application to set aside—Forum.*

Where a sale held by the Collector, is sought to be declared void on the ground that it was held after an order staying proceedings by the Court has been passed, the Civil Court is the only authority to determine whether or not the execution sale was valid. The proceeding is one under S. 47 as it related to the execution of the decree. (*Niyogi, J.*) ZIBAL ISWARA *v.* MUKA. **1940 N.L.J. 473.**

——S. 47—*Questions relating to execution—What constitute.*

Where on the one hand the decree-holder alleges that a particular property in the possession of a party to the decree can be proceeded against in execution, and the judgment-debtor or his legal representative, as the case may be, states that it cannot be, that precisely is the type of question that must be settled only under S. 47, C. P. Code. (*Stone, C.J. and Bose, J.*) SHALIGRAM *v.* DHURPATI. **I.L.R. (1939) Nag. 165=182 I.C. 285=11 R.N. 6=1939 N.L.J. 82=A.I.R. 1939 Nag. 147.**

Question relating to satisfaction.

——Ss 47 and 68—*Question relating to satisfaction—Decree transferred to Collector for execution—Decree-holder certifying payment through mistake or fraud of judgment-debtor—Collector entering satisfaction—Jurisdiction of trial Court.*

In a case where a decree was transferred to the Collector for execution under S. 68, C. P. Code, the decree-holder certifies payment by mistake or through fraud of the judgment-debtor, and the Collector orders the case to be filed as fully satisfied, the decree-holder should seek redress in the trial Court which has jurisdiction to deal with the matter under S. 47, C. P. Code, as it undoubtedly relates to the discharge or satisfaction of the decree. (*Nanavutty and Zia-ul-Hasan, JJ.*) GAJRAJ SINGH *v.* DEBI SINGH. **167 I.C 401=9 R.O. 385=1937 O.L.R. 111=1937 O.W.N. 231=A.I.R. 1937 Oudh 298.**

——S. 47—*Question relating to satisfaction of decree—Separate suit—Necessity.*

In execution of a decree the agent of the decree-holder along with the judgment-debtor applied to the Collector before whom the decree was sent for execution that the decree was fully satisfied and that execution be struck off. Shortly after this the decree-holder applied stating that his agent was cheated by the judgment-debtor and that the decree was not satisfied and prayed that the case be restored to the file. The Collector thinking that it required an investigation into question of law and facts referred it to the Civil Court.

Held, that the Collector had authority to refer to the Civil Courts under R. 13 (Revenue Book Circular, Vol. 2, S. 3, serial No. 8) of the rules under S. 70 (1), C. P. Code, and that such application raised a question as to the satisfaction of a decree and as such lay under S. 47, C. P. Code., and no separate suit was necessary. (*Pollock, J.*) BHAGIRATHIBAI *v.* RAUPRAO RANUJI. **173 I. C. 718=10 R.N. 323=A.I.R. 1938 Nag. 49.**

Representative.

——S. 47—*'Representatives'—Meaning of.*

The word "representatives" in S. 47, C. P. Code, is not limited to legal representatives of a deceased person but includes persons on whom an interest has devolved by assignment, transfer or otherwise. (*Agarwala and Rowland, JJ.*) AJODHEYA LAL MAHASETH *v.* BRIJ KISHORE DASS. **186 I.C. 786=12 R.P. 529=6 B.R. 393.**

——S. 47—*"Representative"—Final decree in partition suit—Purchaser of share of defendant subsequent to final decree—If representative of judgment-debtor — Application for delivery in execution against purchaser—Competency.*

A final decree was passed in a suit for partition and subsequently the defendants executed a sale deed in favour of the respondent by which they transferred to the respondent their entire share in the partitioned properties. The plaintiff-decree-holder applied for delivery of possession in execution of the final decree and made the respondent a party to the application.

Held, that the respondent was a representative of the judgment-debtors under S. 47, C. P. Code, and was bound by the decree, and the application for delivery as against the respondent was therefore competent.

Held, further, that the decree-holder was not executing the decree against the respondent, but was merely asking for delivery of the portion of the joint property which had been awarded to him by the final decree, and that the executing Court was merely required to deliver possession of the property to the decree-holder as determined by the final decree. (*Courtney Terrell, C. J. and Manohar Lall, J.*) SARAN BIHARI SAHAY *v.* HAMED HOSSAIN. **178 I.C. 912=11 R.P. 319=5 B.R. 184=1938 P.W.N. 124=19 Pat.L.T. 820=A.I.R. 1938 Pat. 478.**

Restitution.

——S. 47 — Restitution — Decree passed by Court *A*—Purchase of judgment-debtor's property by decree-holder in execution at *A*—Sale set aside—Decree transferred to Court at *B*—Appeal against order setting aside sale allowed—Meanwhile decree executed in Court at *B*—Application by judgment-debtor for restitution in Court *B*—If lies. *See* C. P. CODE, Ss. 144, 147 AND 151. **A.I.R. 1938 Cal. 554.**

Scope.

——S. 47 and O. 21, R. 2—*Scope—Adjustment of decree by executory agreement—Validity—Agreement varying time or manner of enforcement of decree and agreement totally adjusting and immediately extinguishing decree—Distinction—Application to execute decree on ground of repudiation of agreement—Maintainbility.*

A decree can be adjusted or extinguished by an executory agreement if that is the intention of the parties. A compromise agreement varying the time or manner of enforcement of a decree may be a partial adjustment of a decree and can, therefore, be enforced in execution proceedings in satisfaction of that part of the decree which remains yet unsatisfied, but if the compromise agreement is a total adjustment of a decree, though that agreement may be the subject-matter of a separate suit, it cannot be enforced in execution of a decree which is totally adjusted or satisfied. Where it is found that there was a compromise agreement between the parties whereby the balance of the decretal amount due on the mortgage debt was to be paid off within twelve months, failing which one of the mortgaged properties was to become the property of the plaintiff who was to release the other mortgaged property, and that it was the intention of the parties that this new contract was to extinguish the rights and liabilities under the decree, it must be held that there was an immediate extinguishment and total adjustment of the decree, and not an extinguishment dependent on some future contingency. An application for execution of the original decree on the basis of a repudiation of such an agreement has to be rejected by the executing Court which can order the adjustment to be recorded. (*Davis, J.C. and Lobo, J.*) Lachhumal *v.* Atta Mahomed Khan. **I.L.R. (1939) Kar. 725=187 I.C. 428=12 R.S. 239=A.I.R. 1939 Sind 343.**

——S. 47—*Scope—Application to set aside decree on ground of death of plaintiff before hearing and decision in suit—Competency.*

The executing Court cannot set aside a decree on the ground that it is null and void; but it is open to that Court to see whether the decree under execution was or was not null and void. The question whether a decree is null and void on the ground of the death of a party is one which can be raised in execution, and it is open to a judgment-debtor to apply under S. 47, C. P. Code, to have an execution sale set aside on the ground that the plaintiff had died before the hearing and decision of the suit and therefore the decree passed therein is null and void. (*Dhavle and Rowland, JJ.*) Ram Khelawan *v.* Ramudar Choudhury. **182 I.C. 208=5 B.R. 732=12 R.P. 9=A.I.R. 1939 Pat. 534.**

——S. 47—Scope—Applications under Ss. 19 and 20, Madras Agriculturists' Relief Act—If fall under S. 47, C. P. Code. *See* Madras Agriculturists' Relief Act, Ss. 19 and 20. **50 L.W. 851 =(1939) 2 M.L.J. 853.**

——S. 47—*Scope — Decree for maintenance creating charge—Prior mortgagee of properties charged subsequently purchasing them—Decree, if can be executed against—S. 50 and O. 22, R. 10.*

S. 47, C.P. Code, does not confer upon a decree-holder any right to proceed in execution against persons who are not judgment-debtors themselves. Such a right is conferred by S. 50 which allows execution against legal representative under certain circumstances. A person who is a prior mortgagee of some of the properties on which a charge is created for maintenance under a decree and who subsequently purchases those properties outright is neither a judgment-debtor nor a legal representative of any judgment-debtor, when he has not been impleaded as a party to the suit in which the decree is passed. The decree-holder is not entitled to execute the decree as against him by making him a party to the execution proceedings, especially when there has been no application beforehand to make him a party judgment-debtor in the execution application.

Quaere.— Whether O. 22, R. 10, C. P. Code, applies to execution proceedings, and whether apart from that rule the Court has power to add a party for purposes of execution. (*Pandrang Row, J.*) Subramania Sastri *v.* Subbalakshmamma. **166 I C. 941=9 R.M. 413=44 L.W. 444=1936 M.W.N. 1028=A.I.R. 1936 Mad. 870 =71 M.L.J. 385.**

——S. 47—*Scope of—Decree-holder auction-purchaser if a party till delivery of possession—Resistance by judgment-debtor—Question, if falls under S. 47 or O. 21, R. 103.*

S. 47 should be construed liberally. A decree-holder purchasing the property sold in execution of his decree with the permission of the Court retains his character of a party to the suit and continues to be a party to the suit till the delivery of possession to him of the property purchased by him and if any question is raised by the judgment-debtor at the time of delivery of possession relating to the nature of the rights purchased and resistance to delivery of possession is offered, the question will be one relating to the execution, discharge and satisfaction of the decree, arising between the parties to the suit and falling under S. 47 and an appeal would lie from an order passed in relation to the question. The case is not governed by O. 21, R. 103. (*Stone, C.J. and Puranik, J.*) Mst. Semabi *v.* Ganpatrao Yadorao. **I.L.R. (1938) Nag. 583=177 I.C. 643=11 R.N. 155=A.I.R 1938 Nag. 212.**

——S. 47—*Scope — Disputes between rival decree-holders regarding attachment or distribution of assets.*

Disputes between rival decree-holders seeking to attach the same property or claiming against each other in the distribution of the assets or disputes between joint decree-holders *inter se* are not within the purview of S. 47. (*King, C.J. and Nanavutty, J.*) Mahomed Salamatullah *v.* Murlidhar. **163 I.C. 175 (2)=8 R.O. 416=1936 O.W.N. 559=1936 O.L.R. 336=A.I.R. 1936 Oudh 277.**

——S. 47—Scope—Duty of Court to work out right finally in execution. *See* T. P. Act, Ss. 60 and 82. **21 Pat. L.T. 227.**

——S. 47—*Scope of —Execution struck off, decree having been fully satisfied—Reopening—Permissibility.*

Where an execution case was struck off at the request of the decree-holder, as the decree was fully satisfied, and a subsequent application is made questioning the propriety of the satisfaction on a question whether the executing Court can reopen execution proceedings after they were struck off.

Held, that the wording of S. 47, C. P. Code, was comprehensive enough to include a case where an objection is raised to the order regarding satisfaction of decree and striking off the execution proceedings. An application made after decree is satisfied is as much an application under S. 47 as it is when made before it. (*Niyogi, J.*) Kachru *v* Laxman. **11 R N. 218=178 I.C. 308 =1938 N.L.J. 162=A.I.R. 1938 Nag. 363.**

——S. 47—*Scope—Objection after confirmation of sale—Maintainability.*

An objection under S. 47, C. P. Code, to the effect that the sale should be set aside, cannot be taken after the confirmation of the sale. (*Addison and Ram Lall, JJ.*) Wasti Ram Gurditta Mal *v.* Ganeshi. **I.L.R. (1939) Lah. 116=184 I C. 846=12 R.L. 260=41 P.L.R. 175=A.I.R. 1939 Lah. 405.**

——S. 47—*Scope—Objection to attachability of property by legal representatives of deceased debtor sued as such.*

An objection that a certain property is exempt from attachment under S. 60, C. P. Code (read with S. 35 of the Punjab Relief of Indebtedness Act) raised by the legal representative of a deceased debtor, against whom a decree was obtained as representing the estate of the deceased, falls under S. 47, C. P. Code, and the question can be raised before the Executing Court prior to the date of confirmation of the sale. (*Addison, J.*) INAYAT *v.* KARTAR SINGH. **41 P.L.R. 288=A.I.R. 1939 Lah. 256.**

——— S. 47—*Scope—Objection under S.* 60 *after sale and before confirmation—Maintainability.*

The Court has power to take notice of any objection under S. 47, relating to property until the sale of that property is confirmed, as it is not till then that the sale becomes absolute and title passes. It is the duty of the Court to follow the law as long as it can, *i.e.*, as long as it is not *functus officio*. Until the sale is confirmed and becomes absolute the Court is not *functus officio*. It is not necessary that the application under S. 47 must be made before the auction of the property has taken place. Until therefore the sale becomes absolute, it is the duty of the Court to decide an objection under S. 47 to the effect that the property is not liable to sale An objection under S. 60 (1) (*c*) falls under S. 47. Where such objection is raised before the sale is confirmed it is the duty of the Court to decide it and to see if it has jurisdiction to sell the property. If it has no jurisdiction, it is its duty to end the execution proceedings by refusing to confirm the sale which so far has not becomes absolute. (*Addison and Ram Lall, JJ.*) RAM CHANDAR *v.* SARUPA. **I L. R. (1939) Lah. 103=184 I.C. 393=12 R.L. 218 =41 P.L R 436=A.I.R. 1939 Lah. 113.**

———**S. 47**—Scope—Order by appellate Court refusing to stay execution proceeding appeal from decree—If falls under—"Decree"—Appeal. *See* C. P. CODE, S. 2. **40 Bom.L.R. 1198.**

———**S. 47**—Scope—Order under O. 21, R. 50 (2) and (3)—If falls under S 47. *See* COURT-FEES ACT (AS AMENDED IN BOMBAY), SCH. I, ART. 1 AND SCH II, ART. 11 **A.I.R. 1939 Sind 161 (F.B.).**

———S. 47—Scope—Party to suit—Objection under O 21, R. 58—Dismissal as barred and as not maintainable—Subsequent suit—Bar—If can be treated as application under S. 47 and entertained—*Res judicata.* *See* C. P. CODE, S. 11. **19 Pat. L.T. 157.**

———**S. 47**—*Scope—Plea of debtor—Instalment mortgage bond—Default clause giving right to sue for whole amount on default in payment of two consecutive instalments—Default—Suit for overdue instalments only—Decree for sale—Execution—Plea that suit should have been for whole amount—Competency.*

Where in a suit on a mortgage bond providing for payment in instalments with a default clause giving the mortgagee the right to sue for the whole amount in case of default in payment of two consecutive instalments, the mortgagee claims the amount of the defaulted instalments only and the Court passes a decree making the property liable to be sold for the amount due in respect of the two instalments alone, it is not open to the mortgagor to plead in execution, that the mortgagee ought to have sued for the entire amount due on the mortgage, and that the mortgagee not having done so, the sale cannot be held subject to the remaining instalments of the mortgage debt in respect of which no suit has been filed. The objection is really not one to the manner of execution so much as to the decree which has been obtained, and must therefore be raised in the suit itself and not in the process of execution. (*Wadsworth, J.*) SUBBAYYA *v.* VENKATASUBBAYYA. **50 L W. 775=1939 M.W.N. 1239=A.I.R. 1940 Mad. 296.**

———S. 47—*Scope—Question if attached property belongs to deceased debtor or his son—Decree obtained against latter as representing estate of deceased.*

The question whether an attached property belongs to the deceased debtor or his son against whom a decree has been obtained as representing the estate of the deceased, falls under S. 47, C. P. Code, and can be raised up to the date of the confirmation of the sale. (*Addison, J.*) INAYAT *v.* KARTAR SINGH. **41 P.L.R. 288=A.I.R. 1939 Lah. 256.**

———**S. 47**—Scope—Question under S. 52—If one falling under—Separate suit—If lies. *See* C. P. CODE, O. 21, R. 63. **A.I.R. 1937 Rang. 531.**

———**S. 47**—Scope—Question whether decree is in contravention of Santhal Parganas Settlement Regulation and as such invalid—If can be raised in execution. *See* SANTHAL PARGANAS SETTLEMENT REGULATION, S. 6 (*b*). **1938 P.W.N. 617.**

———S. 47—Scope — Uncertified adjustment—Subsequent mortgage by judgment-debtor—Suit on mortgage—Plea of non-certification of adjustment in bar and consequent invalidity of mortgage—Power of Court to recognize adjustment. *See* C. P. CODE, O. 21, R. 2. **19 N.L.J. 175.**

———**S. 47 and U. P. Temporary Postponement of Execution of Decrees Act, S. 3**—*Appealability—Test—Order under S.* 3 *of the U. P. Act X of* 1937—*If appealable.*

The test to be applied in determining whether an order passed in execution is appealable or not is this—does the order conclusively determine the rights and liabilities of parties in a controversy which has arisen between them and which relates to the execution, discharge or satisfaction of a decree. Where an order is passed under S. 3 of the U. P. Temporary Postponement of Execution of Decrees Act staying the execution of a decree, the decree-holder has thereafter no right to apply to the Court for the execution of his decree. There is a conclusive determination of a question arising between the parties, and which related to the execution, discharge or satisfaction of a decree. The order therefore is appealable. (*Thom, C.J., Allsop and Ganga Nath, JJ.*) HAR NARAIN LAL *v.* MATHURA PRASAD. **1940 A.L.J. 377=1940 A.W R. (H.C.) 357=A.I.R. 1940 All. 326 (F.B.).**

———**S. 47 (1)**—*Applicability—Parties being both judgment-debtors and decree-holders.*

Sub-S. (1), S. 47, C. P. Code, should not be restricted to parties ranged against each other on opposite sides. It also applies where the parties are both judgment-debtors and decree-holders. Appeal lies from an order under the section and even second appeal lies where the parties are both decree-holders and judgment-debtors at the same time. (*Skemp, J.*) ISHAR DAS *v.* BHANA MAL. **174 I C. 862=10 R.L. 620=A.I.R. 1937 Lah. 592.**

———**S. 47 (2)**—*Applicability—Original Side of the High Court—Suit, if can be treated as application.*

Quaere.—Whether S. 47 (2) applies to proceeding on the Original Side of the High Court and whether a Judge sitting on the original side is justified in treating an original suit as it were a proceeding in execution under S. 47 (2). (*Derbyshire, C.J. and Costello, J.*) Sarada Churn *v.* Prativa Sundari Debi. **40 C.W.N. 428.**

——S. 47 (2)—*Application of—Partition proceedings—Award declaring rights of parties without giving possession—Decree on award—Application for execution claiming possession with alternative prayer to treat application as a suit.*

In a partition proceeding the award declared the rights of the parties without giving them possession. A decree was passed in accordance with the award. In a *bona fide* application for execution of the decree, the applicant claimed possession of the property and made an alternative prayer that in case possession might not be given, the application should be treated as a suit under S. 47 (2), C. P. Code, on payment of additional court-fee.

Held, that the question of payment of additional court-fee could arise only when the Court had decided that application for execution did not lie. After this had been done, the applicant could have been called upon to make good the deficiency in the court-fee. The case was a fit one in which the salutary provisions of S. 47 (2) should have been applied. (*Tek Chand and Abdul Rashid, JJ.*) Sant Lal *v.* Ramaya Ram. **178 I.C. 547=11 R.L. 474=40 P.L.R. 619=A.I.R. 1938 Lah. 177.**

——S. 47 (2)—*Conversion—Appellate Court, if can exercise power.*

It is open to an appellate Court to exercise the power given under S. 47 (2), of treating an application for execution as a suit. (*Hamilton and Radhakrishna, JJ.*) Sat Narain *v.* Chandra Mohan. **12 R.O. 162=184 I.C. 850=1939 O.L.R. 671=1939 O.W.N. 936=1939 A.W.R. (C.C.) 233=A.I.R. 1940 Oudh 27.**

——**S. 47 (3) and O. 21, R. 16**—*Appeal—Order dismissing application for execution by assignee.*

An appeal lies from order dismissing an application for execution of a decree by an assignee on the ground that the assignee has not acquired any title to the decree by the deed of assignment. The question before the Court is whether the assignee is a representative of the decree-holder and as such entitled to execute the decree, and it clearly comes under S. 47 (3), C. P. Code. (*Nasim Ali and Mitter, JJ.*) Surja Narain Roy *v.* Kashinath Roy. **70 C.L.J. 124.**

——S. 47 (3)—*Bar of suit—Legal representative—Decision as to.*

According to the third clause of S. 47, C. P. Code, the question as to whether a person is or is not a representative of a party, shall, for the purposes of this section, be determined by the Court. The only meaning that can be attached to this is that the question whether a person is or is not a representative of a party to a decree must be decided by the executing Court and not in a separate suit and that once decided, it becomes final, so far as matters relating to the 'execution, discharge or satisfaction' of that decree is concerned. (*Stone, C.J. and Bose, J.*) Shaligram *v.* Dhurpati. **I.L.R. (1939) Nag. 165=1939 N.L.J. 82=182 I.C. 285=12 R.N. 6=A.I.R. 1939 Nag. 147.**

——S. 48—Applicability—Application for personal decree. *See* C. P. Code, O. 34, R. 6. **1937 A.M.L.J. 99.**

——S. 48—*Applicability—Application to revive made after 12 years—If barred.*

On an application for execution, certain property of the judgment-debtor was sold, but subsequently the sale was set aside under O. 21, R. 90, C. P. Code, 12 years after the date of decree. Then the decree-holder filed an execution application praying for re-sale of the property.

Held, that the subsequent application for re-sale of the property which was not declared to be incapable of being sold under the decree was an application for revival of the previous execution. S. 48 is applicable only to fresh application and not to revival applications. (*Mahomed Noor and Madan, JJ.*) Saukhi Singh *v.* Thakur Prasad Sinha. **166 I.C. 950 (1)=9 R.P. 369=3 B.R. 238 (2)=18 Pat.L.T. 90=A.I.R. 1937 Pat. 43.**

——S. 48—*Applicability—Application to revive a prior application—Compromise of execution proceedings—Failure to carry out terms—Application to continue execution—If one for revival.*

S. 48, C. P. Code, bars only a fresh application for execution and not an application by which a prior execution application is revived. Where certain execution proceedings were compromised and on the failure of the judgment-debtor to pay the instalments as agreed, the decree-holder applies for continuation of his prior execution application, the bar under S. 48 does not apply to it. It is clearly an application to revive an execution application which remained suspended for some time. (*Zia-ul-Hasan and Bennet, JJ.*) Bhagwan Das *v.* Pyare Lal. **1939 O.W.N. 947=184 I.C. 845=1939 O A. 817=1939 O.L.R. 669 (2)=12 R.O. 159=1939 A.W.R. (C.C.) 240=A.I.R. 1940 Oudh 26.**

——S. 48—*Applicability—Decree not capable of execution until the happening of a contingency—Execution—Starting point of limitation.*

S. 48, C. P. Code, deals with decrees and the execution thereof and obviously must relate to a decree which is capable of execution. In the case of a decree which is not executable except on the happening of a particular contingency, the time under S. 48, C. P. Code, will not begin to run until that contingency occurs. (*Broomfield and Norman, JJ.*) Rango Rama Charya *v.* Gopal Narayan. **I.L.R (1939) Bom. 87=183 I.C. 45=11 R B. 277=40 Bom.L.R. 1278=A.I.R. 1939 Bom. 75.**

——S. 48—*Applicability—Decree under Chota Nagpur Tenancy Act—Execution by Civil Court—Limitation applicable.*

Quaere.—Whether, even if a decree passed by the Deputy Commissioner under the Chota Nagpur Tenancy Act can be executed in a Civil Court by transfer, the more liberal provisions as to limitation obtaining therein will apply rather than those contained in the Tenancy Act. (*Macpherson and Fazl Ali, JJ.*) Maharaja Pratap Udainath Sahi Deo *v.* Baraik Lal Sahi. **15 Pat. 439=165 I.C. 959=9 R.P. 241=18 Pat. L.T. 36=3 B.R. 112=1936 P.W.N. 669=A.I.R. 1936 Pat. 615.**

——S. 48—*Applicability — Execution—"Case struck off as transferred to Collector"—Sale of three out of six properties by Collector—Amount realised insufficient—Subsequent application for* *issue of second C form for sale of remaining properties after three years—If fresh application.*

A decree was transferred to Collector for realization of decretal amount mentioned in the C form, and the executing Court ordered the case to be struck off as transferred to Collector. The Collector sold three out of the six items of landed property attached, but found that the sum could not satisfy the decretal amount due to claim for rateable distribution. Therefore an application for issue of second C form was filed in the Civil Court for sale of remaining properties. It was contended that there being no execution application pending at that time, the application for issue of the second C form was a fresh application for execution and was therefore barred by time.

Held, that the order of the Civil Court striking off the case was clearly not an order dismissing the case. The case was bound to go back to the Civil Court when the decree was returned by the Collector to the Civil Court with the sale proceeds, and the order was merely one adjourning the proceeding until that date. A subsequent application for the sale of the remainder of the attached property was not a fresh application for execution, either in form or substance, but merely an application ancillary to the substantive application. The application therefore for the sending of a second form C to the Collector was not barred by limitation. (*Pollock, J.*) Rupchand Balmukund *v.* Motilal Nathusa Bania. **I. L.R. 1937 Nag 522=169 I.C. 974=10 R.N. 36= A.I.R. 1937 Nag. 92.**

———S. 48—*Applicability—"Fresh application"—Execution application presented within 12 years—Application beyond 12 years for amendment to include property or person not named or specified in original application—Maintainability—If "fresh" applications or only in continuation of original application.*

An application by which it is sought to proceed against properties other than those mentioned in the first execution application or against a person not impleaded or mentioned in the first execution application must be regarded as a fresh application within the meaning of S. 48, C. P. Code, and no such application can therefore be entertained after 12 years from the date of the decree. There is no difference in principle between an attempt to proceed at a late stage in the execution proceedings against properties which it was not sought to proceed against in the original application and an attempt at a late stage to proceed against a person other than the person against whom it was originally sought to execute the decree. Applications for amendment of an execution application, by which the decree-holder seeks to execute his decree against a person who was not named in the original application as presented to Court within the period of limitation or to execute his decree against property which was not specified in the application as originally presented, must be regarded as "fresh" applications and not as being in continuation of the application already on the file; and if made after the expiry of 12 years from the date of the decree, they must fail as time-barred and cannot be allowed. Where the date on which an application to amend an execution petition is presented is a date on which a fresh application to execute the decree would have been barred by S. 48, C. P. Code, then the Courts, will apply the same principles as they would in dealing with an application which is in form a fresh application. (*Agarwala and Rowland, JJ.*) Ram Ran Bijay Prasad Singh *v.* Kesho Prasad Singh. **21 Pat.L.T. 407=A.I.R. 1940 Pat. 571.**

———S. 48—*Application for execution—If fresh or in continuance—Test.*

The question whether an application for execution is a fresh application or one in continuation of a former execution must be determined on the facts of a particular case, regard being had to the substance rather than to the form of the application. In order that an application may be treated as one to continue an earlier execution, the first condition necessary is that the earlier execution case must not have been finally disposed of. If it was so disposed of, no question of continuing it can arise. If, on the other hand, there was an interruption in the earlier proceeding by reason of which the Court, being unable to grant the appropriate relief, struck off the case, it cannot be said to have been finally disposed of. It will then be considered to be still pending, and may, if proper case is otherwise made out, be revived and continued. A second application will not, however, be considered to be a continuation of a former one if it is found to be different in its scope, or if the former execution is found to have been abandoned by the decree-holder or to have been dismissed through his default or laches. (*Rowland and Chatterji, JJ.*) Harihar Gir *v.* Dulhin. **186 I.C. 385=6 B.R. 359=12 R.P. 494=A.I.R. 1940 Pat. 432.**

———S. 48—Bar of limitation—Extent. *See* Limitation Act, S. 15 and C. P. Code, S. 48. **A. I.R. 1939 All. 403 (F.B.).**

———S. 48—*Construction—"Decree sought to be executed"—Decree subsequently amended—Effect on starting point of 12 years.*

The period of 12 years under S. 48, C. P. Code, is final and cannot be extended by any amendment of the decree. Art. 182 (4) of the Limitation Act cannot be invoked to find the starting point for the 12 years period under S. 48, C. P. Code. The "decree sought to be executed" cannot be interpreted as meaning the decree as amended. (*James and Rowland, JJ.*) Mt. Dulhin *v.* Harihar Gir. **18 Pat. 395=1939 P.W N. 611=185 I. C. 373 (2)=6 B R. 172 (2)=20 Pat.L.T. 932= 12 R.P. 364=A.I.R. 1939 Pat. 607.**

———S. 48—*Construction and scope—"Decree"—If includes appellate decree dismissing appeal for want of prosecution—Starting point for execution—Date of decree of trial Court or appellate Court—Limitation Act, Art. 182 (2).*

The word "decree" in S 48, C. P. Code, is not limited to the decree of the Court of first instance when there has been an appeal from the decree of the first Court, and the appeal is dismissed for want of prosecution, the date of the decree of the appellate Court dismissing the appeal is the starting point of limitation as provided by Art. 182 (2) of the Limitation Act. S. 48 only provides the maximum period during which an application for execution can be taken out, but the time from which limitation would run is that which is provided by the Limitation Act. (*Wort, C.J. and Manohar Lall, J.*) Ram Ran Bijaya Prasad Singh *v.* Kesho Prasad Singh. **175 I.C.**

558=4 B.R 612=10 R.P. 638=19 Pat. L.T. 424 =1938 P.W.N. 449=A.I R 1938 Pat 401.

——**Ss. 48 and 51**—*Decree-holder attaching agricultural land and applying for temporary alienation—Subsequent application for appointment of receiver—If one in continuation of previous application.*

The five separate methods for executing a decree, provided for by S. 51 are quite distinct from each other and *prima facie* an application asking that one method should be adopted is not in continuation of a previous application asking for some other methods. Where the character of the second application is different from that of the former the second application will be deemed to be a fresh application within the meaning of S. 48. Where therefore a person attaching certain agricultural land and applying for temporary alienation thereof, subsequently applies for the appointment of a receiver of the attached properties, the characters of the two applications are different in that they seek totally different remedies and as such the second application cannot be deemed to be in continuation of the previous one, and if made after the expiration of 12 years from date of decree is barred by time. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) Bhagwandas *v.* Mahomed Akram. **166 I.C. 683=9 R. Pesh. 72=A.I.R. 1936 Pesh 209.**

——**S. 48**—*Execution against minor—Minor not described as such—Guardian* ad litem *appointed after period of limitation—Execution—If barred.*

In proceedings for execution of a decree against a minor, the fact that the minor is not described as a minor in the execution petition, and that the guardian *ad litem* is not appointed till after the expiry of the period of limitation will not make the application barred by limitation. Execution under the C. P. Code, is intended to be less, rather than more, formal than in a suit. (*Agarwala and Madan, JJ.*) Ghasiram Marwari *v.* Shiba Prasad Singh. **16 Pat 316=18 Pat. L T. 341=1937 P. W. N. 521=169 I C. 872=3 B R. 638=10 R.P. 55=A.I.R. 1937 Pat. 321.**

——**S. 48**—*Execution application dismissed in default—Second application—If revival of prior application.*

Where an application for execution is dismissed in default on account of non-appearance of decree-holder, a second application cannot be said to be in revival of the prior application and would be barred when it is presented more than three-years after the date of the last application. (*Din Mahomed, J.*) Kundo Mal *v.* Daulat Ram Vidya Parkash. **A I.R. 1940 Lah. 75.**

——**S. 48**—Execution — Limitation—Revival. *See* Limitation Act, Art. 182. **1937 A.M.L J. 53.**

——**S. 48**—*'Fresh application'—Test—Substance and not form*

The question of the character of an application for the purposes of ascertaining whether it is a 'fresh application' or not for purpose of S. 48, C. P. Code has to be decided upon the circumstances of each case. The substance of the matter must prevail over the form of the application. (*Sir George Rankin.*) Oudh Commercial Bank, Ltd. *v.* Bind Basni Kuer. **66 I A. 84=14 Luck. 192=I.L.R. (1939) Kar. 136 (P.C.)=11 R.P.C. 176=69 C.L.J. 317=50 L.W. 39=1939 A.L.J. 481=41 Bom.L.R. 708=1939 M.W.N. 692=1939 P.W.N 784=1939 O.W.N 313=43 C.W.N. 501=180 I.C. 378=1939 R D. 208=1939 O.L R. 187=1939 O.A. 352=5 B.R. 476=1939 A.W.R. (P.C.) 43=A.I.R. 1939 P.C. 80=(1939) 1 M.L.J. 652 (P.C.).**

——**S. 48**—*Instalment decree for money—Default clause—Execution on default—Limitation.*

A decree which provides that the whole decree shall become payable in the event of a default in the payment of any instalment is not a decree for money payable on a certain date within the meaning of the first part of S. 48. Such a decree does not cease to be an instalment decree when a default takes place; therefore after 12 years from the date of the default only that instalment will become barred in respect of which the default is made under the latter portion of S. 48. 1928 All. 629, Rel. on. (*Tek Chand and Bhide, JJ*) Shankar Das *v.* Desa Mal Mula Mal. **162 I.C. 673 =8 R.L. 938=A.I.R. 1936 Lah. 159.**

——**S. 48**—*Judgment-debtor's property under the control of the Collector in execution of a decree for a certain period—Exclusion of period —Execution of another decree.*

Where the entire property of a judgment-debtor was under the control of the Collector for some period, commencing from a certain date, in execution of a decree and another decree was obtained against the same judgment-debtor subsequent to that date, and various applications for execution were put in, the period referred to above should be excluded from the period of twelve years prescribed by S. 48 of the C. P. Code. (*Thomas and Zia-ul-Hasan, JJ.*) Mahomed Amir Mirza Beg *v.* Bishunath. **1937 O. W.N. 1116.**

——**S. 48**—Objection under—When to be taken —Plea of limitation after sale and before confirmation of sale—If can be considered—Refusal to confirm sale on ground of limitation—Power of Court. *See* C. P. Code, O. 21, Rr. 89, 90 and 91. **1937 A W.R 1222.**

——**S. 48**—*Previous application for execution dismissed for default—Second application for same relief—If revival of prior application.*

Where a previous application for execution has been dismissed for default on the part of the decree-holder, a subsequent application cannot be said to be for revival of the old application merely because the relief prayed for is the same. (*Bhide, J.*) Gopal Dass *v.* Hafizabad Municipality. **186 I.C. 860=12 R.L. 428=A.I R. 1940 Lah. 35.**

——**S. 48**—*Release of property from attachment on objection—Effect on execution proceedings—Application for reattachment after dismissal of objection—If a fresh application for execution.*

The right of a decree holder to obtain execution of the decree will not necessarily be defeated by objections raised by the judgment-debtor, or proceedings taken by the Court for which the decree-holder is not responsible, which prevent the completion of execution proceedings initiated by an application made within the period of limitation. Accordingly a temporary release of property from attachment because a person had raised the objection that he was not a partner of the judgment-debtor firm does not bring the proceedings taken upon an execution application to a final adjudication but postpones them. A request by the decree-holder for re-attachment of the property after the Court holds such a person to be a partner is, therefore, not a fresh application for execution. (*Coldstream, J.*) Tulsi Ram *v.* E. D. Sasoon & Co., Ltd. **161 I.C. 960=8 R.L. 827=39 P.L.R. 8=A.I.R. 1936 Lah. 843.**

——S. 48—*Scope—Application for execution made within time-limit—Order on after period—If precluded.*

S. 48, C P. Code, only prohibits a Court from passing orders on an execution petition filed after the time-limit prescribed by the section, but it does not prohibit orders being passed on applications, like applications to issue notice to a judgment debtor, which are only ancillary to an execution petition which itself has been filed within the time limited. An application made within the 12 years' time does not preclude an order being made on it after that period. (*Cornish, J.*) Venkatraju *v* Gangaraju. **166 I.C. 648=9 R.M. 385 (1)=1936 M.W.N. 1366=44 L.W. 805=A.I.R. 1937 Mad. 113=71 M.L.J. 808.**

——S. 48—*Scope—Execution application not properly filed within 12 years—Amendment—Powers of Court.*

Ordinarily an execution application which has not been properly made within the 12 years' period prescribed by S. 48, C P. Code, should not be allowed to be amended so as to deprive the respondent of right of putting forward the plea of limitation. But the Court is not powerless to order amendment in special circumstances. The Court has a discretion in the matter. (*King and Krishnaswami Ayyangar, JJ.*) Jhorama *v.* Latchanna Dora. **187 I.C. 334=12 R.M. 702=1939 M.W.N. 988=A.I.R. 1940 Mad. 19.**

——S. 48—*Scope—If affected by Art.* 182, *Limitation Act — Time-barred decree—Amendment under S.* 152, *C. P Code—If furnishes starting point of limitation for execution*

Art. 182 of the Limitation Act leaves the provisions of S. 48, C. P. Code, untouched, and there can be no execution of a decree governed by S. 48, C. P. Code, when twelve years have passed from the date of the decree, amendment or no amendment. It is true that there is no period of limitation for an amendment of a decree to correct an accidental slip or omission under S. 152, C. P. Code, but that does not affect the law of limitation. A correction made in a time-barred decree leaves the decree still time-barred. (*Leach, C. J., Krishnaswami Aiyangar and Somayya, JJ.*) Ramachandra Rao *v* Parasuramayya. **I.L.R. (1940) Mad. 349=187 I C. 176=12 R.M. 688=1940 M.W N. 181=51 L.W. 173=A.I.R. 1940 Mad. 127=(1940) 1 M.L J. 235 (F.B.).**

——S. 48—Scope—If controlled by S. 15, Limitation Act. *See* Limitation Act, S. 15. **40 Bom. L.R. 1278.**

——S. 48—Scope—Period of 12 years—If affected or controlled by S. 78 (2), Provincial Insolvency Act. *See* Provincial Insolvency Act, S. 78 (2). **48 L.W. 881.**

——S. 48 and Limitation Act, S. 6—*Scope—Period of 12 years—If extended by S. 6 of Limitation Act.*

S. 6 of the Limitation Act only purports to control the periods prescribed by the 1st schedule to Limitation Act. The period of limitation for execution application is provided by Art. 182, Limitation Act, but it does not provide the limit or the number of such applications which could be made. S. 48, C. P. Code, does that by prohibiting any application, after the first, which is made more than 12 years after the date of the decree. S. 48, C. P. Code, therefore clearly controls Art. 182. If the period of 12 years fixed by S. 48 is allowed to be enlarged by S. 6 of the Limitation Act it would amount to S. 6 of Limitation Act controlling periods of limitation prescribed by other enactments which it does not purport to do. (*Stone, C.J. and Bose, J.*) Yadorao *v.* Gobindrao. **I.L.R. (1939) Nag. 559=184 I.C. 72=12 R.N. 91=1939 N.L.J. 387=A.I.R. 1939 Nag. 245.**

——S. 48 (1) (b)—*Limitation—Decree amount payable in instalments under compromise in execution proceedings—Starting point.*

Where the decree amount is payable in yearly instalments by virtue of a compromise entered into between the parties in execution proceedings, the starting point for the period of 12 years fixed by S. 48, C. P. Code, is not the date of the decree but the date of default in the payment of the instalments. (*Thom, C.J. and Ganga Nath, J.*) Chhatrapati Pratap Bahadur *v.* Hari Ram. **1940 A.W R. (H.C.) 396=1940 A.L.J. 439=A.I. R. 1940 All. 423.**

——S. 48 (1) (b)—*"Subsequent order"—Decree modified by compromise between parties—Order of competent Court in terms of compromise—If a subsequent order—Limitation for execution—Starting point.*

Where the parties to a decree enter into a compromise by which it is agreed that the decretal amount would be payable by instalments and on default to be realised by execution, and a competent Court passes an order in terms of the compromise, the order is in the nature of a subsequent order under S. 48 (1) (*b*), C. P. Code, and the limitation for execution runs against the decree-holder from the date of that order, and not from the date of the original decree. (*S. K. Ghose and Patterson, JJ.*) Kartic Chandra Mukherjee *v.* Batakrishna Roy. **I.L.R (1937) 2 Cal. 373=176 I.C. 212=11 R.C. 49=65 C.L.J. 403=A.I.R. 1938 Cal. 25.**

——S. 48 (1) (b)—*"Subsequent order"—Meaning of.*

The words "subsequent order" in S. 48 (1) (*b*) show that the order must be subsequent to the decree. Hence the order which the section contemplates must be passed not in the suit but in execution. A mere variation as to the time or mode of paying the decretal debt cannot be considered a substitution of one decree for another or any material alteration in the decree which the Civil Procedure Code forbids. But where the parties, keeping the decretal liability unaltered, enter into a compromise by which the method of satisfying the decree is changed and the executing Court by its order records the compromise and directs the parties to act upon it, the order must be deemed to be a "subsequent order to pay" within the meaning of S. 48 (1) (*b*) and a fresh period of 12 years runs from the date of such order. (*Davis, J.C. and Tyabji, J.*) Kazi Ali

Mahomed *v.* Gangaram Chatomal. **I.L.R. (1939) Kar. 502=181 I.C. 264=11 R.S. 212=A.I.R. 1939 Sind 93.**

——**S. 48 (1) (b)**—*"Subsequent order"—Order of executing Court regarding realization of decretal sum by instalments—Whether amounts to.*

An order passed by an executing Court regarding the realization of a decretal sum by means of instalments does not amount to a "subsequent order" within the meaning of S. 48 (1) (*b*), C P, Code. The subsequent order must be an order made by the Court which passed the decree and not an order made in the course of execution. 54 All. 573 (F. B), Foll. (*King, C. J.*) Nihal Husain *v.* Syed Ahmed. **12 Luck. 244=162 I.C. 715=8 R.O. 400=1936 O.W.N. 517=1936 O.L.R. 293=A.I.R. 1936 Oudh 266.**

——**S. 48 (2) (a)**—*'Fraud'—Fraudulent transfer of property—If amounts to*

A fraudulent transfer of property by the judgment-debtor amounts to fraud within the meaning of S. 48 (2) (*a*), C P. Code (*Din Mohammad, J.*) Ismail *v.* Anjuman Imdad Qarza, Mauza Banga. **188 I.C. 891=42 P.L.R. 10=A.I.R. 1940 Lah. 178.**

——**S. 48 (2) (a)**—*'Fraud'—Raising of objections so as to prolong execution proceedings beyond limitation.*

The mere raising of objections so as to prolong execution proceedings beyond the period of limitation cannot, in all cases, be regarded as fraud for the purposes of S. 48, C P. Code. If the objections are patently frivolous, they can ordinarily and ought to be disposed of speedily by the Court, if the decree-holders are diligent. An objection by a person to the attachment on the ground that the Executing Court had no jurisdiction to adjudicate on the question whether he was or was not a partner of the judgment-debtor firm cannot be regarded as dishonest. But where his objection that he was not a partner of the judgment-debtor firm is false and was adopted as a trick by which the decree-holders were forced by no fault of their own to delay execution proceedings until the period of 12 years had expired, his conduct in raising the plea is fraudulent and has the effect of enlarging the period of limitation. (*Coldstream, J.*) Tulsi Ram *v.* E. D. Sassoon & Co, Ltd. **161 I C. 960=8 R.L. 827=39 P.L R. 8=A.I R. 1936 Lah. 843.**

——**S. 49 and O 21, R. 18**—*Applicability and scope—Execution by assignee—Claim to set-off—Principles.*

There is no inconsistency between S. 49 and O. 21, R. 18, C P. Code. If there be any, S. 49 will prevail. *G. P.* obtained a money decree against *B.N.* and *M.P.* *B N.* obtained a decree against *D* and three others. *G P.* subsequently assigned his rights under the decree obtained by him to *D.* *B.N.* afterwards assigned his decree to *S. S.* applied for execution of the decree against *D.* and others. *D.* then claimed a set-off of the decretal amount due under the decree assigned to him by *G.P.* against the decretal amount claimed by *S.*

Held, that on a correct application of O. 21, R. 18 and S. 49, C. P. Code, the rights of the parties were adjustable by a set-off. (*Niamatulla and Allsop, JJ.*) Brij Mohan Lal *v.* Manmohan Das. **1937 A.L.J. 258=1937 A.W.R. 191=169 I.C. 385=I.L.R. 1937 All. 553=1937 A.L.R. 521=10 R.A. 11=A.I.R. 1937 All. 351.**

——**S. 49**—*Decree for costs in favour of* A *against* B—*In another suit* B *obtaining decree for rent against* A—*During pendency of latter suit* A *assigning his decree to* C *who had no notice of pending rent suit*—B, *if entitled to set-off decree for rent against decree for costs.*

A held a decree for costs against *B.* Subsequently in another suit *B* obtained a decree for rent against *A.* During pendency of the latter suit *A* transferred his decree to *C* who had no notice of the pending rent suit. When *C* applied for execution of the decree for costs, *B* claimed to set-off against it the decree for rent.

Held, that inasmuch as there was debt in the form of rent and as a suit was pending to enforce payment, there was an equity and *C* took the transfer subject to it. The question of want of notice on part of *C* was immaterial. *B* was therefore entitled under S. 49, C. P. Code, to claim set-off. (*Roberts, C.J. and Leach, J.*) Daw Aye *v.* U Aye Maung. **172 I.C. 241=10 R R. 236=A.I.R. 1937 Rang. 316.**

——**S. 49 and O. 21, R. 29**—*Scope—Equitable set-off—Assignee of decree—If takes subject to rights of judgment-debtor to get stay and set-off.*

An equitable set-off can be and has been recognised in India; in fact the right of a judgment-debtor to ask for a stay under O. 21, R. 29, C. P. Code, is an equity which binds the assignee of the decree; and when both decrees arose out of one transaction no Court of equity can reject the request of the judgment debtor. The assignee can only take subject to the judgment-debtor's equitable right to have execution stayed until his suit shall have been decided and therefore to set-off his decree which may be passed in his suit. (*Barlee and Macklin, JJ.*) Gurushantappa *v.* Nagappa. **I.L.R. (1938) Bom. 263=175 I C. 427=10 R.B. 560=40 Bom.L R. 188=A.I.R. 1938 Bom. 253.**

——**S. 50**—*Judgment-debtor dying during execution—Executing Court—Power to proceed with execution against legal representatives—Fresh order from Court passing decree—Necessity for.*

If a judgment-debtor dies during execution, it is irregular for the Court which has not passed the decree to proceed with the execution against the representatives of the deceased judgment-debtor, without fresh orders from the Court which passed the decree; under S. 50, the application for such execution is to be made to the Court which passed the decree. (*Mohammad Noor and Madan, JJ.*) Official Trustee of Bengal *v.* Basdeo Bhagat. **168 I.C. 346=3 B.R. 421=9 R.P. 481=A.I.R. 1937 Pat. 239.**

——**S. 50**—*Legal representative—Alienee from legal representative—Liability to be proceeded against in execution.*

A mere alienee from a legal representative is not a legal representative for purposes of execution, though such alienee may have intermeddled with the property. The question of liability of property transferred to a stranger cannot be decided in execution. (*Horwill, J.*) Thiagaraja Iyer *v.* Narayanaswami Pillai. **182 I.C. 333=12 R.M. 58=47 L.W. 782=1938 M.W.N. 518=A.I.R. 1938 Mad. 684=(1938) 1 M.L.J. 867.**

——**S. 50**—"Legal representative"— Decree against Hindu father—Execution against joint family property in the hands of sons—Attachment of joint family property—Subsequent insolvency and death of father—Sons—If legal representatives. *See* C. P. CODE, Ss. 2 (11), 50 AND 53 AND O. 21, R. 22. **38 Bom L R. 977.**

——**S. 50**—*Legal representative — Extent of liability—Security deposit of deceased judgment-debtor in hands of his employer—If can be attached.*

The provision of the Code are to be strictly observed and there is no provision under S. 50, C. P. Code, for attachment in execution against a legal representative, of either a debt due to him or of movable property that has not yet come into his possession. The security deposit therefore of a deceased judgment-debtor in deposit with his employer cannot be attached by a prohibitory order under O. 21, R. 48 of the Code in execution against the legal representative of the judgment-debtor (*Mosely, J.*) LEONG AH CHOY *v.* T. D. FINDLAY & SONS. **170 I.C. 766=10 R.R. 106=A.I.R. 1937 Rang. 274.**

——**S. 50**—*Legal representative—Possession of assets, if necessary.*

Legal representative merely means the person who in law represents the estate of the deceased, and it is immaterial whether such a person has actually obtained possession of the estate or even whether the deceased left any estate. The extent of liability has to be decided in execution. (*D. R. Norman.*) SRI LAL *v.* MST. JHAMKU. **1939 A. M L J 69.**

——**S. 50**—Legal representative—Prior mortgagee of property charged under maintenance decree—Mortgagee purchasing such property subsequently—If can be proceeded against in execution. *See* C. P. CODE, S. 47. **71 M L J. 385.**

——**S. 50 and O 22, Rr. 11 and 12**—*Relative scope of—S. 50, if applies to appeals from execution proceedings—O. 22, R. 11, if applies—And if controlled by R. 12.*

It is because of the special provision in S. 50, C. P. Code, that R. 12 of O. 22 excludes the execution proceedings from the operation of Rr. 3, 4 and 8 of that order. R. 12 of O 22 must therefore be construed as referring only to the proceedings in the executing Court and not to those in the appellate Court which hears appeals from execution proceedings. S 50, C. P. Code, does not apply to appeals arising from execution proceedings but only to those in the original Court. It is not correct to say that R. 11 of O 22 is controlled by R. 12 of the same order. There is no reason why R. 11 of O. 22 should not apply to an appeal under S. 47, C. P. Code, as the C. P. Code does not make a distinction between appeals arising from execution proceedings and those preferred against decrees. (*Stone, C. J. and Niyogi, J.*) MADHORAO *v.* BALIRAM. **I.L R. (1939) Nag. 119=178 I.C. 568=11 R N. 237=1938 N.L. J. 312=A I.R 1938 Nag 502.**

——**S. 50 and O 21. R. 22**—*Scope—Order for sale—Subsequent death of judgment-debter—Sale without impleading legal representatives—If void.*

Where, after the attachment of the immovable properties of the judgment-debtor in execution of a decree against him, and after the Court has passed an order for sale, the judgment-debtor dies and the sale is held without impleading the judgment debtor's legal representatives, the sale is null and void and not merely irregular. (*Cornish, Varadachariar, Wadsworth, Venkataramana Rao and Lakshmana Rao, JJ.*) KANCHAMALAI PATHAR *v.* SHAHAJI RAJA SAHIB. **59 Mad. 461 =162 I.C 156=8 R.M 946=43 L.W. 238=1936 M.W.N. 60=A.I.R. 1936 Mad. 205=70 M.L.J. 162 (F.B.).**

——**Ss. 50, 52 and 53**—*Scope and effect of—Hindu father—Death undivided from son—Administration suit by creditor—Maintainability in the absence of separate property left by father,*

A creditor is not entitled to bring a suit for the administration of the estate of a deceased Hindu who was joint with his son and died leaving no property apart from his interest in the family estate. There is nothing in Ss. 50, 52 and 53, C P. Code, which would sustain an administration suit where the Hindu father dies leaving no property of his own. (*Leach, C.J. and Somayya, J.*) MEENAKSHI ACHI *v.* RAMASWAMI CHETTIAR **I.L.R. (1939) Mad. 820=184 I.C. 183=12 R.M. 420= 49 L.W 701=1939 M W.N. 493=A.I.R. 1939 Mad. 552=(1939) 2 M.L.J. 653.**

——**S. 50**—*Suit against wrong legal representative—Decree—Binding nature of—Duty of plaintiff in such cases.*

In a suit against the estate of a deceased person, represented by his legal representative, the plaintiff must be diligent and careful to implead all the ordinary legal representatives under the law applicable, if he wishes to bind them by any decree that might be passed. Nevertheless, if a plaintiff has impleaded the ordinary legal representative, and owing to ignorance of facts or circumstances by reason of which it turns out that the proper legal representatives were in fact others than those ordinarily impleaded and there is no fraud or collusion, the estate will still be bound. (*Tek Chand, J.*) MT. HARBANSO *v.* MUNSHI RAM. **40 P.L.R. 25.**

——**S. 50**—*Transfer of decree—Application to add legal representative—To which Court to be made—Matter one of procedure and not jurisdiction.*

The addition of the legal representative after a decree is transferred for execution, is a matter of procedure not of jurisdiction. The jurisdiction of the executing Court over the subject-matter continues as before, but it has to be exercised according to certain prescribed procedure. If there was a non-compliance with such procedure the defect might be waived. (*Baguley and Mosely, JJ.*) K. K. K. M. CHETTYAR *v.* SELLAMI ACHI. **1938 Rang.L.R. 355=179 I.C. 374=11 R.R. 313=A.I.R. 1938 Rang. 385.**

——**S. 51**—Applicability—Scheme decree directing trustee to pay certain amounts—Execution—Appointment of receiver to collect—Legality. *See* C. P. CODE, S. 92. **71 M.L.J. 87.**

——**S 51**—*Appointment of receiver—Lands exempt from attachment—Ajmer Courts Regulation, S 24.*

Execution by appointment of a receiver under S. 51, C P. Code, is a distinct and different mode of execution from that of attachment and sale. In the case of lands exempt from attachment under S. 24 of Ajmer Courts Regulation, if they were leased to lessees, a receiver could be appointed to recover the rents. But if the lands were being cultivated by the judgment-debtor personally an appointment of a receiver would probably be inappropriate. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J 89.**

——S. 51 and O. 21, R. 11 and O. 40, R. 1—*Execution by appointment of receiver—Power of Court—Considerations.*

Appointment of a receiver for the purpose of execution of a decree has been held to be equitable execution. It is not always necessary that legal execution should be exhausted before equitable execution by this mode is resorted to. Where the decree debt would not only be satisfied as in any other way and at the same time the judgment-debtor will be saved from great prospective loss, a Court may appoint a receiver. It can also be made where the interests of both the judgment-debtor and decree-holder can be safeguarded, or where that is the only way in which the decree-holder can hope to realise his decree or any part of it. (*Thomas, C.J and Yorke, J.*) JAI DAYAL *v.* JAGDEO NARAIN **14 Luck. 538=180 I.C. 29=11 R O. 226=1939 O.A. 248=1939 O L.R. 118=1939 O.W.N. 206=A I.R. 1939 Oudh 116.**

——S. 51—Indirect execution — Receiver—Availability. *See* C P. CODE, S. 60 (*n*). **A.I.R. 1937 Mad. 864.**

——S 51—*Power of temporary alienation.*

The power to grant a temporary alienation under S. 51 is derived from the power of sale and if the power of sale is taken away by the legislature all powers derived therefrom are similarly taken away. (*Middleton, J. C. and Almond, A. J. C.*) JETHA NAND *v.* KHUDA BAKHSH. **161 I.C. 628=8 R. Pesh. 176=A.I.R. 1936 Pesh. 90.**

——S. 51—*Scope—Appointment of receiver in respect of certain property—Right of decree-holder to proceed against other properties also.*

There is no reason why the decree-holder should not take out any or all the forms of execution which the Code of Civil Procedure entitles him to pursue against various items of the judgment-debtor's property. Consequently, where by a consent order a receiver is appointed of certain properties, treating the appointment of receiver as a form of equitable execution, there is no reason why the decree-holder should not proceed or be entitled to proceed against properties which are not the subject-matter of the order appointing receiver. (*Wort and Varma, JJ.*) SHYAM SUNDER SINGH *v.* DHIRENDRA NATH. **17 Pat. 248=174 I.C. 34=4 B.R. 377=19 Pat.L.T. 359=10 R.P. 473=A.I.R. 1938 Pat. 130.**

——S. 51—*Scope—Right of decree-holder to choose mode of execution—Discretion of Court to interfere.*

Section 51, C. P. Code, lays down the mode in which a Court may execute a decree. It does not however give the Court any discretion to choose one particular mode of execution as against another. The Court has therefore no jurisdiction to direct a decree-holder to proceed against the property of the judgment-debtor, when he desires to proceed against the person. A.I.R. 1926 Lah. 110; A.I.R. 1934 Nag. 140, Foll.; 48 M. 494 and 11 I. C. 848, Dist.; 29 I.C. 152, Diss. (*Middleton, J. C. and Almond, A. J. C.*) KRIPAL SINGH *v.* SYED ASHRAF ALI SHAH. **160 I.C. 812=8 R. Pesh. 130=A.I.R 1936 Pesh. 46.**

——S. 51 and O. 21, Rr. 30 and 64—Scope—Sale without attachment—If nullity. *See* EXECUTION—SALE **41 Bom.L.R. 463.**

——S. 51 (d) and O. 40, R. 1—*Appointment of receiver—Discretion of Court.*

No doubt S. 51, C. P. Code, prescribes the appointment of a receiver as one of the modes in which a decree can be executed but the appointment of a receiver in all cases is subject to the provisions of O. 40, R 1 of the Code and no receiver can be appointed in any case unless it appears to the Court that it is just and convenient that a receiver should be appointed. (*Nanavutty and Zia-ul-Hasan, JJ.*) MANRAJ KUNWAR *v.* S. P SHUKLA. **167 I.C. 302=9 R.O. 381=1937 O. W.N 243=1937 O.L.R. 105=A.I.R. 1937 Oudh 232.**

——S. 51 (d) and O. 40, R. 1—*Execution—Receiver of properties outside jurisdiction—Power of Court to appoint.*

The Court has no doubt jurisdiction to appoint a receiver of immovable properties in execution of a decree although such properties be situate outside the jurisdiction of the Court. But if the judgment-debtor objects to the appointment of a receiver in execution and if there is a reasonable chance of the decree-holder being able to satisfy his decree by attachment and sale, he should be relegated to that remedy. In a case, however, where the properties of the judgment-debtor prove to be saleable, the Court is entitled to appoint a receiver in execution of properties outside the jurisdiction notwithstanding the judgment-debtor's objection thereto. (*Panckridge, J.*) JAWLA PROSAD BHARTIA *v.* HANUMANBUX PODDAR. **40 C.W.N. 1065.**

——S. 51 (d)—*Execution—Service inam lands—Judgment-debtor—Execution against—Receiver to collect income—Power of Court to appoint.*

Though inam fields granted to a person partly for maintenance and partly for remuneration of services rendered as kazi cannot be alienated or attached and sold, a receiver can be appointed in execution of a decree against such person to realize the income from such fields to satisfy the decree-holder's claim. But it is open to the judgment debtor to apply for an allowance to maintain his family. (*Pollock, J.*) SYED WAZIRUDDIN *v.* SYED BASIRUDDIN. **I L.R. (1937) Nag. 534=167 I. C. 878=9 R. N. 229=A.I.R. 1936 Nag. 288.**

——S. 51 (d) and O. 40, R. 1—*Judgment-debtor possessing share in firm—Receiver, if can be appointed.*

In execution of a decree against a person possessing a share in a firm it is doubtful if a receiver under S. 51 can be appointed because a receiver cannot be appointed for the custody of the property which the judgment-debtor himself cannot take possession of. In order to ascertain the approximate value of the shares of the judgment-debtor, it may be open to the Judge to appoint a Commissioner to make an inventory of the assets of the firm and its liabilities. (*Jai Lal, J*) MOHAN LAL LAKSHMI DAS *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **174 I.C. 692=10 R.L. 583=A.I.R. 1937 Lah. 313.**

——S. 51 (d)—*Property in foreign territory—Power of Court to appoint receiver.*

The Court can appoint receiver over property out of its jurisdiction. This power is based upon the doctrine that the Court acts *in personam.* The Court does not and cannot attempt by its order to put its own officer in possession of property in foreign territory, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign territory. (*Bhide, J.*) SUNDER SINGH GIYANI *v.* GANGA RAM. **I.L.R. (1938) Lah. 305=175 I.C. 734=11 R.L. 34=39 P.L.R. 415=A.I.R. 1938 Lah. 93.**

——**S. 51 (d)**—Scope—Wakf property—Receiver in execution—Power of Court to appoint. *See* C. P. CODE, O. 40, R. 1. **1937 A.W.R. 903.**

——**Ss. 51 (e) and 72**—*Execution of decree—Powers of Civil Court—Sale of land prohibited by S.* 16 *of the Bundelkhand Land Alienation Act —If could be leased.*

Where the lands of the judgment-debtor were prohibited from being sold by S 16 of the Bundelkhand Land Alienation Act on a question whether a Civil Court can in execution of a simple money decree, lease such property.

Held, that an executing Court is bound by the methods laid down in S. 51, C. P. Code, and those methods were subject to conditions and limitations prescribed by the rules under the Code and by the Code itself. S. 51 does not authorise a Civil Court to grant a lease. Sub-S. (*c*) of S. 51 does not mean anything else than a reference to the particular method of execution which a particular relief granted requires. S. 72 could not apply as it comes into opeation only after an order for sale has been made and no notification has been made under S. 68 It applies only to property which could be sold in execution of a decree. (*Bennet, Iqbal Ahmad and Allsop, JJ.*) BHAGWATI SINGH *v.* KASHI NARAIN. **I.L.R. (1938) All. 528=175 I. C. 238=10 R. A. 658=1938 A. L. R. 387=1938 A. W. R. (H. C.) 310=1938 A.L.J. 444=A.I.R. 1938 All. 290 (F.B.).**

——**S. 51 (e)**—*Scope—Lease in satisfaction of decree—Power of Court to grant in execution.*

Quaere.—Whether the Civil Court has a general right to grant a remedy in execution by itself giving a lease of the property of the judgment-debtor for the purpose of satisfying the decree. But the Code does not make any provision for such a procedure. (*Sulaiman, C.J. and Bennet, J.*) BASORE SINGH *v.* SANT KUMAR. **10 R.A. 338=171 I.C. 903=1937 R.D. 422=1937 A.L.R. 905=1937 A.W.R. 686=1937 A.L.J. 801=A.I.R. 1937 All. 699.**

——**S. 51, Proviso**—*Capacity of judgment-debtor to pay—Determination of— Judgment-debtor an agriculturist—His agricultural lands and residential houses—If can be taken into account.*

Under the newly introduced proviso to S. 51, C. P. Code, in determining the question of the capacity of a judgment-debtor who is an agriculturist to pay the amount of a decree, his agricultural lands and his residential houses cannot be taken into account. (*Din Mahomed, J.*) ABDUL HAMID *v.* AMRIT LAL. **183 I.C. 133=12 R.L. 100=41 P.L.R. 101=A.I.R. 1939 Lah. 299.**

——**S. 51, Proviso, Explanation**—*Applicability—Judgment-debtor transferring after suit land not liable to attachment with dishonest intention—Forfeiture of protection.*

The explanation applies only to Cl. (*b*) of the proviso. By virtue of the explanation, property which could not be attached or sold was not to be considered only when deciding as to whether the judgment-debtor had any means to pay the money decreed. Obviously, the explanation has nothing to do with Cl. (*a*) and therefore it cannot be said that a gift by the judgment-debtor after the institution of the suit of his land not liable to attachment and sale does not make him forfeit the protection afforded to him by the amendment of S. 51 by Act XXI of 1936 even if the gift was made with a dishonest intention. (*Mir Ahmad, J.*) ATTAR CHAND *v.* ABDUL MAJID. **189 I.C. 371=A.I.R 1940 Pesh. 33.**

——**S. 51, Proviso (a) (ii)**—*Fraudulent concealment or transfer of property—What amounts to.*

Where a defendant against whom a decree for price of plaintiff's car has been passed makes a hypothecation of the plaintiff's car along with other cars, that have been left with him for sale or for custody, to a third party, and he then brings a suit against the third party and abandons it, and the transaction of hypothecation appears to be fictitious, his conduct amounts to making a fraudulent concealment or transfer of his properties and comes within proviso (*a*) (*ii*) to S. 51 as amended by S. 2, C.P. Code (Amendment) Act (XXI of 1936). (*Ameer Ali, J.*) ELLIS STELLA BEAUMONT *v.* ENGLISH MOTOR CAR CO. **177 I C. 1008=11 R.C. 312=A.I.R. 1938 Cal. 448 (2).**

——**S. 51, Proviso (b)**—*Burden of proof of means to pay debt.*

The onus of proof is on the decree-holder to establish that the judgment-debtor had sufficient means to pay the debt within the meaning of sub-Cl. (*b*) of the Proviso to S. 51. (*Wort, Ag.C.J.*) JUGAL KISHORE *v.* PAHLAD RAI. **5 B.R. 16=11 R. P. 182 (1)=177 I.C. 797=A.I.R. 1939 Pat. 22.**

——**S. 51, Proviso, Cl. (b)**—*Judgment-debtor after decree selling his property but neglecting to pay decretal amount—If liable to be detained in civil prison.*

Where a judgment-debtor after the date of the decree sells his property, receives the consideration but neglects to pay the decretal amount or a substantial part thereof, Cl. (*b*) of the Proviso to S. 51 comes into play and he is liable to be detained in civil prison. (*Mir Ahmad, J.*) SURJAN SINGH *v.* RAM SINGH. **174 I.C. 629=10 R. Pesh. 70=A.I.R. 1938 Pesh. 17.**

——**S. 51, Proviso, Cl. (b)**—*Means of judgment-debtor—Maintenance expenses of debtor—If must be taken into account.*

In the calculation of the means of the judgment-debtor for the purpose of S. 51, proviso, cl (*b*), C.P. Code, the necessary expenses of maintaining the life of the debtor and of his dependants must be taken into account and deducted from his income. (*Mitter and Khundkar, JJ.*) MAHOMED NABIBAKHSH *v.* ABDUL BASED. **43 C. W.N. 427.**

——**S. 51, Proviso, Cl. (b)**—*Means of judgment-debtor—Property under attachment in execution of another decree—If can be taken into account.*

In the calculation of the means of the judgment-debtor for the purpose of Cl. (*b*) of the proviso to S. 51, C. P. Code, the value of the property under attachment in execution of another decree, cannot be taken into account. (*Mitter and Khundkar, JJ.*) Mahomed Nabibakhsh *v.* Abdul Based. **43 C.W.N. 427.**

——**S. 52**—*Applicability—Decree passed against company taking over assets and liabilities of another company.*

S. 52 (2), C. P. Code, simply enacts a rule of procedure in accordance with natural justice. If a debtor dies and his properties are taken by his legal representatives, they are bound to pay his debts to the extent of the assets they have taken. Consequently if a creditor has obtained a decree for the payment of money out of the property of the deceased, and proves in the execution proceedings that the debtor died leaving properties which came into the hands of his representatives, then it is for these representatives to account for those properties, and if they fail to do so, they become personally liable to the extent of the assets not accounted for. The principle of the section applies to a decree passed against a company which has taken over the entire assets and liabilities of another company when the latter went into liquidation, and its liability is expressed in the form adopted in decrees against legal representatives of deceased persons. As regards the mode of execution of such a decree, it does not in principle differ from a decree passed against the legal representatives of a person who has died a natural death. (*Mahomed Noor and Dhavle, JJ.*) Baraboni Coal Concern, Ltd. *v.* Ram Chandra Marwari. **5 B.R. 664=181 I.C. 721=11 R.P. 626=20 Pat.L.T. 685=A.I.R. 1939 Pat. 580.**

——**Ss. 52 and 53**—*Award against son as legal representative of father—Execution against ancestral property in his hands—Permissibility.*

If an award is made by the Registrar under the Co-operative Societies Act against a son as representing the estate of his father, the ancestral property in the hands of the son and his sons is liable to be attached and sold in execution of the award. (*Fazl Ali and Varma, JJ.*) Sheosaran Singh *v.* Gaya Amla Co-operative Society. **5 B.R 600=181 I.C. 512=11 R.P. 597=A.I.R. 1939 Pat. 500.**

——**S. 52**—Decree against assets of deceased debtor—Share of offerings made at temple in hands of legal representative—If attachable. *See* C. P. Code, Ss. 60 and 52. **58 All. 457.**

——**S. 52**—*Decree against estate in the hands of heirs—Income accruing after death of debtor—Liability.*

Where the estate in the hands of the heirs of the original debtor against whose estate the decree was passed is liable for the satisfaction of the decree, then even the produce and income of that estate which has accrued after the death of the original debtor is liable to attachment and sale in satisfaction of such decree. (*Jai Lal, J.*) Manzur Hussain *v.* Ram Rattan Shah. **165 I.C. 802=9 R.L. 304=A.I.R. 1936 Lah. 236.**

——**S. 52**—*Decree against legal representative—Substitution of his legal representative on his death—Liability for decree—Test—Possession of assets.*

Where on the death of a legal representative against whom a decree has been passed to the extent of the assets of the deceased in his hands, his legal representative is added, he cannot escape the liability for the decree so long as the assets

are in his hands. (*Stone, C.J. and Bose, J.*) Jagdish *v.* Punamchand. **1938 N.L.J. 176.**

——**S. 52**—*Decree against widow as legal representative of deceased husband—Minor son not impleaded in suit—If bound by decree.*

A decree obtained against a widow as legal representative of the estate of her deceased husband without making the minor sons, who are the proper legal representatives, as parties to the suit, is binding upon such sons, when there is nothing to show that the widow was negligent of the interests of her sons or that she did not defend the case properly. (*Dalip Singh, J.*) Jharu *v.* Pardhana. **183 I.C. 487=12 R.L. 123 =41 P.L.R. 147=A.I.R. 1939 Lah. 277.**

——**Ss. 52 and 53**—*Mortgagee executed by two members of joint Hindu family—Death of one of them—Suit by mortgagee decreed against estate of deceased executant in hands of his sons and against other executant personally—Suit dismissed as against grandsons of deceased executant—Decree, if can be executed against interest of grandsons—Mortgagee's proper remedy.*

Two members of a joint Hindu family governed by the Mitakshara executed a mortgage deed in favour of the appellant. One of them having died, the appellant brought a suit to enforce the mortgage against the sons and grandsons of the deceased and against the other executant. The Court passed a simple money decree against the estate of the deceased executant in the hands of his sons and against the other executant personally. The suit was dismissed as against the grandsons. The appellant applied for execution of the decree even as against the interest of the grandsons in the family property.

Held, that the grandsons having been dismissed from the suit could not be made liable under the decree, that if the debt in question was not contracted for purposes regarded as immoral by the Hindu Law and if the grandsons were liable therefor to the extent of their interest in the joint family property, the trial Court's decree was erroneous and that the appellant should have appealed therefrom claiming a decree against the grandsons in like manner as against the other defendants, and that such a decree passed in accordance with S. 52, C. P. Code, would have attracted the operation of S. 53 and the grandsons' interests in the joint property would have been liable to attachment under the decree notwithstanding that such interests were not "property of the deceased" in the strict meaning of those words. (*Sir George Rankin.*) Raja Ram *v.* Raja Bakhsh Singh. **13 Luck. 61=42 C.W.N. 200=1938 M.W.N. 1=1938 A.W.R. (P. C.) 1=19 Pat.L T. 1=172 I.C. 5=47 L.W. 1=10 R.P.C. 119=1937 O.W.N. 1199=A.I.R. 1938 P.C. 7=32 S.L.R. 221=66 C.L.J. 422=1937 O. L.R. 614=1937 All.L.R. 982=4 B.R. 169=1938 O.A. 84=40 Bom.L.R. 277=(1938) 1 M.L.J. 41 (P.C.).**

——**S. 52**—*Principle of section—Decree for dower against all heirs of deceased taluqdar in Oudh—Decree realized only out of non-taluqdari property—Suit for contribution against succeeding taluqdar—If lies—Proper method of allocation of debts.*

The principle or method of which S. 52, C. P. Code, is an expression has always been so operated as not to prejudice the rights *inter se* of beneficiaries or legatees over whom the creditor has priority. In the ordinary case of a Muslim whose whole property descended according to his personal law it would be impossible to suggest that an heir was without remedy against his co-heirs if by the action of the judgment creditor under a decree obtained under S. 52, C. P. Code, in a suit brought against all the heirs of the deceased Mahomedan, he was left with less than his proper share of the net estate of the deceased. His right to contribution would be plain. As a beneficiary, he would have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution. but the basis of his claim would be the same in each case, *viz.*, the right to have due administration of the deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under S. 218, Succession Act. A proper administration of the deceased's estate involves and requires a proper allocation of the debts as between properties to which different rules of descent apply. A Mahomedan widow of a taluqdar in Oudh obtained a decree under S. 52, C. P. Code, for dower against all the heirs of the deceased including the taluqdar succeeding the deceased. The decree-holder realized the decretal amount only out of the partible or non-taluqdari estate in the hands of the heirs. The latter brought a suit against the existing taluqdar for contribution contending that as both taluqdari and non-taluqdari properties were liable for the debt, the taluqdari estate should be made to contribute according to its value. The taluqdar had obtained the necessary permission under S. 3, Oudh Settled Estates Act, and declared that certain portion of the taluqa was to be held subject to the provisions of he Act.

Held, that the rights of the plaintiffs could not be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late taluqdar made them co-beneficiaries with the existing taluqdar in respect of assets all of which were answerable for the debts of the deceased and the fact that different portions of the assets devolved on different principles in no way defeated the plaintiff's right to contribution.

Held also, that for the purpose of the allocation of debts of the late taluqdar between taluqdari and non-taluqdari properties, the value of his interest in the taluqa was to be taken as it stood at the date of his death. The value of the property comprised in the declaration subsequently made by the taluqdar under the Oudh Settled Estates Act could not be excluded, as "to be or to have vested" in S. 15 of the same Act could not be interpreted to be operating retrospectively. (*Sir George Rankin.*) MAHOMED KASIM ALI *v.* SADIQ ALI. **65 I.A. 219=13 Luck. 494=1938 M.W.N 545=42 C.W.N. 901=48 L.W. 16=10 R.P C. 295=4 B.R. 606=67 C.L.J. 350=1938 O A. 508=1938 P.W N. 514=1938 O.L.R. 282=1938 O W.N. 581=1938 A.L.R. 415=40 Bom.L.R. 843=1938 A.L.J. 843=174 I.C. 977=1938 A.W.R. (P.C.) 138=32 S.L.R. 772=A.I.R. 1938 P.C. 169=(1938) 2 M.L.J. 210 (P.C.).**

——**S. 52**—*Profits of property of deceased accruing after death—If form part of his estate.*

Rents and profits of the property of a deceased person accruing after the property has devolved on his heirs form part of the estate of the deceased. (*Zia-ul-Hasan and Smith, JJ.*) SHAHANSHAH BEGAM *v.* AKBAR HUSSAIN. **13 Luck. 689=172 I.C. 306=1938 O A 48=10 R O. 170=1937 O.W.N. 1243=1937 O.L.R. 604=A.I.R. 1938 Oudh 45.**

——**S. 52**—*Property of deceased in hands of his widow as executrix—Right of decree-holder to proceed against it in execution.*

Where property of the deceased is in the hands of his widow as executrix and it is not proved that it belongs to her in her personal capacity, the property may be attached in execution of decree against her as executrix. The decree-holder may not file an administration suit because a decree-holder has rights which he may work out in execution proceedings, and the cumbrous method of filing an administration suit when he desires to attach property *prima facie* in the hands of the judgment-debtor as such may not appeal to him (*Roberts, C.J.*) SARAB SAUL SOFAER *v.* W. M. EZEKIEL. **187 I.C. 370=12 R.R. 327=A.I.R.1940 Rang. 78.**

——**S. 52**—*Scope—Property devolving on heir of debtor—Mortgage by heir—Priority over debt due by deceased.*

When property devolves upon a heir it becomes the property of the heir who is entitled to deal with it as his own. He may execute a mortgage of the property as his own property; and unless the alienation is proved to be *mala fide*, it will prevail against right of a creditor of the ancestor, who has not taken proper proceedings to seize the property before the mortgage (*Venkataramana Rao, J.*) NAMBIAR *v.* CHANDUKUTTY. **186 I.C. 323=12 R.M. 622=1939 M.W.N. 1041=50 L.W 655=A.I.R. 1940 Mad. 22.**

——**S. 52**—*Scope—Property transferred by legal representative to stranger—Right of creditor to proceed against in execution—Limits to.*

S. 52 (1), C. P. Code, gives a creditor a right to proceed against the property of the deceased in the hands of a legal representative and sub-S. (2) of that section gives the creditor the right to proceed personally against the legal representative if the latter cannot satisfy the Court that he has properly accounted for the property in his hands. It does not give the creditor a right to proceed against property which is no longer in the hands of the judgment-debtor. To proceed against such a transferee, the creditor must establish his equitable right to do so in a separate suit. It would not be competent to an executing Court to attach the property of a stranger on purely equitable considerations. But any interest which the legal representative has in such property, such as an equity of redemption can be attached by the creditor. (*Horwill, J.*) THIAGARAJA IYER *v* NARAYANASWAMI PILLAI. **182 I.C. 333=12 R.M. 58=47 L.W. 782=1938 M.W.N. 518=A.I.R. 1938 Mad. 684=(1938) 1 M.L.J. 867.**

——**S. 52**—*Suit against personal representatives—Proof that they did not receive assets of deceased—Duty of Court.*

If in a suit on a bond instituted after the death of the executant against his personal representatives, the Court is satisfied that at the time when the suit was brought the defendants had received no part of the assets of the deceased, the only course open to it is to dismiss the suit. (*Harries, J.*) TARA CHAND *v.* DHARMAN. **1936 A.W R. 32.**

——**S. 52**—*Void alienation by legal representatives—Right of decree-holder to pursue property.*

S. 52, C. P. Code, merely provides that if the legal representative of a judgment-debtor has improperly disposed of any property of the deceased he would himself become personally liable. That does not mean that if an alienation is made by the legal representative which is void in law, the property in the hands of the alienee could not be pursued by the decree-holder. (*Bhide, J.*) JAGIR CHAND *v.* BABU RAM. **41 P.L. R. 362=A.I.R. 1939 Lah. 373.**

——**S. 52** (2)—*Personal liability of legal representative for decretal amount.*

It is for the decree-holder to satisfactorily establish that any property belonging to the deceased had actually been disposed of by the legal representative before the latter can be held personally responsible for the payment of the decree under S 52 (2), C.P. Code. (*Abdul Qayoom, C J.*) HUSSAIN KHAN *v.* KALU MAL. **39 P.L.R. J. & K. 48.**

——**S. 52** (2)—*When comes into operation.*

S. 52 (2), C P. Code, does not come into operation and there can be no execution against the legal representative personally until it is proved that the property inherited by the legal representative from the deceased judgment-debtor is no longer in his possession. (*Middleton, J.C.*) SHIV LAL *v.* AKBAR KHAN. **169 I.C. 445=10 R. Pesh. 3=A.I.R. 1937 Pesh. 80.**

——**S. 53** — Applicability — Privy Council—Appeal to—Death of respondent—Decree against dead respondent—Executability against heirs of dead respondent. *See* PRIVY COUNCIL—PRACTICE. **18 Pat.L.T. 341=A.I.R. 1937 Pat. 321.**

——**S. 53**—*Applicability and scope—If limited to property devolving by survivorship—Property falling to share of son on partition with father—Liability for debts of father.*

S. 53, C P. Code, is as comprehensive as it can be, and it does not limit the liability of ancestral property to property devolving by survivorship. The section would equally apply to ancestral or joint family property which comes into the possession of the son or other descendant on a partition between him and his father or ancestor. It is deemed to be the property of the father or ancestor (judgment-debtor) for the purpose and within the meaning of S. 53, C P. Code. There is nothing in S. 53 which limits the scope of the enquiry or the remedy to property devolving by survivorship. (*Davis, J. C and Weston, J*) NATIOMAL HASSANAND *v* TIRITHMAL KUNDANMAL. **I.L.R. (1939) Kar. 300=184 I.C. 582=12 R.S. 119=A.I.R. 1939 Sind 258.**

——**S. 53**—Joint Hindu family—Decree against member of—Execution against shares of other members except sons—Rights of creditor—Other members—If legal representatives. *See* HINDU LAW—JOINT FAMILY. **(1937) 1 M.L.J. 224.**

——**S. 53**—*Joint Hindu family—Decree against deceased member—Execution against surviving brother—Permissibility.*

S. 53, C. P. Code, imposes the liability to pay the decree on the son or other descendant of the judgment-debtor and not on any collateral of the judgment-debtor. Accordingly on the death of a member of a joint Hindu family against whom a personal decree is passed, the decree-holder can proceed only against the assets of the deceased in the hands of his sons and not against the property belonging to the surviving brother. (*Nanavutty and Thomas, JJ.*) SHEO GOPAL *v.* GANESH DAS RAMGOPAL. **13 Luck. 241=168 I.C. 268=9 R.O. 456=1937 O L.R. 245=1937 O.W.N. 516=A.I. R. 1937 Oudh 327.**

——**S. 53**—*Legal representative—If includes Hindu son becoming owner of his father's property by survivorship.*

The definition of the term "legal representative" does include a son becoming owner of his father's property by virtue of survivorship, for he does represent in law the estate of the deceased and at any rate it is he who intermeddles with the estate of the deceased. He, as a Hindu son, is legally bound to provide out of the estate, which descends to him, maintenance for those persons, whom the late proprietor was legally or morally bound to maintain. It cannot be said that the particular property specifically charged for the maintenance can alone be proceeded against. According to Hindu law the property inherited by the heir is liable for the maintenance of the persons entitled to maintenance. If a charge is placed upon a specified property, it is only for the sake of convenience, and it does not amount to surrender of the right given by law on the entire property. (*Almond, J C. and Soofi, J.*) AUTAR SINGH *v.* MT. JOGINDAR KAUR. **184 I.C. 456=12 R. Pesh. 27=A.I.R. 1939 Pesh. 45.**

——**S. 53**—*Scope and applicability of—Decree for compensation in lieu of specific performance.*

S. 53, C P. Code, is creating a fiction for purposes. The purposes are the purpose of S. 50 and the purpose of S. 52. The fiction created by S 53 is that in certain circumstances property, not the property of the deceased and not therefore in *A* as the deceased's personal representative, shall be deemed to be property held by *A* as a legal representative. S. 53 seems to be limited to cases where the decree that is being executed is a decree passed in a suit on a debt. Hence it will not apply to a case where a decree for compensation in lieu of specific performance has been passed, for, the decree may only be regarded as creating a debt of record without its being a decree on a debt. (*Stone, C. J. and Bose, J.*) RAO BHIMSINGH *v.* GANGARAM. **1940 N.L.J. 275.**

——**S. 53**—*Scope— Hindu father — Decree against in respect of pre-partition debt—Executability against joint family property in the hands of son after partition.*

Per *Cornish, J.*—Apart from S. 53, C. P. Code, a Hindu son cannot be made liable in execution as his father's legal representative in respect of property which was not property in which the father had any right or title at the time of his death. The language of S. 53 is wide enough to include a liability incurred by the father which is enforceable against the property in the hands of his son, whether the liability was incurred by the father in his capacity of manager or personally. In both cases it is the Hindu law which attaches to the property this liability. S. 53 covers a case where there is a decree against the father in respect of pre-partition debt binding on the share of property allotted to the son in the partition. The word 'debt' as used in the text is wide enough to include a pre-partition debt which will include a liability for mesne profits incurred by the father before partition, although the actual liability is not determined in a suit until after the partition. (*Venkatasubba Rao, Cornish and Venkataramana Rao, JJ.*) VENKATANARAYANA RAO *v.* VENKATA SOMARAJU. **1937 M.W.N. 427=46 L.W. 112=171 I.C. 101=10 R.M. 262=I.L.R. (1937) Mad. 880=A.I.R. 1937 Mad. 610=(1937) 2 M.L.J. 251 (F.B.).**

——**S. 53**—Scope—If qualifies S. 2 (11)—Decree against Hindu father—Attachment of joint family property--Insolvency and death of father—Execution of decree against sons—Application for—Competency—If affected by insolvency of father. *See* C. P. CODE, Ss. 2 (11), 50 AND 53 AND O. 21, R. 22. **38 Bom.L.R. 977.**

——**S. 53**—Scope—Mortgage decree against father—Plea by son that no debt existed—If precluded. *See* HINDU LAW—DEBTS. **1939 M.W.N. 918.**

——**S. 53**—Scope and effect of—Undivided Hindu son—Suit against by creditor for administration—Competency. *See* ADMINISTRATION—SUIT FOR. **46 L.W. 321=A.I.R. 1937 Mad. 785.**

——**S. 55**—*Arrest where salary not attachable—Propriety.*

Where the salary of a judgment-debtor is such that no portion of it would be attachable under S. 60, C. P. Code, to allow a decree-holder to proceed by way of arrest of such a judgment-debtor, would be to make the law ridiculous. (*D. R. Norman.*) ISMAIL *v.* WALI MOHAMMAD. **1939 A. M.L.J. 75.**

——**S. 55**—*Bond under—Judgment-debtor to appear when ordered by Court—Court permitting him to absent himself—Latter absconding—Liability of surety under bond.*

The fact that a judgment-debtor for whose appearance a person has stood surety absconds does not necessarily involve a breach of the condition in the surety bond executed by the surety, if that bond provides that he should appear only when ordered by the Court; if the Court has permitted the judgment-debtor to absent himself, and if he then absconds the bond cannot be enforced against the judgment-debtor. But if there is a disobedience by the judgment-debtor of an order of Court, whether express or implied, to appear, *prima facie*, the surety is liable under the bond. (*Davis, J. C. and Tyabji, J.*) PEOPLE'S BANK, ETC. *v.* NANIKRAM. **I.L.R. (1939) Kar. 401=185 I.C. 573=12 R.S. 166=A.I.R. 1939 Sind 270.**

——**S. 55**—*Execution of bond by surety—If necessary.*

Under S. 55, C. P. Code, all that is necessary is that security 'to the satisfaction of the Court' should be furnished. It is not provided that the surety will become effective only if a bond is formally executed. In such cases the liability of the surety is determined by the undertaking that is given to the Court by means of the agreement or statement made by him and accepted by the Court, and non-compliance with the undertaking renders the surety liable under S. 145, C. P. Code. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v.* IBRAHIM. **174 I.C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.**

——**S. 55**—*Surety under—Bond by—Construction—Surety—When to be proceeded—Right of decree-holder—Option of executing Court—Court discharging surety—Subsequent execution against surety—Jurisdiction.*

A surety bond has to be interpreted according to the conditions expressly mentioned in it, and not independently of them. The fact that it is executed under S. 55, C. P. Code, makes no difference. In case the conditions laid down in the section are not fulfilled, the option lies not with the decree-holder but with the executing Court to proceed against the surety under the section or against the judgment-debtor. When once the Court exercises its option and discharges the surety, it cannot afterwards re-open the matter and proceed against him. If it does so, it acts without jurisdiction and the High Court will interfere under S. 115, C. P. Code. (*Fazl Ali, J.*) SATYA NARAIN *v.* MAHABIR PRASAD TEWARI. **18 Pat. L.T. 357=170 I.C. 955=3 B.R. 791=10 R.P. 158=A.I.R. 1937 Pat. 476.**

——**S. 55 (3)**—*Failure to inform judgment-debtor that he could apply for insolvency—Legality of warrant.*

The failure of the Court to inform the judgment-debtor under S. 55 (3), C. P. Code, that he can apply for insolvency, does not invalidate the warrant of arrest which is otherwise legally issued. (*Din Mohammad, J.*) BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

——**S. 55 (4)**—*Bond under—Construction—Undertaking that judgment-debtor would be present on specified date and that in default surety would produce him—Failure to produce after specified date when called on by Court—Liability of surety—Time granted to judgment-debtor by Court—If exonerates surety.*

Where a surety executes a bond to the Court stipulating that the judgment-debtor will be present in Court on a particular date, and that if he failed to be present the surety will produce him, the liability of the surety is not confined to producing him merely on that date. He is liable to produce the judgment-debtor on some date after that date, and if he fails to produce him on a subsequent date when called upon by the Court, he is *prima facie* liable under the bond. The fact that the Court grants time to the judgment-debtor several times cannot have the effect of exonerating the surety, as the grant of time by the Court cannot impair the decree-holder's security, unless it can be shown that the *decree-holder* granted time to the judgment-debtor. (*Burn and Lakshmana Rao, JJ.*) SAMBASIVA SASTRIAL *v.* MUTHURAMAN NAIDU. **1937 M.W.N. 1165.**

——**S. 55 (4)**—*Construction—Surety—Liability of—Both conditions—If to be broken.*

A surety is liable under S. 55 (4), C.P. Code, if there is a breach of either of the two conditions, that is to say, if the judgment-debtor fails to apply in insolvency or fails to appear before the Insolvency Court or the executing Court. It is not necessary that both the conditions should be broken. (*Norman.*) SHAM LAL *v.* BABU RAM. **1937 A.M.L.J. 49.**

——S. 55 (4)—*Security bond—Liability of surety when arises.*

Where a surety bond has been executed under S. 55 (4), C. P. Code, unless there has been failure in both respects, namely, in applying for adjudication and in appearance, the decree-holder is not entitled to proceed against the surety. Where the judgment-debtor applies for adjudication, one of the conditions is complied with and the decree-holder is not thereafter entitled to ask the Court to realise the security. (*Bennet and Verma, JJ.*) LACHHMAN DAS *v.* BABU LAL. **I.L.R. (1940) All. 338=188 I.C. 869=1940 A.W. R. (H.C.) 266=1940 A.L.J. 344=A.I.R. 1940 All. 304.**

——S. 55 (4)—*Surety bond—Breach—Condition that judgment-debtor would appear on all days fixed for hearing of his insolvency petition—Petition adjourned for mention as to arrangement between him and his creditors—Failure of judgment-debtor to appear on adjourned date—Liability of surety.*

A judgment-debtor who was arrested in execution of a money-decree was ordered by the Court to be released "on execution of the necessary bond". The bond executed by the sureties was in common form, and under it, the judgment-debtor was bound to appear on all the days to which the hearing of his insolvency application was adjourned until its disposal. The judgment-debtor succeeded in obtaining adjournment after adjournment of the hearing of the petition upon one pretext or another, the main pretence being that he was on the point of making an arrangement with his creditors. On the last hearing date his counsel stated that he had received instructions from him saying that he had nearly completed all the terms of his arrangement with his creditors and that within 7 days he would be prepared to withdraw the petition. Thereupon the petition was again adjourned for a week "for mention" On the adjourned date, the judgment-debtor was absent and his counsel withdrew from the case for want of instructions. The decree-holder filed an application seeking to have the amount of the surety bond escheated for non-compliance with the condition set out therein. It was contended on behalf of the surety that it was only when some special notice calling upon the debtor to appear on any particular occasion had been served upon him that he was "called upon" to appear within the meaning of S. 55 (4), C. P. Code. Overruling that contention,

Held, that it was sufficient to satisfy the requirements of S. 55 (4) that the counsel who had represented the judgment-debtor on many previous occasions in the insolvency proceedings should have been informed on his behalf that the judgment-debtor would have to state on the adjourned date whether or not an arrangement had been arrived at between him and his creditors, and that as he did not instruct an advocate or pleader to appear for him and did not appear himself on that occasion, there was a failure on his part to appear when called upon on a day fixed for his attendance within the meaning of the condition in the bond. (*Page, C.J. and Mya Bu, J.*) L. V. COLATO *v.* U AUNG DIN. **14 Rang. 190=162 I.C. 251=8 R.R. 554=A.I.R. 1936 Rang. 168.**

——S. 55 (4)—*Surety under—Bond by—Contents of.*

A bond executed by a surety under S. 55 (4), C. P. Code, cannot be made to contain conditions not covered by the section. (*Davis, J.C. and Lobo, A.J.C.*) SADIKLALI MOOSAJI *v.* HASSASING TAHILSING. **30 S.L.R. 177=166 I.C. 268=9 R.S. 133=A.I.R. 1936 Sind 244.**

——S. 55 (4)—*Surety under—Bond by—Enforcement against surety—Power of Court to reduce amount of bond.*

In enforcing a bond executed by a surety under S. 55 (4), C. P. Code, the Court has no power to reduce the amount for which the bond is executed. The security in such a case is not forfeited by way of penalty. It is part of the fruits of the decree obtained by the decree-holder, and the Court is not entitled to deprive the decree-holder of the fruits of his decree. (*Davis, J.C. and Lobo, A.J.C.*) SADIKLALI MOOSAJI *v.* HASSASINGH TAHILSING. **30 S.L.R. 177=166 I.C. 268=9 R.S. 133=A.I.R. 1936 Sind 244.**

——S. 55 (4)—*Surety under—Bond by—Undertaking to cause judgment-debtor to file insolvency petition and to get him to prosecute it to its very end—Meaning of—Extent of liability—If ends with adjudication or continues up to discharge.*

A surety for a judgment debtor under S. 55 (4), C. P. Code, executed a security bond whereby he undertook to produce the debtor before the Court whenever directed, "to cause him to file an insolvency petition within one month from that date, and to get him to prosecute it to its very end and also to produce him in the meantime." The debtor presented his insolvency petition and was duly adjudicated an insolvent; but on failure to apply for his discharge within the prescribed time, his insolvency was annulled.

Held, that the liability under the bond was satisfied by the adjudication of the debtor upon his petition, and that it did not continue after that up to the final discharge. The very end of the insolvency petition means either its dismissal by the Court or an order of adjudication on it by the Court. Though it is possible for a surety by adequate words to extend his liability beyond the point of dismissal or adjudication, in the absence of such a provision, he could not be made liable to the decree-holder once the petition resulted in an adjudication. (*Cornish, J.*) KARUPPANA GOUNDAR *v.* CHIDAMBARAM CHETTIAR. **165 I.C. 864=9 R.M. 311=1936 M.W.N. 1031=44 L.W. 647=A.I.R. 1936 Mad. 963=71 M.L.J. 646.**

——S. 55 (4)—*Surety under—Bond by—Undertaking to produce judgment-debtor on date fixed—Surety failing to appear and failing to produce judgment-debtor on date fixed—Plea of illness of judgment-debtor—Absence of evidence to show physical impossibility to appear—Effect—Liability of surety.*

Appellants were sureties for a judgment-debtor and undertook to produce him in Court on a specified date, but failed to produce him on that date. They themselves did not also appear in Court on that date and did not put forward any explanation for the non-production. They subsequently pleaded that the judgment-debtor was suffering from fever and therefore unable to appear in Court on the date fixed. It was however not established that he was so ill that it was physically impossible for him to appear or to be produced.

Held, that the surety bond not having provided for such a contingency or for absolving the sureties from liability in such a contingency, they were not absolved from liability and hence were liable to be proceeded against under the bond in execution of the decree. (*Pandrang Row, J.*) KUMARASWAMY REDDIAR, *In re.* **178 I.C. 511=11 R.M. 463=47 L.W. 408=1938 M.W.N. 321=A. I.R. 1938 Mad. 530.**

——S. 55 (4)—*Surety under—Execution—Procedure—Death of surety pending sale—Substitution of heirs—If essential before sale—Notice under O. 21, R. 22—Necessity.*

An execution proceeding cannot be continued against the estate of a dead man without bringing on record his legal representatives. Where in execution proceedings against a surety for a judgment-debtor under S. 55 (4), C. P. Code the surety dies after the issue of the sale proclamation and before sale, the decree-holder should, in order that he may continue the proceedings, substitute, in the place of the deceased surety, his legal representatives. The Court should issue notice to them under O. 21, R. 22, C. P. Code, whilst substituting them, and their objections should be heard before the execution proceeding can be further continued against them. The circumstance that the legal representatives have already entered appearance in the execution proceeding does not dispense with the issue of notice under O. 21, R. 22 or of hearing their objections, if any.

Rowland, J.—There can be no short cuts in matters of procedure. The correct procedure for taking proceedings against a surety for the judgment-debtor is first to call on him to produce the judgment-debtor, then, on his failure to do so, to call on him to show cause against forfeiture and execution, and next on his failure to show cause to the satisfaction of the Court, to obtain an order of the Court directing execution to proceed against the person and property of the surety. The correct procedure after the death of the surety is to substitute his heirs in the execution proceeding and to obtain the leave of the Court to continue the execution against them; thereafter to serve them with notices under O. 21, R. 22, C. P. Code, and on their appearance, the Court, after hearing and determining any objections that they may make, would permit or disallow the continuance of the execution. A sale cannot proceed without the legal representatives being brought on the record. (*Rowland and Chatterji, JJ.*) MAZHARUL HAQ *v.* RAGHUBER SINGH. **18 Pat. 761 =187 I.C. 52=12 R.P. 558=6 B.R. 418=1940 P.W.N. 163=21 Pat.L.T. 369=A.I.R. 1940 Pat. 142.**

——S. 58—*Applicability—'Detention'—Meaning of—If includes detention in Court-house.*

Words 'such detention' in proviso (1) and 'detention under this section' in proviso (2), S. 58 refer to and mean 'detention in civil prison.' Civil prison means civil jail and not Court-house. Detention therefore in the Court house cannot be said to be detention in a civil prison. A judgment-debtor was committed to the civil prison in execution of a decree but was released during the pendency of the appeal by him against the decree. The decree-holder withdrew the balance of the subsistence allowance deposited by him on release of the judgment-debtor. On dismissal of his appeal he was detained by the appellate Court for the whole day but was released as no subsistence allowance was deposited by the decree-holder. He was ordered to appear before the lower Court on a fixed date and on appearance it was contended by the judgment-debtor that he could not be re-arrested in view of proviso (2), S. 58.

Held, that as at the time of the decree-holder's omission to pay the subsistence allowance the judgment-debtor was not detained in the civil prison but in the Court-house, S. 58 did not apply. The judgment-debtor was not therefore exempt from being committed to the civil prison to undergo the remaining term of imprisonment. (*Skemp, J.*) KESAR SINGH *v.* KARAM CHAND. **172 I.C. 510=10 R.L. 334=39 P.L.R. 471=A.I.R. 1937 Lah. 253.**

——S 58 (2)—*Scope and effect of—Joint decree for arrears of rent against eight persons—Arrest and imprisonment of one in execution—Subsequent release within 6 months—Effect—Attachment of crops raised by all—Right of decree-holder.*

The only effect of a release under S. 58, C. P. Code, is to protect from re-arrest the judgment-debtor who has been released from prison. The incarceration of one judgment-debtor out of eight judgment-debtors in execution of a joint decree for arrears of rent and his release before the expiry of 6 months cannot discharge his debt; nor can it clear the liabilities of the other seven. Crops raised by all the judgment-debtors are consequently attachable in execution of the decree notwithstanding the imprisonment and release of one of the judgment-debtors. (*Darling, S. M and Bomford, J.M.*) JAIRAM SINGH *v.* TRIBENI LONIA. **1937 R.D. 13**

——S 60—*Amendment to S. 60 introducted by Act IX of 1937—Retrospective effect—"Suit" in S. 3 of Act IX of 1937—Meaning—Proceedings resulting on award in arbitration*

The word 'suit' in S. 3 of the Amending Act IX of 1937 is not necessarily confined to execution proceedings arising out of suits which are initiated by the presentation of a plaint, but is also applicable to execution proceedings resulting on an award in arbitration. The Legislature never intended that the word 'suit' in S. 3 should be used in a restricted sense. (*Lobo, J.*) KARACHI URBAN CO-OPERATIVE BANK, LTD. *v.* MAHOMEDSHAH. **177 I.C. 504=11 R.S. 63=A.I.R. 1938 Sind 176.**

——S 60—Applicability—Crown grant of village—Conferment of successive life estates on grantee and his heirs—Prohibition on alienation —Attachability—Rights of creditor. *See* CROWN GRANTS ACT, S. 3. **1938 M.W.N. 440.**

——S. 60—*Applicability to distraint.*

Distress is not permitted under C. P. Code, and provisions of S. 60 cannot be applied by analogy to distraint. (*Davis, J.C. and Weston, J.*) GHULAM KHADIR *v.* MOHIDIN HAJI AHMED. **I.L.R. (1939) Kar. 566=184 I.C. 698=12 R.S. 131=A.I.R. 1939 Sind 276.**

——S. 60—*Applicability—Mortgage by agriculturist.*

Where an agriculturist himself mortgages his house, S. 60 does not apply. A.I.R. 1935 Lah. 164, Rel. on. (*Bhide, J.*) KHAZANCHI SHAH *v.* HAZI NIAZ ALI. **A.I.R 1940 Lah. 126.**

——**Ss. 60, 4 and Electricity Act, S. 5 (f)**—*Attachment of property of licensee whose licence has been revoked—C.P. Code, how affected by the Electricity Act—Scope of S. 5 (f) of the Electricity Act.*

Where the judgment-debtor is a licensee whose licence under the Electricity Act has been revoked, the Court when it has to consider whether under S. 60, C. P. Code, his property is or is not liable to attachment and sale in execution of the decree, has to bear in mind S. 4, C. P. Code. As the Electricity Act is a special law, the provisions under the C P. Code are subject to any conditions regulating that procedure by the provisions of the Electricity Act. When a licence is revoked certain provisions laid down by S. 5 of the Act have an imperative effect and under those provisions the licensee has the option of disposing the property of the undertaking in such manner as he thinks fit under Cl. (*f*) only. That clause is more or less residuary and comes into operation only when the preceding provisions in the earlier clauses have been complied with. (*Iqbal Ahmad and Bajpai, JJ.*) RADHA KRISHNA BENI PRASAD *v* KISHORE CHAND SHIVA CHARAN LAL. **I L R (1939) All. 901=186 I.C. 689=12 R.A. 442=1939 A.L J. 983 =1939 A.W.R. (H.C.) 848=A.I.R. 1940 All. 24.**

——**S. 60**—*Compensation money in hands of Collector awarded under Land Acquisition Act—Liability to attachment.*

Compensation money awarded under the Land Acquisition Act is not liable to attachment at the instance of the creditors of the persons whose lands have been acquired until the amount is tendered to them under S. 31 of Land Acquisition Act. The money in the hands of the Collector is money belonging to the Government until the tender is made and no relationship of creditor and debtor can be said to have been established between the Collector on the one side and the owners of the lands on the other. S 60, C P. Code, does not therefore apply to such a case and the amount in the hands of the Collector cannot be attached by creditors holding money decrees against the persons to whom the compensation has been awarded. (*Addison and Abdul Rashid, JJ.*) SUNDAR DAS *v.* SECRETARY OF STATE. **I L R. (1938) Lah. 548=178 I.C. 443=11 R.L. 456 (2)=40 P. L.R. 817=A.I.R. 1938 Lah 533.**

——**S. 60**—Decree against real owner—Attachment of property in the hands of *benamidar*—Validity. *See* BENAMI—PRESUMPTION. **A.I.R. 1936 Pesh. 88.**

——**S. 60**—*'Debt'—Meaning of.*

The word 'debt' in S. 60, C. P. Code, means an actually existing debt, that is, a perfected and absolute debt. A sum of money which might, or might not, become due, or the payment of which depends upon contingencies which may or may not happen, is not a debt. (*Tek Chand, J.*) BRIJ KUNWAR *v.* NAURANGI LAL. **176 I.C. 634=11 R. L. 218=40 P.L.R. 73=A.I.R. 1938 Lah. 336.**

——**S. 60**—*House in Istimrari estate—Attachability.*

The occupant of a house in an Istimrari estate, is entitled on eviction, to remove the materials of the house and hence to that extent, he has an attachable and saleable interest in the house. (*D. R. Norman.*) MOOL CHAND *v.* DURGA PERSHAD. **1939 A.M.L.J. 102.**

——**S. 60**—*Implements of husbandry—Motor tractor, if one.*

A motor tractor is not indispensable for agriculture and therefore it cannot be regarded as being essential to it and hence is not exempt from attachment. (*Niyogi, J.*) SHALIGRAM *v.* SHEOPRATAP. **I.L.R (1939) Nag. 355=179 I.C. 656=11 R.N. 306=1938 N.L.J. 416=A.I.R. 1939 Nag. 3.**

——**S. 60**—Jagir—Grant to person to enjoy so long as any descendant should survive—Prohibition against transfer—Effect — Saleability in execution of money decree. *See* GRANT—ALIENABILITY. **18 Pat 370.**

——**S. 60**—*Mere right to give lease—Attachability*

A mere right to give a lease is not property which can be transferred. So it is not attachable under S. 60, C. P. Code. (*Middleton, J.C. and Almond, A J.C*) JETHA NAND *v.* KHUDA BAKHSH. **161 I.C. 628=8 R Pesh. 176=A.I.R. 1936 Pesh. 90.**

——**S. 60**—Mortgage—Unpaid balance of consideration in mortgagee's hands—Attachability. *See* MORTGAGE. **17 Lah. 270.**

——**S. 60**—*Mutual Benefit Fund—Moneys subscribed by member payable under rules to nominee or legal heirs—Decree against member's assets after his death—Amount in Fund—Attachability in execution.*

Where moneys are subscribed by a person to a Mutual Benefit Fund or Society under a contract between that person and the Fund of which he is a member, under which the Society undertakes to pay a particular person, or *nominee* of the member, that person or *nominee* is entitled to the money and not the member subscribing although the member may have the power to select any person he chooses as his nominee. The money subscribed by the member to the Fund cannot form part of his assets on his death, but is money available for payment to the *nominee* or the legal heirs, in case the nominee dies before the member, according to the rules of the Fund or Society by which the member agreed to be bound when he became a member and entered into a contract with the Fund. The member has no property in the amount payable after his death; it does not form part of his estate and he has no disposing power over the same, and therefore it is not liable to be attached in execution of a decree against him. Even if it be held that the contract between the member and the Fund is not enforceable by the *nominee* or the legal heirs, it does not follow that the moneys form part of the estate of the member.

Obiter.—The contract can be enforced by the nominee or the legal heirs on the ground that they are in the postion of *cestui que trust*, a recognized exception to the rule that a stranger to a contract cannot sue upon it. (*Venkataramana Rao, J.*) THIAGARAJAN *v.* VENKATARAMA AYYAR. **162 I.C. 889=8 R M. 1066=43 L.W. 527=1936 M.W.N 333=70 M.L.J 581.**

——**S. 60**—*Mutual Relief Fund—Policy in—Appointment of nominee—Effect—Decree against employee during life — Attachment of amount under policy after death—Sustainability.*

A railway employee who was a member of the Mutual Relief Fund had appointed his wife as nominee of his policy. The certificate of membership provided for the payment of pecuniary relief in the case of death or retirement from service to the member or "his nominee or the legal heirs of the nominee." The employee died during service and his creditors who had obtained a decree against him in his lifetime proceeded to execute the decree by attachment of the amount of the policy of the deceased in the hands of the fund.

Held, that the deceased had no interest in the Relief Fund which passed on his death to his legal representatives, as the ownership of the Relief Fund and therefore the interest of the deceased therein had been transferred to the trustee of the fund and there was a vested trust in favour of the nominee; and although the trust in favour of the nominee was a contingent trust, the contingency having occurred before the judgment-creditor affected any attachment, the trust in favour of the nominee ceased to be contingent and hence the amount payable by the Mutual Relief Fund became payable to the nominee and was not liable to attachment by the creditors of the deceased A.I.R. 1931 Bom. 300, Rel. on. (Case-law referred.) (*Lobo, J.*) KASHIBAI *v.* PARSRAM. **179 I. C. 296=11 R.S. 128=A.I.R. 1939 Sind 15.**

——S. 60—*Partial redemption—Property owned jointly by two tarwads—Separate mortgage by each of undivided share to same mortgagee—Suit for redemption by one tarwad alone without claiming partition—Maintainability.*

A Malabar tarwad became divided into two tarwads. Each of them possessed an undivided moiety in certain properties and each of them separately mortgaged its undivided half to the same person. One of the tarwads sought to redeem its half-share without suing for partition.

Held, that it was not open to the mortgagee to resist redemption and the plaintiff tarwad was entitled to redemption of the undivided half mortgaged by it. (*Pandrang Row and Venkataramana Rao, JJ.*) KAMMARAN NAMBIAR *v.* KOMAN. **182 I.C. 916=12 R.M. 163=47 L.W. 686 =1938 M.W.N. 78=A.I.R. 1938 Mad. 562.**

——**S. 60**—*Pay of soldier in regular forces governed by Army Act—Attachability.*

The pay of a soldier of His Majesty's regular forces subject to the Army Act of 1881 is not liable to attachment under a decree of the Civil Court. (*Davis, J.C. and Mehta, J.*) PREMIER CLOTHING CO. *v.* FRUSHER. **I.L.R. (1939) Kar. 160=178 I.C. 793=11 R.S. 111=A.I.R. 1938 Sind 237.**

——**S. 60**—*Property—Preliminary decree for dissolution of partnership and accounts—Attachability—Mode of attachment—O. 21, R. 53 (4).*

A preliminary decree for dissolution of partnership and for accounts is property which is capable of attachment within the meaning of S. 60, C. P. Code; though it may not be capable of immediate execution, it nevertheless creates rights which must be regarded as property. Such a decree falls under O. 21, R. 53 (4) and can be attached in the manner provided therein. (*Fazl Ali and Chatterji, JJ.*) RATANSHI HIRJI BHOJRAJ *v.* TRICUMJI JIWANDAS. **18 Pat. 688=186 I. C. 623=12 R.P. 519=6 B.R. 383=1939 P.W.N. 839=A.I.R. 1940 Pat. 107.**

——**S. 60**—Property — Thiccadar — Decree against for arrears of thicca rent—Saleability of thicca in execution. *See* LANDLORD AND TENANT —THICCADAR. **19 Pat.L.T. 280.**

——**S. 60**—*Property of judgment-debtor—Meaning of—Hindu father—Suit on mortgage—Exoneration of sons—Partition—Subsequent personal decree against father—Executability against son's shares—Properties allotted to sons —If property of father—Judgment-debtor.*

In so far as the substantive law is concerned, that dealing with the actual rights and liabilities of the parties, *e.g.*, son's liability for his father's debts, it is of course regulated by the Hindu law, but as regards the procedure to be followed, the old Hindu law of procedure under which these rights could once have been enforced no longer applies, and Courts are governed in these matters by the Code of Civil Procedure. Where in a mortgage suit against the father and sons, the suit is dismissed against the sons and a decree given against the father alone and before an application for personal decree is made under O. 34, R. 6, C. P. Code, partition takes place, the property of the sons cannot be taken in execution of the personal decree even if the debt was not incurred for immoral or illegal purpose. To say a son is under a pious obligation to pay certain debts is one thing; to say his property can be taken in execution is another. Property of the sons can only be attached and sold in execution if it falls within the kind of property that can be attached and sold under S. 60, C. P Code. After partition, the share that goes to the son does not belong to the father and the father has no disposing power over it. Therefore such property does not fall within S. 60. Thus it cannot be attached. But the son can be made liable for his father's debts if he has become a surety; he can be made liable under the pious obligation rule also. In neither of the cases however could his liability take the form of having his property taken in execution and sold without any prior proceedings brought against him, leaving him to raise the question whether his liability as surety or under the pious obligation rule precluded him from claiming in execution. (*Stone, C.J. and Bose, J.*) JAINARAYAN *v.* SONAJI. **I.L.R. (1938) Nag. 136=174 I.C. 621=10 R.N. 408=A.I.R. 1938 Nag. 24.**

——**S. 60**—*Rights of patentee—Saleability.*

Obiter.—The rights of a grantee under a Letters Patent are covered by S. 60, C. P. Code, and can be attached and sold in execution of a decree. (*Panckridge, J.*) RADHA KISSEN *v.* HIRALAL BANJARA. **I.L.R. (1938) 2 Cal. 618= 181 I C. 909=11 R.C. 869=42 C.W.N. 1086= A.I.R. 1939 Cal. 283.**

——**Ss. 60 and 52**—*Right to receive offerings made at temple—Attachability—Decree against assets of deceased debtor—Share of offerings in hands of legal representative—If attachable.*

A right to receive the offerings made at a temple is liable to attachment and sale in execution of a decree, when such right is independent of an obligation to render services involving qualifications of a personal nature, such as officiating at the worship. Where a decree is passed against the assets of a deceased debtor in the hands of his legal representative, not only the collections which had been received during the lifetime of the debtor could be attached in execution of that decree but also the share of the offerings in the hands of the legal representative. What is in the hands of the legal representative of the debtor is by inheritance his share, and as the share produces a certain annual income, that income may be attached as it is one of the assets of the deceased. 50 All. 394 Foll. (*Sulaiman, C. J. and Bennet, J.*) Nand Kumar Datt *v.* Ganesh Das. **58 All. 457=159 I.C. 812=8 R.A. 512=1935 A.W.R. 1506=1935 All.L.R. 1205=1936 A.L.J. 409=A.I.R. 1936 All. 131.**

———(as amended in 1937), S. 60—Scope—If affects S. 73. *See* C. P. Code, S. 73. **A.I.R. 1938 Sind 144.**

———S. 60 (1)—*'Debt'—Money left with vendee for payment to creditor.*

Money left by a judgment-debtor with a vendee to whom he had sold some immovable property for payment to his creditors but which was not so paid within a reasonable time, can be looked upon as a debt due to the judgment-debtor and attached and sold in execution of a decree against him, even though no time limit had been fixed for its payment to the creditors. (*Bhide, J.*) Gujar Mal Kundan Lal *v.* Parasram Sundar Lal. **172 I.C. 438=10 R.L. 325=39 P.L.R. 201=A.I.R. 1937 Lah. 608.**

———S. 60 (1)—*"Debt"—Money payable under policy of life assurance—Attachability.*

The amount due under a policy of life assurance is a debt within the meaning of S. 3, T. P. Act, and it is attachable under S. 60, C. P. Code, though it becomes payable only on the death of the assured. (*Wadia, J.*) Varjiwandas *v.* Maganlal. **39 Bom L.R. 493=170 I.C. 850=10 R.B. 140=A.I.R. 1937 Bom. 382.**

———S. 60 (1)—*Debt—Share of debt due to judgment-debtor—Attachability.*

The word 'debts' in S. 60, C. P. Code, includes share of debts. A debt due to the judgment-debtor and other persons jointly can, therefore, be attached and sold in execution. (*Nasim Ali and R.C. Mitter, JJ.*) Upendra Mohan Pal Chowdhury *v.* Nalini Mohan Ray Chowdhury. **I.L.R. (1937) 2 Cal 48=41 C.W.N. 410=171 I.C. 119=10 R.C. 226=67 C.L.J. 35=A.I.R. 1937 Cal. 199.**

———S. 60 (1) (c)—*'Agriculturist'.*

A judgment-debtor is not an agriculturist under S. 60 (1) (*c*), C. P. Code, if agriculture is only a subsidiary occupation of his. (*Henderson, J.*) Umes Chandra *v.* Bharat Kumar. **A.I.R. 1940 Cal. 5.**

———S. 60 (1) (c)—*Agriculturist—Burden of proof.*

A judgment-debtor objected to the attachment of his house on the ground that he was an agriculturist. It was established by evidence that he owned some land which was not situated near the house in dispute but in another village. It was not proved what the area of that land was. It was conceded that he did not cultivate the land himself but got it cultivated by servants. It was also proved that he was doing contractor's work and also that in a portion of the house in dispute there was a shop in which he was selling flour and grain.

Held, that the burden was upon the judgment-debtor to prove that he was an agriculturist in the strict sense of the term, and that in the circumstances of the case it was impossible to hold that he was an agriculturist in spite of the fact as alleged by him that he was a member of an agricultural tribe. (*Jai Lal, J.*) Mahomed Akbar *v.* Harbans Singh. **161 I.C. 16=8 R.L. 664=A.I.R. 1936 Lah 532.**

———S. 60 (1) (c)—*'Agriculturist'—Determination of status—Material time—Property attached when in possession of legal representative of debtor—Status of legal representative—If material.*

The question whether the judgment-debtor is an "agriculturist" within the meaning of S. 60, C. P. Code, has to be decided with reference to his status at the date of the attachment. If he becomes an agriculturist at the date of the attachment, his property cannot be attached although at the time of the decree he was not an agriculturist. Similarly if he ceases to be an agriculturist at the time of the attachment, his property can be attached although he was an agriculturist at the date of the decree. Where, therefore, property is attached while in possession of the legal representative of the debtor, it is the status of the legal representative and not that of the original debtor that determines the attachability or otherwise of the property. (*Dalip Singh, J.*) Baldev Singh *v.* Sher Singh. **41 P.L.R 524=185 I.C. 609=12 R.L. 306=A.I.R. 1939 Lah. 556.**

———S. 60 (1)(c)—*'Agriculturist'—Meaning of.*

A person who is proved to have cultivated land in one year and who admits not to have cultivated any land in the subsequent year cannot be said to be an 'agriculturist' within the meaning of S. 60, C. P. Code. (*Din Mahomed, J.*) Banarsi Das *v.* Rulia. **42 P.L.R. 261.**

———S. 60 (1) (c)—*'Agriculturist'—Meaning of.*

While there is no justification in the wording of S. 60, C. P. Code, for holding that for the purpose of that section the term 'agriculturist' excludes a large land owner or a person who does not depend solely or mainly on cultivation for his livelihood, there is no doubt that a person who does not himself till land and earn his living thereby wholly or partly is not an agriculturist within the meaning of the section. (*Coldstream, J.*) Gurbakhsh Singh *v.* Lal Chand Darshan Chand. **164 I.C. 690=9 R.L. 149=38 P.L.R. 333=A.I.R. 1936 Lah. 737.**

———S. 60 (1) (c)—*'Agriculturist'—Meaning of.*

A man who has been cultivating for many years and who has his cattle tethered beneath his house and a granary at the back of it has all the insignia of a cultivator. Where he occupies the house sought to be attached, and uses it directly for agricultural purposes in housing his cattle, his implements and his seed, paddy and his labourers, he must be regarded as occupying the house as an agriculturist, and is entitled to exemption from attachment. The mere fact that the judgment-debtor owns 150 acres of land makes no difference when there is evidence to the effect that he cultivates only 25 acres, while the rest of the land is cultivated by his son who devotes all the profits to paying off his father's debts; that does not render the judgment-debtor a zamindar or a rent receiving landlord. (*Baguley and Mosely, JJ.*) Maung Tun Aye *v.* Maung Hla Han. **162 I.C. 694 (2)=8 R.R. 579=A.I.R. 1936 Rang. 215.**

——S. 60 (1) (c)—"*Agriculturist*"—*Who is—Test to decide.*

The protection under S. 60 (1) (*c*), C. P. Code, is intended to be given to those who are real tillers of the land; and an "agriculturist" within the meaning of S. 60 (1) (*c*) is a person who is really dependent for his living on tilling the soil and unable to maintain himself otherwise. The test is not whether agriculture is the sole, main, chief or principal source of his income. (*Beasley, C.J., Venkataramana Rao and Lakshmana Row, JJ.*) LAKSHMAYYA *v.* OFFICIAL RECEIVER OF KISTNA. **I.L.R. (1937) Mad. 777=1937 M.W.N. 524=170 I.C. 198=10 R.M 147=45 L.W. 704=A.I.R. 1937 Mad. 551=(1937) 2 M.L.J. 11 (F.B.).**

——S. 60 (1)—*Agriculturist—Who is—Tests to be applied.*

In determining whether a person is an agriculturist the following factors should be noted: (1) Whether a person is an agriculturist or not is not a question turning on source of income but on nature of occupation. (2) A person may have many occupations. If one of them is agriculture and for that purpose a house or building is occupied, protection can be claimed. (3) A person who owns and lets it reserving either money or produce is not an agriculturist but a landlord (4) A person who cultivates the land as a labourer, though neither a landowner nor a tenant, is an agriculturist. (5) If a man cultivates the land with his own hands or by means of labourers whose activities he directs, he is an agriculturist whether he operates on a large or a small scale. If he has no connexion with the land except that he owns it and people work for him, he may or may not be an agriculturist according to circumstances. (Case-law discussed.) Hence an owner of land is not an agriculturist, if he lets out on batai (reserving share of produce instead of money rent). (*Stone, C.J. and Puranik, J.*) GOWARDHANDAS *v.* MOHANLAL. **I.L.R. (1938) Nag. 461=179 I.C. 688=11 R.N. 309=A.I.R. 1938 Nag. 366.**

——S. 60 (c)—'*Agriculturist*'*—Meaning.*

The term 'agriculturist' as used in S. 60 must be strictly construed. It denotes a husbandman and a person who carries on and makes his living by tillage and not a mere owner of land. 47 P.R. 1897, Foll. (*Bhide, J.*) SANT RAM *v.* BUTA KHAN. **I.L.R (1938) Lah 374=177 I.C 60=11 R.L. 251 (2)=40 P.L.R. 984=A.I.R 1938 Lah 72.**

——S. 60 (1) (c)—"*Agriculturist*"*—Meaning of.*

Protection given by S. 60 is intended to be given to those who are real tillers of the land. An agriculturist, within the meaning of S. 60, is a person who is really dependent for his living on tilling of soil and unable to maintain himself otherwise; main, chief or principal sources of income are not the proper tests. Where the person claiming protection under S 60, is a large landlord whose main source of income is rents from tenants and a jagir of Rs. 3500, he is not an agriculturist within the meaning of S 60. A.I.R. 1937 Mad. 551 (F.B.), Rel. on; A.I.R. 1936 Lah. 737, Not foll. (*Skemp, J.*) BALWANT SINGH *v.* ANJAMAN IMDAD BAHAMI QARZA. **180 I.C 242=11 R.L. 666=41 P.L.R 225=A.I.R 1939 Lah. 40.**

——S. 60 (1)—"*Debt*" — *Attachability—Conditions of—If should have become payable before attachment — Advocate engaged by government to conduct government case—Stipulation of fixed daily fee—Direction to submit bills for payment at end of month—Advocate entering upon duties—Remuneration earned by advocate—Attachability before end of month.*

A debt, in order to be attachable, need not necessarily have become payable. It should not be an uncertain sum; nor merely a right to sue. If it is an existing property vested in the judgment-debtor, though the time of its realisation has not come, it can be attached and sold. Where the Government engages an advocate to conduct a case on behalf of the government in a particular Court, stipulating a certain daily fee payable to him, and directing the advocate to submit his bills for payment of his fees at the end of each month, it must be held that after each day's work the daily fee stipulated becomes due to the advocate from the government, and that all the daily fees of a month become payable to him at the end of the month. The daily fees earned by the advocate become a debt after the day's work, and are therefore liable to be attached and sold in execution of a decree against him, though such fees become payable only at the end of the month. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. **17 Pat. 706=11 R.P. 211=1939 P.W.N. 103=178 I.C 141=5 B.R. 61=19 Pat.L.T. 768=A.I.R. 1939 Pat. 77.**

——S. 60 (1)—Disposing power—Properties allotted to wife and daughter in partition—Liability to be proceeded against. *See* HINDU LAW—DEBTS. **(1937) 1 M L.J 249.**

——S. 60 (1)—*Disposing power—State lands—Interest of occupier—Attachability.*

An occupier of State lands possesses the right of cultivating them and of reaping and selling the crops, which gives him a disposing power over the profits. As the right of occupancy of State lands has value and as the Government expressly permits the right to be transferred, the occupier has a saleable interest in the property which can be attached and brought to sale in execution of a decree against him. The fact that the Government may step in and deprive the transferee of the benefit of the purchase does not alter the position. (*Leach and Spargo, JJ.*) B. K. HALDAR *v.* MA PWA ME. **14 Rang 619=167 I.C. 920=9 R.R. 335=A.I.R. 1937 Rang. 74.**

——S. 60 (1)—Grant of absolute hereditary estate—Liability to attachment. *See* GRANT—CONSTRUCTION. **A.I.R. 1937 Nag. 248.**

——S. 60 (1)—"*Property*"—*Suit for unpaid consideration under mortgage deed—Preliminary decree—If "property" or "decree"— Procedure after attachment—O. 21, Rr. 53 and 64—Applicability.*

A preliminary decree passed in a suit for recovery of the unpaid consideration money due under a mortgage bond is not such a decree as is contemplated by O. 21, R. 53, C. P. Code, and the procedure under that rule is not therefore applicable to such a decree when attached. Such a decree is saleable property within the meaning of S. 60, C. P. Code, and the proper procedure is for the Court to sell the decree attached, as property under O. 21, R. 64 (*Collister and Bajpai, JJ.*) ISMAIL *v.* JOHRI MAL SITAL PRASAD. **171 I.C. 782=10 R.A. 317 (1)=1937 A.L.R. 894=I.L.R**

(1937) All. 823=1937 A.L.J. 776=1937 A.W.R. 649=A.I.R. 1937 All. 652.

——S. 60 (1), Provisos. (a) to (p)—*Exemptions under—If cumulative.*

All the sub-heads running from (*a*) to (*p*) under S. 60 (1), proviso, C. P. Code, are on the same footing, and the exemptions provided thereunder are cumulative, and any man is entitled to all the benefits and not confined to one only, if he is qualified to do so. (*Baguley, J.*) MUNICIPAL CORPORATION OF RANGOON *v.* RAM BEHARI. **1939 Rang.L R. 504=185 I.C. 460=12 R.R. 194=A.I. R. 1939 Rang 432.**

——S. 60, Proviso (1) (b)—*Construction—"Implements of husbandry"—Engine or water-pump used by agriculturist for irrigation of fields.*

The term 'implements of husbandry' in Cl. (*b*) to Proviso (1) to S. 60 should be interpreted in a fair and reasonable and even a generous spirit and not in a narrow and mean manner. The clause is not intended to force agriculturists back to primitive ways but to protect them in their livelihood as agriculturists by preventing the attachment even of those mechanical means whereby they plough and irrigate and cultivate the soil and obtain their livelihood as agriculturists. An engine or a water-pump is necessary for the agriculturist to irrigate and cultivate his fields and earn his livelihood as an agriculturist and therefore it comes within the term 'implements of husbandry'. (*Davis, J.C. and Tyabji, J.*) UDHARAM DALUMAL *v.* ROZI SHAMBE. **I.L. R. (1939) Kar. 499=181 I C. 250=11 R.S. 205=A.I.R. 1939 Sind 96.**

——S. 60 (1) (b) and (c)—*"Agriculturist"—Test.*

The word 'agriculturist' in S. 60, C. P. Code, may be defined as meaning a person who personally engages himself in the occupation of tilling the soil and who derives his livelihood from that occupation and cannot or does not maintain himself from other sources. It is not meant thereby that the sole source of his income or the main source of his income must be this occupation of tilling the soil. No doubt in most cases a rough and ready test would be afforded by considering the main source of income or the sole source of income; but that is not an absolutely correct test. The true test is whether a man personally engages in tilling and whether this occupation is essential to his maintenance. (*Dalip Singh, Monroe and Ram Lall, JJ.*) NIHAL SINGH *v.* SRI RAM. **I.L. R. (1940) Lah. 23=184 I.C. 261=12 R.L. 190=41 P.L.R. 560=A.I.R. 1939 Lah. 388 (F.B.).**

——S. 60 (1) (c) (as amended by Punjab Act VII of 1934)—*Applicability—Property vested in Official Receiver in* 1933.

The amendment to S. 60 (1) (*c*), C. P. Code, introduced by S. 35, Punjab Relief of Indebtedness Act (VII of 1934), which came into force in 1935 does not divest the Official Receiver of property which is validly and legally vested in him in 1933. Nor can the legal representatives of the insolvent claim exemption under S. 60 (1) (*c*) when succession to them opened out long after the vesting of the property in the Official Receiver. (*Tek Chand, J.*) KALA SINGH *v.* BOOTA SINGH. **11 R.L. 418=178 I.C. 195=40 P.L. R. 793=A.I.R. 1938 Lah. 459.**

——S. 60 (1) (c)—*Construction—'Occupied by'—Meaning of—All occupied houses, if exempt.*

The words 'occupied by' in S. 60 (1) (*c*), C. P. Code, mean that it is something more than a dwelling-house. It is a building occupied by him when he is following his avocation of an agriculturist. The use of the word 'houses' make it clear that all houses occupied by him, as such, are exempt. (*Darling, S. M. and Mehta, J. M.*) AMAR SINGH *v.* GANGA PRASAD. **1938 R.D. 840.**

——S. 60 (1) (c)—*Decree against non-agriculturist legal representative—Original debtor an agriculturist—Property, if liable to attachment.*

Where for the debts of a person a decree is passed against his legal representative who is non-agriculturist his property derived from original debtor is liable to attachment even if the original debtor was an agriculturist. A.I.R. 1939 Lah. 556, Affirm. (*Tek Chand and Bhide, JJ.*) SHER SINGH *v.* BALDEV SINGH. **A I.R. 1940 Lah. 320.**

——S. 60 (1) (c)—*Exemption under*—Bona fide *occupation for agricultural purposes—Need for proof.*

In order to claim exemption from attachment or sale under S. 60 (1) (*c*) it is not sufficient merely to show that the house in question belonged to an agriculturist, or was being lived in by him, but it must be established further that it was being used or occupied *bona fide* for purposes of agriculture. (*Tek Chand, J.*) BALWANT SINGH *v.* JAGDISH SARAN. **172 I.C. 412=10 R L. 316=39 P.L.R. 418=A.I.R. 1937 Lah. 200.**

——S. 60 (1) (c)—*Exemption under—Scope of—Person ceasing to be a Zamindar and becoming an 'Agriculturist' between dates of attachment and sale—If can claim.*

The house of an agriculturist is under S. 60 (1), C. P. Code, exempt both from an attachment and sale in execution of any decree. Where on the date of attachment the judgment-debtor had two sources of livelihood (1) rent payable to her by tenants and (2) profits arising from the cultivation of her *Khudkasht* lands and was therefore not considered an agriculturist, but owing to a subsequent sale of Zamindari she became an agriculturist before the date of sale.

Held, that as the main source of her livelihood namely, Zamindari had passed out of her hands, after the attachment of her house but before its sale so as to make agriculture the only source of her livelihood her residential house could not be sold. (*Niamatullah, J.*) ARAZ BIBI *v.* MUBARAK ALI KHAN. **173 I.C. 337=10 R.A. 474=1938 R. D. 32=1937 A.L.J. 1314=1937 A.W.R. 1220=1938 A.L.R. 114=A.I.R. 1938 All. 85.**

——S. 60 (1) (c) (as amended by S. 35 of the Punjab Relief of Indebtedness Act, VII of 1934)—*House mortgaged with possession by agriculturist and taken on rent from mortgagee—Liability to attachment.*

Where a house belonging to an agriculturist is exempted from attachment and sale in execution of a decree under S. 60 (1) (*c*), C. P. Code, as amended by S. 35, Relief of Indebtedness Act, the mere fact that the judgment-debtor has mortgaged the house with possession and taken it on rent from the mortgagees, does not disentitle him to the protection afforded by S. 60 (1) (*c*), as the judgment-debtor never gave up possession of the house and has been using it throughout for purposes subservient to agriculture. A.I.R. 1933 Lah. 893, Rel. on. (*Abdul Rashid, J.*) Dulla *v.* Ram Chand. **180 I.C. 92=11 R.L. 660=A.I.R. 1938 Lah. 736.**

——**S. 60 (1) (c)**—*House of agriculturist—Dismissal of father's objection in execution—Sons, if can re-agitate it, by separate suit.*

Where in execution of a decree against a father of a joint family, the father objects to the sale of his house on the ground of its being exempted under S. 60 (1) (*c*), C. P. Code, from such a sale, but it is dismissed for default and the house is sold, it is not open to the sons later on to file a regular suit to restrain the purchasers from interfering with their possession, on the ground that the house could not be sold in execution; the reason being that inasmuch as the father had represented the sons in the execution proceedings, the decisions in those proceedings are as much binding on them as on their father. (*Thom, C.J., Collister and Ganga Nath, JJ.*) Thakur Din *v.* Sita Ram. **I.L.R. (1939) All. 602=183 I.C. 434=12 R.A. 139=1939 O.L.R. 521=1939 A.L.J. 450=1939 A.W.R. (H.C.) 431 =A.I.R. 1939 All. 399 (F.B.).**

——**S. 60 (1) (c)**—*House of agriculturist—Voluntary transfer to satisfy decree—If prohibited.*

S. 60, C. P. Code, does not prohibit a voluntary transfer of a house of an agriculturist for satisfaction of a decree against him. (*Bhide, J.*) Sita Ram *v.* Phusal Singh. **170 I.C. 896=10 R.L. 152 (1)=A.I.R. 1937 Lah. 939.**

——**S. 60 (1) (c) (as amended by Punjab Relief of Indebtedness Act)**—*House of insolvent—Exemption.*

If the insolvent was not engaged in the occupation of tilling the land on the date of order of his adjudication and there is nothing to indicate that he maintained himself solely or mainly on agriculture at that time, his house is not exempt from attachment and sale under S. 60 (1) (*c*), C. P. Code, as amended by the Punjab Relief of Indebtedness Act. (*Tek Chand, J.*) Amar Singh *v.* Inder Mal. **41 P.L.R. 663=A.I.R. 1939 Lah. 537.**

——**S. 60 (1) (c)**—*House of judgment-debtor attached in his lifetime—Judgment-debtor not an agriculturist—His legal representative, an agriculturist—Right of latter to claim exemption from attachment.*

A decree for money was executed against the deceased debtor during his lifetime and his non-ancestral house was attached. The judgment-debtor was not an agriculturist. Subsequently his legal representative inherited it and occupied it as an agriculturist and claimed exemption from attachment,

Held, that in deciding the question whether the house is or is not exempt from sale under S. 60, it was not the profession of the legal representative but that of the deceased debtor against whom the decree was and against whom it was being executed, that should be taken into consideration. Therefore, the house could not be released on the finding that the heir occupied it as an agriculturist. (*Jai Lal, J.*) Hirda Ram *v.* Mohammad Din. **167 I.C. 457=9 R.L. 493=A.I.R. 1936 Lah. 895.**

——**S. 60 (1) (c) (as amended by S. 35 of Punjab Relief of Indebtedness Act)**—*Judgment-debtor's house lent to and occupied by his sons who are independent proprietors—Exemption from attachment.*

Where the house of the judgment-debtor was not occupied by him but was lent to and occupied by his sons who were independent proprietors and were living at a different place.

Held, that the house was not exempt from attachment as the sons came under the word 'others' in S. 35 of the Punjab Relief of Indebtedness Act. (*Bhide, J.*) Sultan *v.* Official Receiver. **182 I.C. 631=12 R.L. 61=41 P.L.R. 377 (1)=A.I.R. 1939 Lah. 50.**

——**S. 60 (1) (c)**—*Object of—'Agriculturist', who is—Test—Burden of proof.*

The object of proviso (*c*) to sub-S. (1) to S.60, C. P. Code, is to prevent the deprivation of his means of livelihood from an agriculturist by having his house and other buildings taken from him. The word 'agriculturist' means a person who earns his livelihood wholly or principally by cultivating land either personally or through servants. The test is what is the chief source of his livelihood. If it is other than by cultivation of land he is not an agriculturist though he may also cultivate lands. (*Darling, S. M. and Mehta, J. M.*) Amar Singh *v.* Ganga Prasad. **1938 R.D. 840.**

——**S. 60 (1) (c)**—*Objection under, belated—If can be entertained.*

Objections under S. 60, C. P. Code, even if belated could be entertained, and where, therefore, objections under S. 60 (1) (*c*) were raised two days prior to the sale, the Court ought not to dismiss them on that ground. (*Agha Haidar, J.*) Fata *v* Sham Sunder. **38 P.L.R. 669.**

——**S. 60 (1) (c)**—*Person living upon trade—Pleasure garden appurtenant to house—House and garden—If exempt from attachment.*

A person relied for his livelihood upon trade and contractor's work. He had no agricultural land except a pleasure garden appurtenant to his house nor was this garden used as a source of livelihood.

Held, that neither the house nor the garden was exempt from attachment under S. 60. (*Middleton, J.C.*) Safdar Ali Khan *v.* Mian Umar Bakhsh. **163 I. C. 621=9 R. Pesh. 7=A.I.R. 1936 Pesh. 151.**

——**S. 60 (1) (c)**—*Protection under—If can be waived—Mortgage by agriculturist—If amounts to waiver.*

The protection given under S. 60 is for the benefit of the judgment-debtor and can be waived by him. Therefore, if he chooses specifically to mortgage his agricultural houses he must be taken to have waived the privilege conferred upon him by this section. (*Bose, J.*) Ramadhin *v.* Sheodutt. **180 I.C. 690=11 R. N. 389=1938 N.L.J. 445=A.I.R. 1938 Nag. 544.**

——**S. 60 (1) proviso, cl. (c)**—*Property exempt from attachment in hands of judgment debtor—If also immune from attachment in hands of his legal representatives.*

Under cl. (*c*) of the proviso to sub-S. (1) of S. 60, C.P. Code, exemption attaches to the property itself and not to the person holding the property for the time being. Consequently if a property is exempt from attachment under the said clause in the hands of the judgment-debtor, it is also immune from attachment in the hands of his legal representatives, although they are not agriculturists. (*Addison and Din Mohammad, JJ.*) GURPARSHAD DEWAT RAM *v.* KISHEN CHAND. **11 R.L. 369=177 I.C. 835=40 P.L.R. 409=A.I.R. 1938 Lah. 608.**

——**S. 60 (1) (c)**—*Scope—Agriculturist waiving objection to attachment and sale of house—Effect.*

There is no statutory bar to an agriculturist voluntarily alienating his houses. The bar under S. 60 is against the compulsory sale of such a house in execution of a money decree. Where therefore an agriculturist waives objection to attachment and agrees to the sale of the houses in execution of the decree, S. 60 does not protect the houses from attachment and the sale. A.I.R. 1935 Lah. 164, Foll. (*Tek Chand, J.*) NATHA SINGH *v.* BHAG MAL. **42 P.L.R. 398=A.I.R. 1939 Lah. 316.**

——**S. 60 (1) (c)**—*Waiver of right by agriculturist.*

An agriculturist may waive the right vested in him under S. 60, C. P. Code, by voluntarily surrendering his house in favour of the decree-holder. (*Din Mahomed, J.*) BANARSI DAS *v.* RULIA. **42 P.L.R. 261.**

——**S. 60 (1) (e)**—*Mere right to sue—Co-sharer's share of village profits before accruing due—Attachment and sale—Validity.*

The right of a co-sharer to village profits does not accrue till the end of the agricultural year. The rights are not ascertainable until the year has ended and consequently any attachment of the share of a co-sharer in village profits before the first day of the agricultural year next following that to which the village profits refer, is an attachment of a mere right to sue and a sale held in pursuance of such attachment being of a mere right to sue is invalid and of no effect. (*Vivian Bose, J.*) JAGANNATH *v.* JAMNAVALLABH. **168 I.C. 266=9 R.N. 247=A.I.R. 1936 Nag. 218.**

——**S. 60 (1) (f)**—*Right of personal service.*

The rights of personal service within the meaning of proviso (*f*) to S. 60, C. P. Code, cannot be either heritable or partible or transferable. (*Courtney Terrell, C.J. and Dhavle, J.*) RAMSARAN PANDEY *v.* ISWAR PANDEY. **160 I.C. 355=8 R.P. 360=17 Pat.L.T. 77=A.I.R. 1936 Pat. 10.**

——**S. 60 (1) (i) (as amended) and S. 73**—*Decrees in suits prior and subsequent to amendment of S. 60—Salary of judgment debtor—What portion attachable and how to be distributed.*

Where there were two decrees against the same judgment-debtor, one obtained in suit instituted before the 1st June of 1937 to which the amendment of S. 60, C. P. Code by Act IX of 1937 would not apply, and another subsequent to that date, to which the amendment would apply, the half salary of the judgment-debtor, has to be attached and distributed rateably between the two decree-holders. (*Davies.*) RAM PARTAP *v.* RAM CHANDRA. **1939 A.M.L.J. 157.**

——**S. 60 (1) (g) and (n)**—*Applicability—Grant in consideration of right as Deshmukh, Deshpandia and Sir mukaddam.*

The word 'pension' as used in the C. P. Code implies periodical payments of money by Government to the pensioner; it cannot apply to one who draws rent as a limited owner of the properties which yield them. Hence a grant in consideration of the grantee's right as Deshmukh, Deshpandia and Sir mukaddam, is not affected by Cl. (*g*) of S. 60 (1), C. P. Code. Nor is it affected by Cl. (*n*) either for the right of the holder is not future or contingent, but present and vested. (*Pollock, J.*) DEORAO *v.* RAMBHAU NILKANTRAO, **I.L.R. (1939) Nag. 679=181 I.C. 65=11 R.N. 418=1938 N.L.J. 112=A.I.R. 1938 Nag. 269.**

——**S. 60 (1) (g)**—*Jagir—Government granting income of certain water mills as jagir—Jagirdar leasing out water mills—Income from lease—Attachability.*

No distinction can be drawn between the right of a jagirdar, who has been granted the income as jagir of certain water mills, to recover a certain sum per year as revenue, jagir or royalty and his right to recover rent from the lessee to whom he has granted lease of the water mills. The only right he has in the water mills is the right to recover rent from the occupants of the water mills and the rent is really the royalty for the use of water. The occupation of the water mills is merely a subsidiary right to the principal right and the principal rights is conferred upon him as a jagir by the Government. Consequently his income from the lease cannot be attached. (*Jai Lal, J.*) RAJA BALBHADAR SINGH *v.* SHANKAR DAS. **172 I.C. 426=10 R.L. 318=39 P.L.R. 434=A.I.R. 1937 Lah. 211.**

——**S. 60 (1) (g)**—*'Pension'—Jagir.*

The words 'pension' as used in S. 60 (1) (*g*), C. P. Code, is wide enough to cover all sorts of periodical payments in whatever shape they are made by the Government. A Jagir that is realised in the shape of an assignment of land revenue is a pension within that clause, and is, therefore, exempt from attachment in execution of a decree. (*Addison and Din Mohammad, JJ.*) ACHHRUMAL *v.* BALWANT SINGH. **18 Lah. 415=171 I.C. 6=10 R.L. 177=39 P.L.R. 80=A.I.R. 1937 Lah. 178.** [On appeal from **38 P.L.R. 531.**]

——**S. 60 (1) (g)**—*'Pension'—Meaning of—Grant of cash allowances and inam lands to person holding office of Deshpandia for his maintenance—Share in such 'inam lands'—If exempt from attachment.*

The word 'pension' as used in the C. P. Code "implies periodical payments of money by Government to the pensioner", and it does not apply to a person who draws rents not as a pensioner, but as a limited owner of the properties which yield them. By a grant of land the Government made a grant of certain cash allowances and landed inams to a person for having held the office of Deshpandia and with a view to provide for his proper maintenance according to his status. The judgment-debtor inherited a share in such inam lands. In execution of a decree against the judgment-debtor, the said share was attached. The judgment-debtor raised an objection that the share was not liable to attachment as it was a political pension within the meaning of S. 60 (1) (*g*)

Held, that as the rents and profits realized by the judgment-debtor from such inam lands were not drawn by him as a pensioner, but as a limited owner thereof till the resumption of such lands by the Government on the breach of conditions mentioned in the grant, the share could not fall under S. 60 (1) (*g*) of the Code so as to be exempt from attachment. (*Vivian Bose, J.*) YADEO NILKANTH DESHPANDE *v.* JANKIDAS NAR-

SINGDAS. 170 **I.C. 78=10 R.N. 37=A I.R. 1937 Nag. 202.**

——(as amended in 1937), S. 60 (1) (h)—*Construction and scope of.*

On a consideration of the entire S. 60, C. P. Code, there is no doubt that the latter part of Cl. (*h*) of sub-S. (1) protects from attachment in execution of a decree salary of all persons in receipt thereof other than public officers and servants of a railway company or local authority. (*Lobo, J.*) HORMASJI JAMSHEDJI, *In re.* **182 I. C. 185=12 R.S. 1=A.I.R. 1939 Sind 134.**

——(as amended in 1937), S. 60 (1) (h)—*Interpretation—Principle of.*

Cl. (*h*) of sub-S. (1) of S. 60 should be interpreted with reference to the entire section, and any interpretation founded upon that clause alone would be unsafe and unwarranted by all canons of interpretation. (*Lobo, J.*) HORMASJI JAMSHEDJI, *In re* **182 I.C. 185=12 R.S. 1=A.I.R. 1939 Sind 134.**

——S. 60 (1) (h) and (i)—*"Salary"—If includes daily wages or fees of temporary employee.*

The word "salary" in Cls. (*h*) and (*i*) of S. 60 (1), C. P. Code, before the Amendment Act IX of 1937, cannot be construed as being restricted to an emolument which is payable monthly or to a man who holds a permanent or semi-permanent employment. The remuneration of a temporary employee engaged on daily fee is "salary" within the meaning of Cls. (*h*) and (*i*) of S. 60 (1). (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. **17 Pat. 706=11 R.P. 211=1939 Pat.W.N. 103=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=A.I.R. 1939 Pat. 77.**

——(as amended by Act IX of 1937), S. 60 (1) (h) and (i)—*Scope—If retrospective.*

Cls. (*h*) and (*i*) of S. 60 (1), C. P. Code, as amended by Act IX of 1937 have no application to proceedings arising out a suit instituted before the first day of June, 1937. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. **17 Pat. 706=11 R.P. 211=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=1939 P.W.N. 103=A.I.R. 1939 Pat. 77.**

——S. 60 (1) (i)—*Applicability—Ghatwali estate—Profits accruing to ghatwal—Attachability in execution of decree against him.*

The profits accruing to a ghatwal from his estate are not his salary within the meaning of S. 60, C. P. Code, and is not on that account exempt from attachment. The surplus profits of the estate after all the necessary outgoings are to be regarded as the personal property of the ghatwal and are therefore liable to attachment in execution of a decree against him. (*Rowland and Chatterji, JJ.*) BANSIDHAR SHROFF *v.* ASHUTOSH. **180 I.C. 8=5 B.R. 344=11 R.P. 436=1939 P.W.N. 86=A.I.R. 1939 Pat. 242.**

——S. 60 (1) (i)—*Attachment of salary—Compromise by judgment-debtor waiving objection—Validity.*

It is open to a judgment-debtor to enter into a compromise contracting himself out of any benefit that S. 60, C P. Code, confers on him in the matter of the attachment of his salary. (*Ram Lall J.*) JAGAN NATH *v.* ALLAH DAD. **41 P.L.R. 631=185 I.C. 317=12 R.L. 273 (2)=A.I.R. 1939 Lah. 539.**

——S. 60 (1) (i)—*Construction and scope—Salary—If restricted to salary of officers entitled to allowance under Cl.* (h).

There is no reason to restrict the scope of Cl. (*i*) of S. 60 (1), C. P. Code, and to hold that the salary mentioned in Cl. (*i*) refers to the salary of one who is entitled to get allowances mentioned in Cl. (*h*). Though Cl. (*i*) refers to Cl. (*h*), that is only to avoid the repetition of the description of officers whose salaries have been exempted. It does not follow that their salary for the period for which they are on duty is not covered by Cl. (*i*), sub-S (1). (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. **17 Pat. 706=11 R.P. 211=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=1939 P.W.N. 103=A.I.R. 1939 Pat. 77.**

——S. 60 (1) (i) and (j)—*Pay of Assistant Surgeon of Indian Medical Department—Attachability.*

The pay of an Assistant Surgeon of the Indian Medical Department is not liable to attachment in execution of an order for maintenance and alimony passed by a Civil Court, whether he be a person to whom the Indian Articles of War apply or a person to whom the provisions of the Army Act of 1881 apply. (*Sulaiman, C.J., Thom and Bennet, JJ.*) NORBERT EDWIN NUGENT *v.* MARJORY JULIA NUGENT. **167 I.C. 179=9 R.A. 495=1937 A.L.R. 145=I.L.R. (1937) All. 350=1936 A.W.R. 1239=1936 A.L.J. 1291=A.I.R. 1937 All. 129 (F.B.).**

——S. 60 (1) (i)—*Public officer—Advocate engaged by Government to conduct Government suit—If public officer.*

Conduct of a suit on behalf of the Government by an advocate for the recovery of public money is performing a public duty which the advocate undertakes. An advocate who is appointed by the Government as a lawyer to conduct a suit on its behalf is an officer and a public officer within the meaning of S. 60 (1) (*i*), C. P. Code. (*Mahomed Noor and Chatterji, JJ.*) BANSI LAL *v.* MAHOMED HAFIZ. **17 Pat. 706=11 R P. 211=178 I.C. 141=5 B.R. 61=19 Pat.L.T. 768=1939 P.W.N. 103=A.I.R. 1939 Pat. 77.**

——S. 60 (1) (k)—*Applicability—Provident Fund of aided college—Fund existing before notification by Government—Deposits in—Attachability—Immunity from attachment—Extent of—If ceases on payment to depositor—Provident Funds Act, S.* 3.

A Provident Fund maintained by the authorities of an aided college, provided it is constituted by the authority of Government is a Government Provident Fund as defined by the Provident Funds Act, and as long as the money remains in the Fund it is immune from attachment under S. 60 (1) (*k*), C. P. Code, read with S. 3 of the Provident Funds Act (1925) as amended in 1927. The fact that a Provident Fund has been in existence before the Government issued a Notification introducing a Provident Fund makes no difference; when the Fund is constituted under the authority of the Government, the entire amount of the Fund, both the amounts subscribed before and the amounts subscribed after the notification becomes consolidated into one Fund, and the whole deposit is exempt from attachment.

Quaere:—Whether the immunity from attachment lasts only as long as the money is in the

Fund and whether it comes to an end when it reaches the depositor. (*Khaja Mohammad Noor and Madan, JJ.*) KRITYANAND SINGH BAHADUR *v.* SAILESWAR SEN. **15 Pat. 779=166 I.C. 499=9 R.P. 305 (2)=3 B.R. 181=1936 P.W.N. 756=17 Pat.L.T. 731=A.I.R. 1937 Pat. 22.**

——**S. 60 (1)(k)**—*Applicability—Railway guard—Allowances of over and above salary—Attachability—Advance from Provident Fund—Repayment in monthly instalments—Instalments—If deductible from attachable salary.*

The allowances of a Railway guard over and above his salary are not exempt from attachment. Where an advance taken by a guard from his Provident Fund is being recovered from him in monthly instalments, such instalment payment by him are not deposits, though they may be compulsory deductions or recoveries, and there can be no deduction of this amount from the salary available for attachment under S. 60 (1) (*k*), C. P. Code. (*Horwill, J.*) KONDAYYA NAIDU *v.* MARIANAN. **52 L.W. 69=1940 M.W.N. 555=A.I.R. 1940 Mad. 766=(1940) 1 M.L.J. 936.**

——**S. 60 (1) (k)**—*Exemption from attachment—Amount standing to Imperial Bank employee's credit in Provident Fund.*

Under S. 60 (*k*), C. P. Code, the amount standing to the credit of an employee of the Imperial Bank of India in the Provident Fund established by that Bank for the benefit of its employees is exempt from attachment. (*Jai Lal and Dalip Singh, JJ.*) MAI DHAN SITA RAM *v.* IMPERIAL BANK OF INDIA, RAWALPINDI **165 I.C. 767=9 R.L. 303=38 P.L.R. 1155=A.I.R. 1936 Lah. 694.**

——**S. 60 (1) (k)**—*Provident fund money—Appointment of receiver—Permissibility.*

Although S. 60, C.P. Code, prohibits the attachment of provident fund money, it is open to a decree-holder against the estate of the deceased to apply for the appointment of a receiver in execution. (*McNair, J.*) BARAMDEO PANDEY *v.* MRS. FAY SMITH. **44 C.W.N. 637.**

——**S. 60 (1) (k)**—*Subscriptions payable to Provident Fund—Exemption.*

The definition of "Compulsory deposit" in S. 2 of the Provident Funds Act applies to "Compulsory deposits" referred to in S. 60 (1) (*k*), C. P. Code, and they mean "subscriptions *to* or deposits *in*" a Provident Fund. A judgment-debtor is, therefore, entitled to claim exemption from attachment the amount of subscription payable out of his salary to the Provident Fund. Before the time of payment the money is not his. At the time of payment it becomes a subscription to the Fund and a subscription to the Fund is a compulsory deposit and therefore exempted. There is no intervening moment when it is susceptible of attachment. (*Baguley, J.*) MUNICIPAL CORPORATION OF RANGOON *v.* RAM BEHARI. **1939 Rang.L.R. 504=185 I C. 460=12 R.R. 194=A.I.R. 1939 Rang. 432.**

——**S. 60 (1) (l)**—*Attachment of salary in contravention of—Consent of judgment-debtor—Effect of.*

S. 60, C. P. Code, is a prohibition only against forcible attachment or sale, and there is nothing in law to prevent a judgment-debtor from consenting to the attachment of half of his salary although the attachment contravenes the section as amended by Act XI of 1937. (*Bhide, J.*) RAJINDAR KUMAR *v.* CHETAN LAL. **188 I.C. 639=41 P.L.R 834=A.I.R. 1940 Lah. 65.**

——**S. 60 (1) (m)**—*Applicability—Contingent interest—Attachability.*

A clause in a codicil provided that the income from certain property was to be divided between *A* and his wife *B*, in a certain proportion so long as they were both alive. In case one of them died, his or her share of income was to belong to their four children or the survivors of them in equal proportions and, when the living parent died, the capital and income were to belong to children then living in equal proportion. The testator was dead and *A* and *B* were alive. The question arose as to whether *D*, one of the four children referred to in the codicil, received merely a contingent interest in the legacies within the meaning of S. 60 (*m*), C. P. Code.

Held, that the bequest in favour of *D* was a contingent interest within the meaning of S 60(*m*) and not a vested remainder and was not liable to attachment and sale. 1930 P.C 17; 1865 W.R. 87; 14 M.I.A. 40 (P.C.); In re *Clarke Coombe* v. *Carter*, (1887) 37 Ch.D. 348, Ref ; 18 Cal. 164, Dist. (*Rupchand Bilaram and Mehta, A.J.Cs.*) PESTONJI BHICAJI *v.* PATRICK H. ANDERSON. **30 S.L.R. 50=163 I.C. 206=8 R.S. 190=A.I.R. 1936 Sind 65.**

——**S. 60 (1) (m)**—*Applicability—Will—Life-estate to widow and absolute grant of residue to daughter after widow's death—Daughter dying before widow leaving husband—Interest of latter—Attachability.*

Where a testator after making specific bequests grants the residual estate to his widow for her lifetime, and then to his daughter absolutely, and the daughter dies during the lifetime of the widow, leaving her husband as her sole heir, the interest of the husband in the property is not a mere expectancy of succession and is not exempt from attachment and sale, under S. 60, Proviso 1, Cl. (*m*) in execution of a decree obtained against the widow and the husband. The right to the property vests absolutely in the daughter after the testator's death and though a life-interest is bequeathed to the widow, the interest of the daughter is not a mere possibility but a vested remainder. So long as the daughter is alive her heir, *i.e.*, the husband, has only an expectancy of succession to the vested remainder, but after her death, it devolves on him by inheritance. The fact that the husband's right depends upon a contingency, namely, the death of the widow, makes no difference for a contingent interest is something different from a mere possibility of succession. (*Guha and Nasim Ali, JJ.*) MATIMALA DEBI *v* SURENDRA NATH MUDI. **I L.R. (1937) 1 Cal. 583=168 I.C. 102=9 R.C. 763=A.I.R. 1936 Cal. 802.**

——**S. 60 (m) and O. 21, R. 52**—*Contingent interest—Right of judgment-debtor to surplus sale proceeds prior to confirmation.*

Where in execution of a mortgage decree the sale proceeds are deposited in Court pending confirmation of sale, to which the judgment-debtor does not object, the surplus amount of the sale proceeds which is payable to the judgment-debtor after confirmation of the sale is not a contingent interest as contemplated by S. 60 (*m*), C.P. Code, and can be attached under O 21, R. 52 of the Code. A Court passing a prohibitory order for attaching such property acts within its jurisdiction. The mere fact that the confirmation of sale is stayed at the instance of another person who has filed a suit against the judgment debtor will not entitle the latter to raise the contention that the property is not attachable. (*Puranik, J.*) TUKARAM RAGHUNATH *v.* BHIKU BAI **I.L.R. 1938 Nag. 402=173 I.C. 215=10 R.N. 289=A.I.R. 1937 Nag. 391.**

———S. 60 (1) (m)—*"Contingent or possible right or interest"—Bequest of income of property to husband and wife for life—Gift over of income and corpus to children—Interest of children—Attachability during lifetime of parents.*

A testator by his will directed that the residue of his estate should be divided into sixteen shares and he bequeathed three of such shares to his nephew *A* and *W*, his wife and their issue. By a codicil of later date the testator revoked his bequest and in lieu thereof directed: "The income from these three-sixteenths shall so long as *A* and *W*, his wife, are both alive, be divided two-thirds to the wife and one-third to the husband. If one of them dies, his or her share of the income shall belong to their four children or the survivor of them in equal proportions and when the remaining parent dies, the capital and income shall belong to the children then living in equal proportions." After the death of the testator and while both *A* and *W* were alive, a creditor attached the interest of *P* one of the sons of *A* and *W* in the three-sixteenths shares in the testator's residuary estate.

Held, that the interest of *P* under the codicil was, during the joint lives of *A* and *W*, unquestionably contingent both as to the income and as to the corpus, and that it was exempt from attachment and sale under S. 60 (1) (*m*), C. P. Code. (*Lord Romer.*) PESTONJI BHICAJEE *v.* ANDERSON. **I.L.R. (1939) Bom. 36=32 S.L.R. 963=179 I.C. 995=11 R.P.C. 156=41 Bom.L.R. 1=1939 O.A. 185=1939 A.W.R. (P.C.) 15=1939 O.W.N. 196=1939 O.L.R. 129=5 B.R. 402=1939 M.W.N. 551=68 C.L.J. 339=48 L.W. 912=1938 P.W.N. 882=A.I.R. 1939 P.C. 6=(1938) 2 M.L.J. 906 (P.C.).**

———S. 60 (1) (n)—*Applicability—"Right to future maintenance"—Person having vested right to rents in inam land granted to office-holder for maintenance—Land—If exempt from attachment.*

The rule in S. 60 (1) (*n*) is no more than an application of the general principle that only present rights can be dealt with as property and not inchoate future rights which have not accrued, such as a *spes successionis* or a right to future rents. A grant of land as inam was made by Government to the ancestor of the judgment-debtor for his own maintenance in consideration of his family history and the office of Deshpandia which he held. The judgment-debtor inherited a share in such lands and in execution of a decree against the judgment-debtor, the share was attached. On a contention being raised by the judgment debtor that the inam was a right to future maintenance and was not therefore attachable under S. 60 (1) (*n*).

Held, that the property in question, *i.e.*, the inam lands, were in existence and were owned by the judgment-debtor, till they were resumed by the Government on breach of any of the conditions mentioned in the grant. The right of the judgment-debtor in the property was not future or contingent, but present and vested, the judgment-debtor having a right to deal with the property as he liked during the period of his life. The right to the inam land, therefore, could not fall under S. 60 (1) (*n*) of the Code, so as to be exempt from attachment. (*Vivian Bose, J.*) YADEO NILKANTH DESHPANDE *v.* JANKIDAS NARSINGDAS. **170 I.C. 78=10 R.N. 37=A.I.R. 1937 Nag. 202.**

———S. 60 (1) (n)—*Future maintenance—Allowance to disinherited son—Exemption from attachment.*

A wealthy father disinherited his son in the sense that he did not give him any share in his property under his will, but provided for his food and lodging. The testator further provided that out of the income of his property his son should get Rs. 100 per month as his pocket money. On a construction of the will,

Held, that the sum of Rs. 100 which was described as pocket money of the son might be treated as his "future maintenance" out of which he was to supply himself with such necessaries of life as, having regard to his position in life, would be required for his sustentation and physical well-being, and was, therefore, exempt from attachment under S. 60 (1) (*n*), C. P. Code. (*Agha Haider, J.*) TARA CHAND *v.* BAKHSHI SHER SINGH. **167 I.C. 844=9 R.L. 559=38 P.L.R. 702=A.I.R. 1936 Lah. 944.**

———S. 60 (n)—*Judgment-debtor having only a life estate with a restraint on alienation—Saleability in execution—Relief by way of indirect execution.*

A settlement deed settled the property on a widow out of the income of which she had to maintain the settlor himself, and his other relatives. It also provided that the widow was not to alienate the property and that subsequent to her death it was to devolve on settlor's and settlee's heirs. It did not contain any provision for the maintenance of the widow. The property was sought to be attached in execution of a decree against the widow, and the execution was contested on the ground that the property was not attachable under S. 60 (*n*), C. P. Code.

Held, that the document did not confer on the widow anything more than a life estate and since there was a restraint on alienation imposed, the property was not property over which the widow had a disposing power and therefore it could not be attached in execution of a decree against her. But the decree-holder was entitled to have a receiver of the income of the property, although he could not bring that property to sale. (*Beasley, C. J.*) JANAKI AMMAL *v.* MARUDAI CHETTI. **175 I.C. 305=10 R.M. 766=A.I.R. 1937 Mad. 864.**

———S. 60 (1) (n)—*Right of maintenance—Attachability—Test.*

Where a right of maintenance is sought to be attached, the true test to lay down is whether such a right is purely personal, non-heritable and non assignable, or it is an alienable and heritable right which takes the shape of an annuity or has been granted in lieu of a share in an estate. If it is the former, it will be protected under the provisions of the C P. Code, but if it is the latter it will not be exempt from attachment. In a family governed by rule of primogeniture, a dispute between the two brothers *K* and *J* was decided by arbitration by which *K* was entitled to the whole of his father's property and *J* to a certain maintenance with a right of residence. On the award being challenged by *J's* son an agreement was entered into by the parties under which the monthly allowance of *J* was increased. *J* was given Rs. 20,000 and promised Rs. 3,000 on the occasion of marriage of each child and *J* and his son and descendants relinquished all rights to the property which they possessed and undertook to be bound by the agreement for all time to come. *J* was later on declared insolvent and the Official Receiver proceeded to attach the amount of maintenance recoverable by him (*J*) under the agreement.

Held, that the allowance payable to *J* was not a right to future maintenance which was exempt from attachment under the provisions of C. P. Code, but was in the form of annuity and was not therefore immune from attachment. (*Addison, A.C.J. and Din Mahomed, J.*) CHUNI LAL *v.* JAI GOPAL. **17 Lah. 378=163 I.C. 103=8 R.L. 1002 =38 P.L.R. 707=A.I.R. 1936 Lah. 55.**

——S. 60 (1) (n)—*Right of residence—Equitable execution—Permissibility.*

Although the right of residence enjoyed by a judgment-debtor in certain landed property, is not attachable and saleable, such right is, in a proper case, liable to be dealt with in execution of a decree by adopting the remedy of equitable execution, namely, the appointment of a receiver who would act under the orders and supervision of the Court, and realize the income of the property, and after defraying the incidental expenses and his own remuneration would devote the proceeds towards the satisfaction of the decretal amount. (*Agha Haidar, J.*) SAIN DAS *v.* TIKKA SANT SINGH. **165 I.C. 519=9 R.L. 254=A.I.R. 1936 Lah. 830.**

——Ss. 63 and 73—*Applicability and relative scope—Several decree-holders—Attachment of same and several properties of same judgment-debtor in different Courts—Rateable distribution—Entire sale proceeds—If divisible among all—Rule.*

S. 73, C. P. Code, is not to be regarded as the only section for rateable distribution in the Code. The section must be read in conjunction with S. 63 of the Code. While both Ss. 63 and 73 aim at the fair distribution of the proceeds of sale among the judgment-creditors of the common judgment-debtor, there is a fundamental distinction between the two sections. The fund available for distribution under S. 73 is the entire fund realised or received by the executing Court, leaving out of consideration the proviso to the section. On the other hand the funds available for distribution under S. 63 are the proceeds of common property attached by the judgment-creditors. It is the fact of attachment, and attachment of the identical properties by the several decree-holders that bring S. 63 into operation. Where one of several decree-holders executes his decree against the judgment-debtor in a particular Court and sells his properties, if other persons holding decrees against the same judgment-debtor apply for execution to the same Court before the receipt of the proceeds of sale, the whole sale proceeds will have to be rateably distributed among all the decree-holders under S. 73. The

latter decree-holders need not take any further steps beyond applying for execution to the Court which sells and realises to the assets. Where *A*, holding a decree against *J*, executes his decree in one Court and attaches and sells his properties *X*, *Y* and *Z*, and *B*, *C*, *D*, who also hold decrees against *J* execute their decrees in other Courts of lower grade and attach respectively the same properties, *X*, *Y* and *Z* before the sale proceeds are received by the former Court, but they do not apply for execution to the former Court attaching and selling all the properties *X*, *Y* and *Z*, and do not transfer their executions to that Court before the receipt of assets, but they bring the fact of the attachment to the notice of that Court, the entire proceeds of all the properties cannot be distributed among all of them. The proceeds of the sale of *X* alone has to be distributed between *A* and *B*, those of *Y* between *A* and *C*, and those of *Z* between *A* and *D*. That is the effect of S. 63 of the Code. (*R. C. Mitter, J.*) SURENDRA KUMAR GUHA *v.* JAMINI KUMAR GUHA. **I L.R. (1937) 1 Cal. 391=166 I.C. 178 (2)=9 R.C. 484=40 C.W.N. 1307=A.I.R. 1936 Cal. 723.**

——S. 63—*Applicability — Decrees of same Court under execution by different Courts.*

The fact that the several decrees under execution by different Courts are passed by the same Court does not make S. 63 inapplicable. S. 63 would still apply to the case; the words "if more Courts than one" in the section must be read as qualifying the word "attachment" and not the word "decrees". The object of the section is to deal with several attachments no matter whether the decrees are passed by the same Court or by different Courts. The phrase 'in execution of decrees' is explanatory of the word "attachment." (*Venkatasubba Rao and Cornish, JJ.*) MEGRAJ ISWARADAS *v.* CORPORATION OF MADRAS. **59 Mad. 1028=166 I.C. 769=9 R.M. 400=44 L. W. 358=1936 M.W.N. 655=A.I.R. 1936 Mad. 797=71 M.L.J. 328.**

——S. 63—*"Court of highest grade"—Small Cause Court having higher pecuniary jurisdiction than additional Small Cause Court—If Court of higher grade.*

A Small Cause Court, which has a higher pecuniary jurisdiction than the Additional Small Cause Court in the same area is a Court of higher grade within the meaning of S. 63, C. P. Code, and the additional Court has no jurisdiction to deal with an application for a share in the assets realised by the former Court. (*Pollock, J.*) WASUDEO BALIRAM *v.* LAXMAN RAMCHANDRA. **I. L.R. 1937 Nag. 122=167 I.C. 156=9 R.N. 167= A.I.R. 1936 Nag. 270.**

——Ss. 63 and 73—*Decree-holder seeking rateable distribution—If must apply to Court where realization of assets takes place.*

S. 73, C. P. Code, does not require the transfer of a decree to the Court where the process of realization of assets takes place as a condition precedent to an application under S. 63, C.P.Code, and therefore *a fortiori* it is not necessary for the decree-holder seeking rateable distribution to apply for execution of his decree to the Court where the realization takes place. If such realization takes place in a Court of inferior grade, it is the duty of that Court to send the sale proceeds to the superior Court. (*Zia-ul-Hasan, J.*)

RAM RACHHPAL SHIAM LAL *v.* GUR NARAIN BROTHERS. **171 I.C. 222=10 R.O. 97=1937 O.L.R. 534=1937 O.W.N. 1040=A.I.R. 1938 Oudh 12.**

——**Ss. 63 and 73**—*Relative scope—'Any claim' in S. 63—Meaning of second application for execution, if necessary in Court of highest grade.*

Ss. 63 and 73 of the Code must be read together and since the Court of highest grade has been empowered to determine 'any claim' in respect of property, it must include claims for rateable distribution under S. 73. Consequently there is no need for second application for execution in the Court of the highest grade by the decree-holder applying for rateable distribution in that Court. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag. 219=171 I.C. 371=10 R.N. 109=A I.R. 1937 Nag. 80.**

——**Ss. 63 and 73**—*Relative scope—Attachment of same property in execution of decrees of several Courts—Right to rateable distribution.*

S. 73 of the C. P. Code cannot be regarded as a self-contained rule. To so read the section would defeat and render nugatory the provisions of S. 63, C. P. Code. S. 63 must be treated as constituting an exception to S. 73. Where, as stated in S. 73, the property is under attachment in execution of decrees of more Courts than one, if the other conditions specified in S. 73 are fulfilled, the right to rateable distribution arises. (*Venkatasubba Rao and Cornish, JJ.*) MEGRAJ ISWARADAS *v.* CORPORATION OF MADRAS **59 Mad. 1028=166 I.C. 769=9 R.M. 400=44 L.W. 358=1936 M.W.N. 655=A.I.R. 1936 Mad. 797=71 M.L.J. 328.**

——**Ss. 63 and 73**—*Right under—Conditions of—Prior attachment—If essential.*

Prior attachment of the property is not essential under S. 63. Under S. 73 also prior attachment is not necessary so far as the creditors seeking rateable distribution are concerned. All that is required is an application for execution before the assets are received by the Court entitled to receive them. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag 219=171 I.C. 371=10 R.N. 109=A.I.R. 1937 Nag. 80.**

——**Ss. 63 and 73 and O. 21, R. 72**—*Scope—Sale in contravention of S. 63 (1)—If void—Set-off allowed by Court against prior decree-holder's right to rateable distribution—Validity.*

The right of set-off under O. 21, R. 72, C. P. Code, is subject to the provisions of S. 73. The application under S. 73 must be made before the sale and it is not enough to say that it should be made before the entire sale proceeds are paid. If there is no application to the Court which holds sale and the Court allows set-off, the order of the Court is not improper, although in contravention of S. 63. *A* attached some property in execution of the decree of *X* Court against *C* and *B*; another decree-holder subsequently attached the same property in execution of his decree of *Y* Court against *C*, and *Y* Court brought the property to sale; on date of sale *A* applied to that Court for not allowing set-off to *B*; the Court rejecting the application, allowed set-off to *B*.

Held, though the sale of property by *Y* Court was in contravention of S. 63, it being validated by sub-S. (2) of S. 63 there being no application by *A* for rateable distribution before date of sale, the order of Court in allowing the set-off to *B* was not illegal. (*Ghose and Mukherjea, JJ.*) AHINATH GANGULAI *v.* NEPAL CHANDRA. **65 C.L.J. 399=169 I.C. 713=10 R.C. 21=41 C.W.N. 350=A.I.R. 1937 Cal. 55.**

——**S. 63**—Scope—If controlled by S. 38—"Realize such property"—Superior Court calling up proceedings from inferior Court—Jurisdiction to sell property attached by inferior Court. *See* C. P. CODE, Ss. 38 AND 63. **48 L.W. 664.**

——**Ss. 63**—*Scope and applicability.*

In order to bring a case within the purview of S. 63, C. P. Code, it is necessary that several decree-holders, who are executing their decrees against the same judgment-debtor, in different Courts, must have attached the same property or certain common properties belonging to the judgment-debtor. In such cases, the sale proceeds of the attached property would have to be distributed amongst all the attaching decree-holders by the superior Court or the Court which has first made the attachment in accordance with the section. Where, therefore, the rival decree-holders have not attached any of the properties belonging to the judgment-debtor, they cannot invoke the provision of S. 63. (*S. K. Ghose and Mukherjea, JJ.*) FATIMA KHATUN *v.* ASHANANDA BEHARA. **I.L.R. (1939) 1 Cal. 488.**

——**Ss. 63 and 73**—*Scope and effect of—Several decrees against same judgment-debtor passed by same Court—Transmission for execution to Courts of different grades—Attachment by both Courts—Sale by inferior Court and set-off by decree-holder—Application by rival decree-holder to superior Court to call for sale proceeds and for rateable distribution—Maintainability.*

Where several decrees, some in favour of one decree-holder and others in favour of another, are passed by the same Court and sent for execution to different Courts one of which is a superior and the other an inferior Court, and both those executing Courts attach the same properties, each decree-holder acting in ignorance of the proceedings taken by the other, the fact that the inferior Court holds the sale in pursuance of its attachment and allows the decree-holder to set-off the purchase price against the decree amount before the date fixed for sale by the superior Court will not deprive the decree-holder in the superior Court of his right to apply to the superior Court under S. 63, C. P. Code, on his becoming aware of the sale, to call for the proceeds of the sale from the inferior Court and to distribute them rateably. In such a case the decree-holder purchaser in the inferior Court may properly be given a choice either to elect to have a re-sale, or to pay into Court so much of the price as may become due to the rival decree-holder on rateable distribution. (*Venkatasubba Rao and Cornish, JJ.*) MEGRAJ ISWARADAS *v.* CORPORATION OF MADRAS. **59 Mad. 1028=166 I C. 769=9 R.M. 400=44 L.W. 358=1936 M.W.N. 655=A.I.R. 1936 Mad. 797=71 M.L. J. 328.**

——**S. 63**—*Scope and object of—Attachment of same property by different decree-holders in Courts of different grades—Sale by inferior Court—Validity—Rateable distribution—Proper Court—Procedure.*

S. 63 contemplates a case where attachments of the same property have been made by different Courts at the instance of different decree-holders of the common judgment-debtor, and provides for the distribution among them of the proceeds of the attached property by one of such Courts only. The distribution is to be made by the superior Court; but if all the Courts are of the same grade, the distribution is to be made by the Court which first attached the property. In such a case a sale by an inferior Court of the property under attachment by a superior Court or by the Court of the same grade, which attached later in point of time a sale under later attachment pending an earlier attachment is valid; but it is the duty of the Court which sells the property to send the sale proceeds to the Court of superior grade or the Court which attached the property first, as the case may be. When the assets are not so sent by the Court selling the property, the procedure according to the view of the Calcutta High Court is to move the District Judge for asking the Court holding the sale to send the sale-proceeds to the proper Court for distribution. (*R. C. Mitter, J.*) SURENDRA KUMAR GUHA *v.* JAMINI KUMAR GUHA. **I.L.R. (1937) 1 Cal. 391=166 I.C. 178 (2)=9 R.C. 484=40 C.W.N. 1307=A.I.R. 1936 Cal. 723.**

——**Ss. 63 (1) and 73 (1)**—*Attachments by Courts of different grades—Sale and realization by superior Court—Attaching decree-holder of inferior Court if can apply to superior Court for rateable distribution.*

Where the holder of a Munisif's Court decree obtains from that Court an order for attachment in execution, of certain property of the judgment-debtor and the holder of a decree in the Subordinate Judge's Court against the same judgment-debtor, obtains an attachment of the same property from the Subordinate Judge's Court and the property is sold by that Court and assets are realised, the Munsif's Court decree-holder could apply to the Subordinate Judge's Court for rateable distribution without following strictly the procedure laid down by S 73 (1). His case is governed by the language of S. 63 (1), C. P. Code, and the question of rateable distribution is one which will come under the words 'shall determine any claim thereto' occurring therein. (*Bennet and Verma, JJ.*) CHAND MAL RUP CHAND *v.* GURDIAL PRASAD. **I.L.R. (1939) All. 162=180 I.C. 714=11 R A. 516=1938 A.W.R. (H.C.) 870=1939 A. L.J. 4=A.I.R. 1939 All. 159.**

——**S. 64**—*Applicability—Adjustment within meaning of O. 21, R. 2.*

Where there is an adjustment within the meaning of O. 21, R. 2, the provisions of S. 64 have no application to a transfer by way of mortgage effected by the judgment-debtor for satisfaction of the decree under which the property was attached in execution; for a transfer made contrary to the provisions of S. 64 is only void as against claims enforcible under the attachment. When there is an adjustment for full satisfaction of the decree out of Court, there is no further claim which could be enforced under the attachment and therefore the transfer cannot be void. (*Almond, J.C.*) GHULAM NABI *v.* AZIZULLAH. **188 I.C. 757=A.I.R. 1940 Pesh. 18.**

——**S. 64**—*Applicability—Attachment before judgment—Contract of sale—Attachment—Subsequent sale in pursuance of contract—If void.*

The word "right" in O. 38, R. 10 is not restricted to rights in property. It includes a right to

claim specific performance of a contract of sale. Hence where a contract of sale between parties is entered into before attachment takes place, such right to enforce the contract of sale is unaffected by the attachment and the subsequent sale in pursuance of the contract is not void under S. 64, C. P. Code. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **I.L.R. (1936) Nag. 172=166 I.C. 950 (2)=9 R.N. 152=A.I.R. 1936 Nag. 163.**

——**S. 64**—*Applicability and scope—Attachment before judgment—Requisites of validity—Mere order of attachment—Sufficiency—Private transfer—When void—Non-compliance with formalities of due attachment—Effect on private alienation.*

An attachment before judgment, under O. 38, R. 7, C. P. Code, has to be effected in the same manner as in attachment in execution of decree; and in the case of immovable property, the provisions of O. 21, R. 54, C. P. Code, must be complied with. A mere order of attachment is not enough; unless all the processes of attachment required by law to effect a valid attachment have been served, there is no attachment of the property which would invalidate its transfer under S. 64, C. P. Code. (*Lokur, J.*) BAI HAKIMBU *v.* DAYABHAI. **185 I.C. 655=12 R.B. 258=41 Bom.L.R. 1104=A.I.R. 1939 Bom. 508.**

——**S. 64**—*Applicability—"Contrary to such attachment"—Attachment in execution of decree—Application by another decree-holder without attachment—Private sale by judgment-debtor and satisfaction of former decree—Sale—If void as against latter decree-holder.*

Plaintiff held a simple money decree against judgment-debtor. *R* also had a simple money decree against the same judgment-debtor and attached his property in execution of his decree. Plaintiff applied for rateable distribution in January, 1933, but did not apply for attachment of the property of the judgment-debtor. On 11-4-1933, the judgment-debtor sold his property privately to a stranger who under the terms of the sale deed paid off the decree amount due to *R*. On 19-4-1933, *R* applied to the Court under O. 21, R. 2, acknowledging satisfaction of his decree and the attachment was accordingly struck off. Plaintiff did not apply for attachment until 13-4-1933, *i.e.*, after the sale deed.

Held, that the sale by the judgment-debtor was not "contrary to such attachment" within the meaning of S. 64, C. P. Code, and was not void as against the plaintiff. The plaintiff consequently was not entitled to question the alienation under S. 64. (*Sulaiman, C.J. and Bennet, J.*) RADHA BALLABHA *v.* MAKHAN LAL. **1937 A.W.R. 600=1937 A.L.J. 785=10 R.A 321=171 I.C. 799=1937 A.L R. 893=A.I.R. 1937 All. 641.**

——**S. 64**—*Applicability—Conveyance in obedience to Court's decree—If void.*

S. 64, which declares private alienation of property after attachment to be void, does not cover the enforced execution of a conveyance in obedience to a decree of a Court. (*Pollock, J.*) GHUSARAM *v.* PARASHRAM. **I.L.R. (1936) Nag. 172=166 I.C. 950 (2)=9 R.M. 152=A.I.R. 1936 Nag. 163.**

——**S. 64**—Applicability—Sale deed of property executed prior to attachment but registered after attachment—If void. *See* REGISTRATION ACT, S. 47. **A.I.R. 1937 Nag. 143.**

——S. 64—Attachment—If confers charge or other interest in favour of decree-holder. *See* C. P. CODE, O. 34, R. 1. **A.I.R. 1936 Nag. 209.**

——S. 64—*Attachment subject to mortgage—Subsequent agreement by mortgagor to transfer portion of mortgaged land to mortgagee—Legality.*

Where an attachment in execution of a decree is made subject to the mortgagee rights, a subsequent compromise, whereby the mortgagors agree to transfer a portion of the mortgaged property to the mortgagee in consideration of his reducing the mortgage charge and releasing the rest of the property from the mortgage is not illegal by reason of S. 64, C. P. Code, more specially so when the mortgagee had already become entitled to possession even prior to the attachment. (*Bhide, J.*) KISHAN SINGH *v.* PRITAM SINGH. **182 I.C. 353=12 R.L. 19=A.I.R. 1938 Lah. 737.**

——S. 64—*"Claims enforceable under the attachment"—Meaning of.*

A property was attached by a decree-holder but the assets were not brought to the Court. Pending this attachment, the property was transfered; but the attachment was raised later on. Subsequently another decree-holder attached the same property and the transfer being held valid, he contended that he could enforce his claim under the attachment by the other decree-holder,

Held, that he was not entitled to do so as the attaching creditor under the prior attachment, which had been raised, never got the assets into the executing Court and further the present attaching creditor under the latter attachment never applied for rateable distribution. (*Stone, C. J. and Niyogi, J.*) KASTURCHAND *v.* MT. WAZIR BEGAM. **167 I.C. 48=9 R.N. 160=I.L.R. (1937) Nag. 291=A.I.R. 1937 Nag. 1.**

——S. 64—*Construction—"Private transfer"—Transfer by arrangement between parties effected in form of award—Application to Court to pass decree in terms—Decree—Effect—If private transfer.*

The meaning of "private transfer" in S. 64, C. P. Code, is a transfer which is brought about solely by the act of parties and not as a result of a judicial decision. If in reality there has been a transfer by the private act of parties, it does not cease to be private by being given the appearance of a public adjudication *e.g.*, where the parties intimate the arrangement to the Court in the form of an award and pray for a decree in terms of the same. Such a transfer is essentially a private one and the Court is merely asked to give its permission to it. (*Broomfield and Norman, JJ.*) DAMODAR SUKRAM *v.* KASHINATH. **183 I.C. 313=12 R.B. 90=41 Bom.L R. 473=A I.R. 1939 Bom. 212.**

——Ss. 64 and 73—*Construction and scope—"Claims enforceable under the attachment"—Attachment—Subsequent private alienation—Subsequent attachment in another decree—Effect of on prior alienation—Sale in execution of latter decree—Title of purchaser—If prevails over the private alienee.*

Per *C. J., Pandrang Row and Patanjali Sastri, JJ.*:—Under S. 64, C. P. Code, when a property has been attached, any subsequent alienation is against all claims enforceable under that particular attachment. The section does not go beyond this. An attachment effected after a private alienation is not assisted by an attachment before the alienation. If the execution proceedings in which the second attachment has been made have been instituted before assets have been brought into Court, the creditor would be entitled to rateable distribution if the property is sold in the earlier execution proceedings, but if the sale takes place as the result of the attachment effected after the private alienation a person who buys the property at the Court auction would not obtain a good title,

Abdur Rahman and Krishnaswami Aiyangar, JJ.—A private transfer made after and during the pendency of an attachment in one suit is void against the title of an auction-purchaser in execution of a decree in another suit under an attachment made after the transfer but while the decree in the former suit remains unsatisfied and the attachment therein is subsisting. (*Leach, C. J., Pandrang Row, Abdur Rahman, Krishnaswami Ayyangar and Patanjali Sastri, JJ.*) NANA RAO *v.* ARUNACHALAM CHETTIAR. **I.L.R. (1940) Mad. 526=188 I.C. 81=12 R.M. 776=1940 M.W.N. 207=51 L.W. 270=A.I.R 1940 Mad. 385=(1940) 1 M.L.J. 482 (F.B.).**

——S. 64—*Part of attached property vesting in judgment-debtor only after attachment—Validity of attachment—Subsequent sale of such property by judgment-debtor—If can be impugned.*

An attachment is not ineffective in relation to that part of the property which does not vest in the judgment-debtor at the time of the attachment but vests in him immediately after the attachment. As soon as it vests in him any defect that existed in the attachment before is *ipso facto* removed. If, therefore, the judgment-debtor transfers that property thereafter by sale, the transfer can be impugned under S 64, C. P. Code. (*Din Mohammad, J.*) LADHA RAM *v.* DAS MAL **42 P.L.R. 356.**

——S. 64—*Properties mortgaged to a person—Personal decree passed against the owner of the properties—Attachment of properties—Mortgagee purchasing the properties during the continuance of attachment—Validity of purchase—Mortgage if extinguished—Suit on mortgage, if lies.*

Where certain items of property which were already mortgaged to *A*, were attached by *B* in execution of a personal decree against their owner, and *A*, the mortgagee purchased the properties while the attachment was subsisting and he had no knowledge of the attachment, and the consideration for the sale was credited to the mortgage-debt by way of partial discharge, *B* brought those items to sale in pursuance of their attachment, and was resisted in delivery proceedings by *A*, *A* subsequently brought a suit for sale of the properties, being unsuccessful in the claim petition.

Held, that in view of the terms of S. 64, C. P. Code, the purchase by *A* must be deemed to have been non-existent from the point of view of *B*. The effect of the attachment is that so far as *B* was concerned the mortgage exists over the property just as it did prior to the sale. The sale being void, *A* becomes a simple mortgagee and can bring a mortgage suit. (*Horwill, J.*) MARIYAPPA NADAR *v.* RAMANUJA NAICK. **180 I.C. 908=11 R M. 757=1938 M.W.N. 60=A.I.R. 1938 Mad. 465.**

———S. 64—Scope—Assignment or charge in favour of attachment creditor—If invalid. *See* C. P. CODE, S. 73. **1937 A.W.R. 284=A.I.R. 1937 All. 424.**

———S. 64—*Scope—Attachment in execution of one decree—Sale in execution of another decree obtained later—If void—Sale without notifying prior attachment—Material irregularity.*

The rule enacted in S. 64 refers only to a private transfer of the attached property by the judgment-debtor. It does not extend to a transfer or sale under an order of Court in execution of a decree, though the decree in execution of which the property is sold is passed subsequent to the attachment under the prior decree. The sale is not void. The mere fact that the previous attachment is not notified in the sale proclamation does not render the sale liable to be set aside. An attachment is not an incumbrance or a charge on the property and the omission to notify a prior attachment in the sale proclamation is not a material irregularity vitiating the sale. (*Varma and Rowland, JJ.*) DURGA PRASAD SHRAFF *v.* MAHADEB LAL SINGHANIA. **166 I.C. 873=9 R.P. 348=3 B.R. 229=17 Pat.L.T. 847=1936 P.W.N. 785=A.I.R. 1937 Pat. 50.**

———S. 64—*Scope—Attachment of land before judgment—Decree—Subsequent mortgage of attached land—Attachment of rents of land in execution after mortgage—Right of decree-holder to rents and profits as against mortgagee—Mortgage if invalid by reason of second attachment.*

Under S. 64, C. P. Code, any private alienation of property pending an attachment thereon would be void only as against all claims enforceable under that attachment, and no other. On 11—11—1927, *K*, who had filed a suit against *R*, attached the latter's land before judgment, and on 8—12—1927, the suit was decreed and the attachment confirmed. On 24—6—1928, the attached land was mortgaged to *S*, and on 12—9—1928, *K* attached the rents due in respect of the land for a particular term, and got himself appointed as receiver in execution for the purpose of collecting the rents which had been attached. The mortgagee having laid claim to the rents,

Held, that the right of the decree-holder-receiver to the rents was under the second attachment and not under the first, and since the mortgage was executed prior to that second attachment, the mortgagee's right to the rents of the mortgaged land was not affected by reason of the subsequent attachment. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) AMBI *v.* KELAN. **1937 M.W.N. 1001=I.L.R. (1937) Mad. 970=176 I.C. 218 =11 R.M. 42=46 L.W. 375=A.I.R. 1937 Mad. 843=(1937) 2 M.L.J. 728.**

———S. 64—*Scope—Attachment of movable property in British India—Subsequent adjudication of judgment-debtor as insolvent by foreign Court—Effect of—Private international law—Attachment subsequent to adjudication—If prevails against foreign receiver.*

An adjudication of a person as insolvent by a foreign Court operates as a private transfer within the meaning of S. 64, C. P. Code. On such adjudication, the only property that vests in the receiver is the movable property which the insolvent was free to assign on the date of the adjudication and such property vests by virtue of private international law. But the adjudication does not affect the rights of a creditor who has attached, before adjudication, the movable property of the insolvent. He remains entitled to the benefits of his attachment. But an attachment after adjudication by a foreign Court is entirely a different matter. The receiver of the foreign Court is entitled to all the free assets of the insolvent, assets which were free at the date of the adjudication, and they must be deemed to be the moneys left over after satisfaction of the claims of the creditors who had attached before the adjudication. The provisions of Ss. 64 and 73 do not override the rule of private international law, and creditors who attach after the foreign adjudication cannot claim anything out of the assets on the ground that they have claims enforceable under the attachment. (*Leach, C.J. and Kunhi Raman, J.*) VEERANNA SHA *v* OFFICIAL RECEIVER OF SECUNDERABAD. **50 L.W. 701=1940 M.W.N. 195=A.I.R. 1940 Mad. 47=(1939) 2 M.L.J. 859.**

———S. 64—*Scope and effect of—Contract by judgment-debtor for sale of property to another—Subsequent attachment of property—Sale in pursuance of contract—If void against attaching creditor—Insolvency of judgment-debtor—Sale by Official Receiver in terms of contract under order of Insolvency Court—Effect of as against attaching creditor.*

All that S. 64, C. P. Code, provides is that any private transfer by the judgment-debtor of the property attached shall be void as against the attaching creditor and shall not prejudice his rights. The section cannot be read as putting an end to the power of sale altogether. Where a sale is made in pursuance of a contract entered into prior to the attachment, cannot be said to be contrary to the terms of S. 64, C. P. Code. The right of the judgment-debtor in the property which is all that is attached, is on the date of the attachment qualified by his obligation incurred by him under the earlier contract to sell and the attaching creditor cannot claim to ignore that obligation. A sale in pursuance of pre-existing contract is only the fulfilment of the obligation to which the judgment-debtor was already subject, whether the sale is carried out by him or by the Official Receiver in insolvency under the orders of the Insolvency Court on the insolvency of the judgment-debtor. A sale by the Official Receiver in pursuance of an order of Court would be all the more effective, as the order of Court would in effect be a decree for specific performance, though passed by the Insolvency Court. (*Varadachariar and Gentle, JJ.*) DIRAVYAM PILLAI *v.* VEERANAN AMBALAM. **I.L.R. (1939) Mad. 853=1939 M. W.N 329=185 I.C 562=12 R M. 554=49 L.W. 460=A.I.R. 1939 Mad. 702=(1939) 2 M.L.J. 822.**

———S. 64—*Scope—If controlled by O. 38, R. 10—Attachment before judgment—Sale of property subsequently in pursuance of contract made prior to attachment—Priority over attachment.*

S. 64 and O. 38, R. 10, C. P. Code, must be read together. S. 64 applies to an effective attachment; under O 38, R. 10, an attachment before judgment is not effective as against rights subsisting at the date of the attachment. A conveyance of property executed after its attachment before judgment by a creditor, in pursuance of a contract made before the attachment, should prevail over the attachment. (*Beaumont, C.J.*) BASAPPA *v.*

Han[illegible]appa. 41 Bom.L R. 943=185 **I.C. 225=12 R.B.**235=A.I.R. 1939 **Bom. 492.**

———S. 64—*Scope—If invalidates sale in execution of another decree.*

Under S. 64, C. P. Code, the attachment only serves to prevent a private transfer of the property and cannot invalidate a judicial sale in execution of another decree. (*Bhide, J.*) Prem Chand *v.* Mulkh Raj. 188 **I.C. 529=12 R.L. 535=41 P.L.R. 305=A.I.R. 1939 Lah 380.**

———S. 64—Scope—Order allowing claim to attached property—Transfer by successful claimant before suit to set aside claim order—If void. *See* C. P. Code, O. 21, R. 63. **17 Pat 588.**

———**S. 64**—Scope—Order of attachment—Subsequent mortgage by judgment-debtor—Completion of mortgage before affixture of order of attachment—If void. *See* C P. Code, O. 21, R. 54 (3) (Nagpur). **19 N.L J 94.**

———**S. 64**—*Scope—Private transfer — Charge created by compromise decree subsequent to attachment—If void.*

A charge created under a compromise decree is no better than a private transfer for purposes of S. 64, C. P. Code, and must be deemed to be void as against a decree-holder who has got the property attached prior to such compromise decree (*K. S. Menon, J.*) Singaravelu Naidu *v.* Desika Iyengar. **1937 M.W N. 45.**

———S. 64—Scope—Sale after attachment—If void against all creditors of judgment-debtor. *See* Provincial Insolvency Act, S 51. **1937 M. W.N. 366**

———S. 64, Expl.—*'Claims enforceable under attachment'—If include possible claims for rateable distribution.*

No doubt under Explanation to S. 64, C. P. Code, claims enforceable under an attachment include claims for the rateable distribution of assets. But a right to rateable distribution is conditional upon there being assets in the hands of the Court. Where the property had never been sold by the Court but had been sold by private treaty between the judgment-debtor and the decree-holder and consequently no proceeds came into the hands of the Court, there is no right to rateable distribution and, therefore, no claim enforceable under an attachment. (*Wort, J.*) Kedarwati *v.* Radhey Lal 170 **I.C. 353=3 B. R. 705=10 R.P. 101=1936 P.W.N. 898=A.I.R. 1937 Pat. 609.**

———**S. 64, Expl.**—*Effect of.*

The combined effect of S. 64, C. P. Code, and the explanation which has been added thereto is to extend the protection of that section to the claimants for rateable distribution against private alienations of property after attachment, just as much as to the decree-holder at whose instance the attachment is made. (*Srivastava, Ag.C J and Zia-ul-Hasan, J.*) Bismohan Singh *v.* Jagat Bahadur Singh. **12 Luck. 365=164 I.C. 1031 =9 R.O. 126=1936 O W.N. 861.**

———S. 65—*Auction-purchaser's right to possession—When accrues—Right to mesne profits.*

The title to the property after the sale is made absolute vests in the auction-purchaser from the date of the sale according to S. 65 and it is wrong to say that the right to possession only accrues from the date of the sale certificate. Where the auction-purchaser had applied for possession and is resisted by person claiming under judgment-debtor the latter can be said to have had notice of the claim of the auction-purchaser to possession. It is not necessary that a separate notice should be given that if he did not give up possession, he would be liable for mesne profits. The auction-purchaser is thus entitled to mesne profits from the date of the sale. (*Dalip Singh and Sale, JJ.*) Abdul Ghani *v.* Lala Lal Chand. **A.I.R. 1940 Lah 230.**

———S. 65—*Co-sharer—Sale of rights of—Property—When vests in purchaser—Right of co-sharer to profits after sale and before confirmation—Agra Tenancy Act, S. 227.*

Where the proprietary rights of a co-sharer are sold in auction, the property vests in the purchaser under S. 65, C. P. Code, from the actual date of sale, though the sale itself becomes absolute only later on The co-sharer-judgment-debtor is therefore entitled to the profits in respect of his share only up to the date of actual sale and not thereafter. (*Drake Brockman, S.M. and Knox, J M.*) Bhoop Ram *v.* Kedar Singh. **1936 R.D. 49.**

———**S. 65**—*Property purchased by auction-purchaser—Date of vesting—Proceedings by judgment debtor in connection with confirmation of sale—Effect.*

Where a person purchases certain property in a Court auction held in execution of a decree and the sale is subsequently confirmed in his favour, the property vests in him from the date of confirmation of sale, whatever proceedings may be taken in connexion with the confirmation of the sale by the judgment-debtor whose property is sold. The vesting of the property in auction-purchaser is not postponed till the final decision of the proceedings started by the judgment-debtor. (*Mir Ahmad, J.*) Ram Ditta Mal *v.* Charat Singh. **177 I.C. 555=11 R. Pesh. 29=A.I.R. 1938 Pesh. 49.**

———S. 65—Sale of share in village—Auction-purchaser—Right to profits from date of sale—Mutation effected in village papers only later on—If disentitles him to profits prior to mutation. *See* Agra Tenancy Act, S. 226 (1). **1937 A.W. R. 650=A.I.R. 1937 All. 661.**

———**S. 65**—*Scope and effect of—Sale—If complete without confirmation—Order prohibiting sale—If prohibits confirmation sale of already held but not confirmed.*

The words of S. 65, C. P. Code, make it clear that confirmation of a sale, is an integral part of the transaction of a sale, as the purchaser can acquire no title without confirmation. An order prohibiting the sale would therefore prohibit confirmation of a sale which has taken place already but which had not been confirmed before the prohibitory order was passed. (*Harries, C.J. and Dhavle, J.*) Gopal Bux Rai *v* Shyambehari Singh. **188 I.C. 269=12 R.P. 689=6 B.R. 630= A.I.R. 1940 Pat. 565.**

———**S. 65**—*Scope and effect—Title of purchaser—Relation back—Payment of rent by tenant of judgment-debtor to latter before confirmation of sale—If protected.*

Although the purchaser in execution gets title to the property from the date of sale and not merely from the date of its confirmation by the fiction of the relation back of the vesting, a tenant of the judgment-debtor is entitled to pay rents to the latter until the sale has been confirm-

ed. That will, however, not deprive the purchaser of the rent from the date of purchase to the date of confirmation,—as he can recover it from the judgment-debtor who has received it—but the tenant is protected until such time as the sale is confirmed in regard to any payment that he has made to his former lessor prior to confirmation. (*Beasley, C.J.*) KONDAVA NAYAKAR *v.* CHINNA RAMASWAMI NAICKER **178 I.C. 647=11 R.M. 486=1937 M.W.N. 1009=A I.R. 1938 Mad. 317.**

——S. 65—Vesting of property in auction-purchaser—Point of time. *See* U. P. AGRICULTURISTS RELIEF ACT, S. 5 (1) PROVISO **1937 O.W.N 1153.**

——S. 66—*Applicability—Auction-purchase in* 1874—*Suit after* 1908 *to declare* benami—*Maintainability—Law applicable.*

A suit for a declaration that an auction-purchase made in the name of the defendant's predecessor in 1874 was *benami* for the predecessor of the plaintiff, the suit being instituted under the C. P. Code of 1908, is not barred by S. 66 of the Code of 1908. The auction purchase having taken place while the Code of 1859 was in force, the suit would be governed by S. 260 of that Code and not S. 66 of the new Code, and is therefore maintainable. (*Rau, J.*) MANIR AHMAD *v.* MUNSHI OBEDAL HOQUE. **40 C.W.N. 470.**

——S. 66—*Applicability—Certified purchaser being benamidar even before auction sale.*

The fact that the certified purchaser was a benamidar for the plaintiff even before the auction sale is no answer to an objection under S. 66, C. P. Code. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSHUNNESSA. **181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R. 1938 Cal. 602.**

——S. 66—*Applicability—Plaintiff already in possession seeking its confirmation.*

S. 66, C. P. Code, applies although the plaintiff is already in possession and is seeking for its confirmation and not for recovery of possession on the strength of the auction-purchase. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSHUNNESSA. **181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R 1938 Cal. 602.**

——S. 66—*Applicability—Purchase out of joint fund at Court auction—Certificate in the name of one—Suit by others, for possession, if barred by S.* 66.

Where three persons agree to purchase certain property at a Court auction sale and it is so bought out of funds contributed by each in certain agreed shares, but the certificate was issued in the name of one of them, a suit by the others for possession is not affected by S. 66, C. P. Code, for it has no application to such a case. It is not a case of some agreement secret or otherwise whereby *A* buys in *B's* name. The plaintiff's right springs out of the fact that the purchase was made out of joint fund contributed to by the three persons. (*Stone, C.J. and Bose, J.*) BHUDARSAO *v.* SAMARATHMAL. **187 I.C. 60=12 R.N. 267=1939 N L J. 539=A.I.R. 1940 Nag. 1.**

——S. 66—*Applicability—Rent decree under Chota Nagpur Tenancy Act—Execution sale by Deputy Commissioner—Suit against certified purchaser—If barred—Chota Nagpur Tenancy Act, S.* 265.

S. 66, C. P. Code, is not applicable to sales in execution of rent decrees under the Chota Nagpur Tenancy Act, held by the Deputy Commissioner. There is no rule under S. 265 of the Chota Nagpur Tenancy Act applying S. 66, C. P. Code, to matters before the Deputy Commissioner; and the first clause of S. 265, Chota Nagpur Tenancy Act, by implication renders the provisions of C. P. Code, inapplicable to matters before the Deputy Commissioner except in so far as they are made applicable by rules. Consequently a suit against the certified purchaser at sale held by the Deputy Commissioner under the Chota Nagpur Tenancy Act is not barred by S. 66, C. P. Code. (*Agarwala and Madan, JJ.*) RAJAB ALI *v.* AKBAR ALI. **169 I.C. 736=3 B.R. 615=10 R. P. 33=1937 P.W.N. 305=18 Pat.L.T. 397=A.I. R. 1937 Pat. 324.**

——S. 66—*Applicability—Suit against assignee of certified purchaser.*

The objection under S. 66, C. P. Code, applies to a suit against an assignee of the certified purchaser. (*S. K. Ghose and Patterson, JJ.*) ALI AHMED *v.* SHAMSUNNESSA. **181 I.C. 102=11 R.C. 783=42 C.W.N. 1059=A.I.R. 1938 Cal. 602.**

——S. 66—*Applicability—Suit brought after present Code came into force—Execution sale held and confirmed before its enactment.*

A suit for a declaration of title brought after the present Code of 1908 came into force against the transferee from the heir of the certified purchaser, where the sale took place and was confirmed before its enactment, is governed by S. 317 of the old Code, and not by S. 66 of the present Code, and is, therefore, maintainable. (*Tek Chand, J.*) JAI KISHAN SINGH *v.* PARMESARI DAS. **39 P.L.R. 152=171 I.C. 856=10 R.L. 240=A.I. R. 1937 Lah. 471.**

——S. 66—*Effect of.*

The consequence of S. 66 is that unless the auction sale could be impugned on the ground of fraud or of some other grave irregularity which made it a nullity, the plaintiff's suit that the purchase was on plaintiff's behalf cannot be maintainable. Fraud must be strictly pleaded and particulars of any fraud relied upon must be stated in the pleading. It is very important that one who seeks to set aside a purchase completed under sanction of the Court should state the grounds on which he claims to impeach it and should not be allowed after trial of the case to rely on other grounds which had not been the subject of trial or adjudication in the Court which took the evidence. (*Roberts, C.J. and Mosely, J.*) CHIN AH ON *v.* CHIN AH FOO. **181 I.C. 94=11 R.R. 451=A.I.R. 1939 Rang. 122.**

——S. 66—*Purchase benami for plaintiff—Sale set aside with consent of benamidar on application by judgment-debtor—Plaintiff dispossessed by judgment-debtor—Suit against benamidar and judgment-debtor—If maintainable.*

Certain property was sold in execution of a money-decree against defendants 2 and 3 and purchased by the plaintiff's predecessor in the benami of defendant 1 and was taken possession of by him. The sale was subsequently set aside with the consent of defendant 1 on an application under O. 21, R. 90, C. P. Code, filed by defendants 2 and 3 who dispossessed the plaintiff. The plaintiff sued the defendants to recover possession of the property.

Held, that the suit was not barred under S. 66, C. P. Code, as it was not really against any person claiming title under a purchase certified by the

Court, as contemplated by that section. Defendants 2 and 3 relied on their original title as judgment-debtors, the execution sale having been set aside Defendant 1 made common cause with the other defendants and his case was that as the execution sale was set aside, the title of the judgment-debtors had revived and there was no subsisting title in him as a certified purchaser. (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA GHOSH. **42 C.W.N. 497.**

———S. 66—*Scope—Bar of suit—Claim by person alleging purchase to be for himself solely or for himself jointly with certified purchaser—Maintainability.*

S. 66, C. P. Code, is a bar to a claim by a person who alleges that the actual purchase was either on behalf of himself exclusively or of himself jointly with the certified purchaser, whether the purchase is alleged to be in execution of an express agreement or otherwise; and the fact that the principal claims only to have provided a part of the purchase-money and to be entitled to only a share in the property purchased does not make any difference in principle. (*Harries, C.J and Agarwala J.*) SHIVA SHANKAR SAHI *v.* MANABHARAN RAY. **18 Pat. 181=11 R.P. 340=179 I. C. 295=5 B.R. 215=20 Pat.L.T. 117=A.I.R. 1939 Pat. 207.**

———S. 66—*Scope—Purchase benami for plaintiff—Plaintiff dispossessed by certified purchaser —Suit, if maintainable.*

What brings a case within the purview of S. 66, C. P. Code, is that there must be a suit against the certified purchaser or anybody deriving title from him, on the ground that the purchase was made on behalf of the plaintiff or his predecessor. If relief is sought against the certified purchaser or his representative, and the plaintiff claims title on the ground that the purchaser was his *benamidar*, the mere fact that the plaintiff once got possession of the property and was subsequently dispossessed by the certified purchaser or his representative, would not enable him to get round the bar of S. 66, C. P. Code, unless the possession continued for twelve years and thus gave the plaintiff a title quite independent of the purchase made at the execution sale (*Mukherjea, J.*) THAKUR DAS NATH *v.* KESHAB CHANDRA. **42 C.W.N. 497.**

———S. 66—*Scope—Relief in suit dependent on declaration of title as against certified purchaser —Suit, if barred.*

A suit for a relief which can only be given on declaration of title as against persons claiming title under a purchase certified by the Court, such persons being parties and contesting the claims, is barred under S. 66, C. P. Code. (*S.K. Ghose and Patterson, JJ.*) BANWARI MUKUND DAS NANDI DALAL *v.* AJIT KUMAR NANDI. **182 I.C. 201=12 R.C. 12=67 C.L.J. 320=A.I.R. 1938 Cal. 874.**

———S. 66—*Scope—Suit for joint possession over one-half of property purchased—Maintainability.*

The primary object of S. 66, C. P. Code, is that the certified purchase should be deemed to be conclusive and no one should be allowed to challenge it, unless he comes within the exceptions mentioned in the section itself, and those exceptions are contained in sub-S. (2) under which a wrong insertion of the name of the purchaser in the sale certificate made fraudulently or without the consent of the real purchaser can be rectified and under which third persons are absolutely protected. It is immaterial whether the plaintiff claims the whole of the property purchased at the auction or only a share in that property. Where, therefore, the plaintiff brings a suit claiming joint possession over one-half of the property on the ground that it was purchased by the auction-purchaser on his own behalf and on behalf of the plaintiff, the suit is not maintainable. (*Sulaiman, C.J. and Bajpai, J.*) BISHAN DAYAL *v.* KESHO PRASAD. **167 I.C. 683=9 R.A. 572=1937 A.L.J. 52=I.L.R. (1937) All. 113=1937 A.L.R. 232=1936 A.W.R. 1254=A.I.R. 1937 All. 176.**

———S. 66—*Scope—Suit for money advanced—Plaintiff not challenging defendant's title to property purchased by him at Court sale.*

In a suit for recovery of money, the case of the plaintiff was that that was the share contributed by him for the purchase of certain land in which he, the defendant and other parties were concerned as *ijaradars* and which was going to be sold in Court auction. The plaintiff did not even seek to challenge the title of the defendant to the property purchased by him at the Court sale. He did undoubtedly say that the arrangement was that the property was to be purchased for all the *ijaradars* who contributed the purchase-money, but he did not in this suit endeavour to assert his title to his share of the land. The suit was based on the footing that the defendant had no longer any title to keep the money that had been advanced to him by the plaintiff.

Held, that the suit did not come within S. 66, C. P. Code. (*Dhavle, J.*) NISAN SINGH *v.* RAMCHANDRA SAO. **8 R.P. 544=17 Pat.L.T. 591=162 I.C. 553=1936 P.W.N. 526=A.I.R. 1936 Pat. 429.**

———S. 66—*Scope and applicabilty.*

S. 60, C. P. Code, applies only when the plaintiff attempts to enforce his secret title *as against* the certificated purchaser. It has no application if the heirs of the ostensible purchaser do not appear in the case and deny plaintiff's 'benami' purchase. 75 I.C. 197, Foll. (*Thom and Smith, JJ.*) ASGHARI BEGAM *v.* KANHAIYA LAL. **165 I.C. 709 (2)=9 R.A. 297=1936 A.L.J. 1169=1936 A.W.R. 844=1936 All.L.R. 936=A.I.R. 1936 All. 750.**

———S 66 (1)—*Applicability—Benami purchase of house at Court sale—Subsequent contract by benamidar to sell house to beneficial owner—Suit to rectify sale deed—If barred.*

Section 66 (1) has to be strictly applied. Its object is to prohibit on grounds of public policy a suit against the certified purchaser on the ground specified in the section. It does not render benami transactions illegal. If the cause of action is not based on the benami purchase but on a contract or title acquired subsequent thereto, S. 66 is not a bar. Where therefore a person purchased a house benami for the mortgagor at a Court sale and by a subsequent contract sold the same by a sale deed to the mortgagor, and a suit was brought for rectification of the sale deed.

Held, that the cause of action was the title under the conveyance, an event which happened subsequent to the Court-sale and the fact that the basis of contract embodied in the sale deed was a prior benami purchase did not affect the title under the conveyance. S. 66 therefore was no bar to the suit. (*Venkataramana Rao, J.*) MUNIAPPA MUDALI *v.* THANGAVELU MUDALI. **173 I.C. 387=10 R.M. 580=A.I.R. 1937 Mad. 362.**

——**Ss. 68, 69, 70, 71 and 72**—*Applicability—Decree of Revenue Court under Agra Tenancy Act—Execution—Procedure—O. 21, C. P. Code—Revenue Manual, Ch, 40—Applicability.*

The rules in Ch. 40 of the Revenue Manual do not apply to the execution of Revenue Court decrees, because Ss. 68 and 72 of the C. P. Code do not apply to the Agra Tenancy Act, in view of List I of Schedule II of that Act. Such decrees of the Revenue Courts passed under the Act must be executed, therefore, in the manner laid down in O. 21, C. P. Code. (*Drake Brockman, S.M. and Knox, J.M.*) MUQADDAM ALI *v.* MAHERUDDHUJ SINGH. **1936 R.D. 197.**

——**Ss. 68 to 72 and O. 21**—*Applicability—Revenue Court—Decree by, under Agra Tenancy Act — Execution—Mode of — U. P. Revenue Manual, Ch 40—Application of.*

The rules in Ch. 40 of the Revenue Manual do not apply to the execution of decrees of Revenue Courts because Ss. 68 to 72, C. P. Code, have been specifically excluded by the Second Schedule to the Agra Tenancy Act. Decrees of the Revenue Courts passed under the Agra Tenancy Act must be executed in the manner laid down in O. 21, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) KALYAN SINGH *v.* BHAGWAN SINGH. **1937 R.D. 37.**

——**S. 68 and O. 21, R. 2**—*Collector executing decree—Adjustment of decree—Jurisdiction to record—Court or Collecter—Collector, if Court.*

The Collector executing a decree, which a Civil Court transferred to him under S. 68, C. P. Code, is not a Court; and he is not competent to entertain an application under O. 21, R. 2 to record adjustment of the decree. The application to record adjustment of the decree, in a case where the decree has been transferred to the Collector for execution, must be made to the Court which alone has jurisdiction, to recognize the adjustment, (*Broomfield and Wadia, JJ.*) SHANKAR ATMARAM *v.* KESHAV GOVIND. **60 Bom. 729=164 I.C. 9=9 R.B. 70=38 Bom.L.R. 505=A I.R. 1936 Bom. 277.**

——**Ss. 68 and O. 21, R. 2**—*Collector executing decree—Power to certify adjustment of decree—"Court."*

The Collector executing a decree transferred to him under S. 68, C. P. Code, is not a Court, and he has no power to certify an adjustment of the decree under O. 21, R. 2, C. P. Code. An adjustment recorded by the Collector during execution cannot consequently be treated as certification under O. 21, R. 2, C. P. Code. (*Stone, C.J. and Niyogi. J.*) RAGHOJI *v.* VITHOBA. **169 I.C. 110=9 R N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.**

——**Ss. 68 and 70**—*Collector proceeding—Relative powers of Collector and Civil Court.*

The transfer of the decree to the Collector does not oust the jurisdiction of the Civil Court in all matters A Collector ceases to have jurisdiction to sell or to confirm the sale after the Court passing the decree recalls it. Whether the Collector fails to comply with the Civil Court's order in disregard or in ignorance of it,

that order must prevail against anything done by the Collector subsequent to that order. The Collector's power to proceed with the case is suspended by virtue of any order of stay that might be passed by the Court passing the decree. A Civil Court's order comes into effect as soon as it is passed so as to suspend the Collector's power to proceed with the execution, irrespective of its being comunicated to the Collector. (*Niyogi, J.*) ZIBAL ISWARA *v.* MUKA. **1940 N.L.J. 473.**

——**S. 68**—Decree satisfied by sale of some of the villages under Collector's control—Mortgage of exempted villages without Collector's permission—Validity. *See* CIVIL PROCEDURE CODE, SCH, III, PARA 11 (1), AND S. 68. **1937 O.W.N. 784=A.I.R. 1937 Oudh 410.**

——**S. 68**—Decree transferred to Collector for execution — Decree-holder certifying payment through mistake or fraud of Judgment-debtor—Collector entering satisfaction—Jurisdiction of trial Court. *See* C. P. CODE, Ss. 47 AND 68. **167 I.C. 401=1937 O.W.N. 231.**

——**Ss. 68, 70 and O. 21, R. 72**—*Execution transferred to Collector—Judgment-debtor minor—Leave to bid—Grant of—By whom to be made—Civil Court or Collector.*

When execution proceedings are transferred to the Collector under S. 68, C. P. Code, for sale of immovable property, and the judgment-debtor is a minor, the Civil Court, and not the Collector, has the power to give permission to the decree-holder to bid at the sale, which is required under O. 21, R. 72. (*Beaumont, C.J. and Macklin, J.*) ZIPRU KRISHNA *v.* PANNALAL BAHIRUDAS. **60 Bom. 688=162 I.C. 806=8 R.B. 428=38 Bom. L.R. 276=A I.R. 1936 Bom. 189.**

——**S. 68**—*Mortgage decree—Mortgaged property ancestral—Transfer of execution proceedings to Collector—Duty of Court.*

Where the mortgaged property is ancestral, the Civil Court is bound under S. 68, C. P. Code, to transfer the proceedings in execution of the mortgage decree to the Collector. (*Srivastava and Nanavutty, JJ.*) BHOLA NATH *v.* MAHRANI KUAR. **162 I.C. 362=8 R O 364=1936 O.W.N. 489=1936 O.L.R. 242=A.I.R. 1936 Oudh 280.**

——**S. 68**—*Notification under, by Punjab Government—Notification No. 365-R (Revenue Department) dated 17th January, 1939—Land falling within its purview ordered to be sold—Execution of entire decree—If should be transferred to Collector.*

The executing Court does not become *functus officio* entirely after land covered by the notification is ordered to be sold. Hence, it is not necessary to transfer the execution of the decree as a whole to the Collector merely because some land falling within the purview of the notification had been ordered to be sold. However, as soon as any land falling within the purview of the notification is ordered to be sold, the execution of the decree so far as that land is concerned must be transferred to the Collector. (*Bhide, J.*) NARAIN DASS GULAB SINGH *v.* PATIALA DURBAR. **A.I.R. 1940 Lah. 345.**

——**S. 68**—*Notification under, by Punjab Government—Notification No. 365-R (Revenue Department) dated 17th January, 1939—Applicability—Pending execution proceedings.*

The Notification under S. 68, No. 365-R (Revenue Department), dated 17th January 1939 applies even to pending execution proceedings in which an order for sale of such land has been passed, provided, of course the sale had not been actually carried out before the notification. (*Bhide, J.*) NARAIN DASS GULAB SINGH *v.* PATIALA DURBAR. **A.I.R. 1940 Lah. 345.**

———**S. 68**—Order for sale and transfer of execution to Collector—Powers of Collector and Court. *See* C. P. CODE, SCH. III, PARA. 1. **38 Bom.L.R. 221.**

———**Ss. 68 and 70**—*Powers and duties of Collector—Sale by Collector — Debtor producing certificate from Debt Conciliation Board before Civil Court—Latter staying proceedings—Power of Court to confirm sale.*

The jurisdiction of the Collector, when executing a Civil Court decree under Ss. 68 and 70, C. P. Code, is derived from the Civil Court, and when that Court directs a stay of execution, the Collector is deprived of his jurisdiction to proceed further, and the order of stay can be avoided only by a reference to the Civil Court. It is not open to the Collector to proceed after the proceedings have been stayed by the Civil Court from which the decree was transferred for execution. Where, therefore, after a sale by the Collector but before its confirmation, the Civil Court, on production of a certificate from a Debt Conciliation Board under S. 21 of the C. P. Debt Conciliation Act, orders a stay, the Collector is bound to stay his hands and has no power to proceed to confirm the sale. (*Greenfield, F.C.*) GANPATRAO *v.* BALMUKUND. **20 N.L.J. 242.**

———**Ss. 68 and 72**—*Relative scope— Court's powers.*

S. 72 must be read as alternative to S. 68 and so read it only indicates the source of the authority of the Collector to exercise powers under Sch. III in local areas where the Local Government has not issued a notification under S. 68. The Civil Court has under S. 72 power to authorize the Collector exactly as the Local Government has it under S. 68. The Civil Court cannot under S. 72 exercise the powers of Collector under Sch. III due to the express provisions of Ss. 72 (2) and 70 (2), (*Niyogi, J.*) BALARAM MISRA *v.* MANOO SINGH. **I.L.R. (1937) Nag. 261=167 I. C. 807=9 R.N. 214=A I.R. 1937 Nag. 41.**

———**S. 68**—Sale by Collector—Insolvent judgment-debtor—*Locus standi* to appear and to be heard. *See* PROVINCIAL INSOLVENCY ACT, S. 28. **20 N.L.J. 179.**

———**S. 68**—Scope—If controls S. 45, Madras Court of Wards Act, *See* MADRAS COURT OF WARDS ACT, S. 45. **(1937) 2 M.L.J. 540.**

———**S 68**—*Scope—Status of judgment-debtor as agriculturist — Wh n to be considered—Material date—Compromise agreeing to give up plea as to status—Order for sale—Subsequent claim for transfer of proceedings to Collector—If barred—Duty of Court.*

Under S. 68, C. P. Code a Court is bound to transfer execution proceedings to the Collector if it finds that at the date of the order for sale the judgment-debtor or any one of several judgment-debtors (when there are more than one) is an agriculturist. The date at which the status of the debtor is to be considered is the date on which the order for sale is passed. If on a date prior to the order for sale the judgment-debtor agrees under a compromise to give up his contention regarding his status, he cannot be regarded as having waived his right to claim the transfer of the proceedings to the Collector, after the order for sale is passed, if he could prove that on the date of the order for sale he was an agriculturist. But if the judgment-debtor fails to put forward his contention that he is an agriculturist to claim transfer of proceedings to the Collector when he is given notice under O. 21, R. 66 for settlement of the terms of the proclamation, and the Court makes an order for sale and issue of proclamation, that order becomes binding on the judgment-debtor and conclusive unless he takes steps to appeal from that order and get it set aside. It is not open to him subsequently after the lapse of a long time to claim a transfer to the Collector. (*Lokur, J.*) MAHADEO SUNDER MEHTA *v.* KHANDERAO SITARAM **186 I.C. 61=12 R.B. 290=41 Bom. L.R. 1166=A.I.R. 1939 Bom. 526.**

———**S. 68**—Transfer to Collector for execution—Effect—Objection to sale—To which Court to be made. *See* C. P. CODE, SS. 47 AND 68—EXECUTING COURT. **1938 O W.N. 758.**

———**Ss. 68 and 70**—*U. P, Rules, R. 3—Execution of mortgage decree sent to Collector—Sale of property — Application by judgment-debtor to Court before confirmation under Agriculturists' Act—Order of Court staying sale proceedings—Confirmation of sale by Collector in contravention of order of Court—Legality.*

An application for execution of a mortgage decree for sale was sent to the Collector under S. 68, C.P. Code, the property being such as could be sold only by the Collector under that section. The Assistant Collector to whom the Collector delegated the power of sale held the sale, but before it was confirmed by the Collector, the judgment-debtor applied to the Court which passed the decree under S. 5 of the U. P. Agriculturists' Relief Act praying for reduction of interest and for an order for the payment of the decree amount in instalments and also for recall of the proceedings from the Collector. The Court thereupon sent an order to the Collector staying further proceedings for confirmation of the sale. The Collector, however, confirmed the sale in spite of the order either in disregard or in ignorance of that order.

Held, that the order for stay passed by the Court was in effect an order recalling the proceedings under R. 3 of the U. P. Government Rules in respect of sale of agricultural land by the Collector, and that the Collector on the making of that order ceased to have jurisdiction to sell or to confirm the sale already held. The order of confirmation of the sale consequently did not confer any right on the auction-purchaser. (*Niamatullah and Bennet, JJ.*) KADHEY MAL *v.* MURTAZA ALI. **I L.R. (1937) All. 766=1937 A. L.J. 723=1937 R.D. 365=171 I.C. 359=10 R.A. 256=1937 A.L.R. 825=1937 A.W.R. 608=A.I. R. 1937 All. 550.**

———**S 70**—*Duty and functions of Collector—Sale confirmed—Subsequent compromise between decree holder and judgment-debtor in face of appeal by latter—Procedure—Duty of Collector—Collector leaving judgment-debtor in possession and referring decree-holder to Civil Court—Propriety of—C. P. Revenue Book Circular, Vol, 2-III-8.*

The function of the Collector on receipt of a C Form issued by the Civil Court according to the rules prescribed under the C. P. Code and in the C. P. Revenue Book Circular, Vol. 2—III 8, is either to execute it by sale of the land attached or to realise the amount due under the decree by a lease or similar arrangement. It is beyond his function, when the sale is closed and the auction confirmed, to entertain a compromise relating to the sale. If after the confirmation of the sale and in face of an appeal to be filed by the judgment-debtor regarding the sale, the decree-holder and the judgment-debtor enter into a compromise the Collector must either give effect to the compromise or to give effect to the sale certificate issued by him and place the decree-holder in possession. He cannot leave the case incomplete, leave the judgment-debtor in possession and refer the decree-holder to the Civil Court to seek his remedy for the fulfilment of the compromise. (*Burton, R.M.*) Gangadhar Krishna Rao *v.* Anandrao. **20 N.L.J. 93.**

——**Ss. 70 and 9**—*Revenue Manual, Rr, 998 and 1011—Order of Commissioner setting aside sale on grounds not covered by rules—Jurisdiction of Civil Court.*

Where a decree is transferred to the Collector for execution under S. 68, C. P. Code, the jurisdiction of the Collector and the Commissioner to confirm or set aside a sale is restricted by Rr. 998 and 1011 of the Manual of the Revenue Department. If therefore the Commissioner in an appeal from the order of the Collector sets aside the sale on a ground which is not provided for by any of the rules, the order of the Commissioner is without jurisdiction and is subject to adjudication by the Civil Court under the general provisions of S. 9, C. P. Code. The cognizance of the suit by the Civil Court is not barred by Cl. 3 of R. 998. (*Thomas and Zia-ul-Hasan, JJ.*) Ram Chandra *v.* Makhdoom Singh. **172 I.C. 655=1938 O.L.R 21=1938 O.W.N. 40=1938 O.A. 26=10 R.O. 193=A.I.R. 1938 Oudh 62.**

——**S. 70**—*Sale by Collector—Acceptance of bid after receipt of order of High Court staying proceedings—Validity—Cancellation—Legality.*

Where a Collector accepted a bid after the receipt of the order of the High Court staying proceedings, the acceptance is in contravention of the order of stay and as such its cancellation is quite legal. (*Roughton, F.C.*) Seth Balkrishna *v.* Goverdhanlal. **1938 N.L.J. 120.**

——**S. 70 (1)**—*Rules framed under by C. P. Government R.* 11 (ii)—*Procedure to be followed after bid—Collector, if can ignore last bid and hold informal sale himself.*

Rule 11, Cl. (*ii*) of rules framed by the C. P. Government under S. 70 (1), C. P. Code, requires the Tahsildar who conducts the sale to adjourn it to the Collector before the final bill is accepted. It is meant to secure the approval of the Collector. It is meant to secure the approval of the Collector. But this does not authorise the Collector, when he does not accept the last bid, to hold an informal sale for the disposal of the property. If he wants to obtain fresh bids, the procedure laid down for holding sales ought to be followed. (*Burton, F.C.*) Narayan *v.* Keshaosa. **1938 N. L.J. 105.**

——**S. 70 (1)**—Rules framed under R. 13 (C P. Government)—Authority to refer to Civil Court Limits. *See* C. P. Code, S. 47—Question Relating to Satisfaction of Decree. **A.I.R. 1938 Nag. 49.**

——**S. 70 (c)**—*Rules framed under (C. P.)—R.* 16—*Scope and extent of power to revise.*

In respect of the execution of decrees transferred to the Collectors, the power to revise is vested in the Financial Commissioner's Court under R. 16 of the rules framed by the Governor in Council under S. 70, C. P. Code. It limits the power of revision to such matters as are provided for in S. 115, C. P. Code. (*Greenfield, F.C.*) Sitaram *v.* Ratanlal. **1938 N.L J. 262.**

——**S. 72**—*Applicability—Conditions of.*

The intervention of the Collector contemplated by S. 72 is a preliminary requisite to the application of that section. S. 72, however, can only be applied in cases where the land is saleable. Where the land is protected from sale by a special enactment, S. 72 can have no application. (*Middleton, J.C. and Almond, A.J.C.*) Jetha Nand *v.* Khuda Bakhsh. **161 I.C. 628=8 R. Pesh. 176=A.I.R. 1936 Pesh. 90.**

——**S. 72**—Applicability—Land prohibited from sale by S. 16 of Bundelkhand Land Alienation Act. *See* C. P. Code, S. 51 (*e*). **1938 A.L.J. 444 (F.B.).**

——**Ss. 72 and 73**—*Application by a decree-holder for temporary alienation of judgment-debtor's land, referred by Court to Collector—Another decree-holder applying to Court for rateable distribution in temporary alienation, before Collector made his proposal—Proper course to be adopted by Court.*

Where a decree-holder took out proceedings in execution of his decree and applied for a temporary alienation of the land of the judgment-debtor and the executing Court granted the application and referred the matter to the Collector for suggesting the period for which temporary alienation could be effected, and before the Collector made his proposal, another decree-holder took out proceedings in his own decree and applied under S. 73, C. P. Code, for "rateable distribution" in the temporary alienation, the proper course for the Court is to refer that application also to the Collector and to ask him to suggest a method of temporary alienation which will provide as far as possible for the satisfaction of both the decrees. An order sanctioning a temporary alienation of the judgment-debtor's land in favour of the former decree-holder alone in full satisfaction of his decree is erroneous and cannot be sustained. (*Tek Chand, J.*) Bhana Ram Hari Kishan *v.* Bhagwan Singh. **169 I. C. 511=10 R.L. 18**

——**Ss 72 and 36**—*Execution proceedings—Farming of land belonging to judgment-debtor—Power of Civil Court—Order making lease money payable in instalments—Enforceability.*

A Civil Court is competent in execution proceedings to grant a farm of the land of a judgment-debtor belonging to an agricultural tribe. If the Court in granting such a lease makes the lease money payable by instalments, it might be said that the Court has acted in an unwise or indiscreet manner by not demanding the entire lease money at once but it cannot be said that the Court has passed an order which it had no jurisdiction to pass. Such an order is not illegal or without jurisdiction to pass. Such an order is not illegal or without jurisdiction and the provisions of S, 36 apply to the case and the Court can enforce payment of the lease money by applying the provisions of the Code relating to execution of decrees. A.I.R. 1920 Lah. 456. Foll (*Addison and Abdul Rashid, JJ.*) PUNJAB NATIONAL BANK, AMRITSAR *v.* SHAMSHER SINGH **166 I.C. 391=9 R.L. 369=38 P.L.R. 936=A.I.R. 1936 Lah. 696.**

——S. 72—*Powers of Collector.*

The Collector has no authority to suggest satisfaction of the decree in part by transfer of certain debts from the judgment-debtors to the decree-holders, or that mortgagee rights should similarly be transferred to the decree-holder. He has also no right to compel the decree-holder himself to take the lands on lease at a valuation fixed by the Collector. (*Almond, A.J.C.*) MAKHAN SINGH *v.* ROSHAN LAL. **160 I.C. 571=8 R. Pesh. 121=A.I.R. 1936 Pesh. 14.**

——S. 72—*Scope—Lease of property for term of years in satisfaction of decree—Power of Court to authorise Collector to grant.*

S. 72, C. P. Code, clearly empowers the Court to authorize the Collector to grant a lease of the property for a term of years in full satisfaction of the decree. (*Sulaiman, C.J. and Bennet, J.*) BASORE SINGH *v.* SANT KUMAR. **1937 A.W.R. 686=1937 A.L.J. 801=1937 A.L.R. 905=10 R. A. 338=171 I.C. 903=1937 R.D. 422=A.I.R. 1937 All. 699.**

——S. 72—Scope and effect of—Powers of Court—S. 68. *See* C. P. CODE, Ss. 68 AND 72. **A. I.R. 1937 Nag. 41.**

——S. 73.

Agreement.
Appeal.
Applicability.
Assets.
Charge.
Costs of realization.
Crown debts.
Order under if judicial.
Receipt of assets.
Right under.
Same judgment-debtor.

——S. 73—*Agreement—Construction— Money decree-holder and mortgage decree-holder agreeing to sale in execution of money decree and to rateable distribution at the time of sale—Rights of mortgage decree-holder.*

There were three decrees against the same judgment-debtors, one, a simple money decree and the other two, decrees for sale based on mortgage. In the course of execution proceedings, the money decree-holder and one of the mortgage decree-holders agreed as follows:—"Sale proceedings be carried out in the execution case of money decree-holder and in the remaining two executions, at the time when sale takes place, rateable distribution be made."

Held, that the reasonable interpretation to be placed upon the agreement was that when the sale took place in execution of the money decree, the mortgage decree-holder would be entitled to the same interest in the proceeds of the sale of the property mortgaged with him as he had in the property sold, in accordance with S. 73 (1) proviso (*b*), C. P. Code. (*Srivastava, Ag. C.J. and Smith, J.*) BRIJ MOHAN *v.* THE DEPUTY COMMISSIONER, PARTABGARH. **166 I.C. 714=9 R.O. 333 =1937 OW.N. 127=1937 O.L.R. 42=A.I.R. 1937 Oudh 270.**

——S. 73—*Appeal—Order between rival decree-holders.*

If an order is made under S. 73 it is an order in execution proceedings and not a decree, being between two rival decree holders and is therefore not appealable, the judgment-debtor being not concerned with the dispute. (*Ram Lall, J.*) FATEH DIN *v.* DIWAN CHAND. **181 I.C. 22=11 R.L. 761=A.I.R. 1938 Lah. 801.**

——S. 73—Applicability—Absence of application by decree-holder—Order for distribution—Legality. *See* C. P. CODE, O. 21, R. 48 AND Ss. 73 AND 151. **1940 Rang.L.R. 421.**

——S. 73 — Applicability — Application for execution "struck off" as infructuous, but attachment kept pending—If pending—Right of decree-holder to rateable distribution of assets received subsequently. *See* C. P. CODE, O. 21, R. 59. **I.L. R. (1938) Nag. 346.**

——S. 73—*Applicability—Attachment before judgment followed by decree under O. 12, R. 6—Court calling for amount from custody Court to pay same to decree-holder—Subsequent suit and attachment before judgment of same amount by another creditor—Decree—Application by latter for payment—Relative rights—First decree-holder —If solely entitled by reason of assignment or charge in his favour.*

In a suit for recovery of Rs. 451, from the defendant, the plaintiff *A*, applied for attachment before judgment of a sum of Rs. 1,000 lying to the credit of the defendant in a Magistrate's Court, being the amount awarded to him out of the fine imposed on an accused in a defamation case instituted by the defendant. The suit was fixed for 18-12-1929, on which date the defendant through his Counsel admitted the claim of the plaintiff and stated that the sum of Rs 451 might be sent for out of the amount of Rs. 1,000 attached by the plaintiff and paid to the plaintiff in satisfaction of the decree passed or to be passed that day. The Court recorded an order, that same day, under O. 12, R. 6, C. P. Code, decreeing the claim and requisitioning the amount of Rs. 451 from the Magistrate's Court for payment to the plaintiff *A*. The requisition was sent but the money was not however received before 30-1-1930. In the meantime another creditor of the same defendant, *B*, sued the defendant for recovery of Rs. 1010, on 20-12-1929, and obtained an order for attachment of the very same Rs. 1,000 lying to the credit of the defendant in the Magistrate's Court, *B's* suit was eventually decreed, and he applied for execution of the decree and claimed payment of the amount of Rs. 451, held by the Court, but *A* objected to the payment of Rs. 451, which, he claimed, belonged solely to him.

Held, that *A* acquired an absolute interest to the sum of Rs. 451, which was requisitioned from the Court of the Magistrate on 18-12-1929, and that the second creditor *B* did not acquire any interest by taking out an attachment under a subsequent order after the defendant-debtor ceased to have any interest left in that amount. S. 73, C. P. Code, did not apply and there could be no rateable distribution of the amount.

Per *Niamatullah, J.*—Though the attachment before judgment would not create any interest in favour of the attaching creditor, the declaration of the defendant made on 18-12-1929 and given effect to by the Court attaching the amount amounted to an assignment of the said amount of Rs. 451 in favour of creditor *A*, the validity of which was in no way affected under S. 64, C. P. Code, by reason of the pendency of his own attachment; and the assignment having been in satisfaction of the suit claim, and requiring, as it did, no particular form or words, conferred an absolute right on *A*. Even if the declaration of the defendant be held not to amount to a legal assignment, *A* certainly acquired a charge which give him the same right at law.

Per *Sulaiman, C.J.*—An oral assignment of a debt was legally valid. Though it might be difficult to hold that there was an out and out assignment, the intention of the judgment-debtor was to give the sum to his creditor *A*, who was consequently entitled to the payment of it as against *B*. (*Sulaiman, C.J. and Niamatullah, J.*) Ram Govind Pandey *v.* Brij Ratan Das. **169 I.C. 836=1937 A.L.R. 594=10 R.A. 74=1937 A.L.J. 348=1937 A.W.R. 284=A.I.R. 1937 All. 424.**

——**S. 73 and O. 21, R. 18**—*Applicability and relative scope—Attachment of decree—Judgment-debtor under attached decree holding cross-decree against holder of such decree—Set-off—Procedure.*

S. 73, C. P. Code, which in general provides for rateable distribution between a number of decree-holders only applies when two or more decree-holders execute their decrees against other properties of the judgment-debtor; but when a decree-holder desires to execute his decree by attaching in execution a decree obtained by his judgment-debtor against another person, and that other person has a cross-decree against the holder of the attached decree, the provisions of O. 21, R. 18, come into play and a set-off has to be allowed. S. 73 does not come into play in such a case. (*Bennet, J.*) Girdhar Das *v.* Triloki Nath. **174 I.C. 53=1938 A.L.R. 224=10 R.A. 536=1938 A.W.R. (H.C.) 3=1937 A.L.J. 1371=A.I.R. 1938 All. 130.**

——**S. 73**—*Applicability—Attachment of same decree for money by several decree-holders—Attachment effected prior to deposit of money under attached decree—Right of rateable distribution—O. 21, R. 53 (2)—Effect.*

If more persons than one holding a decree against the same judgment-debtor attach one and the same decree obtained by the judgment-debtor against another before the money due under the attached decree is deposited in Court by the judgment-debtor of the attached decree, *i.e.*, before the assets are paid into Court, the provisions of S. 73, C. P. Code, are attracted, and the assets after the deduction of the costs of realisation are to be rateably distributed among the several decree-holders. The decree-holder who starts the first execution cannot claim the benefit of the entire amount deposited by reason of O. 21, R. 53 (2), which rule contemplates only cases where a decree for money is attached by a sole decree-holder. (*Nasim Ali and Edgley, JJ.*) Jagabandhu Roy *v.* Jagabandhu Saha Sardar. **40 C.W.N. 1249.**

——S. 73—Applicability—Attachment under prior decree—Later decree against same decree-holder and attachment of same property—Sale under later decree—Procedure—Duty of Court to rateably distribute assets—Executing Court allowing later decree-holder to set-off sale price —Propriety—Effect on sale. *See* C. P. Code, O. 21, Rr. 72 and 90. **17 Pat.L.T. 847.**

——**S. 73**—*Applicability—"Before the receipt of such assets"—Effect on—Application for rateable distribution on same day as deposit of sale proceeds—Sufficiency.*

Before rateable distribution can be ordered to an applicant it must be found as a fact whether the application was made before or after the deposit of sale proceeds. It is not enough if the application is made on the same day as when the sale proceeds are deposited into Court. It cannot be assumed from that that the application was made prior to the deposit. (*Venkataramana Rao, J.*) Ramayya *v.* Rangaraju. **1937 M.W.N 239=45 L.W. 501=170 I.C. 883=10 R.M. 253=A.I.R. 1937 Mad. 504=(1938) 1 M.L.J. 325.**

——**S. 73**—*Applicability — Conditions—Execution application—If must be pending on date of rateable distribution.*

Where persons holding decrees against the same judgment debtor have applied for execution and for rateable distribution prior to the receipt of assets by the Court executing the decree, S. 73 is complied with, and it becomes the duty of the executing Court to see that rateable distribution of the assets is effected. The fact that the execution applications of some of the applicants for rateable distribution are dismissed for default later, *i.e.*, before the rateable distribution is actually effected is immaterial and does not deprive them of their right to such distribution. (*Khaja Mohammad Noor and Madan, JJ.*) Bimala Nanda Tarakatirtha *v.* Dhirendra Nath Chandra. **167 I.C. 613=9 R.P. 418=3 B.R. 307=17 Pat.L.T. 855=A.I.R. 1937 Pat. 92.**

——S. 73 — Applicability — Cross-decrees—Executability of smaller decree in the presence of larger decree. *See* C. P. Code, O. 21, R. 18. **1937 A.W.R. 441=A.I.R. 1937 All. 422.**

—— **S. 73**—*Applicability—Decree against Hindu co-parcener—Attachment of undivided share—Death of co-parcener—Sale of share in execution after death—Application for rateable distribution by other decree-holders without prior attachment of share of co-parcener—Maintainability.*

Where a creditor has obtained a decree against a Hindu co-parcener and attached his undivided interest in the joint family property during his lifetime, and the undivided interest is sold in execution after the death of the co-parcener-judgment debtor, other creditors who have obtained decrees against the same co-parcener but have not obtained attachment of the undivided interest during his life time cannot claim rateable distribution under S. 73, C. P. Code, from out of the sale proceeds. The assets realised by the sale are liable to rateable distribution only among such creditors as have attached the co-parcener's share during his lifetime in execution of their decrees against him. (*Divatia, J.*) Urban Co-operative Bank, Ltd. *v.* Honavar Havik Co-operative Bank, Ltd. **I.L.R. (1940)**

Bom. 146=188 I.C. 433=13 R.B. 9=42 Bom.L R. 218=A.I.R. 1940 Bom. 190.

———S. 73—*Applicability—Decree against Hindu father preceded by attachment of entire joint family property—Subsequent insolvency of father—Subsequent suit against father and sons with leave of Insolvency Court—Attachment of sons' shares—Decree—Execution—Sale of sons' shares—Application by prior decree-holder for execution sale of entire family property and application for rateable distribution—Maintainability—Effect of insolvency.*

S, a Hindu and his three sons constituted an undivided Hindu family. The respondent sued *S* alone, got an attachment before judgment of all the joint family properties of *S* and his sons and in due course got a decree on 12—7—1933. In November 1933, *S* was adjudicated an insolvent. Subsequently the petitioner with the leave of the Insolvency Court sued both *S* and his sons, got an attachment before judgment of the shares of *S's* sons in the joint family property on 4—2—1933 and in due course got a decree as sued for on 21—3—1934. On 31—7—1934 he applied to execute his decree by sale of the son's shares and the sale proceeds were realised and deposited in Court on 19—4—1935. Meanwhile the respondent applied on 13—3—1935 to execute his decree by sale of the entire family properties which he had attached before judgment, and applied for rateable distribution from out of the assets realised in the execution sale held under the decree of the petitioner.

Held, that though the respondent might not be entitled to sell the interest of *S* without leave of the Insolvency Court, he could sell the shares of his sons, which could not be regarded as the property of *S*, and the Official Receiver could not sell the shares of the sons because of the attachment before judgment. The fact that the respondent prayed for attachment and sale of the entire family properties did not take away his right to sell the son's shares, and he was therefore entitled to rateable distribution, the decrees being in law against the same judgment-debtor. (*Venkataramana Rao, J.*) PALANIAPPA CHETTIAR *v.* PALANI GOUNDAN. **165 I.C. 664 (2)=1936 M.W.N. 1142=9 R.M. 286=44 L.W. 615=A.I.R. 1936 Mad. 948=71 M.L.J. 541.**

———**S.** 73 — *Applicability — Decree of Small Cause Court—Execution—Court of Small Causes attaching salary of judgment-debtor and realizing money—Other decree-holders subsequently applying to High Court for execution—Attachment of salary—Garnishee sending monthly instalment to High Court—Former decree-holder applying to High Court for rateable distribution—Right of.*

Certain decree-holders applied for execution of decree in a Court of Small Causes, their decrees being of that Court. The Small Cause Court attached the salary of the judgment-debtor and money was actually being realized by the Court. Subsequently other decree-holders holding decrees against the same judgment-debtor, having applied to the High Court for execution by attachment of the salary of the judgment-debtor, the garnishees began to send the monthly instalments to the High Court and discontinued sending instalments to the Small Cause Court. Thereupon the decree-holders executing their decrees in the Court of Small Causes filed their application for execution in the High Court. It was contended that they were not entitled to rateable distribution with regard to money received prior to their applications being received in the High Court.

Held, that the decree-holders were entitled to rateable distribution along with other decree-holders in all the money received in the High Court by attachment of the salary of the judgment-debtor. (*Lobo, J.*) HINDU CO-OPERATIVE BANK *v.* MAHADEO KALIANJI. **177 I.C. 195=11 R.S. 51=A.I.R. 1938 Sind 175.**

———**S.** 73—Applicability — Distribution of attachable portion of salary of judgment-debtor—Decrees in suits before 1st June, 1937 and after. *See* C. P. CODE, S 60 (1) (*i*) AND S. 73. **1939 A. M.L.J. 157.**

———**S.** 73—*Applicability—Execution application—Court granting time to judgment-debtor and dismissing petition—If a judicial termination of the application—Application, if pending and entitles decree-holder to claim rateable distribution.*

Where in pursuance of an execution application the judgment-debtor is arrested and brought to Court, but is released at his request for the grant of time to pay off the decree amount on furnishing security, a formal order dismissing the execution petition cannot be taken to be a judicial order legally or validly disposing of the execution application, but has to be regarded only as an order for administrative or statistical purposes. The execution application must therefore be deemed to be still pending for purposes of S. 73, C. P. Code, in spite of the grant of time to the judgment-debtor and in spite of the dismissal orders. The decree holder would therefore be entitled to claim rateable distribution on the basis of that application in the case of a sale and realisation of assets at the instance of another decree-holder brought about subsequent to the dismissal. (*Pandrang Row, J.*) RAMANATHAN CHETTIAR *v* ALAGANAN CHETTIAR. **163 I.C. 209=8 R.M. 1117=1936 M.W.N. 223=43 L.W. 703=A.I.R. 1936 Mad. 437=70 M.L.J. 683.**

———**S.** 73—Applicability—Execution of award under Bombay Co-operative Societies Act—Right to rateable distribution. *See* BOMBAY CO-OPERATIVE SOCIETIES ACT, S. 59 (1) (*b*). **A.I.R. 1938 Sind 157.**

———**S.** 73—Applicability—If subject to S. 63. *See* C.P. CODE, SS. 63 AND 73. **40 C.W.N 1307.**

———**S.** 73—*Applicability—Pendency of execution application—If condition precedent—Dismissal of execution application but attachment kept alive—If sufficient.*

A Court has power to dismiss an execution application and to continue the attachment. Hence merely because the Court after dismissing the application, orders the attachment to continue, it cannot be said that the application is pending. The following order was passed on an application for execution : "Sale notice not served. Case struck off as wholly infructuous at the instance of the decree-holder. House shall remain under attachment for three months".

Held, that the application must be held to have been dismissed and not merely adjourned to a future date. Hence the application could not be deemed to be pending for purpose of claiming rateable distribution. (*Pollock, J.*) **GULABCHAND** *v.* DONGARMAL. **168 I.C. 475=9 R.N. 257 (1)=A.I.R. 1936 Nag. 277.**

——**S.** 73—*Applicability — Sale by Collector during Civil Court vacation—Application to Court after re-opening—Right to rateable distribution.*

In execution of the decree of *A*, property was sold by the Collector during Civil Court vacation. On the reopening day of the Court one *B*, who had a decree against the same judgment-debtor, applied for rateable distribution with *A*. It was contended on behalf of *A* that as the assets were already realized during the vacation and as *B's* application was not made before the realization of the assets, it was not maintainable. On behalf of *B* it was contended that the application for execution filed by *B* when the Civil Courts reopened, must be deemed to have been filed before the realization of assets in the vacation. For this reliance was placed on S. 10, General Clauses Act,

Held, that there was no prescription of a certain day or a certain period. All that S. 73 prescribes is that there must be an application for execution before the assets are received. Hence S. 10, General Clauses Act, will not help *B*, nor will any section of the Limitation Act as no question of limitation was involved; the assets having been received prior to the application made by *B*, *B* was not entitled to rateable distribution. (*Pollock, J.*) NARHAR GOPAL KOMTI *v.* LAHANU PUNJAJI BHOI. **I.L.R. (1937) Nag. 420=9 R.N. 237 (2)=168 I.C. 158=A.I.R. 1937 Nag. 16.**

——**S.** 73—*Applicability—Subsisting execution application at time of receipt of assets—If necessary.*

The meaning of S. 73 must be that there should be a subsisting application for execution at the time when the assets are received. (*Pollock, J.*) NARHAR GOPAL KOMTI *v.* LAHANU PUNJAJI BHOI. **I.L.R. (1937) Nag. 420=9 R N. 237 (2)=168 I.C. 158=A I.R. 1937 Nag 16.**

——**S. 73 and 115 and O. 22, Rr. 8 and 12 and Provincial Insolvency Act, S. 28**—*Application for rateable distribution of assets—Maintainability—Interference in revision when other remedies open—Jurisdiction.*

Where an insolvent after adjudication and before discharge presented an application for rateable distribution in execution of a decree obtained by him prior to the insolvency, on the question as to the maintainability of the application by him.

Held, that the application was competent. 68 M.L.J. 392, Foll.

Held, also that a revision lay to the High Court. 49 M.L.J. 753; 19 M.L.J. 307: 32 Mad. 334, Ref. (*Abdur Rahman, J.*) SANKARANARAYANA AIYAR *v.* YEGNALAKSHMI AMMAL. **183 I.C. 576=12 R M. 332=48 L.W. 807=1938 M.W.N. 1247=A.I.R. 1939 Mad. 196=(1938) 2 M.L.J. 1001.**

——**S.** 73—*Assets—Amount deposited by judgment-debtor under O. 21, R. 89—Liability to rateable distribution.*

Obiter.—A deposit made by a judgment-debtor for the purpose of setting aside an execution sale under O. 21, R. 89, C. P. Code, is an asset liable to rateable distribution under S. 73, C. P. Code, 40 C. 619, Doubted. (*S. K. Ghose and Edgley, JJ.*) CHITTAGONG URBAN CO-OPERATIVE BANK, LTD. *v.* THE INDI BURMA TRADES BANK, LTD. **176 I C. 607=11 R.C. 132=42 C.W.N. 840=A.I.R. 1938 Cal. 521.**

——**S.** 73—*"Assets"—Meaning of—If confined to those realised by sale or otherwise in execution of decree.*

The word "assets" in S. 73 is not confined to those only which were realised 'by sale or otherwise in execution of a decree". Money realised by sale of attached property for arrears of revenue is available for rateable distribution, Where a decree-holder attaches property in execution of his decree but part of attached property is sold for arrears of revenue and the amount realised by such sale, over and above the arrears due, is attached by another decree-holder, the decree-holder attaching the property can follow the money realised by sale as the attachment of the property by him continues and fastens itself on to the money in spite of sale. Such decree-holder can therefore apply for rateable distribution in the money realised by sale. (*Bose, J.*) ZUMBERLAL CHHOTELAL *v.* SITARAM. **I.L.R. (1937) Nag. 219=171 I.C. 371=10 R.N. 109=A.I.R. 1937 Nag. 80.**

——**S.** 73—*"Assets"—Money paid by judgment-debtor for specific purpose of payment to particular decree-holder—Liability to distribution.*

Where a judgment-debtor pays an amount into Court for a specific purpose, *e.g.*, for payment to a particular decree-holder for the purpose of postponing an execution sale, that cannot be regarded as assets held by the Court liable to rateable distribution under S. 73, C. P. Code. (*Lokur, J.*) NINGAPPA *v.* ADIVEPPA. **186 I.C. 372=12 R.B. 324=41 Bom.L.R. 997=A.I.R. 1939 Bom. 468.**

——**S.** 73——*"Assets"—Preliminary mortgage decree obtained by judgment-debtor—Attachment by holder of money decree—Attaching decree-holder obtaining final decree for sale and bringing properties for sale—Sale proceeds—If assets available for distribution—Right of rival money decree-holder against mortgagee (judgment-debtor) to rateable distribution.*

A preliminary mortgage decree obtained by a person is his asset or property; if the holder of a money decree against such person attaches the preliminary decree and is allowed to proceed on the mortgage action, and in due course obtains a final decree for sale and brings the mortgaged properties to sale in execution of the final decree as attaching decree-holder, another money-decree-holder of the judgment debtor (mortgageee holder) can claim and is entitled to rateable distribution under S. 73, C. P. Code, from out of the sale proceeds. The method by which the attaching decree-holder comes to execute the mortgage decree of his judgment-debtor is only a method of procedure. The decree is an asset of the judgment-debtor and its money equivalent after the various processes of the Court have been resorted to, would also amount to assets which would still remain the property of the judgment-debtor available for distribution among the holders of decrees against that same judgment-debtor. (*Wort and Varma, JJ.*) DEBI BUX *v.* RAMESHWAR PRASAD NARAIN SINGH. **172 I.C. 195=1937 P.W.N. 823=10 R.P. 305=18 Pat.L.T. 817=A.I.R. 1937 Pat. 651.**

——S. 73—*"Assets held by a Court"—Meaning of—Money deposited in Court by surety for judgment-debtor by way of security in respect of stay of execution of* ex parte *decree*—Ex parte *decree set aside—Fresh decree passed after re-trial—Application for execution—Right of other decree-holders to rateable distribution—Order of rateable distribution—Appeal—S.* 47.

S. 73, C.P. Code, does not apply to monies paid into Court in a suit when no question of execution arises. The expression "assets held by a Court" in the section means assets received in execution; and when the assets have been paid in for a specific purpose, they cannot be applied generally in exection so as to defeat the specific purpose. If a Court receives money on terms that it is to be applied for payment of the debt of *A*, it is clear that it cannot apply the money in payment of the debt of *B*. The Court cannot commit what would be in substance a breach of trust. The plaintiffs who held an *ex parte* decree against the defendant applied to execute it. The defendant asked for a stay of execution and the Court granted a stay on condition that he gave security. The defendant produced a surety who executed a surety bond for a sum of Rs. 3,400, agreeing that the defendant should submit to and discharge his liabilities on the decree or order which decree or order would be passed. He also undertook that if the defendant failed to act accordingly the surety could himself pay into Court the sum of Rs. 3,400. The *ex parte* decree was subsequently set aside, but on re-trial the Court passed a decree in favour of the plaintiffs. On an application by the latter for execution the surety deposited the sum of Rs. 3,400 into Court. Two other persons who had obtained decrees against the same defendants in other suits long after the stay of execution in respect of the plaintiff's decree applied for rateable distribution out of the sum of Rs. 3,400.

Held, that the Court having received the amount on terms that the Court should apply it in payment of the plaintiff's debt, should not now apply the same in payment of somebody else's debt as well as the plaintiff's debt, and the amount of Rs. 3,400 deposited by the surety was not therefore assets subject to rateable distribution.

Held further, that the question involved affected not only the creditors *inter se* but affected the surety to a considerable extent and the judgment-debtor to a lesser extent, and an appeal therefore lay under S. 47. C. P. Code, read with S. 145, C.P. Code. (*Beaumont, C.J. and Sen, J.*) Lalchand Radhakisan *v.* Ramdayal Ramnarayan,. **I L.R. (1939) Bom. 133=181 I.C. 246=11 R.B. 331=41 Bom.L.R. 176=A.I.R. 1939 Bom. 112.**

——S. 73—*"Assets held by a Court"—Money paid under O. 21, R. 55—Liability to rateable distribution.*

Under S. 73, C. P. Code, rateable distribution is not confined to cases where the assets are realised by sale or by some other process of execution. The words of the section are wide enough to cover not only the money which the judgment-debtor is compelled to pay, but also money voluntarily paid into Court by him to satisfy a decree under execution. The expression "assets held by a Court" obviously mean any fund in possession of a Court or its disposal which may be applied by it for the payment of a judgment-debtor's debt. Money paid by a judgment-debtor under O. 21, R. 55, C. P. Code, though made for the satisfaction of a particular debt, is subject to rateable distribution under S. 73, where there are several decree-holders and when all the requirements of S. 73 are complied with, O. 21, R. 55 must be read subject to S. 73, and the judgment-debor cannot prevent rateable distribution by merely earmarking his payment for the benefit of one of the decree-holders. The assets are distributable by operation of law and there is nothing in law which would compel the Court to deal with them according to the wishes of the judgment-debtor. (*Fazl Ali and Manohar Lall, JJ.*) Satnarain Prasad *v.* Mahabir Prasad Chowdhury. **18 Pat. 404=183 I.C. 409=5 B.R. 914=11 R.P. 137=1939 P.W.N. 242=20 P.L.T. 646=A.I,R. 1939 Pat. 392.**

——S. 73—*Assets held by the 'Court'—Moneys received by Collector executing decrees sent to him for execution.*

Even though the Collector to whom the decree is transferred for further execution. by a Civil Court, is not a Court, still in view of the duties of the Collector in this matter, though he is not an agent of such Court. the moneys received by him in execution of such decree are moneys received by him for and on behalf of such Court. The moneys so received, while they are in his hands, are "assets" held by such Civil Court. (*Stone, C.J.*) Jayanarayan *v.* Dhanraj. **I.L.R. (1939) Nag. 285=173 I.C. 98=10 R.N. 276=A I.R. 1938 Nag. 14.**

——Ss. 73 and 115—*Assets held by the Court—Sum brought into Court by attachment in execution by one of the decree-holders—Another decree-holder who had applied to execute, if entitled to rateable distribution—Refusal to order—If failure to exercise jurisdiction.*

Where a decree-holder by attachment in execution of his decree brings into Court a sum of money, and another decree-holder who had already put in his execution application, seeks to obtain rateable distribution, a refusal to so rateably distribute the sum is a failure to exercise a jurisdiction, for the sum is an asset in the hands of the Court and the other requisite is also present, and hence should be set aside. (*Wort, A.C.J. and Manohar Lall, J.*) Jagdeo Sahu *v.* Bhimraj Bansidhar. **177 I.C. 269=4 B.R. 803=11 R.P. 138.**

——S. 73 and O. 21, R. 48—*Attachment of salary—Rateable distribution—If applies.*

The rule relating to rateable distribution applies to attachment of salary. No inference can be drawn from O. 21, R. 48, C.P. Code, to the effect that the intention was to make an exception from that rule. Further O. 21, R. 48 cannot override the substantive provision in the earlier portion of the Code, S. 73. (*Ameer Ali, J.*) Hongkong and Shanghai Banking Corporation *v.* Paresh Lal Roy. **I.L R. (1939) 1 Cal. 40=183 I.C. 444=12 R.C. 158=43 C.W.N. 169=A.I. R. 1939 Cal. 485.**

——S. 73—*Charge—Immovable property given as security—Creation of charge on such property for decree-debt—Effect—Right of other decree-holders to rateable distribution out of sale proceeds.*

Where immovable property is given as security and a charge is created on it in favour of the decree-holder concerned, the effect of that is something more than attachment; it makes the property and sale-proceeds applicable solely in discharge of the particular judgment-debt in question, and the sale proceeds are not liable to rateable distribution among other judgment-creditors. (*Mockett and Horwill, JJ.*) KRISHNAMURTHY AYYAR *v.* MUNISWAMI. **170 I.C. 15=10 R.M. 189=1937 M.W.N. 206=45 L W. 432=A.I.R. 1937 Mad. 531.**

——**S.** 73—*Compliance with—Requisites—Application for rateable distribution—Necessity.*

S. 73, C.P. Code, only requires that applications for execution should have been made to the Court. The Code does not provide for an application for rateable distribution. The duty of distribution is cast on the Court whenever more persons than one have applied for execution of decrees passed against the same judgment-debtor. The fact that a decree-holder claims payment of the whole amount to himself cannot deprive him of his right to a share, if that is all that he is entitled to under the law. (*Varadachariar and Mockett, JJ.*) SOMASUNDARAM CHETTIAR *v.* ALAMELU ACHI. **1937 M.W.N. 480.**

——**S.** 73—*Construction — 'Decrees passed against the same judgment-debtor'—Separate decrees against father and sons, but executable against same estate.*

The language of S. 73 (1), C. P. Code, is clear and unambiguous and as it stands it is not possible to hold that a decree obtained against a father and a decree obtained after his death against his sons upon a promissory note executed by them in respect to a debt of their father are 'decrees passed against the same judgment-debtor' within the meaning of the section, though both the decrees are executable against the same estate. (*Collister, J.*) LAL SINGH NAYAL *v.* JIWA NAND. **184 I.C. 589=12 R.A. 253=1939 A.W.R. (H.C.) 427=A.I.R. 1939 All. 545.**

——**S.** 73—*Costs of realization—Goods attached by creditors remaining in possession of Nazir in premises occupied by judgment-debtor as lessee—Landlord's right to rent during period of occupation as costs of relization.*

Where goods of a judgment-debtor attached by creditors remain in the possession of the Nazir in premises occupied by the judgment-debtor as lessee, and the lease is not terminated after the atachment, there is no privity between the Nazir and the landlord. But the landlord is entitled to claim the rent for the period during which the attached goods were kept in the premises as part of the costs of realization to be deducted from the sale proceeds before distribution to the creditors under S. 73. (*Tyabji, J.*) NUSSERWANJI & Co. *v.* ROYAL TOYLAND. **187 I.C. 55=12 R.S. 217=A.I.R. 1940 Sind 17.**

——**S.** 73—*Crown debts—Priority—Claim to attached property by Collector acting under S.* 46 (2), *Income-tax Act, and under S.* 45, *Lower Burma Land and Revenue Act.*

It is a rule of law that Crown has priority over unsecured creditors in the payment of debts. The powers given to the Collector on behalf of the Crown under the Income-tax Act, S. 46 (2) and the Lower Burma Land and Revenue Act, S. 45, are sufficient to accomplish the purpose of the rule. So the Court holding the assets is bound to recognize the claim of the Collector acting under those sections. The claim cannot be deemed to fall under S. 73, C. P. Code. S. 73 applies only to Civil Courts and although the Collector is empowered in respect of recovery of arrears of income-tax to exercise all the powers conferred on a Court executing a decree, he does not thereby become a Civil Court. There can be no rateable distribution between decree-holders who come within the scope of S 73 and the Collector. (*Mya Bu and Mackney, JJ.*) SECRETARY OF STATE *v.* MA NYEIN ME. **1937 Rang.L.R. 344=172 I.C. 422=10 R.R. 248=A.I.R. 1937 Rang. 380.**

——**Ss. 73 and 63**—Decree-holder seeking rateable distribution—If must apply to Court where realization of assets takes place. *See* C. P. CODE, Ss. 63 AND 73. **1937 O.W.N. 1040.**

——**S. 73 and Companies Act, S. 186**—*'Decree' in S. 73, C. P. Code, if includes order under S.* 186, *Companies Act.*

An order passed under S. 186 of the Companies Act cannot be deemed to be a decree within the meaning of that word in S. 73, C. P. Code. Any person in whose favour such an order has been passed, cannot claim rateable distribution. (*Zia-ul-Hasan and Yorke, JJ.*) LYALLPUR BANK, LTD. *v.* RAMJI DAS. **15 Luck. 332=12 R.O. 270=185 I.C. 889=1940 O.A. 132=1940 A.W.R. (C.C.) 63=1940 O.L.R. 75=1940 O.W.N. 132=A.I.R. 1940 Oudh 237.**

——**S.** 73—*Executing Court—Powers.*

In a case where a decree shows on the face of it that the judgment-debtor is an 'agriculturist' or it may be, if the decree shows on the face of it that it is time barred, the executing Court can refuse to allow rateable distribution. (*Beaumont, C.J.*) KRISHNAJI VISHNU *v.* VISHNU PANDHARINATH. **I.L.R. (1938) Bom. 98=173 I.C. 561=10 R.B. 362=39 Bom.L.R 1212=A.I.R. 1938 Bom. 90.**

——**S.** 73—*Jurisdiction under—Court holding assets—If bound to transfer same to another Court.*

Under S. 73, C. P. Code, it is the Court which holds the assets that can distribute them rateably. That Court is not bound to transfer the darkhast pending before it to another Court at its bidding. (*Lokur, J.*) NINGAPPA *v.* ADIVEPPA. **186 I.C. 372=12 R.B. 324=41 Bom.L.R. 997=A.I.R. 1939 Bom. 468.**

——**S. 73 and 47**—*Order refusing prayer for rateable distribution—Appeal.*

An order refusing a prayer for rateable distribution is one under S. 73 and not under S. 47, C.P. Code; sub-S. (2) of S. 73 gives the aggrieved party a right to bring a regular suit. No appeal is allowed from such order. (*Tek Chand, J.*) MAHBOOB HUSSAIN SHAH *v.* PUNJAB NATIONAL BANK, LTD. **176 I.C. 459=11 R.L. 219=40 P.L.R. 49=A.I.R. 1938 Lah. 307.**

——**S.** 73—*Order under—If judicial or administrative.*

An order under S. 73, C. P. Code, is a judicial and not an administrative order. (*Zia-ul-Hasan and Yorke, JJ.*) LYALLPUR BANK, LTD. *v.* RAMJI. **15 Luck. 332=12 R.O. 270=185 I.C. 889=1940 O.A. 132=1940 A.W.R. (C.C.) 63=1940 O.L.R. 75=1940 O.W.N. 132=A.I.R. 1940 Oudh 237.**

———**S. 73**—Procedure—Application for execution—Necessity—Attachment by Munsiff's Court and Sub-Court—Realisation by Sub-Court—Munsiff's Court decree-holder, if should follow procedure laid down by S. 73 (1). *See* C. P. CODE, Ss. 63 (1) AND 73 (1). **1938 A.W.R. (H.C.) 870.**

———**S. 73**—*Rateable distribution—Amount received by way of—Appropriation of—Right of decree-holder—Costs payable under decree—If reduced* pro tanto.

The holder of a decree who receives a sum of money by way of rateable distribution cannot appropriate that sum in any way he likes. It is because of the total of the decree debt, namely, the amount of the decree proper and the costs awarded, that he is able to get as much as he does get by way of rateable distribution. It would be clearly unequitable and unfair for him to claim after he has received the money that it must all go towards the satisfaction of the first item only. He must admit that what he has received goes towards the payment of every rupee of his debt if the entire decree amount be regarded as a single debt or equally towards the payment of both the debts contained in the decree if the decree amount proper and the costs are regarded as two debts. (*King, J.*) GOPALA RAO *v.* LAKSHMINARASAMMA. **I.L.R (1939) Mad. 301=181 I.C. 388=11 R.M. 804=50 L.W. 908=1938 M.W.N. 1210=A.I.R. 1939 Mad. 268=(1939) 1 M.L.J. 137.**

———**Ss. 73 and 47**—*Rateable distribution—Appeal—Question as to* locus standi *of decree holder's agent.*

Where the question of rateable distribution is solely between the two rival decree-holders, the decision of that question is purely one under S. 73, C. P. Code, and no appeal having been allowed from an order under that section, the aggrieved person has no right to appeal. Of course S. 73 (2), C. P. Code, gives him a right of suit. But where the judgment-debtor is directly or indirectly interested in the order under S. 73, C.P. Code, it falls under S. 47, C. P. Code, as well and is therefore appealable. The question as to the *locus standi* of the agent of the decree-holder is one in which the judgment-debtor is pre-eminently interested and a decision on that question is no doubt one which will also have effect between the decree-holder and the judgment-debtor so far as the execution, discharge or satisfaction of the decree is concerned. Therefore an order of the execution Judge treating an execution application as *ultra vires* holding that the agent who filed it has no *locus standi* is appealable under S. 47. (*Almond, J.C. and Mir Ahmad, J.*) PUNJAB NATIONAL BANK LTD. *v.* HUKAM CHAND SHAH. **177 I.C. 872=11 R.Pesh. 39=A.I.R. 1938 Pesh. 63.**

———**S. 73 and O. 38, R. 11**—*Rateable distribution—Procedure — Application for execution—Necessity—Mere attachment before judgment and decree thereafter, not enough.*

Where a decree-holder had already obtained an attachment before judgment of certain money in the hands of a third person belonging to the judgment-debtor and had not taken any further step after obtaining his decree, but a later decree-holder against the same judgment-debtor, who had also attached, the same money, before judgment, applied after obtaining his decree to direct the said third person to pay the attached amount into Court and it was in fact so deposited, the former decree-holder, though he had obtained his decree earlier in point of time, is not entitled to rateable distribution out of the deposit in Court as he had not applied for execution of his decree, before the realisation of the assets. He could not invoke O. 38, R. 11 in his favour as it does not excuse an application for execution in any circumstances whatever. It only says that upon an application for execution re-attachment of the property need not be applied for if it has already been attached under that order. (*Sharpe, J.*) R. N. PANDAY *v.* MOHAMMAD KASIM KHAN. **1938 Rang.L.R. 565=179 I.C. 987=11 R R. 373=A.I.R. 1939 Rang. 20.**

———**S. 73**—*Rateable distribution—Right to—Crucial date—Dismissal of execution application after the receipt of assets—Right, if affected.*

The crucial date for determining the right for rateable distribution under S. 73, C. P. Code, is the date on which the assets are received. On this date all the decree-holders whose applications were pending for execution in the Court and who had not received satisfaction became entitled to share the assets rateably. Their right to share having accrued to them, it could not be lost by the mere fact that their application was dismissed in default later on. (*Puranik, J.*) BULAKHIDAS *v.* MURLIDHAR. **1940 N.L.J. 340.**

———**S. 73**—*Rateable distribution—Right to—Decree-holder purchaser allowed to set-off decretal amount against sale price—Court, if holds assets.*

Under O. 21, R. 72, C. P. Code, a decree-holder purchaser is allowed an indulgence of setting off the purchase price against the decree, but a purchaser who has obtained this indulgence cannot take advantage of it so far as it affects the rights of other creditors or to alter the substance of the transaction, the substance of the transaction being that the Court instead of actually taking and then giving back the money to the decree-holder makes a sort of debit and credit paper transaction. That being so, where the Court passes an order under O. 21, R. 72, it must be regarded as holding assets at that time available for rateable distribution and if it passes an order for rateable distribution, it can enforce that order by a summary process in execution. (*Bose, J.*) KESHEORAO *v.* MULCHAND. **I.L.R. (1937) Nag. 466=172 I.C. 370=10 R.N. 202=A.I.R. 1937 Nag 383.**

———**Ss. 73 and 145**—*Realisation from surety—Another decree-holder against same judgment-debtor—If can claim rateable distribution.*

Where there has been a realisation from the surety in respect of a decree, a different decree-holder as against same judgment-debtor, is not entitled to rateable distribution out of that realisation. (*Pollock, J.*) SAKHARAM *v.* MAHADEO. **186 I.C. 583=12 R.N. 229=1939 N.L.J. 534=A.I.R. 1940 Nag. 79.**

———**S. 73**—*Receipt of assets—Date of—Decree against father and son—Official Receiver directed to sell son's share also within time fixed—Failure to sell—Sale subsequently by receiver afterwards ratified by Court—Application by holder of decree for execution after receipt of money by receiver but before payment by him to Court—Right to rateable distribution.*

The petitioner, the 1st respondent and the 2nd respondent, were all holders of decrees against the 3rd respondent and his father who became an insolvent. The 1st respondent executed his decree on 15-10-1934 and on 5-1-1935, the Court ordered a sale of the entire properties of the father and the son. Subsequently at the instance of the Official Receiver who was impleaded, the Court on 13-2-1935 passed an order permitting the Official Receiver to sell the entire property within three months and to deposit into Court the share of the non-insolvent son, the 3rd respondent. The sale did not take place within the time fixed, and the executing Court was approached to withdraw the sale from the Official Receiver and to sell through Court. Pending correspondence on this proposal between the Court and the Official Receiver, the latter actually sold the property on 28-10-1935. The price was received by the Official Receiver in two instalments on 29-10-1935 and on 7-11-1935. Petitioner filed his execution petition on 30-11-1935, and the 2nd respondent filed his execution petition on 20-12-1935. No sale deed was drawn up until on 30-3-1936 the Official Receiver paid the son's share of the sale proceeds into Court, and on 8-4-1936 the sale was finally ratified by the Court,

Held, that for purposes of S. 73, C. P. Code, the date of receipt of the assets by the Court was not the date of receipt of the price by the Official Receiver as the agent of the Court, but the date on which the Official Receiver paid the son's share actually into Court. The sale by the receiver beyond the time fixed was unauthorised and irregular, as also the receipt by him of the sale proceeds, and the subsequent ratification by the Court could not transmute the unauthorised receipt of the money by the Official Receiver into a receipt by the Court. Therefore the petitioner and the 2nd respondent were entitled to rateable distribution as they had applied before the date of payment by the Official Receiver into Court, which must be held to be the date of receipt by the Court. (*Wadsworth, J.*) Annamalai Chettiar *v.* Vellayan Chettiar. **1940 M.W.N. 699=52 L.W. 191=(1940) 2 M.L.J. 23.**

——S. 73—*"Receipt of assets"—Date of—Purchase by decree-holder with right of set-off—Date of sale—If date of realisation — Rule in such cases.*

Whenever there is a pending application for execution, the applicant in which would be entitled to rateable distribution, there cannot be any receipt of assets or realisation of assets by the Court unless the decree-holder purchaser's rateable share (when the purchase is by him) is determined and the balance is deposited by him into Court. The rule under which, in an ordinary case, where no question of rateable distribution can arise and a set-off has been allowed to a decree-holder purchaser, the date of sale is to be regarded as the date of realisation of assets, cannot apply to a case where there is a valid claim to rateable distribution. There can be no set-off except subject to the right of rateable distribution and in such cases the assets cannot be deemed to have been realised by the Court till the amount has actually been deposited under orders of the Court. (*Pandrang Row, J.*) Ramanathan Chettiar *v.* Alaganan Chettiar. **163 I.C. 209=8 R.M. 1117=1936 M.W.N. 223=43 L.W. 703=A.I.R. 1936 Mad. 437=70 M.L.J. 683.**

——S. 73—*Receipt of assets—Date of—Purchase of property by decree-holder who sets off sale proceeds against his decree.*

Where a decree-holder purchases the property, brought to auction by himself, and, thereby sets off the proceeds of the sale against his decree, and particularly where he obtains an exemption from payment of 25 per cent., the assets are received by the Court within the meaning of S. 73, on the date on which the sale is confirmed, as it is on that date, the decree-holder should be supposed to have finally made the payment and to have been reimbursed in satisfaction of his decree. Consequently applications presented by other decree-holders before the date of the confirmation of the sale are within time and they are entitled to have a *pro rata* share in the sale proceeds of the property. (*Mir Ahmad, A.J.C.*) Makhan Singh *v.* Moti Ram. **164 I.C. 568=9 R. Pesh. 19=A.I.R. 1936 Pesh. 164.**

——S. 73—*Receipt of assets—Execution by Collector—Assets when realised.*

For purposes of rateable distribution of assets under S. 73, C. P. Code, in cases of execution by the Collector, the assets must be deemed to have been received by the Court on the date when they were received by the Collector. (*Pollock, J.*) Narhar Gopal Komti *v.* Lahanu Punjaji Bhoi. **I.L.R. (1937) Nag. 420=168 I.C. 158=9 R.N. 237 (2)=A.I.R. 1937 Nag. 16.**

——S. 73—*Right to apply—Holder of mortgage decree.*

A mortgage decree passed under the provisions of O. 34, which directs that the amount due to the decree-holder shall first be paid out of the sale-proceeds of the mortgaged property is not a personal decree at first instance even as regards costs and hence the holder of such a decree cannot claim rateable distribution. (*Bhide, J.*) Allahabad Bank, Ltd. *v.* Punjab National Bank. **42 P.L.R. 249=A.I.R. 1939 Lah. 303.**

——S. 73—*Right to rateable distribution—Applicant's decree describing judgment-debtor as 'Agriculturist'—Same judgment-debtor, held not an 'agriculturist' in opponent's decree—Realisation of assets in the latter by sale of immovable property—Applicant's right to rateable distribution in such assets—Dekkhan Agriculturists' Relief Act* (1879), *S.* 22.

Where there are two decrees against the same judgment-debtor, in one of which he is described as an 'agriculturist' while in the other he was held to be not an 'agriculturist' and where in execution of the latter decree, assets are realised by sale of the immovable property of the judgment-debtor, the former decree-holder is not entitled under S. 73 of the C. P. Code to rateable distribution out of such assets, for the reason that his decree cannot be executed against the immovable property of the judgment-debtor by virtue of S. 22 of the Dekkhan Agriculturists' Relief Act. (*Beaumont, C.J.*) Krishnaji Vishnu *v.* Vishnu Pandharinath. **I.L.R. (1938) Bom. 98=173 I.C. 561=10 R.B. 362=39 Bom.L.R. 1212=A.I.R. 1938 Bom. 90.**

——**Ss. 73 and 63**—*Right to rateable distribution—Attachment in Court of lower grade—*

Assets realised by Court of superior grade—Transfer of execution proceedings.

Where a decree-holder who has obtained a decree against the same judgment-debtor and attached the same property in a Court of lower grade has the execution proceedings transferred to the Court of superior grade in which the assets are realised, he is entitled to a rateable share in the assets realised by the latter Court without a fresh application for execution or even for grant of a rateable share. (*Jai Lal, J.*) Balmokand *v.* Ram Saran Das. **163 I.C. 59=8 R.L. 990=38 P.L.R. 281=A.I.R. 1936 Lah. 519.**

——**Ss. 73 and 47**—*Right to rateable distribution—Decree-holder failing to refund amount withdrawn, on sale being set aside—Attachment of his property already attached by another—Auction-purchaser if entitled to rateable distribution of the sale proceeds, of that property.*

On an execution sale being set aside the decree-holder was directed to refund the amount withdrawn by him and on his failure to do so his property which was already attached in execution of a decree obtained against him by a third party, was again attached. It was held that the auction-purchaser whose money was not refunded was entitled to claim under S. 73, C. P. Code, rateable distribution of the sale proceeds of the attached property, inasmuch as the order directing the decree-holder to refund came under S. 47, C. P. Code, and hence amounted to a decree. (*Pollock, J.*) Bhioraj *v.* Shiolal. **188 I.C. 380=12 R.N. 337=1940 N.L.J. 215=A.I.R. 1940 Nag. 267.**

——**S. 73**—Right under—Application for rateable distribution before date of sale—If necessary—Sale by Court attaching later—Absence of application by prior attaching decree-holder—Selling Court allowing set-off—Legality. *See* C. P. Code, Ss. 63 and 73 and O. 21, R. 72. **A.I.R. 1937 Cal. 55.**

——**S. 73**—*Sale proceeds held by Sub-Judge, First Class—Power of senior Sub-Judge to call for them to his Court.*

Where sale proceeds are held by the Sub-Judge, First Class, the Senior Sub-Judge is competent, without intervention of the District Judge, to call for the sale proceeds to his Court to be rateably distributed amongst decree-holders qualified under S. 73. (*Ram Lall, J.*) Fateh Din *v.* Diwan Chand. **181 I.C. 22=11 R.L. 761=A.I.R. 1938 Lah. 801.**

——**S. 73**—*'Same judgment-debtor'—Decree against a firm and a decree against a partner in his individual capacity—If against the same judgment-debtor.*

Where *A* obtained a decree against *B* and proceeded to execution, *C* who held a decree against a firm of which *B* was one of the partners, applied for distribution in the assets realised in execution of *A's* decree.

Held, that *A's* decree against a partner in his individual capacity and *C's* decree against the firm, are not decrees against the 'same judgment-debtor' within the meaning of S. 73 of the C. P. Code. (*Coldstream and Jai Lal, JJ.*) Sadhu Ram *v.* Dhanpat Rai Telu Ram. **18 Lah. 637=175 I.C. 334=10 R.L. 723=40 P.L.R. 419=A.I.R. 1937 Lah. 937.**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father and decree against father and son—Sale of son's share in execution of latter decree—Right of holder of former decree to rateable distribution.*

A decree against a Hindu father and a decree against the father and his son, are decrees against the same judgment-debtor for purposes of S. 73, C. P. Code. If the son's interest in the family property is sold in execution of the decree against the father and son, the holder of the decree against the father alone is entitled to rateable distribution under S. 73. (*Leach, C.J. and Krishnaswami Ayyangar, J.*) Subramania Chettiar *v.* Annamalai Chettiar. **51 L.W. 357=1940 M.W.N. 286=A.I.R. 1940 Mad. 525=(1940) 1 M.L.J. 553.**

——**S. 73**—*"Same judgment-debtor"—Decree against a person as legal representative and decree in his personal capacity—If against same judgment-debtor.*

A decree passed against a person as the legal representative of another is a decree against the same judgment-debtor as another decree passed against the said individual in his personal capacity for purposes of S. 73, C. P. Code, when the former decree makes the legal representative personally liable. (*Varadachariar and Mockett, JJ.*) Alagappa Chettiar *v.* Somasundaram Chettiar. **1937 M.W.N. 465 (2).**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father—Decree against father and sons—If against same judgment-debtor.*

A decree obtained against a Hindu father and a decree against the father and his sons are decrees against the same judgment-debtor for purposes of S. 73, C. P. Code. (*Venkataramana Rao, J.*) Palaniappa Chettiar *v.* Palani Goundan. **165 I.C. 664 (2)=9 R.M. 286=1936 M.W.N. 1142=44 L.W. 615=A.I.R. 1936 Mad. 948=71 M.L.J. 541.**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father and decree against father and son—If against same judgment-debtor.*

A decree against a Hindu father on a promissory note executed by the father alone and a decree against the father and his son cannot be said to be decrees "against the same judgment-debtor" for purposes of S. 73, C. P. Code. The former decree-holder is not entitled to rateable distribution out of sale proceeds representing the son's share in execution of the latter decree, at any rate when the former decree-holder has not made the son a party to his execution and when it has not been found whether his decree was on debt binding on the son. (*Horwill, J.*) Arunachalam Chettiar *v.* Kalayappa Chettiar. **167 I.C. 503 (1)=9 R.M. 464=45 L.W. 203=1936 M.W.N. 1212=A.I.R. 1937 Mad. 253=(1937) 1 M.L.J. 180.**

——**S. 73**—*"Same judgment-debtor"—Decree against Hindu father—Decree against father and sons—If against same judgment-debtors.*

Where there is a decree against a Hindu father and there is also a decree against the father and sons, and where it is admitted that the property from which the assets are realised by the sale was the property of the joint family of which the father and sons are undivided members, the decrees must be held to be decrees against "the same judgment-debtors" for purposes of S. 73, C. P. Code. (*Venkataramana Rao, J.*) Ramayya *v.* Rangaraju. **1937 M.W.N. 239=170 I.C. 883**

=10 R.M. 253=45 L.W. 501=A.I.R. 1937 Mad. 504=(1938) 1 M.L.J. 325.

——S. 73—*"Same judgment-debtor"—Decree against party personally—Separate decree against him as heir of another—If against same judgment-debtor—Rateable distribution.*

If a decree is obtained against a man as heir of a deceased person and another decree is obtained against him in his personal capacity, the two decrees are against the same judgment-debtor within the meaning of S. 73 of the Code of Civil Procedure. Consequently, if one of the two decree-holders takes out execution and assets are realised, the other is entitled to rateable distribution. (*Nasim Ali and Henderson, JJ.*) Hemendra Nath Ray Chowdhury *v.* East Bengal Commercial Bank. **63 Cal. 923=162 I. C. 702=8 R.C. 648=40 C.W.N. 570=A.I.R. 1936 Cal. 210.**

——S. 73—*"Same judgment-debtor" — Interpretation—One decree against manager of joint family—Another decree against members of family and against family property—Whether both decrees are against same judgment-debtor.*

A literal interpretation should not be given to the word "judgment-debtor" in S. 73, C P. Code. Where therefore person is sued as family manager it must be taken that he represents all the members of the family (even if consisting of father and sons) and they are constructively parties to the suit and hence must be deemed to be judgment-debtors for the purpose of the suit. A decree obtained against two persons *eo nominee* as members of the family and as against family properties and another decree obtained against one of them as a manager of the joint family are therefore against the same judgment-debtor within the meaning of S. 73, C. P. Code. A.I.R. 1936 Mad. 40, Foll. (*Venkataramana Rao, J.*) Swaminatha Ayyar *v.* Saivu Rowthan. **160 I. C. 559=8 R.M. 665=43 L.W. 624=1936 M.W. N. 343=A.I.R. 1936 Mad. 123.**

——S. 73—*"Same judgment-debtor"—Meaning of—Decree against person during his lifetime—Decree against his legal representative after his death—If against same judgment-debtor—Rateable distribution.*

A decree against a person during his lifetime and another decree against his legal representative after his death are not decrees against the "same judgment-debtor" for purposes of S. 73, C.P. Code, though both are capable of execution against the same estate. The expression "same judgment-debtor" cannot be construed as if the section provided that decrees capable of execution against the same estate must result in the assets being rateably distributed amongst all the decree-holders. (*Barlee and Tyabji, JJ.*) Chunilal Rai Chand *v.* Broach Urban Co-operative Bank, Ltd. **I.L.R. (1937) Bom. 795=172 I.C. 92=10 R B. 249=39 Bom.L.R. 815=A.I.R. 1937 Bom. 461.**

——S. 73—*"Same judgment-debtor"—Several judgment-debtors—Some of them only common.*

For rateable distribution it makes no difference in law that the parties are two in one case and three in the other so long as the same share of the two parties, who are common in both decrees, is sought to be attached. Hence where there is a decree by a decree-holder against three persons and another decree-holder obtains a decree against two of them and a sale is held in execution of his decree, former decree-holder is entitled to rateable distribution in the sale proceeds. (*Ram Lall, J.*) Fateh Din *v.* Diwan Chand. **181 I.C. 22=11 R.L. 761=A.I.R. 1938 Lah. 801.**

——S. 73—*"Same judgment-debtor"—X obtaining decree against firm by surviving summons on two persons as partners—Y obtaining another decree against these two and three others individually—Y bringing certain properties to sale in execution—Right of X to get rateable distribution of sale proceeds.*

X obtained a decree against a firm by serving summons in the suit against two persons as partners of that firm. *Y* obtained another decree against these two persons and three others individually and attached certain properties in execution and brought them to sale. Before the properties were actually sold, *X* applied for rateable distribution of the sale proceeds.

Held, that the decree of *X* against the firm was in effect a decree against the two partners individually and consequently they were the common judgment-debtors in the two decrees and *X* was, therefore, entitled to get rateable distribution of the sale proceeds. (*Bartley and Nasim Ali, JJ.*) Radha Kanta Pal *v.* Pulin Krishna Pal. **177 I.C. 812=11 R.C. 277=42 C.W.N. 310=A.I.R. 1938 Cal. 316.**

——Ss. 73 and 63—*Same property of judgment-debtor attached by two Courts of same grade and sold by one—Right of decree-holder in other Court to rateable distribution.*

S. 73 is to be read together with S. 63. Where the property of a judgment-debtor has been attached by two Courts of the same grade but the property has been sold by one of them, the proceeds so received shall be deemed to have been received by it on behalf of all the Courts in which there have been attachments in execution of the decrees, prior to the actual receipt of the assets, and the decree-holders in all such Courts are entitled to rateable distribution under S. 73. In such cases no application for execution is necessary to be made to the Court which held the assets, before the receipt of the assets. (*Tek Chand, J.*) Simla Banking and Industrial Co., Ltd *v.* Indo Swiss Trading Co., Ltd. **179 I.C. 376=11 R.L. 556=41 P.L.R. 91=A.I.R. 1938 Lah. 754.**

——S 73—*Scope—Claim by secured creditor—Order for rateable distribution—Power of Court to make.*

It is clearly contemplated by S. 73 that an order for rateable distribution can be made even when one or more of the decree-holders is a secured creditor and special provisions are embodied in the section for the purpose of dealing with their claims. (*Almond, A.J.C.*) Hem Raj *v.* Balu Ram & Sons. **160 I.C. 892=8 R. Pesh. 134=A.I.R. 1936 Pesh. 52.**

——S. 73—*Scope—If affected by Amending Act IX of* 1937.

The amendment of S. 60 by S. 3 of Act IX of 1937 does not affect the provisions of S. 73. Thus a decree-holder has still a right under S. 73 to come in for a share in the rateable distribution of salary attached under a decree, though his suit in which the decree is obtained may have been brought after June, 1937. *(Lobo, J.)* KEWALMAL *v.* RODRIGUES. **176 I.C. 682=11 R.S. 31=A.I.R. 1938 Sind 144.**

——S. 73—Scope—If controlled by S. 63. *See* C. P. CODE, Ss. 63 AND 73. **71 M.L.J. 328.**

——S. 73—*Scope—If exhaustive—Power of Court apart from section to allow rateable distribution.*

Where the parties are not entitled to claim rateable distribution under S. 73, C. P. Code, by reason of the fact that none has applied for execution before the date of receipt of assets, to the Court having the custody of the assets, but all the same have made attachments, the attachment does not create any lien in favour of any of them, and the Court holding the assets can divide the same amongst all of them *pro rata.* *(R.C. Mitter, J.)* KUSUM KUMARI DEVI *v.* GAYANATH PRAMANICK. **166 I.C. 814=9 R.C. 587=A.I.R. 1936 Cal. 390.**

——S. 73 (2)—*Remedy—Order that decree-holder is not competent to apply for rateable distribution—Remedy of decree-holder.*

An order that a certain decree-holder is not competent to make an application for rateable distribution under S. 73, C. P. Code, is final and is not appealable by him. He has his remedy by instituting a suit against other decree-holders for getting a share in the assets. *(Thom and Rachhpal Singh, JJ.)* BEHARI LAL *v.* ALE NABI. **162 I.C. 349=8 R.A. 866=1936 A.W.R. 489=1936 All.L.R. 429=1936 A.L.J. 559=A.I.R. 1936 All. 626.**

——S. 73 (2)—*Scope of.*

The terms of sub-S. (2) to S. 73, C. P. Code, are wide enough to cover a case where the plaintiff claims that he is entitled to all the assets in the custody of the Court and that the defendant, who claims and obtains rateable distribution, is not entitled thereto. *(Collister, J.)* LAL SINGH NAYAL *v.* JIWA NAND. **184 I.C. 589=12 R.A. 253=1939 A.W.R. (H.C.) 427=A.I.R. 1939 All. 545.**

——S. 73 (2)—*Sale in favour of decree-holder purchaser confirmed—Prior applications by other creditors for rateable distribution not disposed of—Remedy of latter.*

A creditor in execution of his decree sold land of his judgment-debtor and purchased it himself but he made no deposit in connexion with the sale. He set off the sale money against his debt. Prior to the sale three applications for rateable distribution had been put in by other creditors. The sale was however eventually confirmed without the applications for rateable distribution having been disposed of.

Held, that any remedy open to other creditors for rateable distribution was by a separate suit under S. 73. *(Almond, J.C.)* SUKH RAJ SHAH *v.* PIR GAUHAR SHAH. **A I.R. 1940 Pesh. 36.**

——S. 73 (2)—*Suit under—Limitation.*

A suit under S. 73 (2), C P Code, to compel refund of money wrongly distributed is not governed by Art. 11 of the Limitation Act. To an order denying rateable distribution no conclusiveness is attached by law such as is done in the case of a claim order by O 21, R. 63. A suit under S. 73 (2) may therefore be brought within three years of the actual distribution. *(Varadachariar and Mockett, JJ.)* SOMASUNDARAM CHETTIAR *v.* ALAMELU ACHI. **1937 M.W.N. 480.**

——S. 73 (2)—*Suit under—Power to award interest prior to suit.*

A suit under S. 73 (2) is in substance one in which the plaintiff claims to be placed in the same position in which he would have been placed had the Court which originally dealt with the application for rateable distribution not made a mistake, and it is governed by the principle that it is the duty of the Court "to take care that the act of the Court does no injury to any of the suitors." The Court has therefore power in such a suit to award interest even prior to suit. *(Varadachariar and Mockett, JJ.)* ALAGAPPA CHETTIAR *v.* SOMASUNDRAM CHETTIAR. **1937 M.W.N. 465 (2).**

——S. 73 (3)—*Decree in favour of Crown—Priority.*

When the Crown and a private individual both execute their decrees against the same judgment-debtor and seek to be satisfied out of the same fund, the rules as to rateable distribution laid down in S. 73 (1) do not apply and the decree in favour of the Crown has priority. In such cases it is not necessary for the Crown or its representative to attach the fund before claiming payment. A pauper appeal filed by the judgment-debtor from a decree passed against him was dismissed and he was ordered to pay the amount of Court-fees. In the execution application of the decree-holder, the house of the judgment-debtor was sold and the sale proceeds deposited in Court. Before the sale, however, the nazir applied for execution of the appellate decree for recovering the amount of court-fees but the application was subsequently withdrawn. When the decree-holder applied for taking out the amount deposited in Court, the nazir appeared and claimed priority and subsequently made a formal application under O. 21, R. 11 for execution of the appellate decree asking for the attachment of the amount lying in Court. No order was passed on this applicatian but in the execution proceeding started by decree-holder the Court passed an order that the Crown had a prior right for the satisfaction of the amount of Court-fees and directed that the amount deposited be paid over to the nazir:

Held, that the order was proper as even in such circumstances the Crown had priority over the decree-holder in respect of the amount of Court-fees. *(Tek Chand, J.)* MUNI LAL *v.* DIWAN CHAND. **I.L R. (1940) Lah. 124=186 I.C. 590=12 R.L. 402=42 P.L.R. 96=A.I.R. 1939 Lah. 488.**

——**S. 73 (3) and O. 33, Rr. 10 and 13**—*Scope and effect of—Pauper suit—Portion of Court-fee ordered to be paid by defendants—Sale of defendant's property in execution of another decree against them—Right of Government to recover Court-fee from out of sale proceeds—Crown debts—Priority.*

There is nothing in the Code of Civil Procedure which precludes the application of the doctrine that in respect of decree debts, the Secretary of State is entitled to invoke the doctrine of priority of Crown debts. Where in a pauper suit the defendants are ordered to pay to the Government a portion of the Court-fee that would be payable by the plaintiff, and the properties of the same defendants are brought to sale by a third party in execution of a decree for money obtained by him against them, if an application is made on behalf of the Government that out of the sale proceeds the amount directed to be paid as Court-fee in the pauper suit may be paid in preference to the claim of the third party decree-holder, the application must be allowed, because the Government is entitled to recover the Court-fee out of the sale proceeds by virtue of the claim being a crown debt. O. 33, R. 10 does not have the effect of restricting the right of the Government to the subject-matter of the pauper suit. S. 73 (3) refers to cases in which the Government is in the same position as any other decree-holder and its obvious intention is that the Government is entitled to the benefit of the doctrine of priority. (*Varadachariar, J.*) VARADACHARI *v.* THE SECRETARY OF STATE. **59 Mad. 872=162 I.C. 868=8 R.M. 1059=43 L.W. 725=1936 M.W.N. 76=A.I.R. 1936 Mad. 602=70 M.L.J. 601.**

——S. 75—Suit for specific movable properties—Commission to ascertain their value—Power of Court to issue. *See* C. P. CODE, O. 20, R. 10 AND O. 21, R. 31 AND 75. **44 C.W.N. 304.**

——S. 79—*Suit under—Duty of Government before instituting.*

The Government while filing a suit through the Secretary of State against a private person should not regard itself as standing in the same position as a private litigant. In the public interests, it should insist that its officers should take upon themselves a due share of responsibility in satisfying themselves that the allegations on which the suit is sought to be founded are reasonably true and not be led away by emphatic assertions made by private parties or even by their offer of indemnity as to costs. (*Varadachariar, J.*) SECRETARY OF STATE *v.* NARAYANA AYYAR. **1937 M.W.N. 145=169 I.C. 597=10 R.M. 71=46 L.W. 748=A.I.R. 1937 Mad. 523=(1937) 2 M.L.J. 178.**

——**S. 80**—*Applicability—Absence of notice, if fatal to whole suit—Dismissal of suit or rejection of plaint—C. P. Code, O. 7, R. 11 (d).*

The requirement as to notice under S 80 of the C. P. Code applies to all cases in which the Secretary of State is a defendant. Absence of such a notice entails a failure of the whole suit, irrespective of the existence of other defendants. In such a case the plaint is defective and should be rejected as a whole under O. 7, R. 11 (*d*), C. P. Code. Such a course is preferable to dismissal of the suit. (*Rowland, J.*) BALDEO PRASAD *v.* SUKHI SINGH. **174 I.C. 358=10 R P. 500=4 B.R. 435=1937 P.W.N. 694=18 Pat.L.T. 921=A.I.R. 1938 Pat. 127.**

——S. 80—*Applicability—Good faith on part of officer—If material.*

S. 80, C. P. Code, which extends the period of limitation by two months applies whether an officer acts in good faith or bad faith. (*Davis, J. C. and Haveliwala, A.J.C.*) UDHARAM VASSANMAL *v.* GRAHAMS TRADING CO., LTD. **32 S.L.R. 106=172 I.C. 622=10 R.S. 171=A.I.R. 1937 Sind 281.**

——S. 80—*Applicability—Mortgage suit—Some of the properties mortgaged to Secretary of State under Land Improvement Loans Act—Secretary of State impleaded as party defendant—Notice of suit—Omission to serve—Effect of—If fatal.*

S. 80, C. P. Code, applies to all forms of suit and whatever the relief sought. The section is express, explicit and mandatory and admits of no implications or exceptions. Where a suit is filed for sale in enforcement of a mortgage to which the Secretary of State for India in Council is a party as being a mortgagee of some of the properties under the Land Improvement Loans Act, notice under S. 80, C. P. Code, is necessary; and in the absence of such notice the suit must be dismissed as against him. (*Pandrang Row and King, JJ.*) SECRETARY OF STATE FOR INDIA *v.* RANGASWAMI NAIDU. **182 I.C. 767=12 R.M. 153=1938 M.W.N. 280=A.I.R. 1938 Mad. 583.**

——S. 80—*Applicability — 'Public Officer'—Liquidator of Co-operative Society—Suit against—Notice—Necessity.*

A liquidator who is appointed by the Registrar of Co-operative Societies to liquidate a private Co-operative Society is not an officer in the service of the Government and is not a "public officer" within the meaning of S. 3 (17) and S. 80, C. P. Code and a suit against him cannot be defeated on the plea that no notice was given as required by S. 80, C. P. Code. (*Pandrang Row and Horwill, JJ.*) GOVINDA CHETTIAR *v.* UTTUKOTTAI CO-OPERATIVE SOCIETY. **52 L.W. 131=1940 M.W.N. 782=(1940) 2 M.L.J. 241.**

——S. 80 — *Applicability—Receiver — Suit against for royalty of lands in his possession—Notice—Necessity.*

Chatterji, J.—Though a receiver appointed in a suit is a public officer within the meaning of S. 80, C. P. Code, non-payment of royalty by the receiver in respect of the lands in his possession is not an official act done by him. S. 80, therefore, does not apply to a suit against the receiver for royalty arising out of an individual or a private contract between him and the plaintiff. (*Fazl Ali and Chatterji, JJ.*) JYOTI PRASAD SINGH DEO BAHADUR *v.* SAMUEL HENRY SEDDON. **19 Pat. 433=A.I.R. 1940 Pat. 516.**

——**S. 80**—*Applicability and scope—Secretary of State impleaded as* pro-forma *defendant without any claim for relief—Notice of suit—Necessity.*

S. 80 of the C. P. Code is clear and peremptory that notice must be served on the Secretary of State as a condition precedent to the institution of a suit against him, although he is impleaded only as a *pro forma* defendant and although no relief is claimed as against him. The section applies to all suits in which the Secretary of State is made a party defendant, whether or not any relief is claimed against him. (*Agarwala and Varma, JJ.*) SECRETARY OF STATE FOR INDIA *v.* AMARNATH. **15 Pat. 353=161 I.C. 690=8 R.P. 467=1936 P.W.N. 206=17 Pat.L.T. 152=A.I.R. 1936 Pat. 339.**

——S. 80—*Compliance—Notice of suit—Suit by manager of Court of Wards on behalf of wards of Court against ex-Receiver of Ward's estate—Postal acknowledgment giving sender's name and address as manager, Court of Wards, etc.—If sufficient compliance.*

The defendant was a former Receiver of an estate which belonged to certain minors and which was subsequently taken over by the Court of Wards. The manager of the Court of Wards sent by registered post a notice of suit under S. 80, C. P. Code. It was addressed to the ex-Receiver and sent by the manager of the Court of Wards as next friend of the minors and in the postal acknowledgment sent along with the notice the sender's name and address was given as manager, Court of Wards, etc

Held, that the postal acknowledgment contained a sufficient description of the address of the manager of the Court of Wards, and that there was a substantial compliance with S. 80, C. P. Code, and that the notice was not defective by reason of there having been no precise description or statement of the places of residence of the minor plaintiffs. (*D. N. Mitter and Patterson, JJ.*) BAIDYA NATH ROY CHOWDHURY *v.* RAM CHANDRA BANERJEE. **41 C.W.N. 92.**

——S. 80—*Compliance—Notice under—Essentials of validity—Statement of cause of action.*

To state a cause of action it may be sufficient to give a legal description by which a particular cause of action is known, such as, damages for breach of contract, and damages for negligence. Where a notice, after stating that the plaintiff has been served with a notice by the Deputy Magistrate purporting to act for the District Magistrate, under S. 15 (4) of the Police Act, making a demand of a certain amount of money as an apportioned amount payable by him for the upkeep of additional police force, proceeded that my client asserts that the assessment of costs against him is illegal and *ultra vires* and secondly the sum assessed is too high.

Held, that the notice did sufficiently comply with the requirements of S. 80, C. P. Code, and that there was a sufficient indication of the cause of action for the suit contemplated. (*Wort and Varma, JJ.*) SRINIVAS MULL *v.* SECRETARY OF STATE. **17 Pat. 345=178 I.C. 571=11 R.P. 273=5 B.R. 116=A.I.R. 1938 Pat. 556.**

——S. 80—*Different causes of action united in suit—Suit bad for want of notice in regard to one of them—Entire suit, if liable to be dismissed.*

It is quite true that if two or more causes of action are united in one suit and with regard to one of them the suit fails for want of notice under S. 80 there is no reason why the entire suit should be dismissed. But where in a suit against a person for declaration of title to certain property the receiver of that property is added as party and there are definite allegations against him of collusion with that person in granting rent receipts and setting up a claim to possession in the disputed property and the defence of both the defendants in answer to the plaintiff's claim is identically the same, it is not possible to sever one part of the case from the other. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal. 1.**

——S. 80—*Notice—Contents—Alternative claim not mentioned—If can be claimed in suit.*

An alternative and a lesser claim which is not mentioned in the notice under S. 80 cannot derogate from the plaintiff's right to have the suit tried on the issue which is claimed in the notice. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I.L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

——S. 80—*Notice of suit—Cause of action—Description of—Claim in notice for larger amount—Suit for smaller amount—Notice, if invalid or defective.*

All that a notice under S. 80, C. P. Code, should contain is a statement of the cause of action, meaning thereby the bundle of facts on which the claim of the plaintiff or plaintiffs is founded. Where a claim is made in the notice for a larger amount of money as due from the defendant, the fact that in the suit the claim is reduced to a smaller amount does not change the cause of action for the suit or render the notice invalid, especially when the notice recites the circumstances under which the claim is made and when the reduction does not operate to the prejudice of the defendant but operates to his benefit. Though the notice should in every case state with precision the cause of action, the mere reduction of the claim does not make the notice defective. (*D. N. Mitter and Patterson, JJ.*) BAIDYA NATH ROY CHOWDHURY *v.* RAM CHANDRA BANERJEE. **41 C.W.N. 92.**

——S. 80—*Object of.*

S. 80 was intended to afford protection to officials against personal responsibility for official acts. If it is sought to make an officer personally liable for certain acts done or purporting to be done by him in his official capacity it is essential before a suit is commenced that there should be a notice served upon him under S. 80. The object of the notice is to give him an opportunity to reconsider his position with regard to the claim and to make amends or settle the claim if he is so advised. (*Mukherjea and Roxburgh, JJ.*) BHUBAN MOHINI *v.* BIRAJ MOHAN. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal, 1.**

——S. 80—*Object of notice—Contents—Interpretation—Rule as to.*

The object of giving two months' notice to the Government, which is prescribed in S. 80, is to give Government sufficient warning of a case which is about to be brought against it, so that Government may, if it so wishes, compromise the case, or afford restitution if it considers that the restitution is due, without recourse being had to a Court of law in which Government might be mulcted in costs. It is necessary to import a little commonsense into notices under S. 80. The Court should look at the wording of the notice and interpret it in the light of commonsense. It is not necessary for the plaintiff to state in his notice the full details of his claim. When the object of the notice is plain and is achieved, and there has not been any violation of the spirit and intention of S. 80, the notice should be treated as valid notice. (*Grille, J.*) SECRETARY OF STATE *v.* NAGORAO TANKO. **I.L.R. (1939) Nag. 206=179 I.C. 711=11 R.N. 313=A.I.R. 1938 Nag. 415.**

——S. 80—*Official Assignee—Suit against, in respect of release of an insolvent's right—Notice, if necessary.*

Where a suit was brought against the Official Assignee for damages for breach of a covenant of title contained in a deed of release executed by the Official Assignee in respect of an insolvent's interest in a property, on a plea that the suit is bad for absence of notice under S. 80, C. P. Code.

Held, that notice under S. 80, C. P. Code, was not necessary, as the Official Assignee in executing the deed of release was not doing an act in his official capacity and further the suit was not against him in respect of any act done by him in that capacity. (*Leach, C. J. and Varadachariar, J.*) OFFICIAL ASSIGNEE OF MADRAS *v.* VEDANARAYANA NAICKER. **177 I.C. 579=47 L.W. 46=11**

R.M. 348=1938 M.W.N. 10=A.I.R. 1938 Mad. 221=(1938) 1 M.L.J. 92.

———**S. 80**—*Official Receiver—Notice—Necessity for.*

Obiter.—S. 80, C. P. Code, applies to all forms of action and to all kinds of relief as against a public officer, and a suit against an Official Receiver is, therefore, liable to be dismissed if no notice was served on him under the section. (*Akram, J.*) Asia Khatun *v.* Amarendra Nath. **44 C.W.N. 586=71 C.L.J. 594.**

———**S. 80**—*Official Receiver—Right to notice—Rival claims by Official Receiver and other creditors—Interpleader suit by debtor—Official Receiver if entitled to notice under S. 80.*

Where a certain amount due under a promissory note is claimed by the Official Receiver and by certain assignees of the note, and the debtor filed an interpleader suit and where the Official Receiver raised a plea that he ought to have been given notice under S. 80 C. P. Code, it was held that the mere setting up of a claim to property on behalf of the estate which a Receiver represents could not be considered to be an act purporting to be done by a public officer in his official capacity so as to attract the application of S. 80, C. P. Code. (*Niyogi, J.*) Narayanchandra *v.* Surendranath. **I.L.R. (1939) Nag. 200=178 I.C. 602=11 R.N. 240=1938 N.L.J. 264=A.I.R. 1938 Nag. 449.**

———**S. 80 and Registration Act, S. 77**—*Official Receiver—Suit under S. 77, Registration Act against receiver in insolvency—Notice, if necessary.*

Where on the refusal of a District Registrar to register a document executed by a receiver in insolvency acting under the orders of the District Court and a suit is filed against him under S. 77 of Registration Act, the receiver cannot plead that he is entitled to notice under S. 80, C. P. Code. The cause of action is no doubt the action of a public officer in refusing to register the document, but the public officer is the District Registrar and the suit is not brought against him but against the receiver and as such no notice under S. 80, C. P. Code, is necessary. Further the Registration Act is a 'special law' and S. 80, C. P. Code, will not apply in view of the provision of 30 days limitation, under S. 77 of the Registration Act, as the period of 30 days is less than the 2 months provided by S. 80, C. P. Code. (*Bennet and Verma, JJ.*) Sultan Ahmad *v.* Gohar Begam. **186 I.C. 505=12 R.A. 400=1939 A.L.J. 1151=1939 A.W.R. (H.C.) 878=A.I.R. 1940 All. 108.**

———**Ss. 80 and 2 (17)**—*Public officer—Receiver.*

It is the duty of a receiver to take charge of the properties in suit on behalf of the Court. He exercises his functions under the supervision and control of the Court and is remunerated under its orders. He can thus be deemed to be an officer of a Court of Justice whose duty it is to take charge or dispose of any property within the meaning of S. 2 (17) (*d*). Even if he is not an "officer" he is clearly a person especially authorized by a Court of Justice to perform such duties and therefore a public officer. (*Mukherjea and Roxburgh, JJ.*) Bhuban Mohini *v.* Biraj Mohan. **186 I.C. 584=12 R.C. 495=44 C.W.N. 74=A.I.R. 1940 Cal. 1.**

———**Ss. 80 and 2 (17) (g) and (h)**—*'Public officer'—Court of Wards manager.*

A manager of an estate appointed under the provisions of the Court of Wards Act, 1879, is not a public officer within the meaning of S. 2 (17) (*g*), C. P. Code, but is a public officer within the meaning of S. 2 (17) (*h*), C. P. Code, being an officer in the service of the Government. He is, therefore, entitled to the benefit of a notice under S. 80, C. P. Code. (*Edgley, J.*) Gokul Chandra Das *v.* Manager of B. M. W. Estate. **I.L.R. (1940) 1 Cal. 73=188 I.C. 637=13 R.C. 13=43 C.W.N. 1212=A.I.R. 1939 Cal. 720.**

———**Ss. 80 and 2 (17) (h)**—*Public officer—Liquidator of a co-operative society appointed under S. 42 of the Co-operative Societies Act—Suit against under O. 21, R. 63—Notice—Necessity.*

The liquidator appointed under S. 42 (1) of the Co-operative Societies Act is appointed by Government and performs public duties and hence he is an officer in the service of Government, when acting as liquidator and is therefore a "public officer" as defined in S. 2 (17) (*h*), C. P. Code. In a suit under O. 21, R. 63 against such liquidator, notice should be given as required by S. 80, C. P. Code. (*Pollock, J.*) Liquidator of the Society, Sangakeda Kalan & Co. *v.* Ayodhya Prasad. **182 I.C. 514=12 R.N. 8=1939 N.L.J. 215=A.I.R. 1939 Nag. 232.**

———**S. 80**—"Public officer"—Wakf property—Dispute between Mutwallis—District Judge appointing defendant to collect rents—Suits against him by Mutwalli—Notice, if necessary. *See* Charitable and Religious Trusts Act, S. 7. **1936 A.L.J. 1112.**

———**S. 80**—*Scope—Mandatory nature of—Compliance—Requirements.*

The provisions of S. 80, C. P. Code, are mandatory and contain a clear and unqualified prohibition upon the institution of suit without the statutory notice. It is not in the public interest that the provisions as to notice can be waived at the whim of the officer concerned. Where there is an averment in plaint that a notice under S. 80 is 'sent' to the officer concerned, the averment is not in compliance with S. 80 as the words 'delivered' or 'left' are not used as provided by S. 80. (*Davis, J. C. and Haveliwala, A.J.C.*) Gangaram and Rupchand & Co. *v.* Secretary of State. **32 S.L.R. 67=172 I.C. 722=10 R.S. 184 =A.I.R. 1937 Sind 291.**

———**S. 80**—*Scope—Suit against two persons—Notice required as against one only—Limitation as against other—If extended.*

Where a suit for damages is brought against joint tort-feasors and one of them requires a notice under S. 80, C. P. Code, which extends the period of limitation by two months as against him, time must be calculated in the same manner as against both even though notice under S. 80 is not necessary to the other tort-feasor. (*Davis, J. C. and Haveliwala, A. J. C.*) Udharam Vassanmal *v.* Grahams Trading Co., Ltd. **32 S.L.R. 106=172 I.C. 622=10 R.S. 171=A.I.R. 1937 Sind 281.**

———**S. 80**—*Strict compliance with—Necessity—Notice to Registrar, Co-operative Societies—Proper service—Test.*

The provisions of S. 80, C. P. Code, are imperative and must be strictly complied with. Where a notice to the Registrar of Co-operative Societies was sent by post through the Secretary of the Central Co-operative Bank, unless it is proved that it was as a matter of fact conveyed to the Registrar, it cannot be taken to be a proper service of the notice. (*James, J.*) Registrar, Co-operative Societies *v.* Ramkishun Mandar. **177 I.C. 709=5 B.R. 13=11 R.P. 180=A.I.R. 1939 Pat 32.**

——**S. 80**—*Suit against estate in hands of receiver—Notice, if necessary.*

No estate vests in the receiver by virtue of his appointment. He collects rents or profits, income or capital on the title of the persons who are parties to the suit and he defends the suit because of the powers given to him by the Court under O. 40, R. 1 (*d*). In cases when no relief is claimed against the receiver personally and the suit is really against the estate which does not vest in the receiver, but which is held by him under orders of the Court who made the appointment, the suit cannot be said to be one against the receiver within the meaning of S. 80. In other words, S. 80 contemplates a suit against the receiver which seeks to make him personally liable for acts, done or purporting to be done by him in his official capacity and it does not contemplate a case where a suit for possession is brought against the owners of the estate in respect of which he has been appointed a receiver and which suit he has got to defend under powers conferred on him by the Court. In such cases it is undoubtedly necessary to take the leave of the Court which appointed the receiver before the latter can be made a party to the proceedings and that is on the principle that interference with the possession of the receiver without leave would amount to a contempt of the Court whose officer the receiver is. But there is no necessity to serve upon him a notice under S. 80. (*Mukherjea and Roxburgh, JJ.*) Bhuban Mohini *v.* Biraj Mohan **186 I.C. 584=12 R.C. 495=44 C.W.N. 74 =A.I.R. 1940 Cal. 1.**

——**S. 80**—*Suit against Official Receiver of estate for arrears of rent—Notice—If necessary.*

In a suit against an Official Receiver of an estate for recovery of arrears of rent notice under S. 80 is not necessary as omission of receiver to pay rent is not an act purporting to have been done by him in his official capacity. (*Nasim Ali and Remfry, JJ.*) Debendra Nath Roy *v.* Official Receiver. **174 I.C 576=10 R.C. 716= 65 C.L.J. 561=A.I.R. 1938 Cal. 191.**

——**S. 80**—*Suit against receiver—Notice, when necessary.*

Although a receiver is a public officer, in the case of a suit against him it is only where the plaintiff complains of some act purporting to have been done by him in his official capacity that notice to him under S. 80, C. P. Code, is enjoined. Where the plaintiff makes no such complaint but simply impleads him in the suit in his capacity as a receiver in possession of some of the properties in suit, no notice need be given to him under S. 80, C. P. Code (*Derbyshire, C.J. and D. N. Mitter, JJ.*) Haridas Chatterjee *v.* Monmotho Nath Mullick. **I.L.R. (1937) 2 Cal. 265=41 C.W.N. 322.**

——**S. 80**—*Suit against receiver for arrears of rent—Notice, if necessary.*

No notice under S. 80, C. P. Code, is necessary for the institution of a suit against a receiver for recovery of arrears of rent. The omission of the Receiver to pay rent is not an act purporting to have been done by him in his official capacity. (*Nasim Ali and Remfry, JJ.*) Purna Chandra Sarkar *v.* Official Assignee, High Court, Calcutta. **174 I.C. 576=10 R.C. 716= 65 C.L.J. 561=A.I.R. 1938 Cal. 191.**

——**S. 80**—*Suit attacking sale by Official Receiver—Notice to Official Receiver—If necessary.*

Where the plaintiffs instituted a suit for declaration that the sale carried out by the Official Receiver was invalid and ineffective as against them and impleaded him as a defendant.

Held, that the Official Receiver was a necessary party to a suit of that nature and that the suit was not maintainable against him without notice under S. 80, C. P. Code. (*Jai Lal and Abdul Rashid, JJ.*) Haveli Ram *v.* Jagan Nath. **173 I.C. 220=10 R.L. 416=39 P.L.R. 726=A.I.R. 1937 Lah. 386.**

——**S. 80**—*Suit within two months of notice—Dismissal—Fresh suit after two months on the same notice—Maintainability.*

The dismissal of a suit filed within two months from the date of notice under S. 80, C. P. Code, on the ground of the insufficiency of the notice is no bar to the maintainability of a fresh suit brought after the expiry of two months from the date of the notice. The second suit would be maintainable on the same notice. (*D. N. Mitter and Patterson, JJ.*) Baidya Nath Roy *v.* Ram Chandra Banerjee. **41 C.W.N. 92.**

——**S. 80**—*Two notices—Suit filed before expiry of two months from second notice—If premature.*

A suit brought after the expiry of two months from the date of service of the first notice but before the expiry of two months from the date of service of the second notice would not be premature, if the second notice does not cancel or annul the first one, but merely amplifies it. (*Sen, J.*) Secretary of State *v.* District Board of Rangpur. **185 I.C. 454=12 R.C. 373=70 C.L.J. 126=A.I.R. 1939 Cal. 758.**

——**S. 85**—*Construction—Suit on behalf of Native State by person not duly authorised—Competency—Dismissal—Subsequent obtaining of authority pending appeal from dismissal—If cures defect and makes suit regular.*

The provisions of S. 85, C. P. Code, are specially enacted for a privileged class of persons, such as a Sovereign Prince or a Ruling Chief, who are parties to suits or legal proceedings, and are subject to the rule of strict construction and must be rigidly followed. A suit instituted on behalf of a Ruling Prince or an Indian State by a person who is not an authorised agent under O. 3, R. 2, C. P. Code, and without the authority required by S. 85, C. P. Code, is a defective suit and has to be dismissed. A subsequent authority obtained under S. 85 for the first time after the presentation of an appeal upon the dismissal of the suit cannot cure the defect so as to make the suit a properly instituted suit. (*Wassoodew and Indarnarayan, JJ.*) Abdul Latif Gulam Nabi *v.* Jawhar State. **I.L.R. (1940) Bom. 225=188 I.C. 805=13 R.B. 22=42 Bom.L.R. 262=A.I.R. 1940 Bom. 172.**

——**S. 85**—*Order signed by Chief Secretary—Validity.*

An order dated 20th June, 1935, and signed by the Chief Secretary of the Punjab Government appointing a person to prosecute or defend all suits on behalf of or against the Jammu and Kashmir State unless it is revoked is valid even after the Government of India (Adaptation of Indian Laws) Order, 1937. (*Addison and Ram Lall, JJ.*) MAHARAJA OF JAMMU AND KASHMIR *v.* SIALKOT MUNICIPALITY. **184 I.C. 488 (1)=12 R. L. 229 (1)=42 P.L.R. 228=A.I.R. 1939 Lah. 279.**

——**S. 86**—*Applicability—Insolvency proceedings—Insolvency petition by debtor of Ruling Chief—Certificate, if necessary.*

S. 86, C. P. Code, in terms applies only to suits, and cannot be made applicable to insolvency proceedings initiated by a petitioning debtor merely by reason of the fact that a Sovereign Prince or Ruling Chief is one of the creditors. An insolvency petition filed by a debtor of a Sovereign Prince or Ruling Chief is, therefore, maintainable without the certificate mentioned in that section. (*Nasim Ali and Rau, JJ.*) MADAN LAL JHUN *v.* RULER OF RAMPUR STATE. **I.L.R. (1940) 1 Cal 344=71 C.L.J. 316=44 C.W.N. 333=A.I. R. 1940 Cal. 244.**

——**S. 86**—*Applicability— Proceedings under Ss. 184, 186 and 187 of Companies Act.*

S. 86, C.P. Code, does not apply to the proceedings under S. 184 but applies to all the proceedings under Ss. 186 and 187 of the Companies Act. If the Court makes an order under S. 184 of the Companies Act and places the name of a Native Prince or a Regent of an independent State upon the list of contributories, it does not thereby enforce a jurisdiction against that Native Prince or against the Regent or President of the independent State. The proceedings under Ss. 186 and 187, however, stand on a different footing. An order under S. 186 for payment of money due from a person can be made by the Court only in cases where a suit to recover the amount would be maintainable and the Court cannot override the provisions of S. 86, C. P. Code, by making an order under S. 186 of the Companies Act. No order under S. 187 can be made against the Sovereign Prince or the Ruling Chief at all, and no question of any consent of the Governor-General in Council can arise, because such a case does not fall in any of the three classes mentioned in sub-S. (2) of S. 86, C. P. Code. (*Sulaiman, C.J. Thom and Iqbal Ahmad, JJ.*) OFFICIAL LIQUIDATORS, DEHRA DUN MUSOORIE ELECTRIC TRAMWAY CO., LTD. *v.* THE PRESIDENT, COUNCIL OF REGENCY, NABHA STATE. **58 All. 742=166 I.C. 98=9 R.A. 364=1936 All. L.R. 998=1936 A.W.R. 1059=1936 A.L.J. 1134=A.I.R. 1936 All. 826 (F.B.).**

——**Ss. 86 and 87**—*Scope of—Suit in reality though not in form against sovereign prince—Absence of certificate—Effect—Waiver, if possible.*

Ss. 86 and 87, C. P. Code, relate to an important matter of public policy in India and the express provisions contained therein are imperative and must be observed. Where a suit was brought against the Gaekwar of Baroda State Railway through the Manager and Engineer in Chief—and the plaintiff admitted that it was owned and managed by His Highness the Gaekwar and where no certificate under S. 86, C. P. Code, was obtained and the suit was decreed on the ground that the Railway was a corporation capable of being sued, it was held that there was no evidence on record to support the contention that the Railway was a corporation and that it was directly contrary to the admission of the plaintiff. It was further held that the suit was in reality though not in form, a suit against His Highness the Gaekwar and if the judgment of the High Court was allowed to stand it might have far reaching results and might have the effect of nullifying the provisions of Ss. 86 and 87 of the C.P. Code. The fact that the Railway was allowed to defend the suit on the merits could not amount to a waiver of privilege as the provisions of Ss. 86 and 87, C. P. Code, are imperative, and having regard to the purpose which they serve, they could not be waived in such a manner. (*Sir Lancelot Sanderson.*) GAEKWAR OF BARODA STATE RAILWAY *v.* HAFIZ HABIB UL-HAQ. **65 I.A. 182=I.L.R. (1938) All. 601=4 B.R. 524=10 R.P.C. 262=1938 A.L. R 352=67 C.L.J. 254=1938 P.W.N. 535=32 S. L.R. 531=40 Bom.L.R. 811=19 Pat.L.T. 689=174 I.C. 551=(1938) M.W.N. 481=1938 O.W. N. 521=1938 A.L.J. 488=42 C.W.N. 705=1938 O.L.R 218=47 L.W. 753=1938 A.W R. (P.C.) 123=A.I.R. 1938 P.C. 165=(1938) 2 M.L.J. 11 (P.C.).**

——**S. 89**—*"Any other law for the time being in force"—Interpretation—If covers O. 23, R. 3.*

The words "by any other law for the time being in force" in S. 89, C. P. Code, refer to some law extraneous to the Code and cannot be legitimately held to cover O. 23, R. 3. In other words, once S. 89 is held to apply, no reliance can be placed for any purpose on O. 23, R. 3. The only remedy left is either to proceed with the arbitration, or if the Court supersedes the arbitration, to proceed with the hearing of the suit or the appeal, as the case may be, on the merits, as required by para. 8 of the Second Schedule read with para. 19. (*Sale, J.*) SITA RAM *v.* HARBANS LAL. **160 I.C. 287=8 R.L. 517=38 P.L.R. 102=A.I.R. 1936 Lah. 374.**

——**S. 89**—*"Any other law"—If includes O. 23, R. 3.*

The words "any other law for the time being in force" in S. 89, C. P. Code, cannot include O. 23, R. 3, C. P. Code. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) MAUNG HLAY *v.* U GE. **1939 Rang. L.R. 280=183 I.C. 343=12 R.R. 71=A.I.R. 1939 Rang. 300 (F.B.).**

——**S. 89 and O. 23, R. 3**—*Arbitration and award out of Court—If can be given effect to—'Any other law' in S. 89 if includes O. 23, R. 3.*

Where during the pendency of a suit parties took time to settle out of Court through an arbitrator, and an award is made subsequently, it cannot be recorded as an adjustment of the suit under a lawful compromise under O. 23, R. 3, C. P. Code. The words 'any other law' occurring in S. 89, C. P. Code, do not include the provisions of O. 23, R. 3 But there is no conflict between S. 89 and O. 23, R. 3. (*Stone, C.J., Grille and Bose, JJ.*) RAMDAYAL MUNNALAL *v.* SHEODAYAL. **I.L.R. (1939) Nag 250=183 I.C. 128=12 R.N. 43 (2)=1939 N.L.J. 228=A.I.R. 1939 Nag. 186 (F.B.).**

——**S. 89**—*Scope of—Whether covers all references to arbitration.*

S. 89, C. P. Code, covers all references to arbitration whether the reference is or is not made without the intervention of the Court, and whether an award does or does not follow. (*Sale, J.*) Sita Ram *v.* Harbans Lal. **160 I.C. 287=8 R L. 517=38 P.L.R. 102=A.I.R. 1936 Lah. 374.**

——**S. 91 and O. 1, R. 8**—*Applicability—"Public nuisance"*—Osara *on village lane or pathway—If a public nuisance—Suit by private person—Competency without sanction—Special damage—Proof of—Necessity—Highway.*

A village pathway, or lane is of the class of a public highway and has its origin in dedication and not in custom. It is not a private way or of a class over which only certain classes of persons or certain portions of the public have rights which have their origin in custom. An *osara* built on such a village-path or lane is a public nuisance within the meaning of S. 91, C P. Code. A suit in respect of such an *osara* can only be brought by observing the conditions laid down in the section—consent in some form as required by the section is necessary. Even if the pathway or lane be treated as a private pathway or one over which only limited persons have a right, notice and leave of Court under O. 1, R. 8, C. P. Code, are necessary. A suit by a private person without sanction under S. 91, or without leave under O. 1, R. 8, or without allegation or proof of special damage is not maintainable. (*Wort, J.*) Bissessar Pathak *v.* Harbans Lal. **166 I.C. 538=9 R.P. 308=3 B.R. 179=17 Pat.L.T. 842=A.I.R. 1937 Pat. 54.**

——**S. 91 and O. 1, R. 8**—*Applicability and relative scope—Village pathway — Obstruction — Right of action—Proof of special damage—Necessity—Sanction of Advocate-General—Necessity—S. 91—If overrides O. 1, R. 8.*

While it is necessary to prove special damage in cases where the plaintiff sues merely as a member of the public in respect of a public right in the full sense, it is not necessary to prove it in the case of quasi public rights, where the plaintiff sues as a member of the limited class whose special rights have been infringed. The doctrine of special damage is based upon the principle of English Common law that there can be no private action for a public wrong. To give a right of suit the wrong must be in some way special or peculiar to the person who sues, and it is based on the sound rule that no man should be harassed by a multiplicity of suits in respect of a single wrong. The principle has been adopted by the Courts in India as a matter of equity and good conscience. The wording of S. 91, C. P. Code, also makes it clear that the Legislature contemplated that this doctrine of special damage should apply in India. The doctrine has, however, two very definite limitations: firstly, it applies only to cases regarding public rights in the full sense; secondly, an invasion of special rights will provide a cause of action without special proof of damage, for in such a case the law will presume damage. It is by reason of these limitations that it has been held not to apply to cases of quasi-public rights, such as village roads, and where the plaintiff sues either for himself as a member of the limited class of persons having special rights in common, or on behalf of that limited class in a representative suit under O. 1, R. 8, C. P. Code for infringement of those rights. O. 1, R. 8 is merely an enabling provision. It provides no new right of suit, but merely a right of representation where a right of suit already exists, and that right of suit is provided by the invasion of the special rights of the limited class represented. S. 91, C. P. Code, on the other hand gives a new right of suit, namely, a right to sue for the removal of a public nuisance, even where there is no special damage, and no invasion of any special right. Obstruction to a village pathway is a public nuisance under S. 91, C. P. Code, though it may not be a public highway in the full sense. S. 91, however, does not take away any independent right of suit which may exist and it does not override the provisions of O. 1, R. 8, and it does not take away any right of suit under O. 1, R. 8, even when it is a case of public nuisance. The special restrictions of S. 91 can be overcome by proof of special damage and by proof of the invasion of the special rights of a limited class which will give an independent right of action. This latter right of suit is independent of both S. 91 and O. 1, R. 8, C. P. Code. Therefore, in the case of suits relating to obstructions to village ways, if the plaintiff does not utilise the special provisions of S. 91, C. P. Code, or prove special damage, but purports to sue under O. 1, R. 8, C. P. Code, he must plead and show, (1) that he sues not on behalf of the public generally, but on behalf of a limited and clearly defined class with which he has a common interest and a common right, and (2) that the pathway in question is not a public highway in the full sense in which all the members of the public who happen to go to the place have equal interest; he must show that it is a way or path of a quasi public type, in which the class he represents has got special rights as distinct from those of the public generally. (*Fazl Ali and Meredith, JJ.*) Bibhuti Narayan Singh *v.* Guru Mahadev Asram Prasad Sahi. **19 Pat. 208=A.I.R. 1940 Pat. 449.**

——**S. 91**—*Applicability — Taking of Granth Sahib to cremation ground—If amounts to public nuisance—Suit with reference to.*

Where a suit is, brought to restrain certain persons from taking the Granth Sahib to the cremation ground S. 91, C. P. Code, does not apply to such a suit as the taking of the Granth Sahib is not a public nuisance. (*Almond, J.C.*) Ram Chand Lachman Dass *v.* Ishar Singh. **10 R. Pesh. 57=173 I.C. 813=A.I.R. 1937 Pesh. 81.**

——**S. 91**—Scope—Absence of sanction—If bar to maintainability of suit—Failure to raise plea of want of sanction—Effect—Plea in second appeal—If open. *See* Tort—Nuisance. **1938 M. W.N. 262.**

——**S. 91**—*Scope—Public way—Obstruction—Suit for establishing public right of way and for removal of obstruction—Maintainability without sanction of Advocate-General—Proof of special damage—Necessity.*

A suit for establishing a public right of way and removal of obstruction which constitutes a public nuisance can be maintained by a plaintiff without the sanction of the Advocate-General under S. 91, C. P. Code, and without proof of special damage. S. 91, C. P. Code though it provides a remedy by getting the sanction of the Advocate-General—a remedy which in many of these cases will be financially out of reach of the parties expressly safeguards any other remedies which may exist. The English rule requiring proof of special damage in cases in which a member of the public prays for the removal of an obstruction to a public way does not apply to India. (*Wadsworth, J.*) MUNISAMI CHETTY *v.* KUPPUSAMI CHETTY. **I.L.R. (1939) Mad. 870=186 I.C. 208=12 R.M. 601=49 L.W. 334=1939 M.W.N. 259=A.I.R. 1939 Mad. 691=(1939) 1 M.L.J. 392.**

——**S. 91**—*Scope—Suit by particular class of public claiming right of way over village path—Maintainability—Sanction of Advocate-General—Necessity—Proof of special damage.*

Under S. 91. C. P. Code, the consent of the Advocate-General is necessary for a suit with regard to a public right, but an action brought by a particular section or class of the public, claiming a right of way over certain land alleged to be a village pathway, is an exception to that general rule. Such an action is maintainable without proof of special damages. (*Wort, J.*) RAMDAHIN PANDE *v.* PARMESHWAR SINGH. **188 I.C. 249=12 R.P. 681=6 B.R. 617=20 Pat. L.T. 414=A.I.R. 1940 Pat. 160.**

——**S. 91**—*Suit in respect of a personal right to use a passage—If affected by S. 91.*

Where a particular passage or way is not a public highway and where certain persons bring a suit in their personal right to the use of the passage or way, it is not barred by S. 91, C. P. Code, for the plaintiffs have a personal cause of action to bring the suit. (*Thom, C.J. and Ganga Nath, J.*) RAM KALI *v.* MUNNA LAL **I.L.R. 1939 All. 754=184 I.C. 620=12 R.A. 260=1939 A.L. J. 821=1939 A.W.R. (H.C.) 515=1939 R.D. 390 =A.I.R. 1939 All. 586.**

——**S. 92.**

Appeal.
Applicability.
Burden of proof.
Charitable trust.
Construction.
Interest.
Jurisdiction of Civil Court.
Parties.
Public or Private trust.
Relief.
Removal of heads of Religious Endowment.
Right to sue.
Scheme decree.
Scope and effect.
Suit under.

Appeal.

——**S. 92**—*Appeal—Death of mutwallis of wakf appointed by Court—Applications by some persons for their own appointment—Order appointing applicants—Appeal—Revision.*

On the death of the mutwallis of a wakf appointed by the Court in a suit under S. 92, C. P. Code, some persons applied to the Court to be appointed mutwallis of the wakf, and the Court passed an order appointing the applicants. Against this order and the order regarding the maintainability of the applications, an appeal was brought.

Held, that the appeal was incompetent and that neither S. 96 nor S. 47, C. P. Code, was applicable

to the case, but that a revision lay against the orders passed by the Court. (*Thomas and Zia-Ul-Hasan, JJ.*) ABUL HASAN KHAN *v.* JAFAR HUSSAIN. **13 Luck. 523=168 I.C. 803=9 R.O. 505=1937 O.L.R. 324=1937 O.W.N. 730=A.I. R. 1937 Oudh 381.**

——**S. 92**—*Appeal—If competent by one of the plaintiffs only—Sanction—Institution of suit, if should conform to.*

Where the consent in writing of the advocate-general, or collector has been obtained to a suit by three persons, the suit as instituted must conform to that consent. If after the institution by three persons as plaintiffs, two die, the suit does not become defective or incompetent. There is no provision at all in the Code for recourse being had to the advocate-general or collector during the course of a suit or proceedings in appeal. The consent is a condition of the valid institution of a suit and has no reference to any other stage. The persons who filed the suit within the leave of the advocate-general or collector are not to be deemed to be one plaintiff and as such there is no reason why one of the plaintiffs in the case should not appeal alone on the same terms and conditions as are applicable to suits in general. (*Sir George Rankin.*) ALI BEGAM *v.* BADR-UL-ISLAM ALI KHAN. **65 I.A. 198=1938 A.L.J. 825 =40 Bom.L.R. 835=42 C.W.N. 845=1938 O.L. R. 278=67 C.L.J. 266=1938 P.W.N. 470=48 L. W. 1=10 R.P.C. 290=4 B.R. 593=1938 O.A. 958 =1938 A.L.R. 430=40 P.L.R. 740=1938 M.W. N. 757=1938 O.W.N. 698=I.L.R. (1938) Lah. 383=32 S.L.R. 749=1938 A.W.R. (P.C.) 131=174 I.C. 870=A.I.R. 1938 P.C. 184=(1938) 2 M.L.J. 1 (P.C.).**

——**Ss. 92 and 47**—*Appeal—Orders for carrying out scheme.*

Where orders are passed merely for carrying out a scheme, they are orders in execution, and appeals lie from such orders under S. 47. (*Mosely and Dunkley, JJ.*) U PO SEIN *v.* U PU. **177 I.C. 919=11 R.R. 184=A.I.R. 1938 Rang. 363.**

Applicability.

——**S. 92**—*Applicability—Conditions—Suit to declare certain properties as trust properties and to restrain defendant from alienating the same—Sanction—Necessity.*

There are only two classes of cases to which S. 92 applies, (1) where there is any alleged breach of any express or constructive trust for public purposes of a charitable or religious nature; (2) where the directions of the Court are deemed necessary for the administration of any such trust; further, in order that the suit should fall within the section, any one or more of the reliefs of the nature described in clauses (*a*) to (*h*) of the section must be the subject of the prayer in the suit. All these conditions must be satisfied before a suit can be said to fall within the purview of S. 92. A suit for a declaration that the property in the suit is a public charitable property and that neither the defendant nor any one else is entitled to alienate the same and for an injunction restraining the defendant from alienating the same or any portion of it to any person, is a suit to which S. 92 applies, because the relief prayed for falls within Cl. (*h*) of the section; consequently sanction under the section is necessary. (*Davis, J.C. and Lobo, A.J.C.*) MULCHAND BASSAAR MAL *v.* DEVIGIR MOTIGIR. **30 S.L.R. 104 =165 I.C. 158=9 R.S. 87=A.I.R. 1936 Sind 179.**

——**S. 92**—*Applicability—Conditions—Suit for removal of trustee* de son tort—*If falls under S.* 92.

In order to invoke the application of S. 92, C. P. Code, four conditions are necessary: (1) the trust in suit must be for public purposes of a charitable or religious nature, (2) the plaint must allege a breach of trust or that the direction of the Court is necessary for the administration of the trust; (3) the suit must be not only in the interest of the plaintiff individually, but in the interest of the public, or in the interest of the trust itself (for where the trust is a public one the interest of the trust will be the interest of the public); and (4) the relief claimed in the suit must be one of the reliefs mentioned in the section. A prayer for removal of a trustee is a relief contemplated by the section and falls under it. The fact that the defendant sought to be removed on the ground of misconduct and misappropriation is a self-constituted trustee, that is to say, a trustee *de son tort* is immaterial, because if the defendant is a person who is not a trustee and purports to act as a trustee, he is a trustee *de son tort*, and a suit to remove such a person, is a suit for the removal of a trustee within the meaning of S. 92, C. P. Code. (*Wort and Meredith, JJ.*) RAMDAS BHAGAT *v.* KRISHNA PRASAD TEWARI. **186 I.C. 359=6 B.R. 351=12 R.P. 486=1940 P.W.N. 123=21 Pat.L.T. 155= A.I.R. 1940 Pat. 425.**

——**S. 92**—*Applicability—Hindu leaving widow and large properties—Wills left by deceased giving considerable properties to trusts and charities and maintenance to widow—Suit by latter claiming higher maintenance according to Hindu Law and challenging wills—Sanction—Necessity.*

A Hindu died leaving his widow and considerable movable and immovable properties. He disposed of his properties by four wills and a trust deed, whereby he bequeathed considerable properties to certain trusts and charities and gave specific amounts of money to his wife for maintenance. After his death, she sued the executors under the wills and the trustees under the trust deed, contesting the validity of the wills, etc. and claiming maintenance suitable to her requirements and status in life under the Hindu law. It was pleaded that the suit was bad for want of sanction under S. 92, C. P. Code, because the plaintiff claimed some reliefs falling under S. 92 (1).

Held, that the suit was not one to enforce the trust, but one claiming what the plaintiff considered reasonable maintenance not on the basis of the trust but in spite of the trust, relying on Hindu Law. She was not asking the Court to administer the trust but to administer her husband's estate in accordance with Hindu Law for the purpose of giving her proper maintenance. S. 92, did not therefore govern the case and no sanction was necessary. (*Broomfield and Macklin, JJ*) MAHANT NARSIDASJI *v.* BAI JAMNA. **185 I.C. 44=12 R.B. 211=41 Bom.L.R. 787=A. I.R. 1939 Bom. 354.**

——**S. 92**—*Applicability—Matter pertaining to administration of religious trust—Temple trustee removing namams in temple and on temple articles and putting different namams—Suit in respect of—Suit to compel trustee to take out deity in procession on certain occasions—Sanction —Necessity.*

Matters pertaining to the administration of a religious trust must be distinguished on the one hand from matters of ritual and on the other from the individual right of worship. Where the complaint is that the trustees of a temple have removed certain namams from the temple, temple articles and certain idols, by erasing them and replaced them with other namams of a different category, it must be treated as one relating to the administration of a religious trust. A suit in respect of such a matter is not competent unless the procedure prescribed by S. 92, C. P. Code, is adopted. So also a claim to compel the trustees of a temple to take in procession certain idols within the precincts of the temple on certain occasion, is one falling within S. 92, C. P. Code, and is not maintainable without sanction. (*Venkatasubba Rao and Abdur Rahman JJ.*) AIYANACHARIAR *v.* SATAGOPACHARIAR. **189 I.C. 190=1939 M.W.N. 418=A.I.R. 1939 Mad. 757.**

——**S. 92**—*Applicability—Public or charitable trust—Allotment of property to poor members of specific community—Trust—Suit in respect of— Sanction—Necessity.*

Allotting property for the benefit of poor members of a particular community is a purpose of a public or charitable nature within the meaning of S. 92. Where a suit relates to such property sanction of the Advocate-General under S. 92 prior to the institution of the suit is essential, although such property forms a small part and is divisible from the rest of the trust property in respect of which the suit is brought. Sanction under S. 92 is all the more necessary when the suit is not divisible and it is not possible for the plaintiff to omit the relief which he claims relating to charitable part of the trust and in such a case the whole suit is governed by S. 92. (*Lobo and Weston, JJ.*) VISHRAM MANJI *v.* GANGARAM LADHA. **I.L.R. (1939) Kar. 325= 178 I.C. 897=11 R.S. 114=A.I.R. 1939 Sind 13.**

——**S. 92**—*Applicability—Suit by new trustee against ex-trustee—Sanction—Necessity.*

A suit by a plaintiff claiming to be a newly appointed trustee of a temple for recovery of movable properties and cash of the temple and for an account of trust money received by the defendant, the previous trustee, who is alleged to have been lawfully removed from office is outside the scope of S. 92, C. P Code, and is not bad for want of sanction under S. 92. (*Lakshmana Rao, J.*) GURUNATHASAMI KOIL *v.* ALANGARAM PILLAI. **1939 M.W.N. 255=49 L.W. 495=A.I. R. 1939 Mad. 594=(1939) 1 M.L.J. 517.**

——**S 92**—*Applicability—Suit by person claiming to be trustee of property against rival trustee —Relief claimed in individual capacity.*

Where a suit is instituted by a person claiming to be a trustee of property dedicated for religious purposes, for a declaration that he is a trustee and is entitled to manage the institution as such but the relief he claimed is in his individual capacity and not in a representative capacity and the suit is against a rival trustee or one who claims to be a trustee, such a suit does not fall under S. 92 (1). No injury to public right or interest is involved; whoever happens to succeed will hold the property as trustee and not in his own right. The dispute between the rival trustees *inter se* is neither a suit for removal of any trustee nor one for appointing a new trustee nor for vesting any property in a trustee and does not fall under any heads from (*d*) to (*g*) or under head (*h*) of S. 92. A suit by a person claiming to be a mutawalli of a certain mosque against a registered corporation which has been managing the mosque, for a declaration that he is the mutawalli of the mosque and as such entitled to manage all the affairs connected with it, does not therefore fall under S. 92, C. P. Code, and does not require the sanction of the Collector required by S. 92 and the institution of the suit in such a form does not amount to a circumvention of law. (*Addison and Din Mohammad, JJ.*) Jamiat Dawat *v.* Mohammad Sharif. **180 I.C. 799=11 R.L. 711=A.I.R. 1938 Lah 869.**

——S. 92—*Applicability—Suit for accounts by trustees against past trustees—Consent of Advocate-General—If necessary—Suit against some only of them—Maintainability.*

S. 92, C. P. Code, does not apply to a suit by the trustees of a property against the past trustees for accounts, and the consent of the Advocate-General is, therefore, not necessary to institute such a suit. The section applies only where the suit brought is representative in its nature, that is to say, where the suit is brought by two or more persons as representing the general public in order to secure the proper administration of a public trust. A suit by trustees on their own behalf and in the discharge of their own functions as trustees, not being a representative suit, is outside the scope of the section. A suit for accounts by the trustees against some only of the past trustee is maintainable, if some only of them are known to have committed a breach of trust. (*Rau and Mukherjea, JJ.*) Indu Bhusan Sen *v.* Kiron Chandra Sen. **44 C.W.N. 327=A.I.R. 1940 Cal. 376.**

——S. 92—*Applicability—Suit for declaration, injunction and possession of property as private property—Nature of—Test—Plea by defendant that property is public charitable and religious trust—Effect.*

A suit in which a claim is made to property as the plaintiff's private property is not a suit to which S. 92, C. P. Code, applies. The nature of a suit is determined by the plaint and not by the written statement. A suit for declaration, injunction and possession of certain property as the plaintiff's own property is not a suit under S. 92. The fact that the defendant in his written statement pleads that the property is a public charitable and religious trust cannot make the suit one under the section. (*Davis, J.C. Mehta, A.J.C.*) Ganga Ram *v.* Keshavdas. **170 I.C. 102=10 R. S. 32=30 S.L.R. 478=A.I.R. 1937 Sind 174.**

——S. 92—*Applicability—Suit for declaration that property is* wakf.

A suit for a declaration that the suit property is *wakf* and not the private property of the defendants is competent without the sanction required by S. 92. (*Tekchand and Coldstream, JJ.*) Ram Rup *v.* Sarn Dayal. **160 I.C. 289=8 R.L. 524=A.I.R. 1936 Lah. 283.**

——S. 92—*Applicability—Suit for possession of trust property against alienee.*

S. 92, C. P. Code, does not apply to a suit by a managing committee of a thakardwara to recover possession of the property originally belonging to it, and mortgaged by a previous mahant, and no sanction is, therefore, necessary for such a suit. (*Skemp, J.*) Bachint Singh *v.* Gajpat Rai. **172 I.C. 319=10 R.L. 297=39 P.L.R. 355=A.I. R. 1937 Lah. 660.**

——S. 92—*Applicability—Suit of trustee against co-trustees for accounts—Sanction of Advocate-General—Necessity—Test.*

A suit by a trustee of a public, charitable or religious trust against his co-trustees for accounts is not a suit falling within S. 92, C. P. Code, and does not require the sanction of the Advocate-General before institution.

Varadachariar, J.—To attract the operation of the section the suit must be brought by individuals as representatives of the general public, and the relief sought must be in the larger interests of the public, besides being of a kind mentioned in S. 92 (1), and not merely for the purpose of vindicating the private rights of one of the trustees. (*Leach, C.J. and Varadachariar, J.*) Shanmukham Chetty *v.* Govinda Chetty. **I.L.R. (1938) Mad. 39=176 I.C. 26=11 R.M. 53 =1937 M.W.N. 849=46 L.W. 426=A.I.R. 1938 Mad. 92.**

——S. 92—*Applicability — Test — Prayer in plaint as on date of institution—If deciding factor —Amendment or abandonment subsequently—If material.*

It is incumbent upon the Court to see what were the prayers in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 has been complied with and for this purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. (*Lobo and Weston, JJ.*) Vishram Manji *v.* Gangaram Ladha. **I.L.R. (1939) Kar. 325=178 I.C. 897=11 R.S. 114=A.I.R. 1939 Sind 13.**

——S. 92—*Applicability—Test—Suit as originally framed falling under section—Sanction not obtained—Effect—Amendment to omit prayer to get over absence of sanction—Permissibility.*

The question whether S. 92 of the C. P. Code has to be applied to suit must depend upon the prayers in the plaint at the date when the suit is instituted, and the section cannot be evaded by an amendment of the plaint at a later date. A suit which, as originally instituted, is obnoxious to S. 92 cannot, by amendments in the plaint, be altered and rendered not obnoxious to the section. (*Broomfield and Tyabji, JJ.*) Annappa Ramchandra *v.* Krishna Narayan. **9 R.B. 202=165 I.C. 1001=38 Bom.L.R. 808=A.I.R. 1936 Bom. 412.**

——S. 92—*Applicability—Tope inam—If public charitable or religious trust—Grant of tope inam to person as* dharmakartha—*Condition that tope to be preserved and produce to be applied to charity—Nature of grant—If to be deemed to be dedicated to use of public.*

Tope inams are a familiar class of charitable grants made by ancient rulers for the benefit of the public or a section of the public, for example, the villagers of a particular locality. In the case of tope inam consisting of 13-78 acres in a village, the date of the original grant was not known, and the grant too was not forthcoming. The inam register showed the grant as a dharmadayam grant, the grantee being described as *dharmakartha.* In the remarks column appeared the statement: "Subject to the condition of the tope being preserved and the produce applied to charity." The evidence showed that the tope was being utilised as a place of shelter for the villagers, for the cattle and for way-farers. It was also found that the produce of the tope was being distributed among the villagers.

Held, that both from the nature of the grant and from the enjoyment in regard thereto, the tope in question must be intended to have been dedicated to the use of the public and was clearly a public charitable trust to which S. 92, C. P. Code, would apply. (*Venkataramana Rao, J.*) APPAMMA *v.* BHUJANGARAYUDU. **174 I.C. 199=10 R.M. 673=46 L.W. 804=1937 M.W.N. 1089 =A.I.R. 1937 Mad. 862=(1937) 2 M.L.J. 505.**

——S. 92—Applicability—Trust funds deposited with banker by trustee—Misapplication to private account of trustee—Suit by co-trustee against banker and trustee—Sanction of Advocate-General — Necessity. *See* BANKER AND CUSTOMER—LIABILITY OF BANKER. **48 L.W. 577 =A.I.R. 1938 Mad. 999.**

——S. 92—*Applicability— Trust properties—Breach of trust by female trustee—Suit by person claiming to succeed to office as next trustee for relief on ground of breach of trust—If falls under section.*

A suit in respect of properties forming the subject-matter of a public charitable trust, seeking relief on the ground of a breach of trust by the defendant trustee falls under S. 92, C. P. Code and is not maintainable unless instituted in conformity with the provisions of S. 92. The fact that the trustee-defendant is a woman and that the plaintiff is a reversioner who has a chance of becoming a trustee in the future makes no difference. There is no difference between a male holder and female holder of the office as regards trusteeship in respect of the status of or the remedies open to the next successor to the office. (*Varadachariar and Pandrang Row, JJ.*) SUNDARAMMAL *v.* JAGADAMBAL AMMAL. **180 I.C. 35=11 R.M. 649=48 L.W. 543=1938 M.W.N 1060=A.I.R. 1939 Mad. 65=(1938) 2 M. L.J. 1013**

——S. 92—*Applicability—Trust for public purposes—Meaning of—Properties held by Mahant of temple—Legal title vesting in him—Obligation to maintain temple—If trust.*

Although it would be unreasonable to hold, having regard to the evidence in a particular case, that the properties held by the Mahant of a temple belong to any idol or to the temple, or to the members of the *panth* or to anybody except the Mahant for the time being the fact that the legal title is in the Mahant cannot dispose of the matter. If the general effect of the evidence is that the ownership of the properties is so restricted by the obligation to maintain the institution for purposes which can only be regarded as public charitable purposes it may fairly be said that a suit has been created for such purposes within the meaning of S. 92, C. P. Code. S. 92 is not limited to trusts in the sense defined by the Trusts Act but must certainly include them. (*Broomfield and Sen, JJ.*) DHORIBHAI DADABHAI *v.* PRAGDASJI. **178 I.C. 926=11 R.B. 207=40 Bom.L.R. 1041=A.I.R. 1938 Bom. 471.**

——S. 92—*Applicability—Wakf partly private and partly public—Suit for removal of trustee alleging breach of private trust—Consent of Advocate-General—If necessary—'Breach of trust'—Meaning of.*

By a deed of wakf, a Mahomedan lady created a primary trust for the benefit of the poor members of her family, and subject thereto, a secondary trust for certain charitable or religious objects, and appointed the defendant as the sole trustee of the wakf property. The plaintiffs who were relatives of the settlor, pleading their interest as members of her family, instituted a suit for the removal of the defendant alleging breaches of the primary trust.

Held, that the word 'trust' in the context 'breach of trust' in S. 92, C. P. Code, denoted the abstract obligation to administer property in a certain defined way which attached to a trustee in whom property was vested upon trust, that by "breach of trust" was meant a breach by the trustee of the confidence or duty that the law or equity imposed on him in the particular respect complained of in the case, that, therefore, as the allegations of the plaint were made by the plaintiffs only as objects of the primary or non-public purpose and as there was no allegation of a breach of the secondary trust which was of a public nature, the case did not fall within S. 92 (1), C. P. Code, and the consent of the Advocate-General was not necessary to the institution of the suit. (*Braund, J.*) I. E. ABOO *v.* G. H. S. ABOO. **1939 Rang.L.R. 140=184 I.C. 413=12 R.R. 142=A.I.R. 1939 Rang. 254.**

Burden of proof.

——S. 92—*Burden of proof—Right to relief.*

In proceedings under S. 92, C. P. Code, the onus of establishing a case for the reliefs asked for is on the plaintiff. It is for the plaintiff to prove that there is an endowment or trust for public of charitable or religious nature. But the question of onus is immaterial when evidence on both sides is adduced. (*Mukerjee and Jack, JJ.*) PRAKASH CHANDRA NAG *v.* SUBODH CHANDRA NAG. **I.L.R. (1937) 1 Cal. 515=170 I.C. 290=10 R.C. 133=64 C.L.J. 341=A I R. 1937 Cal. 67.**

Charitable trust.

——S. 92—*Charitable trust—What constitutes.*

Where the words used in a trust are "charitable and benevolent" purposes, any object to be benefited must possess both characteristics. Accordingly these words will constitute a good charitable trust, that is to say, a charitable trust of a public character. But where the words are "public, benevolent or charitable purposes" the gift is expressed in another form admitting non-charitable objects, for example objects of private benevolence only, or public non-charitable purposes and the trust will fail. A bequest to charitable purposes may by its very terms show that those purposes are of a private nature. In such a case the bequest would not fall under S. 92. Where a gift is to purposes which are charitable, whatever else they may be in addition, then unless the charitable purposes expressed are clearly stated to be of a private nature, the Courts will administer the trust as one for public purposes of the charitable nature. Where the testator's intention is to benefit only the members of his own family who are poor, this is not "a public purpose of a charitable nature" within the meaning of S. 92. But, where charity, *prima facie* for public purposes, is the expressed object of the settlor, these purposes are not in any way defeated by the reminder that members of his own family are eligible to benefit with other members of the public at large. (*Roberts, C.J. and Mosely, J.*) TAW CHEW KEAN *v.* TAW KOCK TYON. **1939 Rang. L.R. 520=184 I.C. 333=12 R.R. 140=A.I.R. 1939 Rang. 203.**

Construction.

——S. 92—*Construction—Principles—Duty of Court.*

The provisions of S. 92, C. P. Code, are of a restrictive nature, and must, therefore, be construed strictly; and before the Court can bar a suit for want of necessary sanction, it has to be satisfied that the suit comes actually within the four corners of the section. But though the section has to be construed strictly, it should not be construed in such a way that a fraud is perpetrated on the section itself. (*Davis, J.C. and Lobo, A.J.C.*) MULCHAND BASSAAR MAL *v.* DEVIGIR MOTIGIR. **30 S.L.R. 104=165 I.C. 158=9 R.S. 87=A.I.R. 1936 Sind 179.**

Interest.

——S. 92—*'Interest'—Meaning of.*

'Interest' in S. 92, C. P. Code, denotes an interest which must be a present and substantial and not a remote and fictitious or purely illusory interest. (*Mya Bu and Sharp, JJ.*) M. E. MITCHLA *v.* A. M. MITCHLA. **1938 Rang.L.R. 276=177 I.C. 851=11 R.R. 175=A.I.R. 1938 Rang. 339.**

Jurisdiction of Civil Court.

——S. 92—*Jurisdiction of Civil Court—Removal of mahant from religious duties.*

Where the secular and religious duties of a mahant of a public endowment are inter-dependent and inseparably blended, as it must be the case in any well-organised institution, a Civil Court has jurisdiction under S. 92, C. P. Code, in fit cases to remove the mahant not only from the trusteeship and management of the temporal affairs of the endowment but also from his spiritual duties. But even if the two capacities of the office can be separated, and the mahantship on its spiritual side regarded as purely an office or dignity, there is no doubt that the office is of such a nature that a suit relating to it must fall within the purview of the explanation to S. 9, C. P. Code—the spiritual portion of the office being intimately connected with the exercise of rights to property. There may, however, be cases where the duties of an office are purely spiritual and moral, entirely unconnected with any particular temple or place. The office may be such that no pecuniary benefit is attached to it or its emoluments are purely voluntary contributions, or the duties attendant to it are the exercise of spiritual and moral supervision over the voluntary actions of the worshippers. In such cases, it may be futile for a Civil Court to interfere with the exercise of the duties of the office. No rights of property are connected with it and there is no machinery by which the Court can control the voluntary action of the worshippers or the mahant. (*M.R. Jayakar.*) SATISH CHANDRA *v.* DHARANIDHAR. **67 I.A. 32=44 C.W.N. 177 (P.C.)=I.L.R. (1940) 1 Cal. 266=I.L.R. (1940)**

Kar. (P.C.) 47=185 I.C. 616=12 R.P.C. 117=51 L.W. 49=1940 O.A. 112=1940 O.L.R. 64=6 B.R. 291=1940 A.W.R. (P.C.) 33=1940 O.W.N. 104=21 P.L.T. 91=1940 P.W.N. 110=71 C.L.J. 1=1940 M.W.N. 172 (2)=42 Bom.L.R. 295=42 P.L.R. 158=1940 A.L.J. 409=A.I.R. 1940 (P.C.) 24=(1940) 1 M.L.J. 371.

Parties.

——S. 92—*Parties—Suit for removal of trustee—Ijaradar from trustee—If necessary party.*

In a suit for the removal of a trustee under S. 92, C. P. Code, the ijaradar from the trustee is not a necessary party. (*S. K. Ghose and Patterson, JJ.*) MASSIRAT HOSSAIN *v.* HOSSAIN AHMAD CHOWDHURY. **176 I.C. 842=11 R.C. 182=42 C.W.N. 345=A.I.R. 1938 Cal. 278.**

——S. 92 and O. 1, R. 10(2)—*Parties—Suit for settling scheme—Person related to founder of trust and qualified to be trustee—If necessary party.*

In a suit under S. 92, C.P. Code, for settling a scheme for a trust, it is necessary to implead as a defendant a person who is not merely a beneficiary but is a near relation of the founder of the trust and has got the necessary qualification which, under the terms of the trust-deed, entitles him to be made a trustee, in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. If he is not so impleaded, he will have no right of appeal against the decree of the trial Judge affecting the trust properties. (*Nanavutty and Zia-ul-Hasan, JJ.*) LAL SURESH SINGH *v.* LEGAL REMEMBRANCER TO GOVERNMENT, U. P. **13 Luck. 255=167 I.C. 828=9 R.O. 402=1937 O.L.R. 160=1937 O.W.N. 271=A.I.R. 1937 Oudh 229.**

Public or private trust.

——S. 92—*Public charitable trust—Trust for poor members of testator's family.*

A trust for the benefit of the poor members of a particular testator's family is not a trust "for a public purpose of a charitable nature" within the meaning of S. 92. Accordingly a suit relating to such a trust does not require for its commencement the sanction of the Government Advocate, even though the suit is for relief of one of the kinds mentioned in that section. (*Braund, J.*) ATTIA *v.* MADHA. **14 Rang. 575.**

——S. 92—*Public or private trust—Provisions in favour of both private individuals and public.*

There is no hard and fast rule that, merely because there are certain provisions in favour of private individuals and certain others in favour of the public, therefore, the case falls within or without the class of public trusts to which S. 92, C. P. Code, applies. The Court must look to the real substance of the trust and the primary intention of the creator of the trust in every case. (*S. K. Ghose and Patterson, JJ.*) MASSIRAT HOSSAIN *v.* HOSSAIN AHMAD CHOWDHURY. **176 I.C. 842=11 R.C. 182=42 C.W.N. 345=A.I.R. 1938 Cal. 278.**

——S. 92—*"Public trust"—Scheme of loans for educational purposes at low interest to Anglo-Indian youths of Madras Presidency—If public trust.*

A trust created by a private person formulating a scheme to help Anglo-Indian youths of the Madras Presidency in their studies, providing for the grant of loans at a low rate of interest to the youths of that community who wished to qualify for professions or obtain higher education generally. is not a private trust, but a public trust governed by the provisions of S. 92, C. P. Code. A scheme of loans for educational purposes at low interest must be regarded as a scheme of a charitable nature. The fact that the founder has placed certain restrictions as regards the age and other qualifications of the recipients of the benefit does not make the trust any the less a public trust. An order of Court permitting a deviation from the trust can only be made in proceedings taken with the sanction of the Advocate-General under S. 92, C. P. Code, and not by way of an originating summons under O. 45 of the Original Side Rules of the High Court. *(Leach, C.J. and Patanjali Sastri, J.)* EDWARD H. M. BOWER *v.* HESTERLOW. **I.L.R. (1940) Mad. 300=189 I C. 96=13 R.M. 135=50 L.W. 534=1939 M.W.N. 1015=A.I.R. 1939 Mad. 920=(1939) 2 M.L.J. 714.**

——S. 92—*Public trust—Temple—Mahant—Properties held by—Dedication—Evidence of.*

Public user for a long period without objection can be relied upon as strong evidence of a public trust. Where properties have been acquired by a Sadhu, *mahant* of a temple and have descended from chela to chela there is a presumption that they have been dedicated to religious uses. *(Broomfield and Sen, JJ.)* DHORIBHAI DADABHAI *v.* PRAGDASJI. **178 I.C. 926=11 R.B. 207=40 Bom.L.R. 1041=A.I.R. 1938 Bom. 471.**

——S. 92—*Public trust—Wakf—Bulk of income reserved for family and family religious purposes.*

Where the bulk of the income from the wakf properties is to be spent for the family or family purposes, some portion for religious purposes which cannot be regarded as wholly public in Mahomedan Law like *Mohurram* and *Ramzan* expenses, and the surplus, if any, is to go to *haj* expenses of the *mutawalli*, the wakf is not a trust created for public purposes within the meaning of S. 92, C.P. Code. *(Ameer Ali, J.)* ABDUL HALIM *v.* NASIBUNNESSA BIBI. **44 C.W.N. 969.**

Relief.

——S. 92—*Relief—Relief of ejectment of lessee—If can be asked for in the suit under the section.*

In a suit under S. 92, C. P. Code, reliefs in the nature of ejectment cannot be asked for as against a lessee in respect of the trust property. *(Mukerji and Jack, JJ.)* FAIZUNNESSA *v.* MOULVI ASAD BUKHT. **41 C.W.N. 298.**

Removal of heads of Religious Endowment.

——S. 92—*Removal of heads of religious endowment from office—Matters for consideration of Court.*

No general rule can be laid down befitting the different kinds of religious heads of varying sanctity and eminence. It must depend upon the facts of each case. It may be that mere mismanagement or incapacity is. in the case of certain high dignitaries, not ordinarily sufficient for their removal from the performance of their religious duties, as distinct from their duties as managers of the properties of the institution. It may also be that a Court, in certain cases, exercises a wise discretion in not directing their total exclusion from their religious office, where (*e.g.*) the lapses are due to causes like a misconception of their position or obligations. The Court may sometimes not order their total removal, but may associate with them a committee of management. But these are all matters for the consideration of the Civil Court, which must necessarily enjoy a wide discretion to decide what form of punitive or ameliorative order will suit the requirements of the case. The true rule in such matters can be stated to be that if it be found by the Court that the functionary, in the exercise of his duties, has put himself in a position in which the Court thinks that the obligations of his office in connection with the endowment can no longer be faithfully discharged without danger to the endowment, that is a sufficient ground for his removal, if need be, from both his offices. *(M.R. Jayakar.)* SATISH CHANDRA *v.* DHARANIDHAR. **67 I.A. 32=I L R. (1940) 1 Cal. 266=I.L.R. (1940) Kar. (P.C.) 47=185 I.C. 166=12 R.P.C. 117=51 L.W. 49=6 B. R. 291=1940 O.A. 112=1940 O.L.R. 64=1940 A.W.R. (P.C.) 33=1940 O.W.N. 104=21 Pat.L. T. 91=1940 P.W.N. 110=71 C.L.J. 1=1940 M. W.N. 172 (2)=42 Bom.L.R. 295=42 P.L.R. 158=1940 A.L.J. 409=44 C.W.N. 177=A.I.R. 1940 P.C. 24=(1940) 1 M.L.J. 371 (P.C.).**

——S. 92—*Removal of mahant from office—Moral character of mahant—Power of Court to consider.*

In a suit under S. 92, C. P. Code, for the removal of a mahant from his office, the Court can consider the moral character of the mahant as directly relevant to the issues arising in the suit, (*e.g.*) his fitness to remain in office and his liability to be removed therefrom. *(M. R. Jayakar.)* SATISH CHANDRA *v.* DHARANIDHAR. **67 I.A. 32=I.L.R. (1940) 1 Cal. 266=I.L.R. (1940) Kar. (P.C.) 47=185 I.C. 166=12 R.P.C. 117=51 L. W. 49=6 B.R. 291=1940 O.A. 112=1940 O.L. R. 64=1940 A.W.R. (P.C.) 33=1940 O.W.N. 104=21 Pat.L.T. 91=1940 P.W.N. 110=71 C.L. J. 1=1940 M.W.N. 172 (2)=42 Bom.L.R. 295=42 P.L.R. 158=1940 A.L.J. 409=44 C.W.N. 177=A. I. R. 1940 P. C. 24=(1940) 1 M. L. J. 371 (P.C.)**

——S. 92—*Removal of mutawalli—Discretion of Court—Interference in appeal.*

A mutawalli had persistently disobeyed the directions of the settlor. He failed to publish accounts and had, in fact, not kept proper accounts of the receipts and disbursements of the trust for which he was prosecuted and acquitted only on a technical ground. He had disobeyed the directions of the settlor regarding the disposal of the income of the trust property. He had *locus penitentiae* but had not profited by the warning which he received and failed to reform. His negligence resulted in great loss to the trust funds. The income of the trust was amply sufficient to meet the charitable objects specified by the donor and yet the charities had not received their dues under the trust deed for many years and payments were in arrears. The lower Court, while finding mutawalli grossly negligent, was influenced by sentiment and sympathy and merely warned him.

Held, that the mutawalli had shown by his conduct to be entirely unfit to administer wakf and should be removed. The discretion of lower Court not being influenced by sound reasoning or exercised judicially, could be interfered with by the High Court. *(Mosely and Dunkley, JJ.)* U

Mye Din *v.* U Mya. **177 I.C. 234=11 R.R. 107 =A.I.R. 1938 Rang. 166.**

Right to sue.

——**S. 92**—Right to sue—Founder of religious endowment divesting himself of all interest and appointing another as manager—Subsequent suit to remove him to re-appoint himself—Maintainability. *See* Hindu Law—Religious Endowment. **A.I.R. 1936 Nag. 223.**

——**S. 92**—*Right to sue—Trust for maintenance of choultry and building of temple—Temple not built—Suit by two members of public for framing scheme for management of trust—Maintainability.*

A trust provided for the building of a Vishnu temple, and establishment of a choultry for feeding the poor. It was established that the main object of the trust was maintaining a choultry and that the temple was not built. Two members of the public brought a suit for framing a scheme for the management of the trust. It was contended by the defendant that as the plaintiffs are not poor people, and not directly interested in the choultry, the suit was not maintainable so far as the choultry is concerned; and as regards the temple it was a matter for the Hindu Religious Endowments Board.

Held, that as there was no temple in being, it was not a matter at this stage for the Hindu Religious Endowments Board, and so any member of the public who was interested in the building of a Vishnu temple was entitled to bring the scheme suit. Having brought this scheme suit in right of their interest, in having the trust relating to the temple carried out, it is necessary to consider a trust as a whole. It would be idle and a waste of the Court's time to split the trust into two, restricting these plaintiffs to the litigation of matters relating to the temple and leaving somebody else to litigate matters so far as the feeding choultry was concerned at some subsequent date. So the suit was maintainable. (*Stone and Varadachariar, JJ.*) Ramayya *v.* Satyanarayanamurthi. **165 I.C. 63=9 R.M. 208 (2)=1935 M.W.N. 1172=A.I.R. 1936 Mad. 495.**

Scheme decree.

——**Ss. 92 and 151**—*Scheme decree—If can be modified by application under S. 151.*

A scheme, particularly one relating to a Muslim wakf, can be modified by an application under S. 151, C. P. Code (*Zia-ul-Hasan and Radha Krishna, JJ.*) Faiyaz Ali Khan *v.* Saifullah Shah Soharwardi. **1940 O.A. 582=1940 A.W.R. (C.C.) 298=1940 O.W.N. 639.**

——**S. 92**—*Scheme decree — Application for removal of trustee and for tracing of funds misappropriated by him—Power of Court to take action.*

The Court cannot remove a trustee from his office for alleged misconduct on a mere application made to it for his removal, when it is impossible for it to entertain the application conformably with the provisions of the scheme. The remedy of the persons interested in the trust is to institute a suit under S. 92, C. P. Code, with the permission of the Legal Remembrancer, for his removal. No action can be taken by the Court on a miscellaneous application for tracing the funds misappropriated by him, nor can it give any directions in respect of the proper management of the affairs of the trust. (*Niamatullah and Bajpai, JJ.*) Rangacharya *v.* Ganga Ram. **58 All. 538=160 I.C. 1091=8 R.A. 698=1935 A.W.R. 1338=1936 All.L.R. 228=1936 A.L.J. 398=A.I.R. 1936 All. 97.**

——**S. 92** — *Scheme decree — Construction—Management vested in trustees nominated by District Judge—District Judge given general control over trustees and their management of the trust—Power to remove any trustee for unfitness, incompetence or negligence—Power to remove all trustees—Power to remove for breach of trust or dishonesty—Suit for removal—Necessity—Power to suspend trustees pending inquiry or to appoint interim receiver—Order removing trustees and appointing receiver—Appeal.*

A scheme of management drawn up by the Bombay High Court by a decree in a suit under S. 92, C. P. Code, in respect of a Sansthan vested the management of the institution in three trustees nominated by the District Judge of Poona, giving the District Judge a general control over the engagement of the establishment by the trustees and provided *inter alia*: "The said trustees shall hold office for life, but it shall be competent to the District Judge of his own motion or on the application or representation of any person interested in the said Devasthan to remove from the management any trustee who may be found to be unfit or incompetent for the management of the Sansthan or negligent in the discharge of his duties." A Government audit of the accounts of the Devasthan having disclosed serious frauds and malpractices on the part of certain clerks employed by the trustees, and suggested that the trustees or some of them might have been privy to the frauds. The District Judge, pending a formal inquiry by him into the matter, suspended the three trustees and appointed a receiver under O. 40, R. 1, C.P. Code, to carry on *interim* administration. After hearing the trustee, and other interested parties and taking evidence, the District Judge exonerated all the trustees of breach of trust, but finding that one of the trustees had been negligent and had failed to exercise proper supervision over the clerks, and that another was unfit by reason of his quarrelsome and obstructive conduct, ordered them to be removed. He found that the third trustee was not to blame in any respect and ordered him to be reinstated.

Held, (1) that the power to remove the trustees conferred on the District Judge under the scheme included power to suspend them pending necessary inquiries; (2) that since the District Judge had power to remove any trustee for unfitness he must also be held to have the power to remove all the trustees if circumstances should make it necessary; (3) that the power to remove for unfitness implied a power to remove for dishonesty or breach of trust, and S. 92, C. P. Code, was no bar to such removal; (4) that the District Judge under the scheme had a general control over the trustees and over their management of the trust, and if in the exercise of his powers under the scheme he found it necessary to remove the trustees, he must be credited with the power to make emergency measures for temporary management pending reconstitution of the board of trustees and the appointment of a receiver was therefore not *ultra vires*, as the appointment could be justified by the inherent powers of the Judge under the scheme; and (5) that the orders passed by the District Judge in accordance with the powers conferred on him by the scheme were not open to appeal on the merits. (*Broomfield and Tyabji, JJ.*) MAHADEV *v.* GOVINDRAO. **168 I. C. 577=9 R.B. 375=38 Bom.L.R. 1137=A.I.R. 1937 Bom. 124.**

——S. 92—*Scheme decree—Construction—Provision regarding election of trustee and his qualification—Scheme empowering trustee, worshippers or voters of temple to apply to Court for directions—Worshippers—Right of, to apply to Court for determination whether person nominated for election as trustee was eligible—Court's power to determine question.*

A decree framed a scheme for the management of a temple and provided for the election of trustee whenever a vacancy occurred. A clause in the scheme stated the qualifications of trustee for being eligible to election and provided that nominations should be delivered to the remaining trustee on a certain date. Another clause in the scheme empowered any trustee, worshippers or registered voters of the temple to apply to the High Court for such further directions as might be necessary for carrying out the scheme. A vacancy having occurred, the nomination for the office of trusteeship of a certain person was received by the remaining trustee. Thereupon worshippers and voters of the temple applied to the Court for determination whether the person nominated was eligible for election.

Held, that the applicants were entitled to apply to the Court for determination whether the person nominated for trusteeship was eligible for it. The Court had power to determine the question and direct the trustee to reject the nomination paper. Such direction was necessary for the carrying out of the scheme.

Held, further, that it was unnecessary to ask for the relief prayed for in the plaint and it need not be specifically provided in the decree. The relief asked for was with reference to a provision made for the management of the trust and it was inconceivable that every direction for carrying out a particular provision of the trust should be asked for in the suit or provided in the decree. There was no necessity to wait until an election took place and file a suit to declare the election void. (*Venkataramana Rao, J.*) GOVINDASWAMI NAIDU *v.* KANDASWAMI CHETTY. **1939 M. Cr.C. 252=1939 M.W.N. 1009=A.I.R. 1939 Mad. 605.**

——S. 92—*Scheme decree—Court making appointment of trustees—If acts as "Court" or* persona designata—*Powers of review.*

A Court or a Judge carrying out the provisions of a scheme decree passed under S. 92, C. P. Code, acts as a Court and not as a *persona designata.* The Court or Judge has power in such cases to appoint trustees to vacancies in the office of trustees which have arisen, but there is no power to cancel an order of appointment or to review the same on the ground that some party alleges that he was misled by reason of wrong information given to him that the case was adjourned and therefore was not present at the time the order was made, when it is not proved that either the Court established or the Judge was at fault. The inherent powers of a Court

cannot be extended to such a case. (*Burn, J.*) LAKSHMANA PILLAI *v.* GOVINDAM PILLAI. **50 L. W. 460=1939 M.W.N. 915=A.I.R. 1939 Mad. 969=(1939) 2 M.L.J. 475.**

——S. 92—*Scheme decree—Decree setting out conditions of management—No provision to remove manager on failure to perform conditions—Mismanagement by manager—Application for execution, if competent.*

In the absence of a provision in the conditions of management set out in the scheme decree that the manager would be liable to be removed on his failure to perform the conditions, action cannot be taken to remove the manager even on proof of his mismanagement by means of an application for execution. (*Jai Lal, J.*) OMA SHANKAR DAS *v.* BHOLA DASS. **174 I.C. 574=10 R.L. 585=A.I.R. 1937 Lah. 490.**

——S. 92—*Scheme decree—Executability.*

Once the decree settling a scheme has been passed the Court has done its duty, and is not to be called upon in the execution department to make the scheme work. Where a scheme decree provides that the manager shall deposit the Kattalai Funds in a Bank, but makes no provision for the decision of any dispute as to the amount to be deposited, and while ordering an annual audit, makes no provision for scrutiny of the report of the auditor by the Court or for enforcing any conclusions arrived at by the auditor or the Court, there is nothing of an executable character in those provisions. (*Burn and Lakshmana Rao, JJ.*) RAMANATHAN CHETTIAR *v.* MADURA SRI MEENAKSHI SUNDARESWARAR DEVASTHANAM. **174 I.C. 934=10 R.M. 746=1937 M. W.N. 1159=46 L.W. 701=A.I.R. 1938 Mad. 256=(1937) 2 M.L.J. 887.**

——S. 92—*Scheme decree — Executability—Clause directing trustee to pay certain amounts—Failure to pay—Application in execution—Maintainability—Appointment of receiver—If justified.*

A provision in a scheme decree to the effect that "the trustees of the respective kattalais shall hand over all the cash proceeds of their property to the treasurer," is inexecutable. Neither S. 51 nor O. 21, R. 32, C. P. Code, can be applied to such a clause in the decree. No receiver can be appointed to execute it by way of equitable execution. Per *Cornish, J.*—There is no short cut of a remedy by application to the Court where a trustee refuses to carry out his duties under the scheme. The only remedy available is a suit to remove him or to have the scheme modified. (*Venkatasubba Rao and Cornish, JJ.*) VAITHILINGA MUDALIAR *v.* BOARD OF CONTROL, SRI THIAGARAJASWAMI DEVASTHANAM, TIRUVARUR. **59 Mad. 751=165 I.C. 820=9 R.M. 303=1936 M.W.N. 673=44 L.W. 93=A.I.R. 1936 Mad. 581=71 M.L.J. 87.**

——S. 92—*Scheme decree — Executability—Decree allowing arrears of pay and paditharam expenses of archakas from date of suit to date of judgment—If form part of scheme—Executability.*

Where a decree provides for a scheme the proper way of dealing with such decree is to separate the scheme part from the rest of the decree and when that is done, no provision in the scheme part is executable, whether it is directory or declaratory. Where a decree when laying down a scheme regulating the constitution of a temple allowed the arrears of pay and paditharam expenses of archakas from the date of the suit to the date of the judgment.

Held, that such payments did not form part of the scheme and therefore could be recovered by way of execution of the decree.

Held, further, that from the date of the decree the archakas became entitled to their salary and the paditharam expenses under the scheme and therefore those amounts becoming due subsequent to the decree could not be recovered by way of execution. (*Venkatasubba Rao and Venkataramana Rao, JJ.*) Trustee of Temple of Sree Venugopalaswamivaru *v.* Vedantham Seetharamanujacharyulu. **168 I.C. 715=9 R.M. 627 (2)=1937 M.W.N. 611=45 L.W. 230=A.I.R. 1937 Mad. 326.**

———**S. 92**—*Scheme decree—Nature of—Clause in scheme providing for alterations by Court from time to time—Validity.*

Tyabji, J.—It is open to the Court to include in schemes for the administration of charitable institutions clauses providing that the schemes may, from time to time and as occasion arises, be altered by the Court according to the practice of the Bombay High Court. Such a clause is a valid provision. Where a decree includes a scheme for the administration of a charitable institution, the decree is in its substance very different from the generality of decrees. Whereas ordinary decrees require a particular act to be done by the defendant for the benefit of the plaintiff, a scheme, on the other hand, provides for continued action in regard to the administration of the charity, it being intended to lay down a plan of lasting character for the working of the institution. It contemplates a series of acts extending over many years during which its terms are to be put into operation. (*Broomfield and Tyabji, JJ.*) Mahadev *v.* Govindrao. **38 Bom.L.R. 1137=168 I.C. 577=9 R.B. 375=A.I.R. 1937 Bom. 124.**

———**S. 92**—*Scheme decree—Provision for amendment on application by party interested—Right to apply—If confined to parties or representatives of parties to original litigation.*

It is not the law that an application for amendment of a scheme of management framed in a suit under S. 92, C. P. Code, can only be made by parties to the suit in which the scheme was originally framed. The scheme cannot be regarded as a continuation of the suit, at any rate in the sense that applications under the scheme can only be made by parties to the scheme. Where the scheme provides for modification of the scheme by the Court on the application of parties interested in the institution, any person who may have an interest in the institution from time to time, whether or not he was a party or a representative of a party to the original litigation, is entitled to make an application for amendment or modification of the scheme. (*Broomfield and Tyabji, JJ.*) Mahadev *v.* Govindrao. **168 I.C. 577=9 R.B. 375=38 Bom.L.R. 1137=A.I.R. 1937 Bom. 124.**

———**S. 92**—*Scheme decree—Provision for removal of trustee for unfitness—Trustee found guilty of breach of trust—Removal in proceedings arising out of the scheme—Power of Court—Suit for removal—Necessity.*

S. 92, C. P. Code, does not say that a trustee guilty of a breach of trust can be removed only by a suit. A suit may be brought to remove him in the manner prescribed by the section. But if a suit has once been brought under the section, and a scheme has been framed, which provides for the removal of trustees for unfitness, the exercise of that power in the course of proceedings arising out of the scheme, is not contrary to S. 92, even though the trustee be found unfit by reason of a breach of trust. (*Broomfield and Tyabji, JJ.*) Mahadev *v.* Govindrao. **38 Bom. L.R. 1137=168 I.C. 577=9 R.B. 375=A.I.R. 1937 Bom. 124.**

———**S. 92**—*Scheme decree—Provision for removal of trustees without recourse to Court—Power given to District Judge as* persona designata *to remove trustees—Validity of scheme.*

Tyabji, J.—If a scheme is so drafted as to make directions of the Court unnecessary, or to preclude breaches of trust, or at any rate, to provide fewer opportunities for breaches of trust, it cannot be suggested that the scheme offends S. 92, C. P. Code. Nor can the validity of the scheme be endangered if the scheme provides for a constitution which makes it unnecessary to obtain some of the specified reliefs, and consequently make it unnecessary to institute suits for obtaining those reliefs. A scheme providing a means for the removal of a trustee without recourse to the Court does not offend any law. S. 92, C. P. Code, does not render invalid or ineffectual a clause in a scheme that the trustee may be removed from his office by the District Judge of his own motion speaking of the District Judge as an individual, not the District Court. The District Judge may be validly empowered as a *persona designata* to remove trustees. (*Broomfield and Tyabji, JJ.*) Mahadev *v.* Govindrao. **38 Bom.L.R. 1137=168 I.C. 577=9 R.B. 375=A.I.R. 1937 Bom. 124.**

———**S. 92**—*Scheme decree—Provision giving Court authority to appoint successor to deceased trustee—Whether* ultra vires.

A provision in a scheme settled under S. 92, C. P. Code, giving the Court authority to appoint a successor in place of a deceased trustee, is not a provision which can be regarded as constituting a modification of the original scheme and is not, therefore, *ultra vires*. (*Srivastava, Ag. C.J. and Smith, J.*) Saadat Husain *v.* Mohammad Haidar. **13 Luck 81=166 I.C. 215=9 R.O. 291=1936 O.L.R. 725=1937 O.W.N. 39=A.I.R. 1937 Oudh 193.**

———**S. 92**—*Scheme decree—Provision reserving power to modify it—Whether* ultra vires*—Inherent power of Court apart from such provision.*

The power of the Court to settle a scheme for the administration of a trust is sufficiently comprehensive to include a provision in the scheme which makes the scheme alterable by the Court, if it is found necessary in future. There is nothing in S. 92, C. P. Code, which makes the reservation of a power to modify the scheme in future *ultra vires*. If the scheme is amended subsequently by the Court within the limits laid down by the decree, the Court should be deemed to be giving effect to its own decree rather than amending it. Apart from the exercise of the Court's power reserved by the scheme itself, the only section in C. P. Code which can justify amendment of the scheme is S. 151. The inherent power of the Court under that section to modify a scheme prepared by itself should be exercised only where it is necessary to prevent abuse of the process of the Court or where the ends of justice plainly demand it. (*Niamatullah and Bajpai, JJ.*) Rangacharya *v.* Ganga Ram. **58 All. 538 =160 I.C. 1091=8 R.A. 698=1935 A.W.R. 1338=1936 All.L.R. 228=1936 A.L.J. 398=A.I.R. 1936 All. 97.**

Scope and effect.

——S. 92—*Scope and effect.*

The real intention and meaning of S. 92, C. P. Code, is that by virtue of the specific categories of relief mentioned in paras. (*a*) to (*g*) and the general relief mentioned in para. (*h*), it intends and is effective to catch all those cases in which any declaration, order or other relief is asked for by way of carrying into execution and administering a trust for public purposes of a charitable or religious nature as opposed to relief claimed adversely to the trust altogether, as for example a claim that no valid wakf exists or that certain property does not form part of the trust property. (*Braund, J.*) Attia *v.* Madha. **14 Rang. 575.**

——S. 92—*Scope—Public charitable trust—Management vested in members of family—Dispute among parties—Reference to arbitration—Award dealing with management and laying down scheme for future management—Suit to make award decree of Court—If falls under S. 92.*

Where an arbitrator is required to investigate the nature of the management of various charitable trusts by the parties in management thereof and is also asked to lay down a scheme for the future management of the institutions, that cannot be regarded as a matter arising out of the private rights of any particular individual. The fact that the disputing parties belong to the family or families in which the management of the institutions is vested will not of itself take the case out of the purview of S. 92, C. P. Code, if the object of the proceeding is to safeguard the interests of the institutions or obtain directions for their proper management. A suit to have such an award made a decree of Court cannot lie when the procedure prescribed by S. 92 has not been complied with. (*Varadachariar and Pandrang Row, JJ.*) Lakshmikantam *v.* Ramalingayya. **183 I.C. 170=12 R.M. 244=1938 M.W.N. 1176=48 L.W. 742=A.I.R. 1939 Mad. 170 =(1938) 2 M.L.J. 972.**

——S. 92—*Scope—Relief against third parties—Admission of trust by defendant—If necessary—Nature of suit—Determination.*

S. 92, C. P. Code, is no doubt inapplicable to the case of actions or suits relating to charities brought against third parties; but if the relief is claimed against persons who are constructive trustees, who have intermeddled with the charitable or trust property and made themselves trustees, then the action is within the section. The fact that the defendant does not admit the property to be trust property will not take the suit out of the section, as the nature of the suit is determined by the allegations in the plaint and not by the contentions in the written statement. The plaint and not the written statement should be looked to in order to determine the jurisdiction of the Court. (*Davis, J.C. and Lobo, A.J.C.*) Mulchand Bassaar Mal *v.* Devigir Motigir. **30 S.L.R. 104=165 I.C. 158=9 R.S. 87=A.I.R. 1936 Sind 179.**

——S. 92—*Scope—Suit instituted claiming reliefs under S. 92—Sanction—Necessity—Subsequent amendment or abandonment of reliefs—If makes suit maintainable without sanction.*

The use of the word "instituted" in S. 92, C. P. Code, makes it incumbent on the Court to see what the prayers were in the plaint at the date the suit was instituted in order to satisfy itself whether S. 92 (2), C. P. Code, had been complied with, and for that purpose the Court must pay no regard to what may happen by way of amendment or abandonment at some later stage in the suit. If the suit as instituted falls under S. 92, it cannot lie if brought without the sanction of the Advocate-General or the Collector. The fact that by subsequent amendment the relief or reliefs falling under S. 92 are struck would not make the suit maintainable.

Broomfield, J.—If a suit claims the reliefs specified in S. 92 and should therefore have been brought under that section, the difficulty cannot be got rid of by amending the plaint or abandoning those reliefs. It would make no difference in principle whether a particular relief is given up after a formal amendment of the plaint or whether it is abandoned without it. (*Broomfield and Divatia, JJ.*) Gajramji Jasramji *v.* Somnath Bhudardas. **42 Bom.L.R. 443=A.I.R. 1940 Bom. 242.**

Suit under.

——S. 92—*Suit under—Frame and reliefs of—Suit primarily for settlement of scheme and appointing trustees—Prayer for possession of properties from strangers—If proper—Order striking off such strangers—If proper.*

In a suit primarily for settling a scheme and for the initiation of a trust and for appointing trustees of the trust, with a prayer for vesting of the trust property in the trustees to be appointed, it is wrong to enlarge the area of the case from creating a trust to determining what property belongs to that trust and passing decrees for possession of that property against outside parties. The case becomes undesirable for multifariousness. Once a trust has been constituted and trustees have been appointed together with a declaration vesting the property of the endowment in the trustees, there will be nothing to stop those trustees from bringing suits, not under S. 92, C. P. Code, but under the ordinary law, for recovering property which is vested in them by way of charity of which they are trustees, and for such suit no fiat of the Advocate-General is necessary. If there is added in a suit under S. 92, a prayer for possession against outside parties which can be sought after the trustees are appointed those outside parties can be struck out from the suit which mainly seeks to have a scheme settled. (*Baguley and Shaw, JJ.*) U Kyai *v.* Shwebontha S. E. L. Association. **172 I.C. 976=10 R.R. 302=A.I.R. 1937 Rang. 483.**

——S. 92—*Suit under—Costs—If to be made payable out of wakf estate.*

In a suit under S. 92, C. P. Code, for removal of mutwallis of a mosque and other consequential reliefs, which has been instituted *bona fide* and in which after protracted proceedings it is found that the allegations of the plaintiffs are well-founded and substantiated, it is only proper that the plaintiffs should get all their costs out of the funds of the wakf estate. There is no justification for refusing to allow the plaintiffs their costs out of the funds of the estate. (*Mukerji, A.C.J. and S.K. Ghose, J.*) Wares Ali *v.* Sheikh Samsuddin. **168 I.C. 260=9 R.C. 790=63 C.L.J. 573.**

———**S. 92**—*Suit under—Death of mutwallis of wakf appointed by Court in suit under—Applications by some persons for their own appointment—Wakf property actually in possession of certain persons who were managing it as mutwallis—Applications, if maintainable—Suit, if necessary.*

In a suit brought under S. 92, C. P. Code, the District Court appointed certain persons mutwallis of a wakf. On the death of all of them, some persons applied to the Court by means of separate applications to be appointed mutwallis of the wakf. Certain persons were actually in possession of the wakf property and managing it as mutwallis.

Held, that although the applicants did not specifically pray for the removal of the persons who were in actual possession of the wakf property from trusteeship, yet that was really their purpose, and that the applications were barred by S. 92, C. P. Code, by necessary implication, as it was hardly conceivable that when the Legislature deemed it necessary that a suit brought for the purposes mentioned in the section should be incompetent unless brought with the consent in writing of the Advocate-General, they meant to permit a mere application to be brought by a private individual without any official sanction whatever for the same purpose, and that, therefore, the prayer of the applicants for their own appointment as trustees could not be granted by the Court without the necessity of a suit under S. 92, C. P. Code. (*Thomas and Zia-ul-Hasan, JJ.*) Abdul Hasan Khan *v.* Jafar Hussain. **168 I.C. 803=9 R.O. 505=1937 O.L.R. 324=1937 O.W.N. 730=A.I.R. 1937 Oudh 381.**

———**S. 92**—Suit under—Death of one of several plaintiffs—Effect—Abatement. *See* C. P. Code, O. 22. **17 Pat.L.T. 926.**

———**S. 92**—Suit under—Defect in sanction—Dismissal of suit—Restoration under Public Suits Validation Act—Subsequent dismissal on absence of valid consent. *See* C. P. Code, S. 93. **62 C.L.J. 70=A.I.R. 1936 Cal. 815.**

———**S. 92**—*Suit under—Maintainability—Allegation as to breach of trust—Necessity.*

The argument that in the absence of an allegation of breach of trust in the plaint the suit is not maintainable, is untenable. A suit under that section lies not only in the case of any alleged breach of trust, but also where the direction of the Court is deemed necessary for the administration of a trust, if it be a trust for public purposes of a charitable or religious nature. (*Mya Bu and Sharpe, JJ.*) M. E. Mitchla *v.* A. M. Mitchla. **1938 Rang.L.R. 276=177 I.C. 851=11 R.R. 175=A.I.R. 1938 Rang. 339.**

———**S. 92**—*Suit under—Parties—Alienee of trust property denying trust and its title to property in his possession—If proper or necessary party.*

Although in a suit under S. 92, C. P. Code, no relief can be granted against third parties, it does not necessarily follow from this that the Court is not competent to bring before the forum any such person. Alienees being in possession of trust property and denying the existence of the trust and its title to the property in their possession are certainly proper, though not necessary, parties to a suit under the section, though no relief or remedy can be given as against them, because in their absence the Court cannot effectually and completely adjudicate the question of the existence of the trust and of the title of the trust to the property in question. (*Varadachariar and Stodart, JJ.*) Anjaneya Sastri *v.* Kothandapani Chettiar. **164 I.C. 615=9 R.M. 137=1936 M.W.N. 245 (2)=43 L.W. 409=A.I.R. 1936 Mad. 449=(1937) 2 M.L.J. 437.**

———**S. 92**—*Suit under—Reference to arbitration—Competency—Matters of public rights—If can be made subject of arbitration on reference in suit regarding private rights—Award declaring property to be trust property—If illegal—Scheme for administration of trust property—Jurisdiction to frame.*

Where a suit could not be brought under S. 92, C. P. Code, except upon the conditions therein specified, the section cannot be evaded merely by a reference to arbitration upon contentions raised in the written statement, and the arbitrators cannot decide upon matters of public right which the law provides shall be brought into issue only in a particular manner. Matters of public right cannot be decided by arbitration, and it makes little difference whether the public rights are determined as a result of their specific inclusion in the terms of reference, or whether they are decided by arbitrators upon a reference in a suit the plaint in which relates to private property. It is only matters in difference in litigation which affect private rights that may be referred to arbitration; a suit under S. 92, C. P. Code, is not a suit for the determination of private rights and matters in difference in such suit cannot be referred to arbitration. Where the jurisdiction to decide a particular matter is given by law to specific tribunals only, determination of that matter by other tribunals is excluded. But a suit for a declaration that certain property is trust property does not fall under S. 92, C. P. Code, and therefore, a declaration in the award of the arbitrators to that effect does not offend against law. But an award which grants reliefs which could only be granted in a suit under S. 92 is without jurisdiction, *e.g.*, the framing of a scheme for the administration of trust property, is beyond the powers of the arbitrators. (*Davis, J.C. and Mehta, A.J.C.*) Ganga Ram *v.* Keshavdas. **30 S L.R. 478=170 I.C. 102=10 R.S. 32=A.I.R. 1937 Sind 174.**

———**S. 92**—Suit under—Right to have a scheme framed or accounts examined—If flows from the preliminary decree. *See* Bengal Wakf Act, Ss. 71 and 83. **I.L.R. (1937) 1 Cal. 673=A.I.R. 1937 Cal. 150.**

———**S. 92**—*Suit under—Suit for removal for shebaits or trustees as founders—Right to relief—Grounds—Proof of breach of trust—Necessity.*

If any relief is to be granted in a suit under S. 92, C. P. Code, ordering the removal or interfering with the rights of the shebaits and trustees as founders, something substantial must be shown justifying their removal or interference. Where therefore members of the old managing committee of an ashram brought a suit against the founders of the institution on their forming a new managing committee on the expiry of the old one without even attributing breach of trust on the part of latter,

Held, that the founders were justified in taking proper steps for the management of the institution and in forming a new committee and there being no breach of trust attributed to them, the suit was not proper. (*Mukerji and Jack, JJ.*) Prakash Chandra Nag *v.* Subodh Chandra Nag. **I. L.R. (1937) 1 Cal. 515=64 C.L.J. 341=170 I.C. 290=10 R.C. 133=A.I.R. 1937 Cal. 67.**

——**S. 92 (1)**—*Construction—Any other Court "empowered in that behalf" by the Local Government—Meaning of—Notification empowering Judge of Court, to hear suits under S. 92—Judge mentioned by name—If empowers him as* persona designata *or empowers Court presided over by him—Limits of jurisdiction not mentioned—If invalidates notification—Power of Court to entertain plaints in suits under S. 92—If also conferred.*

Where a Local Government, purporting to act under S. 92 (1), C. P. Code, issues a notification which empowers the presiding Judge of particular Court, specifically meaning the Judge, to hear suits which may be instituted under S. 92, C. P. Code, it is only reasonable to assume that the Government intends to comply with the section and to confer the necessary powers to the Court over which the named Judge presided and presides. The Court presided over by that Judge is a Court duly "empowered in that behalf" within the meaning of S. 92 (1), C. P. Code. The jurisdiction may, however, be limited in time, *i.e.*, only so long as that Court is presided over by the particular named Judge. The notification cannot be taken as merely empowering the particular named Judge as a *persona designata*, so as to make it not in conformity with S. 92 (1) and invalid on that account. The fact that the limits of the jurisdiction of the Judge are not mentioned in the notification will not also invalidate the notification. The notification in question would also empower the Court presided over by that Judge to entertain plaints, as the power to entertain plaints is included in the general grant of jurisdiction. (*Barlee, Wadia and Mackin, JJ.*) Govind Shripad *v.* Shrinivas Krishna. **I.L R. (1937) Bom. 655=170 I.C. 1=10 R.B. 79=39 Bom.L R. 548=A.I.R. 1937 Bom. 275 (F.B.).**

——**S. 92 (1) (a) and (b)**—*Trustee—Appointment of new trustee—Notice to interested parties—If necessary—Order appointing a trustee by consent of parties to suit—If bars claim of any claimant in future.*

There can be no question that ordinarily when a trustee is removed in accordance with the provisions of S. 92, C. P. Code, the Judge should issue notice to parties interested and also give public notice in such a way as to enable claimants to the office to come forward and put in their respective claims. The law, however, does not make any provision of this nature; and, therefore, it cannot be laid down as a hard and fast rule that in all suits under S. 92 of the Code that

is the procedure necessarily to be restored to. Where the Judge appoints a new trustee by consent of the parties to the suit without making any enquiry or resorting to any elaborate proceeding, the appointment is not an appointment which is the result of a judicial proceeding and can only be justified as an appointment made with the consent of the parties and on no other footing. That being the position, there can be no question that the order which the Judge has made in respect of the appointment will not operate as *res judicata* barring the claim of any claimant in future. (*Mukerji and Jack, JJ.*) Faizunnessa *v.* Moulvi Asad Bukht. **41 C.W.N. 298.**

——**S. 92 (1) (a) and (d)**—*Trustee—Removal of—Decree directing accounts—Court, if bound to pass.*

It is not obligatory on the court to pass a decree directing accounts on the removal of a trustee in a suit under S. 92, C. P. Code. If upon a consideration of the facts and circumstances of the case, when the income of the endowment is quite small and the expenditure does not leave much in the shape of balance, the Court comes to the conclusion that it would not be profitable to make an order for accounts, it is very difficult for the appellate Court to say that that order is not justifiable or that it would be interfered with. (*Mukerji and Jack, JJ.*) Faizunnessa *v.* Moulvi Asad Bukht. **41 C.W.N. 298.**

——**S. 92 (1) (b)**—*Trustee—Appointment of new trustee—Departure from arrangement contemplated by deed of trust—Permissibility.*

In making an appointment of a trustee in a suit under S. 92, C. P. Code, although regard must be paid to the line of devolution that may have been prescribed in the deed of endowment, it is permissible to the Court, in peculiar circumstances having regard to the exigency of the case, to make an appointment which may involve a departure from the arrangement contemplated by the deed of trust itself. (*Mukerji and Jack, JJ.*) Faizunnessa *v.* Moulvi Asad Bukht. **41 C.W. N. 298.**

——**S. 92 (1) (g)**—*Scheme—Settling of—Discretion of Court.*

The discretion which is conferred upon a Court by the terms of S. 92, C. P. Code, is very wide and the law does not make it obligatory upon a Court in a suit under that section to make all the orders that are contemplated by the different clauses of that sub-section. It is quite open to the court not to frame a detailed scheme, if it thinks that certain directions given by it to the newly appointed trustee for the proper carrying out of the endowment would be quite enough. (*Mukerji and Jack, JJ.*) Faizunnessa *v.* Moulvi Asad Bukht. **41 C.W.N. 298.**

——**S. 92 (1) (h)**—*Applicability and scope—Person claiming property as his but admitting execution of trust—Suit against—If falls under S. 92.*

Cl. (*h*) of sub-S. (1) of S. 92, C. P. Code, does not so widen the provisions of S. 92 as to make S. 92 not otherwise applicable to suits against strangers, applicable to such suits. Where the person in possession asserts the property to be his, but admits that he is executing the trust, such person is a trustee either constructive or *de son tort* and in either case he is not a stranger. Therefore a suit under S. 92 can be brought against him. (*Davis J. C. and Lobo, A. J. C.*) SUKHUMAL-MANUMAL *v.* UTTAMCHAND. **171 I. C. 344=10 R.S. 102=31 S.L.R. 510=A.I.R. 1937 Sind 230.**

——S. 92 (h)—*"Such further or other relief"—Meaning of—If includes injunction to restrain alienation by trustee.*

The words "such further or other relief" in 92 (*h*) cannot be held to imply necessarily some relief in addition to the reliefs specified in Cls. (*a*) to (*g*) of S. 92. Clause (*h*) clearly indicates a relief which while falling under it does not fall under any of the clauses (*a*) to (*g*). A prayer asking that the trustees be restrained from alienating the trust property is one which may well be included under S. 92 (*h*). (*Davis, J.C. and Lobo, A. J. C.*) MULCHAND BASSARMAL *v.* DEVIGIR MOTIGIR. **30 S.L.R. 104=165 I.C. 158=9 R.S. 87 =A.I.R. 1936 Sind 179.**

——S. 93—*Defect in sanction—Dismissal of suit—Restoration under Public Suits Validation Act—Subsequent dismissal on absence of valid consent—Legality.*

A suit which has been dismissed under S. 93, C. P. Code, on the ground that the consent required by the section is not in order may be restored under S. 3 of the Public Suits Validation Act of 1932, if an appeal from the decree dismissing the suit is competent and open at the time of the latter Act. Once the order of restoration is made, the suit has to be proceeded with and tried in accordance with law. The suit cannot again be dismissed on the ground that there has been no valid consent given by the Collector. (*Mukerji and S. K. Ghose, JJ.*) BHABATARAN CHAKRAVARTY *v.* RAMLAL DAS. **166 I.C. 954=9 R.C. 631 =63 C.L.J. 70=A.I.R. 1936 Cal. 815.**

——S. 93—*Powers of Collector—Grant of sanction for suit—Jurisdiction to impose conditions—Condition that suit to be filed within two months—Legality—Suit filed beyond two months—If barred—Limitation—Computation — Period of two months—Starting point—Date of order or date of receipt of order.*

The Collector exercising under S. 93, C. P. Code, the powers conferred on the Advocate-General under S. 92, C. P. Code, has no jurisdiction to impose by his order granting sanction for a suit any time limit for the institution of the suit. The only restrictions which can be imposed are in respect of the persons who can institute the suit and in respect of the reliefs which are sought and are obtainable in such suit; any other restrictions either in the matter of the institution or in the conduct of the suit would be *ultra vires.* A condition imposed by the Collector that the suit should be instituted within two months is illegal and may be ignored, although if the suit is filed long after the grant of sanction, the Court has a discretion to refuse to pass a decree in the suit on the ground of unnecessary delay. In any case, assuming that the Collector can impose such time limit the period would not commence to run until the order of sanction is made known to the parties. (*Venkataramana Rao, J.*) RAMACHANDRAYYA *v.* NARASIMHAM. **1937 M.W.N. 1319.**

——S. 94—Construction—'If it is so prescribed'. *See* C.P. CODE, O. 39 AND S. 94. **1937 M. W.N. 1229.**

——**S. 9 4 (c) and O.** 39—*Scope—Application for attachment by defendant—Undertaking by defendant—Acceptance by Court and dismissal of application for attachment—Subsequent breach of undertaking—Power of Court to commit to jail—Jurisdiction.*

When a Court accepts an undertaking given by the defendant in a suit and dismisses an application for attachment before judgment, the order of the Court amounts in substance to an injunction restraining him from acting in breach thereof. The form only implies that the Court is prepared to deal with him honourably in the expectation that he will treat his undertaking as equivalent to an order of Court. It is not open to the defendant to afterwards say that because the Court did not pass an order of its own after accepting his undertaking he is not in the position of a person bound by an order of Court. If the defendant commits a breach of his undertaking, the Court has jurisdiction to commit him to jail for contempt of Court and for violating the undertaking. (*Varadachariar, J.*) GURUMURTHI CHETTI *v.* SELLA PERUMAL PILLAI. **165 I.C. 747 =9 R.M. 297=1936 M.W.N. 519=44 L.W. 714 =A.I.R. 1936 Mad. 651.**

——S. 95—*Burden of proof—Compensation for wrongful attachment—Application for—Onus—Duty of applicant.*

It is incumbent on an applicant under S. 95, C. P. Code, for compensation for wrongful attachment, to prove affirmatively that the attachment was applied for on insufficient grounds. It is not sufficient for this purpose to show that he has properties which are greater in value than the amount at stake in the suit. He must show that the plaintiff was unjustified in suggesting to the Court that he the defendant was about to defeat the object of the suit by making alienations. (*Wadsworth, J.*) PALANISAMI GOUNDAR *v.* KALIAPPA GOUNDAR. **1939 M.W.N. 1084=50 L.W. 640=A.I.R. 1940 Mad. 77=(1940) 1 M.L.J. 782.**

——S. 95—*Construction—"Expense or injury"—Wrongful attachment—Claim to compensation—Proof of special damage—If essential.*

In an application for compensation for wrongful attachment under S. 95, C. P. Code, it is not necessary to prove special damage. The words "expense or injury" indicate that either the particular damage upon which a monetary value can obviously be placed or the more general damage which the Court endeavours to assess in terms of money, is contemplated by the section. It is not necessary to prove more than general damage, *e.g.*, mental pain, general loss of reputation, etc. (*Wadsworth, J.*) PALANISAMI GOUNDAR *v.* KALIAPPA GOUNDAR. **1939 M.W.N. 1084 =50 L.W. 640=A.I.R. 1940 Mad. 77=(1940) 1 M.L.J. 782.**

——S. 95—*Order of attachment passed but attachment not effected—Compensation, if can be allowed.*

Compensation will be granted only where damage has resulted. Where only an order of attachment before judgment has been passed but the property has not been actually attached in pursuance of the order, it cannot be said that the mere order of attachment has resulted in damages and hence the person whose property has been ordered to be so attached cannot claim compensation under S. 95. (*Ba U, J.*) MOHAMAD

Ismail & Co. *v.* Ashgar & Co. **183 I.C. 174=12 R.R. 65=A.I.R. 1939 Rang 260**

———S. 95—*Right to compensation under—Question to be decided.*

The question to be decided under S. 95 is whether there are no sufficient grounds for applying for attachment and not whether there are no reasonable grounds stated in the creditor's application for attachment. *A* sued *B* on a promissory note. *B* was heavily indebted and transferred all the transferable immovable property to his relations after the execution of the promissory note. *A* applied under O. 38, R. 5 for attachment of a part of the sale proceeds in *B's* favour in possession of Collector. The application was granted. *B* applied under S. 95 for compensation.

Held, that it was clear that *A* had reason to suspect that *B* was likely to remove the whole of the attachable property and if it had been stated in the application that all his other property had already been transferred, then the Court would have been justified in granting the application. The grounds, though not stated in the application, were undoubtedly sufficient grounds, and therefore *B* was not entitled to compensation under S. 95. (*Pollock, J.*) Rajaram Chimnaji Kale *v.* Balkrishna Nilkanth. **I.L.R. (1938) Nag. 361=169 I.C. 614=16 R.N. 14=A.I.R. 1937 Nag. 126.**

———S. 95—*Scope—Application for compensation for wrongful attachment—Absolute order of attachment and non-setting aside of order of attachment—If bar to claim to compensation.*

The setting aside of an order of attachment is not an essential preliminary to the grant of compensation for wrongful attachment under S. 95, C. P. Code. Nor would the passing of an absolute order of attachment be a bar to an application under S. 95 for compensation for wrongful attachment. No such preliminary step has been prescribed in S. 95 which alone governs the procedure in a summary application for compensation for wrongful attachment and a Court would not be justified in hedging this remedy round with restrictions which the section itself does not import. (*Wadsworth, J.*) Palanisami Goundar *v.* Kaliappa Goundar. **1939 M.W.N. 1084=50 L.W. 640=A.I.R. 1940 Mad. 77=(1940) 1 M.L J. 782.**

———S. 96—*Applicability—Appeals from decrees passed by High Court on original side.*

S. 96, C. P. Code, does not apply to appeals from decrees passed by a High Court in exercise of its original jurisdiction, but provides for appeals from other Courts exercising original jurisdiction. The original side of a High Court is just as much the High Court as the appellate side, and rights of appeal are given not by the Code but by the Letters Patent. (*Roberts, C.J. and Leach, J.*) Hajee Shakul Hamid *v.* Mohamad Ibrahim. **1937 Rang.L.R. 97=170 I.C. 822=10 R.R. 107=A.I.R 1937 Rang. 268.**

———S. 96—*Applicability—Suit for accounts under S. 33 of the U. P. Agriculturists Relief Act—Trial by Munsif—Right of appeal.*

Where a suit for accounts under S. 33 of the United Provinces Agriculturists Relief Act is tried by a Civil Court of original jurisdiction, a Munsif, the trial Court does not exercise any special jurisdiction under United Provinces

Agriculturists Relief Act and hence the right of appeal will be governed by S. 96, C. P. Code. (*Ganga Nath, J.*) Durga Charan *v.* Markande Misir. **181 I.C 282=11 R.A. 558=1939 A.W R. (H.C.) 105=1939 R.D. 71=A.I.R. 1939 All. 233.**

———S. 96—Decree—Application after preliminary decree in partition suit raising matters not raised in pleadings—Order on—If "decree"—Appealability. *See* C. P. Code, Ss. 2 (2) and 96. **50 L.W. 541.**

———S. 96—"Decree"—Execution—Order refusing to direct value of property to be stated in sale proclamation—Appealability. *See* C. P. Code, S. 47. **41 Bom.L.R. 328.**

———S. 96—*"Decree"—Order by City Civil Judge under S. 7, Madras City Tenants' Protection Act, fixing reasonable rent—Appealability.*

An order passed by the Judge of the City Civil Court, Madras, under S. 7 of the Madras City Tenants' Protection Act fixing a reasonable rent is not appealable. Such an order is not a decree under S. 96, C. P. Code, the scheme of the Act is to make such orders not appealable. (*Burn and Stodart, JJ.*) Perumal Chettiar *v.* Kondal Chetty. **I.L.R. (1939) Mad. 213=183 I.C. 494=12 R.M. 307=49 L.W. 118=1939 M.W N. 129=A.I.R. 1939 Mad. 430=(1939) 1 M.L.J. 80.**

———S. 96—"Decree"—Order under O. 41, R. 5, refusing stay of execution pending appeal—Appealability. *See* C. P. Code, S. 2 (2). **40 Bom. L.R. 1198.**

———S. 96—*Decree in favour of plaintiff imposing conditions—His right to appeal against imposition of conditions—Adverse finding—Applicability—Test.*

Where a decree in favour of the plaintiff allows his claim in its entirety provided a certain condition is fulfilled and dismisses it in its entirety if that condition is not carried out within a specified time, in either event the rights of the parties are conclusively determined by the decree. The plaintiff is entitled to appeal from the order imposing the condition of which he complains. A party in whose favour a decree has been passed may nevertheless have a right to appeal against a finding adverse to him—the test to be applied in each particular case being whether the finding sought to be appealed against is one to which the rule of *res judicata* may be held to be applicable so as to disentitle the aggrieved party to agitate the question covered by the finding in any other proceeding. (*Khundkar, J.*) Tarapada Ghose *v.* Sakhi Kanta Behara. **42 C.W N. 492.**

———S. 96—*"Decree"—Partition suit—Preliminary decree—Order after and before final decree—If decree—Appealability.*

No appeal lies from an order passed in a partition suit after the preliminary decree and before the passing of the final decree. Such an order cannot amount to a decree so as to be appealable. In a suit for partition there are only two decrees, *viz.*, the preliminary decree and the final decree and no third or further decree can be passed by the Court between these two. (*Bennet and Harries, JJ.*) Banwari Lal *v.* Beni Prasad. **10 R.A. 333=171 I.C. 839=1937 A.W.R. 692=1937 A.L.J. 809=1937 A.L.R. 903=A.I.R. 1937 All. 694.**

———S. 96—Right of appeal—Party to suit—Suit against manager of Hindu joint family—Coparcener impleaded as party as member of family —Right to appeal from decree. *See* HINDU LAW —JOINT FAMILY — MANAGER. **A.I.R. 1937 Sind 94.**

——**S. 96 (2)**—*Scope — Defendant not filing written statement on date fixed and failing to appear—Pleader's request to make oral statement refused*—Ex parte *decree—If justified—Appeal after dismissal of application to set aside* ex parte *decree—Power of appellate Court to set aside* ex parte *decree and remand suit—C. P. Code, O. 10, R. 2.—Right of pleader to make oral statement.*

A suit proceeded *inter partes* up to a certain point and the defendant was given time to file a written statement. He, however, was absent on that date and no statement was filed. His pleader offered to make an oral statement but was not allowed to do so. Further adjournment for filing written statement was also refused. The Court proceeded *ex parte* and decreed the suit. An application under O. 9, R. 13 for setting aside the *ex parte* decree was made but was dismissed in default of parties and there was no finding on merits. The lower appellate Court set aside the decree and remanded the case under S. 151, C. P. Code, holding that the trial Court was wrong in passing *ex parte* decree.

Held, that the order of the trial Court was injudicious as the defaulting party to have been penalized by costs and that the lower appellate Court was competent to consider the propriety of passing an *ex parte* order.

Held, further, that O. 10, R. 2, C.P. Code, could not be used to enable counsel to evade a clear direction of the Court. (*Gruer, J.*) RAMBALLABH JASRAJ *v.* DHARAMSI JETHA & CO. **I.L.R. (1937) Nag. 519=173 I.C. 547=10 R.N. 308=A.I.R. 1937 Nag. 268.**

——**S. 96 (3)**—Applicability — Oath taken in pursuance of offer to be bound by—Decree thereon. *See* OATHS ACT, S. 11. **172 I.C. 421.**

——**S. 96 (3)**—Consent decree—Parties inviting Court to adopt special procedure—Court adopting and deciding suit—Appeal from decision—Maintainability. *See* APPEAL—COMPETENCY. **71 M.L J. 281.**

——**S. 96 (3), O. 23, R. 3 and O. 43, R. 1 (m)** —*Order recording compromise under O. 23, R. 3 if decree by consent—Appeal.*

In construing a particular provision of the Code the Courts should, as far as possible, give to the other provisions of the Code their proper and effective meaning to attain their proper and effective purpose. There is a distinction between a decree passed by consent of parties to which S. 96 applies, and a compromise of suit under O. 23, R. 3. S. 96 does not in all cases bar an appeal which involves a consent decree. Where an order recording a compromise is passed under O. 23, R. 3, an appeal lies from it under O. 43, R. 1, Cl. (*m*) and S. 96 (3) is not a bar to such appeal. 1933 Bom. 205, not foll. (*Davis, J.C. and Dadiba C. Mehta, A.J.C.*) GHANSHAMDAS LOKUMAL *v.* NANIKRAM KHUBCHAND. **29 S.L.R. 437=163 I.C. 240=9 R.S. 2=A.I R. 1936 Sind 59.**

——**S. 97**—*Appeal from preliminary decree—Final decree passed during its pendency—Appeal, if competent.*

An appeal filed from a preliminary decree is competent, although during its pendency a final decree is passed but it is not appealed against. (*Addison and Din Mohammad, JJ.*) JOTI PARSHAD *v.* GIRNARI MAL. **40 P.L.R. 123.**

——S. 97—*Scope—Mortgage suit—Preliminary decree also providing for personal liability—No appeal—Appeal from final decree—Right to challenge provision as to personal liability.*

A Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that course is not taken, the decision, however wrong, cannot be disturbed. Even though an application under O. 34, R. 6, C. P. Code, by the mortgagee is necessary for an order for a personal decree for the balance due, still when the preliminary decree contains a statement that the mortgagor is liable for any deficiency that may be found due and the mortgagor prefers no appeal against such decree and a final decree, is subsequently passed, in an appeal by him against such final decree, not only the preliminary decree itself but even such statement cannot be questioned or altered in view of S. 97 of the Code. (*Baguley and Shaw, JJ.*) MAUNG KHIN *v.* L. AHCHOY. **173 I.C. 770=10 R.R. 368 =A.I.R. 1937 Rang. 494.**

——S. 98—Difference of opinion among Judges hearing first appeal—Procedure to be adopted. *See* LETTERS PATENT (ALL.), CL. 27 AND C. P. CODE, S. 98. **1938 A.W.R. (H.C.) 712=A.I.R. 1938 All. 641 (F.B.).**

——S. 98 (3)—Consent decree—Meaning of—Right of appeal in cases decided by Court on procedure not warranted by the Code. *See* PRACTICE—APPEAL. **1939 P.W.N. 151.**

——S. 99—*Applicability—Absence of both parties—Allowing of appeal on statement of person not duly accredited—If can be condoned.*

The law does not contemplate the acceptance of an appeal in the absence of the appellant unless the respondent is present and pleads judgment against himself. Where both the parties were absent, but the Court acting on the statement of a relative of the appellant who was not however his duly accredited representative and on the facts as disclosed in the evidence on record allowed an appeal, it was held that such an order should be reversed as the passing of that order is not such an irregularity as could be condoned under S. 99, C. P. Code. (*Darling, S.M. and Mehta, J.M.*) YAQUB KHAN *v.* JAGMOHAN SINGH. **1938 R.D. 745=1938 A.W.R. B.R. 372.**

——S. 99—Applicability—Award—Order filing award and judgment combined into one—No separate judgment and order as required by Sch. II, para. 21—If illegal—Irregularity—If cured. *See* C. P. CODE, SCH. II, PARA. 21. **A.I.R. 1936 Nag. 246.**

——S. 99—*Applicability — Plaint presented by agent without valid power of attorney—Decree—If to be reversed.*

A plaint was presented on behalf of a person by an agent who had no valid power-of-attorney and the suit proceeded without the plaint being signed by that person and a decree was passed.

Held, S. 99, C. P. Code, applied and cured the defect of this kind. (*Roberts, C.J. and Leach, J.*) A. S. ANNAMALAI CHETTYAR *v.* S.R.M.M.C.T.M. CHIDAMBARAM CHETTYAR. **172 I.C. 492=10 R.R. 337=A.I.R. 1937 Rang. 482.**

——S. 99—*Applicability—Privy Council appeal —Objection to amendment of plaint on ground of* *misjoinder of causes of action—Objection wrongly overruled by High Court—Decree of High Court, if liable to be reversed.*

Even though the High Court has erred in overruling an objection to the amendment of plaint on the ground of misjoinder of causes of action, their Lordships of the Privy Council would not, on that ground, reverse the decree granted by the High Court, when the alleged misjoinder has affected neither the merits of the case nor the jurisdiction of the Court. The provisions contained in Civil Procedure Code, do not regulate the procedure of their Lordships in hearing appeals from India, but there can be no doubt that the rule embodied in S. 99 proceeds upon a sound principle and is calculated to promote justice, and their Lordships would not be prepared to adopt a course which would merely prolong litigation. (*Sir Shadi Lal.*) MAHOMED HUSAIN KHAN *v.* KISHVA NANDAN SAHAI. **64 I.A. 250=I.L.R. (1937) All. 655=1937 M.W.N. 683=41 C.W.N. 1029=46 L.W. 1=1937 O.W.N. 573=18 Pat.L.T. 495=65 C.L.J. 438=1937 P.W.N. 553=1937 A.L.R. 527=10 R.P.C. 1=1937 A.W.R. 631=1937 O.L.R. 367=3 B.R. 603=39 P.L.R. 698=39 Bom.L.R. 979=1937 A.L.J. 1032=169 I.C. 1=31 S.L.R. 590=A.I.R. 1937 P.C. 233=(1937) 2 M.L.J. 151 (P.C.).**

——**S. 99**—*Applicability and scope—Revisional Court—If bound by section—Plaint presented by stranger to suit—Defect—If curable.*

S, 99, C. P. Code, refers only to Courts of appeal and not to a Court of revision. The section also does not condone every irregularity. The presentation of a plaint by a person who is a stranger to the suit is no valid presentation; and the defect cannot be cured under S. 99, C. P. Code. (*Norman.*) MISRI LAL *v.* CHANDAN MAL. **1937 A.M.L.J. 41.**

——**S. 99**—*Defect or irregularity not affecting the merits—Meaning of.*

A properly constituted rent suit was decreed by the Court having jurisdiction and in execution of that decree property which was purchased by plaintiff in execution of a money decree, was brought to sale. The plaintiff then brought a suit for possession and for declaring that the rent decree and sale thereunder were fraudulent and therefore void.

Held, the plaintiff not having proved that the rent decree was obtained by fraud, the rent decree, having been passed by the Court having jurisdiction, could not be varied or modified in his suit for possession, even though the court passing the rent decree might have acted irregularly in exercise of its juridiction. (*Dhavle and Varma, JJ.*) RATANDEO NARAYAN *v.* JAMUNA PRASAD TEWARY. **169 I.C. 304=3 B.R. 536=9 R.P. 548=1936 P.W.N. 901=A.I.R. 1937 Pat. 147.**

——**S. 99**—*Order of Honorary Assistant Collector on a public holiday—If* ultra vires.

There are standing orders of the Government of India that no work of a civil nature can be done on a public holiday and if it is done then it amounts to a nullity. Accordingly an order passed by an Honorary Assistant Collector on a public holiday dismissing an application or execution of a decree is clearly *ultra vires* and is liable to be set aside in revision. (*Nanavutty, J.*) AJHODHYA NATH *v.* DEBI DAYAL. **167 I.C. 280=**

9 R.O. 373=1937 O.W.N. 247=1937 O.L.R. 104=A.I.R. 1937 Oudh 272.

——S. 99—Scope—Appeal from decree—Court allowing unreasonable extension of time for payment of Court-fee—Wrong exercise of discretion—If ground of attack in appeal—Proper remedy. *See* C. P. CODE, S. 149. **18 Pat.L.T. 665=A.I.R. 1937 Pat. 550 (S.B.)**

——**S. 99**—Scope—Decree when could not be attacked on ground of irregularities. *See* C. P. CODE, O. 26, R. 9 AND S. 99. **1938 N.L.J. 392.**

——**S. 99**—*Scope—Suit by Hindu sons impeaching a large number of alienations by their father in favour of various persons—Allegation of vice, extravagance and immorality—Impleading all alienees 78 in number as defendants—Plea of misjoinder raised in written statement but not pressed or proceeded with further—Court dealing with all transactions and coming to correct conclusion—Decree confirmed by High Court—Objection in appeal to Privy Council—Competency.*

The mere fact of misjoinder is not by itself sufficient to entitle the defendant to have the proceedings set aside or action dismissed. S. 99, C. P. Code, is in plain words; joinder of parties and of causes of action is discretionary in the sense that if they are joined there is no absolute right to have them struck out, but it is discretionary in the Court to do so if it thinks right. Three plaintiffs, the sons of a Hindu, brought a suit against no fewer than 78 defendants: and the plaint which contained 69 paragraphs alleged that their father, the manager of the joint family governed by the *Mitakshara*, embarked on a career of vice and extravagance, that the alienations effected by him were not binding on them as they were not made for family necessity, and the debts in respect of which the alienations were alleged to have been made were not binding upon them, having been for immoral purposes, and it impeached all the various alienations made in favour of the various defendants on the ground of their father's bad character and habits. All the alienations were fully investigated by the trial Court who decided that the plaintiffs were entitled to succeed in respect of three-fourths interest in the property and his decision was confirmed by the High Court on appeal. An objection was raised in the written statement of certain defendants that the suit was bad for misjoinder and multifariousness, but no appropriate and serious steps were taken at any time before trial for an order requiring the plaintiffs to amend by discarding portions of their claim. The objection having again been raised before the Privy Council.

Held, that there was good reason to think that the joinder of so many distinct causes of action against so many sets of defendants might well have led the trial Court to decline to entertain so many matters in one suit and though the inconvenience and expense avoided by the plaintiffs had been much exceeded by the inconvenience and expense caused to the defendants, the heavy task which fell to the trial judge was ably and fairly discharged, and that no effect could be given to the objection of misjoinder, the merits of the case having been satisfactorily disposed of in spite of the complication of the proceedings. (*Sir George Rankin.*) RAMDHAN PURI *v.* LACHMI NARAIN. **166 I.C. 649=16 Pat. 149=1937 P.W.N. 87=3 B.R. 318=9 R.P.C. 167=45 L.W. 191**

=1937 O W.N. 155=1937 A.W.R. 184=41 C.W. N. 418=1937 O.L.R. 68=1937 A.L.R. 119=1937 A.L.J 556=1937 M.W.N. 251=65 C.L.J. 47=18 Pat L.T. 54=39 Bom.L.R. 363=A.I.R. 1937 P. C. 42 (P.C.)

——S. 100.

- Adverse Possession—Finding.
- Benami.
- Burden of proof.
- Concurrent finding.
- Construction of document.
- Custom.
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- New case.
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- Question of fact.
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Adverse possession.

——S. 100—*Adverse possession—Finding—Finality—Interference.*

A finding of adverse possession must, to some extent, be a finding of fact, but more particularly in a case where the judgment of the lower appellate Court is a judgment of reversal, the High Court may inquire into the method adopted by the lower appellate Court in coming to its conclusion, and enquire whether the adverse possession as found is supported by evidence and whether the finding, which is said to be based on the proper legal conclusion to be drawn from the settlement and mutation records, is justified. (*McNair, J.*) BEROJULLAH SARKAR *v.* AYATULLAH AKAND. **176 I.C. 706=11 R.C. 159=66 C.L.J. 455=A.I.R. 1938 Cal. 117.**

——S. 100—*Adverse possession—Finding—Finality—Scrutiny of evidence in second appeal.*

The question of adverse possession is a mixed question of law and fact and hence in second appeal, there is no finality about the finding and the evidence can be scrutinised to find out if a correct inference has been drawn therefrom. (*Mehta, S M. and Harper, J.M.*) RAJ BAHADUR SINGH *v.* RAM HARAKH. **1939 R.D. 15=(1939) A.W.R. (B.R.) 124 (2).**

——S. 100—*Adverse possession—Inference from facts—Question of law.*

It is a question of fact whether adverse possession has been proved, but where the decision is whether adverse possession shall be inferred from facts, it is not a question of fact; it is a question of the legal inference to be drawn from facts. (*Davis, J.C. and Mehta, J*) TAHILRAM TACKCHAND *v.* MT. MIRAL **I.L.R. (1939) Kar. 18=176 I.C. 549=11 R.S. 22=A.I.R. 1938 Sind 132.**

Benami.

——S. 100—Benami—*Question of—Finding of* benami *by trial Court on circumstantial evidence—Reversal on appeal without consideration of evidence—If binding in second appeal.*

The question whether a transaction is a *benami* or not is no doubt a question of fact; and when there is circumstantial evidence on which the trial Court justifiably infers that a transaction is *benami*, it is not open to the lower appellate Court to reverse that finding unless it considers that evidence. The finding of the lower appellate Court under such circumstances that it is not *benami* without considering the evidence is not therefore a proper finding which can be regarded as binding in second appeal. (*Cunliffe and Henderson, JJ.*) RAMESH CHANDRA GUHA *v* DINANATH MESTARI. **63 Cal. 846=162 I.C. 348 =8 R.C. 600=62 C.L.J. 483=A.I.R. 1936 Cal. 178.**

Burden of proof.

——S. 100—*Burden of proof—Finding based on mistaken view of burden of proof—Interference.*

Where the evidence has been viewed in the lower appellate Court on a mistaken application of the rule as to burden of proof, its judgment is vitiated on a point of law and is open to attack in second appeal. (*Beckett, J.*) HARCHAND *v.* HIRA LAL **180 I C. 138=11 R.L. 663=40 P.L.R. 682 =A.I.R. 1938 Lah. 760.**

——S. 100—*Burden of proof—Finding of fact based on wrong view as to burden of proof—Finality.*

A finding of fact of first Court even if confirmed by the first appellate Court can be set aside in second appeal if such finding has proceeded upon a wrong basis as to burden of proof. (*Bose, J.*) PREMRAJ BHEORAJ *v.* NATHUMAL RUPCHAND. **I.L.R. 1936 Nag. 142=164 I.C. 740=9 R.N. 31 =A.I.R. 1936 Nag. 130.**

——S. 100—*Burden of proof—Finding of fact or law—Finding arrived at by misapplying law.*

A finding arrived at by misapplying the law, by wrongly placing the burden of proof, is not merely a finding of fact but is one of mixed law and fact, and it can be set aside in second appeal. (*Dunkley, J.*) S. P. L. S. CHETTIYAR FIRM *v.* MA PU. **14 Rang. 697=163 I.C. 604=9 R.R. 33=A. I.R. 1936 Rang. 262.**

——S. 100—*Burden of proof—Finding of fact—Onus wrongly laid—Omission to consider all the facts and circumstances—Finality of finding.*

A finding of fact which is not properly arrived at is not binding in second appeal when the lower Courts lay the onus of proof on the wrong party and do not consider all the facts and circumstances on both sides, the finding arrived at cannot be said to be a proper finding so as to be binding on the High Court in second appeal. (*Pollock, J.*) MOHAMMAD MUSTAFAKHAN *v.* WAMANRAO. **19 N.L.J. 301.**

——S. 100—*Burden of proof—Question of law.*

Where a Court considers the case and the evidence of one side only and disbelieving the evidence dismisses the claim on the ground that the assertions made have not been proved, the case is being solely decided on the question of onus and no amount of lip service to a rule which is ignored in the letter and in the spirit will serve to turn what is then a question of law into one of fact. (*Bose, J.*) UDHEBAN *v.* VITHOBA. **I.L.R. (1939) Nag. 160=180 I.C. 443=11 R.N. 358=1938 N.L.J. 459=A.I.R. 1939 Nag. 78.**

Concurrent finding.

——**S. 100**—*Concurrent findings of fact—Duty of second appellate Court.*

Where the entries in the papers as between the *khasra* and *khatauni* are discrepant, the evidence also is undoubtedly confused and the pleadings of both parties are partially wrong and the lower Courts have done their best to extricate the truth from out of all these, there can be no justification in second appeal to go against the concurrent findings of the lower Courts. (*Harper, S M.*) IQBAL BAHADUR *v.* RAM LAL. **1940 O.A. 491=1940 A.W.R. (B.R.) 106.**

——**S. 100**—*Concurrent findings—Question of fact—Question as to validity of permanent lease of waste lands of trust—Interference.*

It is not an absolute rule of law that in no circumstances should a permanent lease be granted in respect of waste lands belonging to a trust. The question is one of degree, depending upon a number of circumstances and therefore a question of fact; where the lower Courts have not fallen into any error of law and have not lost sight of any rule of law in dealing with the question of the validity of a permanent lease of waste lands belonging to a trust, the concurrent finding of the lower Courts that a particular lease was granted for a justifiable cause cannot be interfered with in second appeal, although some of the observations made by the lower Courts may be open to criticism. (*Varadachariar, J.*) NELLAYAPPAR KANTHIMATHI AMBAL TEMPLE, TINNEVELLY *v.* ARUNACHALAM PILLAI. **1937 M.W.N. 1188.**

Construction of document.

——**S. 100**—*Construction of documents—Document of title—Meaning of word.*

The question as to which of two alternative meanings of a certain word appearing in a document should in the context be held applicable, is one of interpretation of the document, and if the document is one of title it would be open to second appeal. (*Dalip Singh, J.*) HANS RAJ *v.* TULSI. **41 P.L.R. 326=A.I.R. 1939 Lah. 264.**

——**S. 100**—*Construction of document—Finding as to meaning of certain words used in a document—Finality.*

A finding by the lower appellate Court as to the meaning of certain words used in a document must be regarded as a finding of fact. It is doubtful if its interpretation is open to question in second appeal. (*Smith, J.*) PARMESHWAR SINGH *v.* BAIJ NATH. **167 I.C. 295=9 R.O. 374=1937 O.L.R. 106 (2)=1937 O.W.N. 356=A.I.R. 1937 Oudh 295.**

——**S. 100**—*Construction of documents—Finding based on documents of title—If can be challenged.*

A finding based on *khatauni and khasras* which are instruments of title can be challenged in second appeal even if it is a finding of fact. (*Zia-ul-Hasan, J.*) GULAI *v.* SRIPAL. **12 Luck. 155=162 I.C. 334=8 R.O. 363=1936 R.D. 172=1936 O.W.N. 375.**

——**S. 100**—*Construction of documents—Finding based on—Interference.*

A finding of the lower appellate Court based upon documents which are instruments of title and not merely historical material, even if it be a finding of fact, can clearly be challenged in second appeal. (*King, C.J. and Nanavutty, J.*) AMJAD HUSAIN *v.* NAWAB ALI. **11 Luck. 642=161 I.C. 158=8 R.O. 307=1936 R.D. 35=1936 O.L.R. 147=1936 O.W.N. 100=A.I R. 1936 Oudh 225.**

——**S. 100**—*Construction of document of title—If can be gone into.*

The construction of a document of title is a question of law or at any rate of mixed fact and law and the second appellate Court can go into such matter. (*Mohammad Noor and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* RAJENDRA NARAYAN SINGH DEO. **162 I.C 838=8 R P. 586=1936 P. W.N. 458=A.I.R. 1936 Pat. 287.**

——**S. 100**—*Construction of document—If ground for second appeal.*

Misconstruction of a document in the sense of misinterpretation of a term of it so as to lead to a wrong legal inference is certainly a matter for second appeal. (*Gruer, J.*) SANTOSHRAO *v.* SHEOLAL. **20 N.L.J. 39.**

——**S. 100**—*Construction of documents—Interference in second appeal.*

Where the construction placed by the lower appellate Court upon the documents which it considers is not an unreasonable one, no point arises in second appeal for interference. (*Fazl Ali, J.*) NARAIN PANDEY *v.* SURAJBHAN LAL. **18 Pat.L.T. 289=1937 P.W.N. 98=169 I.C. 897=3 B.R. 678=10 R.P. 91=A.I.R. 1937 Pat. 414.**

——**S. 100**—*Construction of documents—Interference.*

The fact that certain documents which are not documents of title have been misconstrued by the lower appellate Court, would not be a good ground for second appeal. (*Tek Chand, J.*) MANGAL DAS *v.* MOOL RAJ. **39 P.L.R 376.**

——**S. 100**—*Construction of documents—Interference.*

Even though the lower appellate Court may not have placed a correct construction on the documents exhibited that would not entitle the High Court to interfere with its finding of fact in a second appeal. (*Jack, J.*) GOPI MOHAN JEO THAKUR *v.* BEPIN BEHARI BHAKAT. **173 I.C. 358=10 R.C. 507=65 C.L.J. 325=A.I.R. 1937 Cal. 371.**

——**S. 100**—*Construction of documents—Mere pieces of evidence—Inference—Challenging in second appeal.*

When the Court only considers various documents as mere pieces of evidence involving no question of construction, its inference of fact is not open to challenge in second appeal. (*Niyogi, J.*) RAJLU NAIDU *v.* MALAK. **I.L.R (1939) Nag. 580=186 I.C. 155=12 R.N. 187=1939 N.L.J. 297=A.I.R. 1939 Nag. 197.**

——**S. 100**—*Construction of documents—Question of fact.*

The interpretation of documents which are not instruments of title is a question of fact. (*Skemp, J.*) DEVI DAS *v.* YARAN KHAN. **168 I.C. 638=9 R.L. 661=39 P.L.R. 482=A.I.R. 1937 Lah. 656.**

——**S. 100**—*Construction of document—Question of law.*

Per *Rupchand Bilaram, A. J. C.*—Where a suit is founded on an agreement between the vendee and the vendor, its construction is a question of law and not of fact. (*Rupchand Bilaram and Haveliwala, A. J. Cs.*) DAYARAM CHAINRAI *v.*

Karmumal Kotumal. **172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.**

——S. 100—*Construction of documents—Question of law.*

The construction of documents is a question of law which may be considered in second appeal. But where there is no error in the construction of a document, and it is argued that there is a mistake in drawing an inference from the document, that is not an error of law, but an error of fact, and High Court will not interfere with a finding of fact by the lower appellate Court merely because it is erroneous. *(Davis, J.C. and Mehta, A.J.C)* Gulabrai Dayaram *v.* India Equitable Insurance Co **30 S.L.R. 371=167 I.C. 929=9 R.S. 207=A.I.R. 1937 Sind 51.**

——S. 100—*Construction of document—When question of law.*

A decision as to how much area was the subject matter of settlement of a touzi at the time of its settlement, which is arrived at on the construction of a Rubkari is a question of law so far as the question of construction of Rubkari is concerned. *(Wort and Agarwala, JJ.)* Ram Rambijaya Prasad Singh *v.* Krishna Madho. **182 I.C. 982=5 B.R. 864=12 R.P. 89=20 P.L.T. 677 =A.I.R. 1939 Pat. 364**

——S. 100—*Construction of documents which are not documents of title—Erroneous decision as to effect—Interference.*

Where none of the documents filed in a case is a document of title, nor is there any question or any decision of the Court with regard to the documents which is a decision on a question of law, an erroneous decision by the Court as to the import of such document is not error of record, but is merely an erroneous decision by the Court on a question of fact, and is binding in second appeal. A. I. R. 1918 P C. 92, Rel. on. *(Wort and Rowland, JJ.)* Sudhakar Misra *v.* Nilkantha Das. **161 I.C. 465=8 R.P. 446=A.I.R. 1936 Pat. 129.**

——S. 100—*Construction of plaint—Question of law.*

The construction of plaint is a question of law. *(Dhavle and Varma, JJ.)* Ladhuram Marwari *v.* Bansidhar Marwari. **16 Pat. 527=4 B.R. 78 =18 Pat.L.T. 640=1937 P.W.N. 677=10 R.P. 260=171 I.C. 881=A.I.R. 1937 Pat. 572.**

Custom.

——S. 100—*Custom—Finding as to existence—When open to interference.*

Where a question as to the existence of a custom has been decided by a lower Court, what has to be seen is not merely whether the decision arrived at is one of fact but whether in arriving at it, the Court has committed an error in law or not; for instance, if it was based upon the acceptance of evidence which was inadmissible, it could be questioned in second appeal but if it was so based because the Judge believed the evidence of some and disbelieved that of the others, it could not be questioned in second appeal. *(Hamilton, J)* Ram Din *v.* Balbhaddar Singh. **14 Luck. 515=181 I C. 70=11 R.O. 280=1939 O L.R. 235=1939 R D. 250=1939 O.A. 364=1939 O.W.N. 372=A.I.R. 1939 Oudh 210.**

——S. 100—*Custom—Finding as to existence of custom—Plea that it is qualified—If open in second appeal.*

Where the lower Courts have found that according to the village custom as recorded in the Wajib-ul-arz the groves of the judgment-debtor are inalienable and cannot be attached and sold in execution of the decree, and the decree-holder did not plead in the Courts below that the custom was qualified in the sense of the restraint against alienation being merely for the benefit of the proprietor, it is not open to him to raise that plea in second appeal which is concluded by the finding of the lower Courts about the existence of the custom. *(Srivastava and Nanavutty, JJ.)* Kandhai Lal *v.* Sheo Nath. **12 Luck. 59=161 I.C. 266=8 R.O. 316=1936 O.W.N. 260=1936 R.D. 113=1936 O L.R. 153=A.I.R. 1936 Oudh 235.**

——S. 100—*Custom—Finding as to proof of—High Court, if and when can interfere in second appeal.*

The finding of lower Court that a custom has not been proved, is a finding on a mixed question of fact and law. The High Court sometimes interferes with such a finding on the ground that the evidence is so considerable in favour of the existence of the custom that the lower Court should have found, the custom proved. But if it is in accordance with the weight of evidence, it would be impossible to reverse it in second appeal. *(Bennet and Verma, JJ.)* Pauhari Bishunath Jati *v* Ramlagan Jati. **183 I.C. 471=12 R.A. 143=1939 R D. 234=1939 A.W.R. (H.C.) 313=1939 A.L.J. 617=A.I.R. 1939 All. 500.**

——S. 100—*Custom—Finding that custom set up is not established—Interference.*

A finding of the lower Courts that a custom set up by a party has not been established by him is one of law and cannot be interfered with in second appeal when it is not vitiated by any error of law. *(Niamatullah, J.)* Mathura Prasad *v.* Bhola Nath. **174 I.C. 433=1938 R.D. 233=10 R.A. 575=1938 A.L.R. 272=1937 A.L.J. 1301=1937 A.W.R. 1228=A.I.R. 1938 All. 144.**

——S. 100—*Custom or usage—Existence of—Question as to—If open in second appeal.*

The question whether the facts found in any particular case prove the existence of the essential attributes of a custom or usage is a question of law which may be discussed in second appeal. *(Agarwala and Madan, JJ.)* Rudra Narain Singh *v.* Kedar Nath Singh. **18 Pat.L.T. 477 =1937 P.W.N. 526=3 B.R. 762=10 R.P. 148=170 I.C. 754=A.I.R. 1937 Pat. 458.**

——S. 100—*Custom—Question as to—Mixed question of law and fact.*

Custom is a mixed question of law and fact. *(Broomfield and Macklin, JJ.)* Babasaheb Appasaheb *v.* Laxmanappa Ramappa. **178 I.C. 854=11 R.B. 198=40 Bom. L.R. 1015=A.I.R. 1938 Bom. 492.**

——S. 100—*Custom—Reasonableness of custom—Question of law.*

A question as to the reasonableness or otherwise of a custom is a question of law and it is open to the High Court in second appeal to look into the facts found by the lower appellate Court, for the purpose of deciding as to whether the custom alleged is reasonable or not. *(M. C. Ghose and Mukherjea, JJ.)* Asrabulla *v.* Kiamatulla Haji Choudhury. **I.L.R. (1937) 2 Cal. 86=41 C.W.N. 503=66 C.L J. 284=10 R.C. 305 =171 I C. 785=A.I.R. 1937 Cal. 245.**

——S. 100—*Custom or usage—Question whether usual practice prevails and duration of its existence—If one of law.*

Whether a usual practice prevails or not, and the length of its existence are questions of fact; although the legal inferences which follow from them may be questions of law. 1931 All. 499 (F.B.), Foll. (*Bose, J.*) GANGADHAR MARTI *v.* SHRI SUNDAR NARAIN SANSTHAN. **I.L.R. 1936 Nag. 13=164 I.C. 825=9 R.N. 39=A.I.R. 1936 Nag. 95.**

Discretion.

——**S. 100**—*Discretion—Calling of witness by lower appellate Court—Interference in second appeal.*

Where the lower appellate Court examines of its own motion under O. 41, R. 27, C. P. Code, a witness who, in its opinion, should have been examined by one of the parties, there is nothing illegal in the exercise of its discretion, and it is not open to the Court on second appeal to decide whether the discretion has not been rightly exercised. (*Jai Lal, J.*) ROSHAN LAL *v.* CHARAN DAS. **168 I.C. 466=9 R.L. 637=38 P.L.R. 449 =A.I.R. 1937 Lah. 115.**

——**S. 100**—*Discretion—Exercise of, by Trial and Appellate Courts—Power of High Court in second appeal.*

The discretion given to the trying Court is not one to be exercised arbitrarily but with due regard to the facts of the case and general principles of justice. High Court in second appeal has power to see which of the two Courts exercised discretion properly in accordance with the judicial principles. (*Niyogi. J.*) BALIRAM *v.* UTTAM CHAND. **I.L.R. (1939) Nag. 452=182 I. C. 52=11 R.N. 495=1939 N.L.J. 157=A.I.R. 1939 Nag. 110.**

——**S. 100**—*Discretion—Grant of specific performance—Discretion of lower Court—Interference in second appeal.*

Per *Haveliwala, A J.C.*—Under S. 22, Specific Relief Act, discretion in the grant of specific performance of the contract depends on the facts and circumstances of each case and where discretion has been exercised by the first appellate Court on the consideration of the evidence recorded, the Judicial Commissioner's Court should not interfere unless it is shown that the discretion was perverse and against judicial principles. More so in second appeal in which questions of fact which are the basis for the exercise of the discretion cannot be gone into. Where the interference in the discretion of the trial Court, by the first appellate Court, rests on the consideration of the whole of the evidence and its decision is on the findings of fact both on the evidence and on the documents which is within the competence of the first Appellate Court to challenge, the Judicial Commissioner's Court cannot and should not interfere unless those findings are vitiated by some error of law.

Per *Rupchand Bilaram, A.J.C.*—Where the appellate Court interferes with the discretion of the trial Court and the basis of the interference is wrong and arbitrary, not judicial, the Judicial Commissioner's Court is justified in interfering with the discretion exercised by the appellate Court. (*Rupchand Bilaram and Haveliwala, A.J Cs.*) DAYARAM CHAINRAI *v.* KARMUMAL KOTUMAL. **172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.**

——**S. 100**—*Discretion—Interference—Exercise of discretion on misapprehension of legal principles—Power of High Court in second appeal*

Where the lower Courts have exercised their discretion not on the special facts of the case but on a misapprehension of the legal principles on which the discretion given by a provision of law should be exercised, it is competent to the High Court in second appeal to interfere and overrule that exercise (*Norman.*) SHAM LAL *v.* BABU RAM. **1937 A.M.L J. 49.**

——**S. 100**—*Discretion — Interference with—Limitation Act, S. 5.*

It is only when the lower appellate Court exercises a judicial discretion, that the High Court will not entertain a second appeal on a plea that the lower appellate Court was wrong in applying the provisions of S. 5, Limitation Act. If the reasoning of the lower appellate Court is based wholly upon an erroneous view of law, or the Court rejects such a plea arbitrarily without exercising judicial discretion, the High Court will interfere in second appeal. (*Agha Haidar, J.*) LADHA MAL-BISHEM DAS *v.* NADAR. **166 I. C. 698=9 R.L. 407=A.I.R. 1936 Lah. 742.**

——**S. 100**—*Discretion—Interference in second appeal—High Court's powers.*

The High Court does not ordinarily interfere in second appeal with the discretion of the Court below when such discretion has been exercised judicially on a full consideration of the evidence in the case. But where the lower appellate Court has not directed its mind to the evidence in the case at all, but has disposed of the suit on a preliminary objection, there is no bar to the High Court interfering with the decision of the lower Court in such a case (*Agarwala and Rowland, JJ*) SATRUHAN PRASAD SINGH *v.* UDAI PRATAP NARAIN SINGH **187 I.C. 207=6 B.R. 433=12 R.P. 573=A.I.R. 1940 Pat. 502.**

——**S. 100**—*Discretion—Refusal of application for adjournment and dismissal of appeal for want of prosecution—Interference in second appeal.*

An appellate Court has a discretion to grant or refuse an adjournment prayed for by the appellant or his pleader; and the exercise of that discretion is not a matter which can be made the subject of a second appeal. A refusal of an adjournment and the consequent dismissal of the appeal for want of prosecution cannot therefore be interfered with in second appeal. (*Niamatullah, J.*) MOHAMMADI HUSAIN *v.* CHANDRO. **168 I.C. 1001=9 R A. 697=1937 A. L.R. 439=1937 A L.J. 174=1937 A.W.R. 122= A.I.R. 1937 All. 284.**

——**S. 100**—*Discretion—Wrong exercise of—Interference—Amendment of plaint.*

Where a judge allowing an amendment of the plaint has proceeded on a wrong view of the law so that he could not have applied his mind to the question whether he should or should not, in his discretion allow the amendment, the High Court would interfere in second appeal though the matter was one in the discretion of the lower Court. (*Stone, C.J. and Bose, J.*) LACHHMANSING *v* MAHENDRA LAL. **I.L.R. (1939) Nag 194 =176 I.C. 728=11 R.N. 72=1938 N.L.J. 198= A.I.R. 1938 Nag. 388.**

Equitable relief.

——S. 100—*Equitable relief — Lower Court wrongly refusing equitable relief—Interference.*

The High Court will always interfere in second appeal where a lower Court has wrongly refused to grant an equitable relief. (*Horwill, J.*) NARAYANAN NAIR *v.* CHEKUNNI. **1937 M. W.N. 245=45 L.W. 648=10 R.M. 164=170 I.C. 242=A.I.R. 1937 Mad. 520.**

Error of Law

——S. 100—*Error of law—Finding by appellate Court in reversal of trial Court's decision without giving reasons and without discussing evidence—Interference in second appeal.*

A provisional finding upsetting a very closely reasoned and elaborate judgment of the trial Court without any discussion of evidence whatever or without giving any reason except the general reason that the evidence is not satisfactory is contrary to law and will be set aside in second appeal. (*Pandrang Row, J.*) VEERAMMA *v.* VEERAPPA. **173 I C. 333=10 R.M. 565=A.I. R. 1937 Mad. 282.**

——S. 100—Error of law—Improper rejection of evidence—Collection papers to rebut presumption under S. 50 (2), B. T. Act—Exclusion from consideration—If vitiates finding—Interference. *See* B. T. ACT, S. 50 (2). **A.I.R. 1936 Cal. 483.**

——S. 100—*Error of law—Test—High Court, if can hear appeal on facts.*

There is an error of law when a Court's finding proceeds upon a misconception of the real nature of the issue in the case, when several facts admitted or proved are not considered in their relation to each other and weighed as whole, when a certain legal consequence which naturally follows from admitted and proved facts is overlooked, or when a material part of admissible evidence which vitally bears on the point at issue is disregarded. A case which involves such an error of law must fall within the ambit of S. 100, C. P. Code. Where therefore lower Court's judgment is based on an error of law it cannot attain finality and High Court in appeal can hear it on facts. (*Niyogi, J.*) MT. ANUPA BAI *v.* BHAGWANT SINGH. **I.L.R. (1938) Nag. 535=179 I.C. 285=11 R.N. 283=A.I.R. 1938 Nag. 470.**

Evidence.

——S. 100—*Evidence—Respondent in lower appellate Court not attacking points decided against him—Evidence on those points, if can be gone into in second appeal.*

The right which a respondent in the lower appellate Court has under O. 41, R. 22, C. P. Code, to support the trial Court's decree in his favour on any points which were decided against him, if not availed of, cannot be used to ask the Court in second appeal to go into evidence bearing on that issue. (*Niyogi, J.*) PANNALAL *v.* SUMRANLAL. **I.L.R. (1939) Nag. 624=185 I.C. 108=12 R.N. 133=1939 N.L.J. 391=A.I.R. 1939 Nag. 260.**

Finding of fact.

——S. 100—*Finding of fact—Absence of—Power of second appellate Court to arrive at finding of fact.*

The High Court in second appeal is entitled to come to a finding of fact where the lower appellate Court has omitted to arrive at such a finding. (*Bennet and Verma, JJ.*) DAULATA KUER *v.* RAM DAS RAI. **1940 A.W.R. (H.C.) 276=1940 A.L. J. 366=A.I.R. 1940 All. 349.**

——S. 100—*Finding of fact—Alienation by mahant—Legal necessity—Question as to—Nature of—Finding on—Finality.*

The question of legal necessity for an alienation by way of a permanent lease by the *mahant* of a *math* is a question of fact. The finding of the lower appellate Court on such a question is binding in second appeal, though the question is disposed of by that Court by applying a principle of law to the proved facts of the case. (*Wort and Rowland, JJ.*) DARBAR SAHEB *v.* BARE LAL KANDARP NATH SAH DEO. **162 I.C. 797=8 R.P. 567=17 Pat.L.T. 488=A.I.R. 1936 Pat. 275.**

——S. 100—*Finding of fact—Appellate Court erring in law in arriving at conclusion upon facts.*

Where the lower appellate Court errs in law in holding on the facts of a case that the descent has not been from preceptor to disciple, the finding can be interfered with in second appeal. (*Dalip Singh and Skemp, JJ.*) GHULAM MOHY-UD DIN *v.* MT. HAJRAN BIBI. **178 I.C. 58=11 R. L. 393=A.I R. 1938 Lah. 182.**

——S. 100—*Finding of fact—Concurrent findings—Rule as to non-interference with—Meaning of.*

On second appeal it is not the concurrent finding of fact which cannot be interfered with; it is the finding of fact of the first appellate Court, and there is no question of it being within the discretion of the second appellate Court to interfere; the second appellate Court cannot interfere, however erroneous it may think this finding of fact to be. (*Dunkley and Wright, JJ.*) U RAI GYAW THOO, LTD. *v.* MA HLA U PRU. **1940 Rang.L.R. 180=A.I.R. 1940 Rang. 126.**

——S. 100—*Finding of fact—Construction of deed—Interference.*

Where it is clear that the lower appellate Court has wrongly interpreted a deed in the same manner as the trial Court and the other facts relied on by the appellate Court are insufficient to sustain the legal inference arrived at by it, the second Appellate Court is bound to interfere and may set aside the judgment and decree. (*Davis, J.C. and Weston, J.*) DOLUMAL *v.* PARMESHARIBAI. **A.I.R. 1940 Sind 74.**

——S. 100—*Finding of fact—Date of termination of agency—Finding as to—If final.*

A finding by the lower appellate Court as to when an agency terminated is binding in second appeal. (*Bajpai, J.*) HINGU LAL *v.* SARJU PRASAD. **169 I.C. 135=1937 A.L.R. 449=9 R. A. 706=1937 A.L.J. 264=1937 A.W.R. 163=A. I.R. 1937 All. 363.**

——S. 100—*Finding of fact—Decision reached after interpreting documents.*

The conclusions of the lower appellate Court that the rights of a party in certain maufi jagirs are not connected with any grant of pension within the meaning of the Pensions Act is essentially a finding in fact which cannot be disturbed in second appeal. It is no less a finding in fact because in reaching his decision the lower Court had to interpret a number of documents. (*Thom, C.J., Collister, Allsop, Ganga Nath and Braund, JJ.*) SAADAT HUSAIN *v.* RAM KISHAN DAS. **1940 A.W.R. (H.C.) 397=1940 A.L.J. 420=A.I.R. 1940 All. 373 (F.B.).**

——**S.** 100—*Finding of fact—Dismissal of appeal under O.* 41, *R.* 11, *C. P. Code—Finding of fact recorded in judgment consisting only of a few lines—If conclusive—Interference.*

A finding of fact of the lower appellate Court is conclusive in second appeal and the mere fact that the judgment of the lower appellate Court consist only of a few lines does not make the finding of fact any the less binding. There is nothing in the Code of Civil Procedure to take out of this rule a case in which the lower appellate Court records a finding of fact while dismissing an appeal under O. 41, R. 11, C. P. Code. The High Court will not interfere in the absence of any errer of law or of defect in procedure. (*Rowland and Chatterji, JJ.*) Baijoo Lall Katarayar *v.* Rajendra Nath Bhattachariya. **179 I.C. 803=5 B.R. 295=11 R.P. 405=A.I.R. 1939 Pat. 267.**

——**S.** 100—*Finding of fact—Evidence—Failure to refer to—Interference.*

Where the High Court is not satisfied with the finding of the fact on the point of possession because the appellate Court had not categorically made reference to the statements of the defendant's witnesses whom it purported to disbelieve nor had it made any reference to the witnesses of the plaintiff on the question of possession, the High Court can look into the evidence of the case and if satisfied that the finding was correct, should not interfere. (*Manohar Lall, J.*) Palakdhari Mahton *v.* Purandra Prasad. **173 I.C 228=4 B.R. 224=10 R.P. 387=A.I.R. 1938 Pat. 10.**

——**S.** 100—*Finding of fact—Fact assumed but not established by evidence—Finality.*

An assumption of a fact which is not established by evidence is not a finding of fact binding in second appeal. (*D. R. Norman*) Indra Bhan *v.* Kala Bhawan. **1937 A.M.L.J. 7.**

——**S.** 100—*Finding of fact—Finality.*

A finding of fact of the first appellate Court is binding upon the High Court however gross and in excusable that finding may be. 17 I.A. 122, Foll. (*Wort and Rowland, JJ.*) Mohan Lal Ram Gopal *v.* Udai Ram Sewa Ram. **161 I.C. 516=8 R.P. 454 (2)=A.I.R. 1936 Pat. 140.**

——**S.** 100—*Finding of fact—Finality of.*

In second appeal the High Court has no jurisdiction to reverse or alter a finding of fact. A question of fact cannot be agitated in second appeal. (*Niyogi, J.*) Sheikh Nuroo *v.* Seth Meghraj Ramkaran. **I.L.R. (1937) Nag. 214=170 I.C. 790=10 R.N. 91=A.I.R. 1937 Nag. 139.**

——**S.** 100—Finding of fact—Finality—Finding based on inadmissible materials and achieved by unjustifiable procedure—If binding in second appeal. *See* C. P. Code, O. 18, R. 18. **48 L.W. 595.**

——**S.** 100—*Finding of fact—Finality—Failure to consider part of evidence—Interference.*

Where the lower appellate Court records findings of fact, the High Court cannot re-open the matter merely because some items of evidence may not have been considered. (*Rowland, J.*) Kunj Bihari Thakur *v.* Umashankar Prasad. **173 I.C. 237=10 R.P. 388=4 B.R. 228=A.I.R. 1938 Pat 38.**

——**S.** 100—*Finding of fact—Finality—Failure to consider material evidence—Effect.*

If an appellate Court, while reversing a well considered judgment of the trial Court, fails to advert to, or in any way indicate that it has considered, a most material piece of evidence which militates against its own view, its finding cannot be accepted as an unassailable finding of fact in second appeal. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Bapayya *v.* Ramakrishnayya. **179 I.C. 265=11 R.M. 560=1938 M.W.N. 354=47 L.W. 477=A.I R. 1938 Mad. 568=(1938) 1 M.L.J. 582.**

——**S.** 100—*Finding of fact—Finality—Finding on point not pleaded based on slender evidence.*

The lower appellate Court as the final Court of fact is entitled to draw such inferences from facts as it thinks proper, and in second appeal there is no power in High Court to interfere with those findings; but when the Appellate Court, on the slenderest of evidence, makes out a case which is not in the pleadings, its finding of fact cannot be binding in second appeal. (*Agarwala, J.*) Bindeshwari Rai *v.* Ram Palak Singh. **175 I.C. 91=4 B.R. 521=10 R.P. 580=1938 P.W.N. 741=A.I.R. 1938 Pat. 181.**

——**S.** 100—*Finding of fact—Finality—Finding that land had been rendered unfit for tenancy.*

Where a tenant builds cooly huts on the land and the lower Court comes to the conclusion that by reason of such construction the land has been rendered unfit for the purpose of tenancy and that there has been a breach of S. 22 of Chota Nagpur Tenancy Act, the finding is one with which the High Court is not entitled in second appeal to interfere. (*Wort, Ag.C.J. and Manohar Lall, J.*) Ramjap Dube *v.* Jagadish Chandra Deo Dhabal. **11 R.P. 237=178 I.C. 274=5 B. R. 78=A.I.R. 1939 Pat. 161.**

——**S.** 100—*Finding of fact—Finality of—Powers of High Court.*

The High Court, in dealing with second appeals under S. 100, C. P. Code, is confined strictly to questions of law, and is bound to accept the lower Court's findings of fact. The High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law, although, if it were dealing with the case as a Court of fact, it might take a different view of the evidence in the case. (*Agarwala and Varma JJ.*) Joala Prasad Singh *v.* Chanderjot Kuer. **17 Pat. 430=4 B.R. 656=175 I.C. 783=11 R.P. 47=1938 P.W N. 250=19 Pat.L.T. 281=A.I R. 1938 Pat. 278.**

——**S.** 100—*Finding of fact—Finality—Question whether tenancy is permanent or not—Lower appellate Court not weighing and discussing evidence—Interference in second appeal.*

The question to decide whether a certain tenancy is permanent or not, when it depends entirely upon the oral and documentary evidence evidencing series of transactions in the absence of a document of title, is always a question of difficulty and in such cases the lower Appellate Court, being the final Court of fact, should be careful to give its reasonings in its judgment, so that the superior Court may be able to see that the evidence, both oral and documentary, in the case has been properly weighed. Where the judgment of the lower appellate Court merely reiterates the findings of the trial Court and does not discuss the oral or documentary evidence, the judgment cannot be said to be a proper judgment. (*Manohar Lall, J.*) Chhaganmal Marwari *v.* Indra Keot. **179 I.C. 176=11 R.P. 337=5 B.R. 205=A.I.R. 1938 Pat. 609.**

——S. 100—*Finding of fact—Finality—Weak evidence.*

A finding on a question of fact which is supported by evidence, however weak, cannot be challenged in second appeal. (*Ismail, J.*) Ram Adhar Misir *v.* Jagnoo Misir. **174 I.C. 82=1938 A.L.R. 237=10 R.A. 546=1937 A.W.R. 1223=1937 A.L.J. 1311=A.I.R. 1938 All. 100.**

——S. 100—*Finding of fact—Finding arrived at without Court applying its mind to facts and circumstances of the case—Finality.*

A finding of fact arrived at by the lower appellate Court without applying its mind to the facts and circumstances on which the trial Court has based its decision cannot be accepted as binding in second appeal. (*Nasim Ali and Edgley, JJ.*) A. H. Mohammad Ismail & Co. *v.* Sachidananda Bhattacharjee. **40 C.W.N. 769.**

——S. 100—*Finding of fact—Finding as to document being tampered with.*

A finding that a document has been tampered with is a finding of fact and is binding upon the High Court in second appeal. (*Mohamad Noor and Dhavle, JJ.*) Janardan Parida *v.* Prandhan Das. **5 C.L.T. 45=A.I.R. 1940 Pat. 245.**

——S. 100—*Finding of fact—Malicious arrest—Finding as to absence of reasonable and probable cause and existence of malice—Suit for damages for—Interference in second appeal*

The finding of the lower appellate Court as to the absence of reasonable and probable cause and to the existence of malice in a suit for damages for malicious arrest, is not a finding of fact conclusive in second appeal. The question is one of law and the High Court has therefore jurisdiction to interfere in second appeal. (*Manohar Lall, J.*) Madan Lal *v.* Lakshmi Narain. **179 I.C. 790=11 R.P. 401=5 B.R. 286=20 P.L.T. 367=1938 P.W.N. 783=A.I.R. 1939 Pat. 13.**

——S. 100—*Finding of fact—Finding as to malice in suit for malicious prosecution.*

A finding in a suit for malicious prosecution that the defendant did not act without any reasonable or probable cause or with malice, is a finding of fact. 25 Bom. 332 (336) P.C., relied on. (*Ganga Nath, J.*) Narain Das *v.* Municipal Board, Gorakhpur. **161 I.C. 443=8 R.A. 736=1936 A.W.R. 31=1936 All. L.R. 277=A.I.R. 1936 All. 441.**

——S. 100—*Finding of fact—Finding as to status of tenant.*

Findings that the tenants are raiyats and they have acquired rights of occupancy are findings of fact. (*S. K. Ghose and Edgley, JJ.*) Prodyot Coomar Tagore *v.* Maynuddin Mia. **68 C.L.J. 435=A.I.R. 1938 Cal. 724.**

——S. 100—*Finding of fact—Finding based on entries in* 'Khatauni' *and* 'Khasras'—*Interference.*

Unless instruments of title are involved, findings of fact arrived at by a Court of first appeal cannot be questioned in second appeal, although documentary evidence has to be considered. "*Khataunis*" and "*Khasras*" cannot always be regarded as instruments of title. Where the entries in the "*Khatauni*" and the "*Khasra*" are relied on by the parties with reference to the question whether a certain plot was occupied by the plaintiff alone or by him and the defendant jointly, such entries are mere items of evidence and cannot be regarded as instruments of title. Accordingly a finding based on those entries is a finding of fact which cannot be challenged in second appeal. (*Nanavutty and Smith, JJ.*) Sripal *v.* Golai. **168 I.C. 302=9 R.O. 464=1937 O.L.R. 247=1937 O.W.N. 544=1937 R.D. 258=A.I.R. 1937 Oudh 370.**

——S. 100—*Finding of fact—Finding based on erroneous approach to case—If final.*

A finding of fact based on an obviously erroneous approach to the case cannot be accepted as binding in second appeal. (*Varadachariar, J.*) Thirumalappa *v.* Ramappa. **176 I.C. 639=11 R.M. 140=1937 M.W.N. 1285=46 L.W. 910=A.I.R. 1938 Mad. 133=(1937) 2 M.L.J. 511.**

——S. 100—*Finding of fact—Finding based on legal error—Inference of fraud from circumstances—Interference in second appeal.*

Though a Court of second appeal is not competent to question the soundness of the finding of fact by the Court below, and the decision of the lower Court as to the effect of the evidence must stand final as to the fact, yet the soundness of the conclusions derived from the findings of fact may involve a matter of law and may, therefore, be questioned by a Court of second appeal. Where in a case fraud is alleged, but there is no direct evidence of fraud and only an inference drawn from circumstances, such a finding involves a legal question as to whether the circumstances are such that the necessary inference can legally be derived. If the lower Court proceeds upon a wrong legal view of the nature of the circumstantial evidence from which fraud can be inferred, the finding is based upon a legal error and can be interfered with in second appeal. (*Fazl Ali and Meredith, JJ.*) Raja Singh *v.* Chaichoo Singh. **185 I.C. 816=12 R.P. 423=6 B.R. 262=20 Pat L.T. 957=A.I.R. 1940 Pat. 201.**

——S. 100—*Finding of fact—Finding based on wrong assumption—Interference.*

A finding recorded by the lower appellate Court based wholly upon wrong assumptions would not be binding on the High Court in second appeal. (*Agha Haidar, J.*) Bhagwan Das *v.* Parabh Dial. **167 I.C. 704=9 R.L. 528=A.I.R. 1936 Lah. 1005.**

——S. 100—*Finding of fact—Finding marked by error of law—Presumption ignored.*

A finding of fact is not binding in second appeal if it is marked by errors of law as that of ignoring the presumption of correctness attaching to the record-of-rights. (*Dhavle and Agarwala, JJ.*) Bhup Narayan Singh *v.* Hira Lal. **161 I.C. 709=8 R.P. 475 (2)=17 Pat L.T. 405=A.I.R. 1936 Pat. 185.**

——S. 100—*Finding of fact—Finding not based on evidence—Question whether a drain constituted nuisance.*

The plaintiffs sued the defendants for a permanent injunction for the closing of a drain from their latrine. The lower appellate Court based its finding on a sweeping statement that water discharged from latrines in Indian homes should as a rule be treated as nuisance and granted the injunction, *Held*, that the finding of the lower appellate Court about the drain in question constituting a nuisance was given without reference to the evidence bearing on the point and its order for the closing of the drain must be set aside. (*Srivastava, J.*). RIYASAT ALI *v.* ZAMIN ALI. **12 Luck. 94=161 I.C. 411=8 R.O. 324=1936 O.W.N. 310=1936 O.L.R. 175=A.I.R. 1936 Oudh 211.**

——S. 100—*Finding of fact—Finding on question of title.*

A finding on the question of title is one of fact and cannot be challenged in second appeal. (*Nasim Ali and Henderson, JJ.*) RAMESH CHANDRA TALUKDAR *v* PRAMATHA NATH SANYAL. **162 I.C. 522=8 R.C. 610=63 C.L.J. 591=40 C.W.N. 758=A.I.R. 1936 Cal. 245.**

——S. 100—*Finding of fact—Finding opposed to weight of evidence—Interference.*

Although a Court of second appeal is, as a rule loath to interfere with a finding of fact, where the finding is very much against the weight of evidence in the case, the Court in second appeal will interfere. (*Drake Brockman, S. M. and Knox, J. M.*) HARAKH CHAND B. *v.* SUMER TEWARI. **1936 R.D. 119.**

——S. 100—*Finding of fact—Finding supported by evidence—Interference.*

Where there is evidence on record which would justify the lower appellate Court in arriving at a particular finding and it has considered the evidence, the High Court will not interfere in second appeal merely because it comes to the conclusion that if the matter had been raised before it, it might have come to a conclusion different from the conclusion arrived at by the lower appellate Court. If there is no evidence upon which the finding could be supported, then the matter becomes not a question of fact but a question of law. (*Davis, J,. C. and Mehta, A. J. C.*) SUJANDAS *v.* SHANKERDAS. **167 I C. 355=9 R.S. 176=A.I.R.1937 Sind 36.**

——S. 100—*Finding of fact—Finding that account book is one kept in regular course of business.*

A finding that a book of account is one kept in the regular course of business is a finding of fact within the competence of the lower appellate Court. (*James, J.*) BAIDYANATH DUTTA *v.* KANHAI LAL MARWARI. **5 B.R. 296=179 I.C. 828=11 R.P. 412=A.I.R. 1939 Pat. 264.**

——S. 100—*Finding of fact—Finding that certain suit was not collusive.*

A finding by the lower Appellate Court that a certain suit was not collusive is a finding of fact which cannot be disturbed in second appeal. (*Addison and Ram Lall, JJ.*) KISHORI LALL *v.* PIARE LALL. **I.L.R. (1940) Lah. 60=41 P.L.R. 462.**

——S. 100—*Finding of fact—Finding that contract was not acted upon—Interference.*

A conclusion of the lower appellate Court that a certain contract was not acted upon by the parties is a finding of fact which cannot be attacked on second appeal. (*Jai Lal, J.*) ALI GAUHAR *v* MAHAND. **38 P.L R. 590.**

——S. 100—*Finding of fact—Finding that lands were totally unfit for cultivation—Interference*

The question whether lands were totally unfit for cultivation for the years in suit is a matter for the Court below and where the lower Appellate Court has accepted the finding of trial Court that the entire land had been diluviated and no area was cultivable in the years in suit the High Court has no jurisdiction to interfere. (*Wort, J.*) NRIPENDRA NATH CHATTERJI *v.* JUGAL PRASAD MANDAL. **185 I.C. 144=12 R.C. 306=A.I.R. 1939 Pat. 386.**

——S. 100—*Finding of fact—Finding that mortgage deed alleged in plaint not proved—If can be challenged.*

A finding by the lower appellate Court that the mortgage deed alleged in the plaint is not proved, is a finding of fact which cannot be challenged in second appeal. (*Nanavutty, J*) RAM SAMUJH *v.* LAL SARAN. **167 I.C. 724=9 R.O. 401=1937 O.L R. 146=1937 O.W.N. 266.**

——S. 100—*Finding of fact—Finding that party did not get possession of property under agreement of partition—Finality—If can be challenged in second appeal.*

A finding of the lower appellate Court that the Court was not satisfied on the evidence that a party got possession of his share of the properties in pursuance of an agreement of partition, is a finding of pure fact and cannot be attacked in second appeal, however liable it might be to be set aside if the evidence could be discussed. (*Burn, J.*) BAPAYYA *v.* RAMAKRISHNAYYA. **1937 M.W.N. 393.**

——S. 100—*Finding of fact—Finding that suit bond was executed owing to undue influence—If can be disturbed.*

A finding by the lower appellate Court that the bond in suit was executed owing to undue influence, is not a pure finding of fact. It is rather a legal inference from the facts of the case. Such a finding can, therefore, be disturbed in second appeal. (*Nanavutty and Zia-ul-Hasan, JJ*) GANGA PRASAD *v.* JANGBAHADUR KHAN. **167 I.C. 424=9 R.O. 387=1937 O.L.R. 114=1937 O.W.N. 277=A.I.R. 1937 Oudh 254.**

——S. 100—*Finding of fact—Finding that there is evidence of agreement—Interference.*

The question whether there is evidence of an agreement is a question of fact. But if the Court comes to the conclusion that there is no evidence or that the evidence in no circumstances could be held to be evidence of an agreement, a question of law might arise. But where on the facts as found, and in the circumstances the Court finds there was an agreement, no question of law arises. (*Wort, J.*) DEO NARAIN SINGH *v.* MT. LILA KUER. **160 I.C. 1079=8 R.P. 414=1936 P.W.N. 52=17 Pat.L.T. 360=A.I.R. 1936 Pat. 96.**

——S. 100—*Finding of fact—Finding that transaction was intended to defeat and delay creditors.*

A finding by the lower appellate Court that a certain transaction was intended to defeat and delay the creditors and was collusive, is a finding of fact which is conclusive in second appeal. (*Bhide, J.*) DAULAT RAM *v.* BISHAN DASS. **38 P.L.R. 577.**

——S. 100—*Finding of fact—Fraud in connection with service of sale proclamation—Non-service of proclamation—Finding as to, not based on evidence—Finality.*

A finding as to the existence of fraud in connection with the service of a sale proclamation or as to non-service of the same, which is not based on evidence is not binding in second appeal and can be interfered with. (*Courtney-Terrell, C. J. and James, J.*) Ramkeshwar Singh *v.* Kesho Prasad Sinha. **180 I.C. 740=5 B.R. 483=11 R.P. 528=1938 P W.N. 202=19 Pat.L.T. 645=A.I.R. 1938 Pat. 622.**

———S. 100—*Finding of fact—Hindu coparcener—Intention to separate from joint family—Suit for partition—Finding that institution of suit was not voluntary act and did not evidence clear intention to separate—If conclusive in second appeal.*

A finding by the lower appellate Court, that a Hindu coparcener in filing a plaint for partition was under the influence of profligate persons who were bent upon ruining him, and that in effect the institution of the suit for partition was their act rather than his act, and that therefore the institution of the suit did not evidence an unequivocal intention on the part of the member concerned to separate from the other members of the joint family, is one of fact, and the High Court in second appeal cannot disregard the same, but must accept it as conclusive. (*Agarwala and Varma, JJ.*) Joala Prasad Singh *v.* Chanderjot Kuer. **17 Pat. 430=4 B.R. 656=175 I.C. 783=11 R.P. 47=1938 P.W.N. 250=19 Pat.L.T. 281=A.I.R. 1938 Pat. 278.**

———S. 100—*Finding of fact—Inferences derived from documentary evidence.*

A finding based on inferences derived from documentary evidence is as good a finding of fact as that based on oral and documentary evidence. (*Niamatullah, J.*) Alakh Narain Singh *v.* Dayal Singh. **167 I.C. 851=9 R.A. 583=1936 A.W.R. 1287=1937 A.L.R. 263 (2)=A.I.R. 1937 All. 197 (1).**

———S. 100—*Finding of fact—Inferences derived from documents.*

The rule that the High Court has no jurisdiction to reverse the findings of fact arrived at by the lower appellate Court, however erroneous, unless they are vitiated by some error of law, is applicable to cases in which such findings are based on inferences drawn from the documents exhibited in evidence. (*Thomas, J.*) Dan Bahadur Singh *v.* Talewand Singh. **167 I.C. 870=9 R.O. 412=1937 O.L.R. 175=1937 O.W.N. 330=A.I R. 1937 Oudh 226.**

———S. 100—*Finding of fact—Inference from evidence—If binding in second appeal.*

A finding of fact resting on evidence is an inference of fact from the evidence, and is binding in second appeal, unless it can be shown to be impossible in law. (*Dhavle, J.*) Mohammad Yaquoob Ally *v.* Chhotey Lal Mistri. **179 I.C. 583=5 B.R. 244=11 R.P. 396=A.I.R. 1939 Pat. 218.**

———S. 100—*Finding of fact—Inference from exhibits—Interference.*

It is open to the lower appellate Court as a Court of fact to draw such inference as could be drawn from the various parts of the exhibits before it, and if it had materials before it on which it could base its finding, the finding cannot be interfered with in second appeal. (*Mahomed Noor, J.*) Jagat Mohan Prasad *v.* L. W. Bion. **167 I.C. 817=9 R.P. 431=3 B.R. 338=1937 P.W.N. 236=A.I R. 1937 Pat. 479.**

———S. 100—*Finding of fact—Inference from record-of-rights.*

The inference as to the nature of a holding to be drawn from the record-of-rights is an inference of fact with which the High Court cannot interfere in second appeal. (*Wort, J.*) Mohit Tewari *v.* Ram Narain Dube. **166 I.C. 454=9 R.P. 296=3 B.R 170 (1)=A.I R. 1938 Pat. 110.**

———S. 100—*Findings of fact—Interference.*

Definite findings on questions of fact by the lower appellate Court cannot be questioned in second appeal. The question whether a person has been admitted to the tenancy or not by the zamindar is a question of fact and the findings on it must be accepted unless it is shown that it is without any basis of evidence. (*Sathe, J.M.*) Sukhrani *v.* Din Dayal. **1940 A.W.R. (B.R.) 89.**

———S. 100—*Finding of fact—Interference.*

In second appeal the Court has no jurisdiction to question the findings of fact however gross or inexcusable the error may seem to be. (Case law discussed.) (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) Dayaram Chainrai *v.* Karmumal Kotumal. **172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.**

———S. 100—*Finding of fact—Interference.*

Finding of fact based on misapprehension as regards real point at issue cannot be upheld in second appeal. (*Bhide, J.*) Co-operative Society Dhingranwali *v.* Muhammad Din. **42 P.L.R. 273=A.I.R. 1939 Lah. 301.**

———S. 100—*Finding of fact—Interference—Absence of evidence.*

A finding on a point of fact is open to consideration in a second appeal when there is no evidence to justify such a finding. (*Hamilton, J.*) Banarsi Das *v.* Kalka. **1938 R.D. 256=1938 O.A. 482=1938 A.W.R. (C.C.) 20=1938 O.W.N. 171.**

———S. 100—*Finding of fact—Interference—Chance of appellate Court coming to different conclusion on same evidence—If a ground.*

Where a lower appellate Court has not discarded defence evidence on any general grounds, but has attempted to discuss the evidence and to arrive at a reasoned conclusion, the mere fact that, that conclusion may be different from the conclusion to which the second appellate Court might arrive, if it considers the matter *de novo* is not enough ground for discarding the finding of fact arrived at by the lower appellate Court. (*Sathe, J.M.*) Saikwa *v.* Ram Pal. **1940 R.D. 246 (1).**

———S. 100—*Finding of fact—Interference—Error of law—What is.*

A finding of fact can be reversed in second appeal when it is vitiated by some error of law. A mistake of law is not confined to a decision based on inadmissible evidence. A finding of fact in order to be binding and conclusive on a Court of second appeal must be one based on evidence legally sufficient to support it. The decision of the lower appellate Court on a point of fact must be proper and judicial. For instance, it must consider all the important evidence; it must correctly state what the witnesses said and what the documents contain. There is a difference between interpretation of a document and giving a meaning to it which cannot possibly be given in view of the contents of the documents, for the interpretation must be a meaning which the document can bear although of course it need not be the meaning which the Court of second appeal would give to it. To find against a party because he has not produced before the Court some material exhibits which were not within his power to produce, and which would prove nothing is obviously an error of law. To disregard the evidence of a witness on the ground that he has made a statement which he has in fact not made is also a mistake of law. (*Zia-ul-Hasan and Hamilton, JJ.*) Dukhharan Nath *v.* Commercial Credit Corporation, Ltd. **15 Luck. 191=184 I.C. 521=1939 O.L.R. 630=12 R.O. 125=1939 O.W.N. 1114=A.I.R. 1940 Oudh 35.**

———S. 100—*Finding of fact—Interference—Failure to appreciate legal effect of recitals of necessity in ancient documents.*

A finding of the lower appellate Court based upon a failure to appreciate the true legal effect of recitals of necessity in ancient documents and omission to consider other documents of recent origin consistent with those recitals, cannot be supported in second appeal. (*Jack and Khundkar, JJ.*) Lakshmi Narayan Jie *v.* Jagadish Ch. Sur. **177 I.C. 477=11 R C. 247=42 C.W.N. 837=A.I.R. 1938 Cal. 541.**

———S. 100—*Finding of fact—Interference—Failure to consider documentary evidence.*

Where the lower appellate Court has failed to consider a certain document which had been relied upon by the trial judge, its finding of fact is not binding in second appeal. (*Skemp, J.*) Debi Singh *v.* Sis Ram. **41 P.L.R. 120=A.I.R. 1939 Lah. 188.**

———S. 100—*Finding of fact—Interference—Finding as to relationship vitiated by misapprehension of pedigree table.*

Where a finding of fact as to the relationship of parties is vitiated by an entire misapprehension of the pedigree table, it is a finding not based on any legal evidence, and can, therefore, be interfered with in second appeal. (*Skemp, J.*) Ghulam Mohammad *v.* Miraj Din. **176 I.C. 464=11 R L. 220=40 P.L.R. 162=A.I.R. 1938 Lah. 303.**

———S. 100—*Finding of fact—Interference—Finding based on conjectures.*

Finding of fact by lower Appellate Court based partly on conjectures and partly on a misunderstanding of the evidence is liable to be set aside in second appeal. (*Bhide, J.*) Ghulam Hussain *v.* Secretary of State. **185 I C. 137 (1)=12 R. L. 270=A.I.R. 1939 Lah. 510.**

———S. 100—*Finding of fact—Interference—Finding based on assumptions and conjectures.*

A finding of fact based purely upon unwarranted assumptions and unjustified conjectures is not binding in second appeal. (*Tek Chand, J.*) Lal Chand *v.* Rehman. **39 P.L.R. 361.**

———S. 100—*Finding of fact—Interference—Finding that house formed part of joint family property.*

The finding that a house was no part of the assets of the firm but formed part of the joint family property is a clear finding of fact and cannot be disturbed on second appeal. (*Din Muhammad, J.*) Punnum Mal *v.* Bishambar Dayal. **A.I.R. 1940 Lah. 205.**

———S. 100—*Finding of fact—Interference—Finding that sale is not fictitious.*

A finding that a sale is not fictitious, right or wrong, is a finding of fact which cannot be interfered with in second appeal. (*Bhide, J.*) Dayal Das *v.* Sant Ram. **42 P.L.R. 246**

———S. 100—*Finding of fact—Interference—Grounds—Findings not recorded on objections specifically raised before lower appellate Court.*

If the lower appellate Court fails to consider and record findings on objections specifically mentioned in the grounds of appeal filed before it, its order is liabe to be set aside. (*Abdul Qayoom, C.J. and Wazir, J.*) Mt. Jainti *v.* Ludar Mani **42 P.L.R.J. & K. 21.**

———S. 100—*Finding of fact—Interference—Grounds.*

A finding of fact arrived at by the first appellate Court is final if there is evidence on record to support it but such finding can be questioned in second appeal, if there is no evidence to support it and it can be interfered with in second appeal. (*Mohammad Noor, J.*) Bengal Nagpur Ry. Co. *v.* Harijiban Iswar Pathak. **169 I.C. 354=3 B.R. 554=10 R.P. 4=1937 P.W.N. 71=A.I.R. 1937 Pat. 289.**

———S. 100—*Finding of fact—Interference—Inference from facts—Question of law.*

A finding of fact based on oral evidence cannot be gone into in second appeal; but the legal inference to be drawn from proved or admitted facts is a matter of law. (*Kania, J.*) Vazirbhai Sultanbhai *v.* Gadmal Nathmal. **I.L.R. (1940) Bom. 505=42 Bom.L.R. 511=A.I.R. 1940 Bom. 263.**

———S. 100—*Finding of fact—Interference—Lower appellate Court differing from trial Court without good reason.*

Where a lower appellate Court without giving very cogent reasons differs from the finding of the trial Court which had the best means of judging the weight to be attached to the evidence tendered before it, it can be set aside in second appeal by the Board. (*Marsh, S.M. and Mehta, J.M.*) Shyam Lal *v.* Iswari Dayal. **1939 R.D. 325=1939 A.W.R. (B.R.) 277.**

———S. 100—*Finding of fact—Interference—Lower Court admitting inadmissible evidence—Evidence Act, S. 167.*

Where there is legal evidence on record in support of the finding of fact by the lower appellate Court, the finding is binding in second appeal even if the lower Court has admitted inadmissible evidence. 19 Cal. 249 (P.C.), Rel. on. (*Agha Haidar, J.*) Mahomed Ali *v.* Labh Singh. **169 I C. 940=10 R.L. 62=39 P.L.R. 184=A.I.R. 1937 Lah. 26.**

———S. 100—*Finding of fact—Interference—Lower Court omitting to consider all available evidence.*

A finding of fact to be binding on a Court of second appeal must be a judicial decision reached on a consideration of the whole of the evidence, and where it appears that all the available evidence has not been considered, the High Court will interfere and should interfere in second appeal. (*Skemp, J.*) Gobind Ram *v.* Kaju Ram. **185 I.C. 652=12 R.L. 310=42 P.L.R. 232=A.I. R. 1939 Lah. 504.**

———S. 100—*Finding of fact—Interference—Lower Court omitting to consider circumstances erroneously holding them to be inadmissible.*

A finding on a question of fact is open to challenge in second appeal if the lower appellate Court has in arriving at that finding refused to consider certain circumstances erroneously holding them to be either inadmissible or irrelevant.

(*Beckett, J.*) KRISHAN CHAND *v.* KANSHI RAM. **40 P.L.R. 705.**

———S. 100—*Finding of fact—Interference—Lower Court omitting to mention certain evidence.*

The mere fact that the lower Court omits to mention certain pieces of evidence does not go to show that he did not consider them. In any case where the finding is based on evidence, it is not liable to be set aside in second appeal, even if the High Court is inclined to come to a contrary conclusion. (*Addison and Ram Lall, JJ.*) RANJIT SINGH *v.* NAWAB KHAN. **185 I.C. 395=12 R.L. 284=41 P.L.R. 826=A.I.R. 1939 Lah. 548.**

———S. 100—*Finding of fact—Interference—Omission to refer to some documents.*

A finding of fact given by the lower appellate Court cannot be challenged in second appeal on the mere ground that certain documents are not referred to in its judgment, unless those documents conclusively prove the case of the appellant. (*Abdul Rashid, J.*) PITAM CHAND *v.* KALLU SINGH. **42 P.L.R. 94.**

———S. 100—*Finding of fact—Interference—Principles.*

No second appeal has any chance of success where the only ground is that the lower Appellate Court has omitted to mention this or that piece of evidence. The Legislature rightly or wrongly has decided that the first Appellate Court is to be trusted and it behoves first Appellate Judges to bear in mind the fact that their findings of fact are conclusive and that they therefore have a great responsibility and should be especially careful in such cases. If they are not, it may be a matter for administrative discipline but a second Appellate Court cannot put the matter right in second appeal. (*Stone, C.J. and Bose, J.*) MADHODASS GULABDAS *v.* APPAJI RAOJI. **I.L.R. (1939) Nag. 510=183 I.C. 492=12 R.N. 71=1939 N.L.J. 329=A.I.R. 1939 Nag. 221.**

———S. 100—*Finding of fact—Interference—Shifting of onus—Unhappy remark by lower Court.*

A finding of fact is not liable to interference in second appeal merely because the lower appellate Court's remark about the shifting of the onus is not happily worded, if it has not really affected the decision on merits. (*Bhide, J.*) DAULAT RAM *v.* BISHAN DASS. **38 P.L.R. 577.**

———S. 100—*Finding of fact—Interference—When justified.*

It is true that a finding of fact arrived at by a lower appellate Court is binding on the High Court, however erroneous it might be. But this dictum presupposes that the finding is honest, that it has been arrived at on the facts of the case uninfluenced by any extraneous considerations, that it is the result of a correct appreciation of the material on the record and that it is based on evidence and not on surmises and conjectures. Any finding of fact which does not satisfy any of the requirements stated above will not be binding on the High Court. Every finding of fact is not sacrosanct and if findings of fact are arrived at on mere surmises and conjectures or on evidence that it is inadmissible or otherwise legally insufficient, those findings can be disturbed. (*Din Mohammad, J.*) BHARPURA *v.* DIWAN CHAND. **A.I.R. 1940 Lah. 329.**

———S. 100—*Finding of fact—Interference—When justified.*

The High Court is not justified in reversing a finding in second appeal, unless of course it is a perverse finding for which there is no evidence whatever or is arrived at by casting the burden on the wrong party and thereby shutting out oral evidence. (*Stone, C.J.*) JAGOBA KASHIBA KASAR *v.* ANANDRAO. **169 I.C. 449=9 R.N. 6=A.I.R. 1937 Nag. 9.**

———S. 100—*Finding of fact—Interpretation of facts found by lower Court.*

Where the lower Court has arrived at a certain finding of facts, and the facts are clear but the dispute relates not to the facts but to interpretation of facts by the lower Court, it can be dealt with in second appeal. (*Dalip Singh and Skemp, JJ.*) LABH SINGH *v.* MST. JASSO. **178 I.C. 81=11 R.L. 400=40 P.L R. 506=A.I.R. 1938 Lah. 180.**

———S. 100—Finding of fact—Minor—Decree against—Gross negligence of guardian—Finding as to—Interference in second appeal. *See* MINOR —DECREE AGAINST. **(1937) 1 M.L.J. 224.**

———S. 100—*Finding of fact—No evidence—Court in second appeal—If precluded from coming to different finding.*

Where there is no evidence on which a finding of fact arrived at by the lower Court, can properly be based, the Court in second appeal, is not, as a matter of law, precluded from coming to a different finding. (*Baguley and Dunkley, JJ.*) RAMANUJA NAIDU *v.* N. K. CHETTYAR FIRM. **167 I.C. 110=9 R.R. 293=A.I.R. 1936 Rang. 488.**

———S. 100—*Finding of fact—Omission to consider materials having obvious bearing on case—If vitiates finding—Finality in second appeal.*

A finding of fact arrived at without considering the materials on record which has an obvious bearing on the case cannot be accepted in second appeal. The omission to consider such materials vitiates the finding. (*Dhavle and Agarwala, JJ.*) SURAJ KUMAR SINGH *v.* SHRI SHRI RADHAKRISHNAJI. **168 I.C. 129=9 R.P. 461=3 B.R. 394=1936 P. W.N. 796=17 Pat. L.T. 774=A.I. R. 1937 Pat. 78.**

———S. 100—*Finding of fact—Omission to consider piece of evidence—Effect*

Mere omission to consider a piece of evidence will not alter the character of a finding of fact. (*Agarwala and Rowland, JJ.*) RADHA MOHAN MISSIR *v.* KAMALDHARI MISSIR. **162 I.C. 21=8 R.P. 505=A.I.R. 1936 Pat. 243.**

———S. 100—*Finding of fact—One witness preferred to another—Interference.*

A finding of fact cannot be challenged in second appeal unless it can be shown that there is no evidence supporting it. It is open to a Court to accept evidence of one witness in perference to that of others and a finding arrived at on such evidence cannot be said to be supported by no evidence. (*Rupchand Bilaram and D. C. Mehta, A. J.Cs.*) ABDUL RAHIM *v* GHULAM MAHAYADI. **161 I.C. 501=A.I.R. 1936 Sind 7.**

——— S. 100—*Finding of fact—Power of High Court to direct enquiry into same matter.*

Where it had been already decided by the lower Court that a certain wall and a door did not encroach on the plot in suit.

Held, that it was not open to the High Court in second appeal to direct the lower Court to hold an enquiry as to the same matter. This would be in effect to re-open and try for a second time a claim for a mandatory injunction in respect of the door and the wall. (*Sir George Rankin.*) Ballabh Das *v.* Nur Mahomed. **40 C.W.N. 449 =160 I.C. 579=17 Pat.L.T. 177=8 R.P.C. 161= 38 P.L.R. 182=1936 A.W.R. 317=1936 A.L.J. 480=43 L.W. 685=1936 O.L.R. 100=1936 A.L.R. 203=1936 P.W.N. 225=1936 R.D. 147=1936 O.W.N. 153=A.I.R. 1936 P.C. 83=70 M.L.J. 455 (P.C.).**

——S. 100—*Finding of fact—Question as to when arrears of pay became due.*

The question as to when the arrears of pay claimed by a person became due is one of fact, depending upon the contract between the parties. (*Nasim Ali and Henderson, JJ.*) Jitendra Nath Roy *v.* Jnanada Kanta Das Gupta. **167 I.C. 265=9 R.C. 672=A.I.R. 1936 Cal. 277.**

——S. 100—*Finding of fact—Question of consideration in pre-emption suit.*

The finding on the question of consideration by a lower appellate Court in a suit for pre-emption is a finding of fact and when based upon the evidence in the case is binding on the second appellate Court. (*Iqbal Ahmad, J.*) Jairaj Singh *v.* Har Narain Singh. **1940 A.L.J. 360=1940 A. W.R. (H.C.) 341=A.I.R. 1940 All. 414.**

——S. 100—*Finding of fact—Question whether execution of document is genuine.*

It is true that a document is said to be executed only if it is proved to have been consciously signed or thumb-marked after the alleged executant had become aware of its contents and that the mere presence of a signature or a thumb-mark on a document may not in certain cases in itself amount to a proof of its execution. But where the Judge has not been impressed by the mere presence of the thumb marks on the document in question, but there are certain other attending circumstances which have influenced his mind while formulating his conclusions that execution of document is genuine, his decision cannot be interfered with in second appeal. (*Addison and Din Mohammad, JJ.*) Hukam Chand *v.* Ramji Das **180 I.C. 555=11 R.L. 699 =A.I.R. 1938 Lah. 357.**

——S. 100—*Finding of fact—Question whether tenancy is permanent or not—Finding on—Interference.*

The question whether a tenancy is permanent or precarious is a legal inference from facts and not itself a question of fact, and the High Court in second appeal can therefore decide the case for itself on the facts found by the lower appellate Court. (*Dhavle, J.*) Jugesh Chandra Bose *v.* Maqbul Hossain. **163 I.C. 415=9 R.P. 9= 17 Pat.L.T. 202=1936 P.W.N. 333=A.I.R. 1936 Pat. 384.**

——S. 100—*Finding of fact—Question whether there has been family settlement among members —"Fact"—Meaning of.*

The word "fact" in S. 100, C. P. Code, must bear the meaning given to it in S. 3, Evidence Act. The question whether there has been a family settlement among the members of a joint Hindu family is one of fact. Whether two persons agree on a certain matter is a thing which is capable of being perceived by the senses, and whether they had the requisite mental intention necessary to give validity to their outward forms or acts of agreement, is a mental condition of which a person can be conscious, and a finding on a matter of this kind is one of fact and not of law. Even if such a finding is based on inferences derived from other facts, it would still be a finding of fact, provided it is possible for a prudent man to come to such a conclusion, for a fact can be proved not only by direct evidence but also by inferences from other proved or accepted facts. It does not cease to be a fact as defined in S. 3 simply because it is proved in this way. A.I.R. 1931 All. 499, Rel. on. (*Vivian Bose, J.*) Dattatraya Govind *v.* Narayan Gangaram. **165 I.C. 217= 9 R.N. 70=A.I.R. 1936 Nag. 186.**

——**Ss. 100 and 101**—*Findings of fact—Respondent's right to challenge.*

There is nothing in the language of Ss. 100 and 101 which gives countenance to the view that a respondent in appeal under S. 100, C. P. Code, is debarred from challenging the correctness of the findings of fact of the first appellate Court which in spite of such findings, dismissed the appeal. (*Mya Bu and Sharpe, JJ.*) Ma Lon *v.* Ma Mya May. **179 I.C. 946=11 R.R. 363=A.I.R. 1939 Rang. 59.**

——S. 100—*Finding of fact—Suit for enhancement of rent—Finding that no prevailing rate existed—B. T. Act, S. 30.*

In a suit for enhancement of rent, the lower Courts come to the conclusion that there was no prevailing rate of rent.

Held, that the High Court could not interfere in second appeal with the finding. (*Wort, J.*) Jagdeo Narain Singh *v.* Tula Singh. **160 I.C. 1102=8 R.P. 423=A.I.R. 1936 Pat. 54.**

——S. 100—*Finding of fact—View of appellate Court—Finality of—Appellate Court concurring in the judgment of trial Court—Nature of judgment.*

An appellate Court disposing of an appeal is not bound to repeat *in extenso* the arguments of the trial Judge which it accepts. But a party is entitled to a considered opinion of the appellate tribunal. It is not the first Court's view but that of the second Court that is final if the question is one of fact. (*Venkatasubba Rao and Madhavan Nair, JJ.*) Venkayya *v.* Venkatarattamma. **174 I.C. 669=10 R.M. 733=47 L.W. 66=A.I.R. 1938 Mad. 253=(1937) 2 M.L.J. 916.**

——S. 100—*Finding of fact—When final.*

In a case in which the findings of fact of the lower appellate Court are to be final, it is necessary that the Court should examine the entire evidence, and its judgment should indicate that it had done so (*Tek Chand, J.*) Bhim Singh *v.* Ramji. **42 P.L.R. 136.**

Intention of parties.

——S. 100—*Intention of parties to contract—Question of fact or question of law.*

Per *Rupchand Bilaram, A.J.C.*—Intention of parties is the inference to be drawn from proved facts. That is a question of law.

Per *Haveliwala, A.J.C.*—Intention to be gathered from evidence as to whether damages or specific performance should be granted on breach of agreement to sell is a question of fact. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) Dayaram Chainrai *v.* Karmumal Kotumal. **172 I.C. 322=10 R.S. 141=A.I.R. 1937 Sind 263.**

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Interference.

——S. 100—*Interference with findings of fact—Rule against—Applicability to findings based on inferences of facts drawn from documents.*

The rule against interference in second appeal with the findings of fact of the lower appellate Court apply equally to the case of findings of fact based on inferences of fact drawn wholly or in part from documents. (*Zia-ul-Hasan and Yorke, JJ.*) DAYAVAT ULLAH *v.* ATTA KHANAM. **186 I.C. 766=12 R.O. 339=1940 O.W.N. 193=1940 O.L.R. 145=1940 O.A. 200=1940 A.W.R. (C.C.) 103=A.I.R. 1940 Oudh 217.**

——S. 100—*Interference — Power of High Court—Error in procedure—Effect of.*

It does not follow that in second appeal an error of procedure will always lead to reversal of the lower Appellate Court's decision. It must be an error affecting the merits of the case, but under S. 100, C. P. Code, High Court can interfere on the ground of any substantial error or defect in the procedure which may possibly have produced error or defect in the decision of the case upon the merits. (*Rowland, J.*) BHAGWAN SINGH *v.* UJAGIR SINGH. **A.I.R. 1940 Pat. 33.**

Jurisdiction.

——S. 100 — *Jurisdiction — Incompetence of lower Court—Interference in second appeal.*

Where a District Judge assumes a jurisdiction which he does not possess, any order which he passes on such assumption can be set aside by the High Court in second appeal. (*Misra, J.*) SHEO NANDAN SINGH *v.* SURAJ PRASAD SINGH. **179 I.C. 39=11 R.A. 348=1938 A.L.R. 932=1938 A.L.J. 988=1938 A.W.R. (H.C.) 682=1938 R.D. 829=A.I.R. 1939 All. 22.**

Malicious prosecution.

——S. 100—*Malicious prosecution—Existence or absence—If a question of law.*

The presence or absence of reasonable and probable cause is a question relating to the state of the mind of the accuser and has to be inferred from the facts of each particular case. The question whether the inference from certain facts is correct or not is a question of law. (*Radhakrishna, J.*) FATEH CHAND *v.* KUNJ BEHARI LAL. **186 I.C. 293=1940 O.L.R. 113=12 R.O. 302=1940 O.A. 195=1940 O.W.N. 201=1940 A.W.R. (C.C.) 108=A.I.R. 1940 Oudh 320.**

Misreading of document,

——S. 100—*Misreading of document—If ground for second appeal.*

Misconstruction of a document which is not a document of title is, no doubt, no ground for a second appeal. But where a document has been held to contain an admission by a party when as a matter of fact no such admission exists, it is not entirely a question of drawing a wrong inference from a certain document, not being a question of title, but a question of misreading of evidence and a second appeal would, therefore, lie. (*Dalip Singh, J.*) MUNSHI *v.* BHAGAT SINGH. **42 P.L.R. 216=A.I.R. 1940 Lah. 278.**

Misreading of evidence.

——S. 100—*Misreading of evidence—Correction in second appeal.*

Where a certain convincing evidence has been set aside in the lower Appellate Court on a ground that can have no legal basis whatever, such a glaring misapplication of law of evidence is open to correction in second appeal. (*Grille, J.*) KISAN ISARAMJEE *v.* MT. JAIWANTI. **I.L.R. (1939) Nag. 324=178 I.C. 920=11 R.N. 260=A.I.R. 1938 Nag. 385.**

Mixed question of fact and law.

——S. 100—*Mixed question of fact and law—Application if "fresh" within meaning of S. 48.*

The question whether an application in question is a fresh application within the language of S. 48 is a mixed question of fact and law and a second appeal is competent. (*Bhide, J.*) GOPAL DAS *v.* HAFIZABAD MUNICIPALITY. **186 I.C. 860=12 R.L. 428=A.I.R. 1940 Lah. 35.**

——S 100—*Mixed question of fact and law—Creation of new tenancy.*

Whether a new tenancy has been created can never be said to be a pure question of law; it is a question of mixed fact and law and a question which certainly depends upon a number of facts. (*Wort, Ag. C.J.*) MT. BUNA BIBI *v.* KESHAB RAI JI THAKUR. **163 I.C. 538=9 R.P. 25=A.I.R. 1936 Pat. 411.**

——S. 100—*Mixed question of fact and law—Negligence.*

Per *Sulaiman, C. J.*—Negligence is at least a mixed question of law and fact and unless it is shown that the Court has approached the question from a wrong stand-point or that the evidence is such that there was no option but to draw the converse conclusion or unless the finding is vitiated by some other legal defect, it may be difficult to upset such a finding in second appeal. (*Sulaiman, C. J. and Bennet, J.*) B. B. AND C. I. RAILWAY *v.* DWARKA NATH. **58 All. 771=1936 A.L.R. 964=165 I.C. 882=9 R.A. 324=1936 A.L.J. 262=1936 A.W.R. 301=A.I.R. 1936 All. 771.**

——S. 100—*Mixed question of law and fact—Question of good faith—Limitation Act. S. 14.*

The question whether a party acted in good faith within the meaning of S. 14, Limitation Act, is a mixed question of law and fact and can be questioned in second appeal, provided that the lower Court's findings of fact are not interfered with. 36 I.C. 702, followed. (*Skemp, J.*) MAYA SINGH *v.* UDHAM SINGH. **181 I.C. 290=11 R.L. 807=40 P.L.R. 631=A.I.R. 1938 Lah. 704.**

——S. 100—*Mixed question of fact and law—Question of adverse possession.*

The question of adverse possession is a mixed question of law and fact and the Court has to draw its inference from the proved facts in the case. (*Agha Haidar. J.*) MT. BHANI *v.* UJAGAR SINGH. **166 I.C. 607=9 R.L. 395=A.I.R. 1936 Lah. 741.**

New case.

——S. 100—*New case—Estoppel—Not set up in written statement and no issue—If can be raised in second appeal.*

Where no case of estoppel was set up in the written statement and no issue was framed on the point, it is too late to set up such a new case in second appeal as there could be no findings of fact on which any estoppel could be based. (*Bennet and Verma, JJ.*) ANJUMAN ISLAMIA *v.* RADHEY LAL. **180 I.C. 621=11 R.A. 486=1939 A.W.R. (H.C.) 141=1938 A.L.J. 1238=A.I.R. 1939 All. 194.**

——S. 100—*New case—Interference—Lower Court basing judgment on new case made out for* *first time in appeal—Failure to adequately consider, more important aspect—Effect of the case.*

Where a Judge sitting in appeal bases his judgment on a new case made out for the first time in appeal, and it is clear that the new case has coloured and influenced his consideration of the facts and his decision on another aspect of the case, which, although treated by the appellate Court as a minor aspect, turns out in fact to be the most important aspect of the case, and it appears that the Court has not adequately considered that aspect and consequently has arrived at a wrong conclusion, his judgment is liable to be set aside in second appeal. (*Davis, J.C. and Mehta, J.*) ARAB JHANGLU *v.* PUNJAL SHAH. **I.L.R. (1939) Kar. 111=178 I.C. 690=11 R.S. 104=A.I.R. 1938 Sind 198.**

New plea.

——S. 100—*New plea—Admissibility of evidence.*

Even if the question of the admissibility of evidence is not raised in the lower Courts and particularly in the lower appellate Court, that question can be agitated at the stage of second appeal. A.I.R. 1927 Lah. 448, Foll. (*Agha Haidar, J.*) BHAGWAN DAS *v.* FARABH DIAL. **167 I.C. 704=9 R.L. 528=A.I.R. 1936 Lah. 1005.**

——S. 100—*New plea—If can be raised in second appeal for first time.*

The High Court should not in second appeal entertain a new point for the first time when all materials for the decision of such point are not before it. If it is necessary to frame an issue and call upon the lower Court to record a finding on such issue before the new point can be decided, the Court should not permit such a new point to be raised in second appeal. (*Harries, J.*) KISHUN PRASAD *v.* SHUBRATAN. **171 I.C. 910=10 R.A. 335=1937 A.W.R. 718=1937 A.L.J. 855 =1937 A.L.R. 907=A.I.R. 1937 All. 696.**

——S. 100—*New plea—Lower appellate Court not noticing in judgment point taken in grounds—Presumption—Point, if entertainable in second appeal.*

Where a point was taken in the grounds of appeal to the lower appellate Court but not noticed by it in its judgment, it must be presumed that the point was abandoned, in the absence of an affidavit to the contrary by the Advocate who argued the case before it, and it would not be entertained in second appeal. (*Skemp, J.*) FATTA *v.* NAZAR HUSSAIN. **39 P.L.R. 312.**

——S. 100—*New point—Plea not taken in Courts below and necessitating fresh evidence—If may be raised in second appeal.*

A point which has not been taken in either of the Courts below and which necessitates the taking of evidence for its decision cannot be allowed to be raised in second appeal. (*Beaumont, C.J. and Wadia, J.*) SECRETARY OF STATE FOR INDIA *v.* GANESH NARAYAN. **I.L.R. (1937) Bom. 801=172 I.C. 194=10 R.B. 257=39 Bom. L.R. 885=A.I.R. 1937 Bom. 456.**

——S. 100—*New plea—Plea of estoppel—If can be raised for first time.*

Estoppel is always a mixed question of fact and law, and a plea of estoppel cannot be allowed to be raised for the first time in second appeal, when it would necessitate the taking of further evidence of facts. (*Rangnekar, J.*) JAMBU TAVANAPPA *v.* GOPALAKRISHNAMACHARYA. **175 I.C. 866=11 R.B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

——S. 100—*New plea—Plea of estoppel—If can be entertained.*

A plea of estoppel which was not made up in the plaint or disclosed by the evidence cannot be raised for the first time in second appeal. (*Agarwala and Rowland, JJ.*) BANSIDHAR SETH *v.* GOPI LAL SETH. **6 B.R. 395=186 I.C. 793=12 R.P. 527=A.I.R. 1940 Pat. 480.**

——S. 100—*New plea—Plea of estoppel not raised in the trial Court—If can be raised in second appeal.*

A plea of estoppel which is not raised in the trial Court and which depends for its decision on many questions of fact which are necessary to be investigated cannot be allowed to be raised for the first time in second appeal. (*Manohar Lall, J.*) BINDESHWARI PRASAD *v.* LAL MUNGARI LAL. **10 R.P. 315=172 I.C. 198=1937 P.W.N. 762=18 Pat.L.T. 814=A.I.R. 1937 Pat. 642.**

——S. 100—*New plea—Plea of invalidity of deed of assignment of decree for want of registration—If can be raised in second appeal for first time.*

When, in both the lower Courts, the plea that the assignment of decree, though requiring registration, was not registered and that the assignee proceeding to execute the decree on the basis of such assignment, had no right to do so on account of the deed of assignment not being admissible in evidence for want of registration, was not raised.

Held, that the question involved a question of fact as to whether the deed of assignment was registered or not and so the plea could not be entertained in second appeal. (*Stone, C.J. and Bose, J.*) BHAGWANSINGH *v.* BEHARILAL. **I.L.R. (1938) Nag. 221=172 I.C. 43=10 R.N. 153= A.I.R. 1937 Nag. 237.**

——S. 100—*New plea—Plea of limitation.*

When the question of limitation depends upon the findings of fact, such question, when not raised in the grounds of appeal, cannot be allowed to be raised in second appeal. (*Vivian Bose, J.*) DULARSINGH *v.* SITARAM. **171 I.C. 783=A.I.R. 1937 Nag. 184.**

——S. 100—*New plea—Plea of limitation—If can be raised in second appeal for first time.*

A suit was instituted on 29th July, 1932, with a defective power-of-attorney. The correct power was filed on 23rd September, 1932, on which date the suit was held to be instituted. In second appeal the defendant contended that the suit, in so far as it related to the transactions more than three years before the date, should be taken as time-barred. The point was not taken in the lower Courts and not also in pleadings, after the correct power was filed.

Held, that the question was not a pure question of law. It involved fact as well. The plea of limitation could not therefore be allowed to be taken, under the circumstances, for the first time in the second appeal. (*Vivian Bose, J.*) AGARWAL JORAWARMAL *v.* KASAM. **I.L.R. 1937 Nag. 28= 174 I.C. 179=10 R.N. 350=A.I.R. 1937 Nag. 314.**

——S. 100—*New plea—Plea of limitation not pleaded or argued in the lower Courts—If can be raised in second appeal.*

A new point of limitation, no mention of which is made in the pleadings, in argument or in any memorandum of appeal cannot be raised for the first time in second appeal. (*Harries J.*) KISHUN PRASAD *v* SHUBRATAN. **1937 A.W. R. 718=1937 A.L.J. 855=10 R.A. 335=171 I.C. 910=1937 A. L.R. 907=A.I.R. 1937 All. 696.**

——**S. 100**—*New plea—Plea of* res judicata *withdrawn in trial Court.*

The High Court will not entertain in second appeal a plea of *res judicata* which was raised by the defendant in her written statement but withdrawn by her counsel on the date of issue and which was not raised in the grounds of appeal filed by her in the lower appellate Court or in the High Court. (*Srivastava, Ag.C.J. and Smith, J.*) BARFO *v.* NARAIN PRASAD. **13 Luck. 167=167 I.C. 72=9 R.O 361=1937 O.W.N. 229=1937 O L.R. 94=A I.R. 1937 Oudh 243.**

——**S. 100**—New plea—Plea of want of sanction under S. 91, C P Code—If may be raised in second appeal. *See* TORT—NUISANCE. **1938 M. W.N 262.**

——**S. 100**—New plea—Plea that anonymous comment is not admissible under S. 90 of the Evidence Act without proof as to its writer—If open in second appeal. *See* EVIDENCE ACT, S. 90. **(1939) 2 M.L.J. 593.**

——**S. 100**—*New plea—Point not one of pure question of law* (viz.) *failure of justice, if caused —If can be raised in second appeal for the first time.*

The question whether there has been a failure of justice or not is not a pure question of law and cannot be decided without finding facts and as such if the point was not taken in the lower Courts, it cannot be raised in second appeal in the High Court for the first time. (*Bennet and Verma, JJ.*) ABDUL RAHMAN *v.* FIRM SALAMAT ULLAH. **I L.R. (1939) All. 167=180 I.C 409=11 R A. 457=1939 A L.J. 50=1938 A.W.R. (H.C.) 873=A I.R. 1939 All. 163.**

——**S. 100**—*New plea—Point not pleaded and involving questions of fact—If can be raised.*

A point which was never pleaded and which involves questions of fact cannot be raised for the first time in second appeal. (*Bose, J.*) SETH RAMNARAYAN *v.* BATTULAL. **20 N.L.J. 89=170 I.C. 170=10 R.N. 50=A.I.R. 1937 Nag. 235.**

——**S. 100**—*New plea—Point not raised in written statement or anywhere—Maintainability in second appeal.*

A point not taken anywhere, not even in the written statement, cannot be urged for the first time in second appeal. (*Divatia, J.*) WAMAN ANANT *v.* CHUNILAL. **181 I.C. 183=11 R.B. 330 =41 Bom.L.R. 205=A.I.R. 1939 Bom. 117.**

——**S. 100**—*New plea—Point of law—If can be raised.*

A point of law on the facts held to be proved by the lower appellate Court may be entertained for the first time in second appeal. (*Bennet, Ag. C.J., Iqbal Ahmad, Collister, Bajpai and Ganga Nath, JJ.*) DULAR PANDEY *v.* NANDA BUDHAI. **I.L.R. (1938) All. 563=11 R A. 61=1938 A.L.R. 578=1938 A.L.J. 585=1938 A.W.R. (H.C.) 385 =176 I.C. 226=1938 R.D. 628=A.I.R. 1938 All. 396 (F.B.).**

——**S. 100**—*New plea—Point of law—If can be raised for first time in second appeal.*

It is well settled that the Court will allow, even in second appeal, a question of law to be raised for the first time, if it can do without any unfairness to the opponents, and if a question of law is such that it does not necessitate the taking of further evidence, the High Court in second appeal would allow it to be raised for the first time in second appeal. (*Rangnekar, J.*) JAMBU TAVANAPPA *v.* GOPALAKRISHNAMCHARYA. **175 I. C 866=11 R.B. 10=40 Bom.L.R. 359=A.I.R. 1938 Bom. 291.**

——**S. 100**—*New plea—Point of law necessitating remand.*

The High Court will not entertain a point of law raised for the first time in second appeal if the point cannot be decided without remanding the case for further evidence. (*Dunkley, J.*) PAPA AMMAL *v.* PANCHAVARNAM AMMAL. **14 Rang. 738=163 I.C. 364=9 R.R. 7=A.I.R. 1936 Rang. 260.**

——**S. 100**—*New plea—Point of law not dependent on fact—Maintainability.*

A point of law not dependent on any question of fact can be raised in second appeal though not raised before. (*Mahomed Noor and Saunders, JJ.*) JOKHIRAM SAGARMAL *v.* CHAMAN CHOUDHRY. **15 Pat. 356=160 I C. 1096=8 R.P. 420=17 Pat. L.T. 57=A.I.R 1936 Pat. 104.**

——**S. 100**—*New plea—Point of law setting up a new right.*

A point of law cannot be taken for the first time in scond appeal if it sets up a new right differing in kind from that asserted throughout the trial. 18 Bom. 679, Foll. (*Dunkley, J.*) PAPA AMMAL *v.* PANCHAVARNAM AMMAL. **14 Rang. 738=163 I.C. 364=9 R.R. 7=A.I.R. 1936 Rang. 260.**

——**S. 100**—*New plea—Point of law—Question whether suit falls under S. 92, C. P. Code—If can be raised in second appeal.*

A point of law can be taken at any time, and though the question whether a suit falls under S. 92, C. P. Code, is a mixed question of law and fact, if all the material facts are on the record, the question whether such facts do or do not show the trust to be a trust within the provisions of S. 92 is a question of law which can be taken at any time. (*Davis, J.C. and Lobo, A.J.C.*) SUKHUMAL-MANUMAL *v* UTTAMCHAND. **171 I C. 344=10 R.S. 102=31 S.L.R. 510=A.I.R. 1937 Sind 230.**

——**S. 100**—*New plea—Point of law—When open.*

A point of law can be raised for the first time in second appeal only when a finding favourable to the appellant would entitle him to a decree on the evidence as it stands. (*D.R. Norman.*) HIRA LAL *v.* KANHAIYA LAL TIWARI. **1937 A.M.L.J. 71.**

——**S. 100**—*New plea—Point requiring further findings of fact—If can be taken.*

It is not open to an appellant in second appeal to take a new point which requires further findings of fact before such point can be determined. (*Harries, J.*) SHYAM LAL *v.* SUNDER LAL. **1937 A.W.R. 650=1937 R.D. 387=1937 A.L.R. 872=171 I.C. 686=10 R A. 299 (2)=1937 A.L.J. 769 =A.I.R. 1937 All. 661.**

——**S. 100**—*New plea—Question of law.*

Where the question is purely one of law, not requiring any additional evidence for its decision, there can be no legal objections to its being raised in second appeal. (*Bhide, J.*) Gurdit Singh *v.* Sher Khan. **164 I.C. 30=9 R.L. 105 =38 P.L.R. 608=A.I.R. 1936 Lah. 448.**

———**S. 100**—*New plea—Question of law.*

Where a highly technical point is not raised by the appellant either in the lower Courts or in the grounds of appeal before the High Court it is open to the High Court, in second appeal, not to allow the appellant to raise it for the first time. Where, however, the question is of importance, the High Court may allow the parties to argue on the point especially if it is a pure question of law apparent on the face of the record and does not depend upon the evidence. (*Agha Haidar, J.*) Dhala Bahlak *v.* Dhala Kakhan. **165 I.C. 66 =9 R.L. 202=A.I.R. 1936 Lah. 612.**

———**S. 100**—*New plea—Question of law—If can be raised.*

Per *Mackney, J.*—When a question of law is raised for the first time in a Court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. (*Mackney, Mya Bu and Spargo, JJ.*) Maung Po Zaw *v.* Maung An. **1939 Rang L.R. 83=179 I. C. 6=11 R.R. 303=A.I.R. 1938 Rang. 376.**

———**S. 100**—*New plea—Question of law—If can be raised for the first time in second appeal.*

Where a new question of law that a suit for pre-emption must fail because all that was sold could not be pre-empted, is raised for the first time in second appeal, it is not only competent but expedient in the interests of justice to entertain it. (*Hamilton and Srivastava, JJ.*) Abdul Hafiz *v.* Manohar Lal. **14 Luck. 678=183 I. C. 604=12 R.O. 44=1939 O.W.N. 736=1939 O.A. 583=1939 A.W.R. (C.C.) 111=1939 R.D. 455=1939 O.L.R. 537=A.I.R. 1939 Oudh 233.**

———**S. 100**—*New plea—Question of law—If can be raised.*

A question of pure law can be raised in second appeal, especially when the other party knows all the relevant facts which the latter himself has mentioned in his pleadings. (*Niamatullah, Ag.C. J. and Allsop, J.*) Gaya Deen Misir *v.* Tirbhuwan Singh. **1937 A.W.R. 1183=1937 A.L.J. 1252.**

Presumption.

———**S. 100**—*Presumption—Wrong statement of law by appellate Court as to—Evidence approached from a wrong standpoint—Interference in second appeal.*

Where the judgment of the appellate Court is extremely brief and the Judge is shown to have started the discussion of the evidence with a wrong statement of the law as to presumptions applicable to the case, and the whole question is shown to have been approached from a wrong standpoint, the High Court can set aside the finding in second appeal. (*Venkatasubba Rao and Madhavan Nair, JJ.*) Venkayya *v.* Venkatarattamma. **174 I.C. 669=10 R.M. 733=47 L. W. 66=A.I.R. 1938 Mad. 253=(1937) 2 M.L.J. 916.**

Question of fact.

———**S. 100**—*Question of fact.*

Questions of fact cannot be entered upon in second appeal. (*Mehta and Lobo, A.J.Cs.*) Chatomal Ranjhomal *v.* Abdul Hamid Khan. **173 I.C. 862=10 R.S. 231=A.I.R. 1937 Sind 312.**

———**S. 100**—*Question of fact—Acceptance of gift by donee.*

The question whether a donee had accepted a gift in the lifetime of the donor is not purely a question of law but would involve evidence as to whether there was or there was not acceptance, and it cannot, therefore, be considered in second appeal when it was not taken in the Courts below. (*Thomas, C.J. and Hamilton, J.*) Lakhpat Lal *v.* Mt. Sukhraji. **1940 O.A. 509=1940 A.W.R. (C.C.) 264=1940 O.W.N. 600=1940 O.L.R. 373 =188 I.C. 666=13 R.O. 10=A.I.R. 1940 Oudh 318.**

———**S. 100**—*Question of fact—Adequacy of damages to be awarded*

There can be no doubt that questions about the adequacy of damages are ordinarily questions of fact which cannot be entertained in second appeal. (*Bose, J.*) Jansa Tansa Kalar Sirri *v.* Banoo. **161 I.C. 593=8 R.N. 228=A.I.R. 1936 Nag. 70.**

———**S. 100**—*Question of fact—Amalgamation of several holding of lands into single holding—Question as to—Finding on—Conclusive character of.*

The question whether several holdings of land have been amalgamated, so as to create a single holding in respect of which a single suit can be instituted for rent is substantially a question of fact, and the finding of the lower appellate Court on that question is conclusive in second appeal. (*James and Rowland, JJ.*) Sidheshwar Prasad *v.* Ram Chariter Choudhury. **182 I.C. 454=12 R.P. 19=5 B.R. 746=1939 P.W.N. 217=A.I.R. 1939 Pat. 269.**

———**S. 100**—*Question of fact*—Bona fide *transferee for consideration.*

The question whether or not a certain transferee is a *bona fide* transferee for consideration is a question of fact. (*Zia-ul-Hasan and Hamilton, JJ.*) Ram Ratan Lal *v.* Akhtari Begam. **181 I.C. 181=11 R.O. 287=1939 O.L.R. 241= 1939 O.W.N. 398=1939 O.A. 375=A.I.R. 1939 Oudh 230.**

———**S. 100**—*Question of fact—Entry in record-of-right describing defendant as a settled raiyat—Question of correctness of—Interference in second appeal.*

The question whether an entry in the record-of-rights describing the defendant as a settled *raiyat* is correct or incorrect is purely one of fact, and a finding of the Court below that it is incorrect is final in second appeal. The mere fact that there are features in the case from which a different conclusion may be drawn about the status of the defendant will not entitle the High Court to interfere with the finding of the Court below. (*Harries, C.J. and Agarwala, J.*) Haladhar Mahto *v.* Kesar Mahto. **179 I.C. 593=5 B.R. 248=11 R.P. 397 (2)=A.I.R. 1939 Pat. 229.**

———**S. 100**—*Question of fact—Inference from documents—Documents containing explicit words and requiring no construction—Second appeal—Competency.*

Where the question is what is the proper inference to be drawn from documents whose construction is not open to any controversy—the words used being explicit and requiring no construction—the question is a question of fact and a second appeal is not competent to the High Court. (*Kania and Wassoodew, JJ.*) MOTICHAND HIRACHAND *v.* KHUDABAKSH GULAMHUSEN. **189 I.C. 545=42 Bom.L.R. 462=A.I.R. 1940 Bom. 255.**

——S. 100—*Question of fact—Instances of burial proved in particular cases—Sufficiency for inference of dedication.*

Whether instances of burial proved in any particular cases are adequate in character, number and extent to justify an inference of dedication is undoubtedly a question of pure fact. (*Lobo, J.C. and Sullivan, J.*) DOST MOHOMED *v.* CHAINRAI. **I.L.R (1940) Kar. 174=187 I.C. 227 =12 R.S. 233=A.I.R. 1940 Sind 43.**

——**S. 100**—Question of fact—Lease—Question whether rate of rent not enforceable as being in contravention of S. 29, B. T. Act. *See* PRACTICE —APPEAL, SECOND. **A.I.R. 1937 Cal. 8.**

——**S. 100**—*Question of fact—Ownership of a house—Decision as to—Interference.*

A finding that a house belonged to a person is a pure finding of fact and as such it is not within the jurisdiction of a learned Judge hearing second appeal to reverse the first appellate Court's finding on that point. (*Zia-ul-Hasan and Yorke, JJ.*) RAM DAS *v.* CHEDI LAL. **14 Luck. 138=177 I.C. 48=11 R.O. 17=1938 O.L.R. 359=1938 O.A 561=1938 O.W.N. 706=A.I.R. 1938 Oudh 186.**

——**S. 100**—*Question of fact—Payment made by debtor to creditor—Whether gift or discharge of debt—Question as to.*

The question whether a certain payment was made by way of gift or by way of satisfaction of a debt is question of fact. (*Venkataramana Rao, J.*) SULTAN NACHI *v.* SALAMA BIBI. **176 I C. 747 =11 R.M. 160=1937 M.W.N. 1166=46 L.W. 617=A.I.R. 1938 Mad. 25.**

——**S. 100**—*Question of fact—Point not decided by lower Court—High Court, when can decide in second appeal.*

Per *Mackney, J.* (in the S. A. under L. P. Appeal)—The question whether the interest of a guardian was adverse to that of the minor is a question of fact and even if the question has not been considered by the lower Courts, the High Court, if there is sufficient material before it on which to form an opinion on the matter, is entitled to decide the matter in second appeal. (*Dunkley and Braund, JJ.*) R. M. A. R. M. CHETTYAR FIRM *v.* MG. SHWE HMUN. **180 I. C. 489=11 R.R 404=A.I R. 1938 Rang. 468.**

——**S. 100**—*Question of fact—Question as to fraud—Finding on—Finality.*

The question whether there was any fraud or not in a transaction is a question of fact, and a finding thereon by the lower appellate Court on the evidence produced by the parties is conclusive and cannot be challenged in second appeal. (*Ganga Nath, J.*) KASHI KURMI *v.* BANSRAJ KURMI. **174 I.C. 298=10 R.A. 564=1938 A.L. R. 262=1937 A L.J. 1346=1938 A.W.R. (H.C.) 13=A I.R. 1938 All. 150.**

——**S. 100**—*Question of fact—Question regarding rebuttal of presumption.*

The question whether the presumption attaching to a document is or is not rebutted in a particular case is a question of fact and cannot be agitated in second appeal. (*Coldstream and Bhide, JJ.*) DIWAN SINGH *v.* NATHA SINGH. **173 I.C. 993=10 R.L. 513=A.I,R. 1937 Lah. 468.**

——**S. 100**—*Question of fact—Question of rebuttal of—Presumption—Record-of-rights.*

The question whether the presumption arising out of an entry in the record of-rights is rebutted by the evidence adduced by a party, is entirely a question of fact which does not come within the jurisdiction of the High Court in second appeal. (*Wort and Rowland, JJ.*) JYOTI PRASAD SINGH *v.* JATAL MUKHOPADHYAYA. **165 I C. 763=9 R. P. 210=3 B.R. 79.**

——**S. 100**—*Question of fact—Question whether lands from part of inam lands—Finality of finding on.*

Where the question to be decided is whether the lands in suit form part of a person's inam lands, that is a pure question of fact; and the finding of the lower appellate Court on such a question is binding and cannot be interfered with in second appeal, when there is evidence to support that finding, especially when it is not suggested that the lower appellate Court wrongly admitted or refused to receive evidence which ought to have been received. There is no jurisdiction to entertain a second appeal on the ground of an erroneous finding of fact, however gross or inexcusable that error may seem to be. (*Beasley, C.J. and Stodart, J.*) THIRAPATIRAYUDU *v.* SECRETARY OF STATE. **163 I.C. 93=8 R M. 1091 =1936 M W.N 348=43 L.W. 369.**

——**S. 100**—*Question of fact—Question whether place is town or village.*

The question whether a particular place is a town or a village is one of fact and the finding on such question cannot be disturbed in second appeal. But if the lower Court while basing its finding upon such question completely ignores the entire oral and documentary evidence, then such a finding is not binding on the High Court and can be interfered with in second appeal. (*Abdul Rashid, J.*) NAWAB KHAN *v.* RANJIT. **41 P.L.R. 227=A I.R. 1939 Lah. 88**

——S. 100—*Question of fact—Question whether properties attached in execution are personal properties of judgment-debtor's legal representative.*

The question whether certain properties proceeded against in execution of a decree are or are not the personal properties of the legal representative of the judgment-debtor is a question of fact and cannot be raised in second appeal in the High Court. The decision of the lower appellate Court is final. (*Fazl Ali and Agarwala, JJ.*) SARJU SINGH *v.* BHAGWAT PRASAD SINGH. **176 I.C. 566=4 B.R. 738=11 R.P. 91=1938 P. W.N. 259=19 Pat. L.T. 193=A.I.R. 1938 Pat. 372.**

——**S. 100**—*Question of fact—Question whether presumption that tenancy was fixed rate one can or cannot arise from tenant having held at uniform rate of rent and other circumstances—Finality.*

The question whether a tenant has held at a uniform rate for a number of years, and the further question whether a presumption could or could not arise, from a tenant having held at uniform rate for a very long period and from other circumstances, that the tenancy was one of which the rent was fixed, are questions of fact and the decision of the final Court of fact must be taken to be conclusive between the parties concerned. (*Guha and Bartley, JJ.*) FERDINAND

Perier *v*. Kumar Krishna Nandy **167 I.C. 596 =9 R.C [illegible] 5=A.I R 1936 Cal. 582.**

———S. 100—*Question of fact--Reasonable care and caution under S. 41, Transfer of Property Act—Question as to—Finding on—If final.*

The question whether a transferee has exercised reasonable care and caution within the meaning of S. 41, Transfer of Property Act, is one of fact, and the finding of the lower appellate Court on it is final in second appeal. (*Agarwala and Rowland, JJ.*) Bansidhar Seth *v*, Gopi Lal Seth. **6 B R 395=186 I.C 793=12 R.P. 527= A.I.R. 1940 Pat. 480.**

———S. 100—*Question of fact—Reasonable and probable cause—Finding, if open to attack in second appeal.*

The finding of the lower Court on the question of the absence of reasonable or probable cause is a question of fact and cannot be reopened in second appeal. (*Bennet and Ganga Nath, JJ.*) Dharam Nath *v*. Mahomed Umar Khan. **I.L. R. (1939) All 424=184 I.C. 247=12 R.A. 205= 1939 A.L.J. 367=1939 A. Cr C. 77=1939 A.W. R. (H.C.) 299=A.I.R. 1939 All. 554.**

———S. 100—*Question of fact—Rebuttal of statutory presumption.*

Whether a statutory presumption was rebutted by the rest of the evidence or not is a question of fact. A.I.R. 1930 P.C. 91, Foll. (*Addison and Din Mohammad, JJ.*) Ghulam Mohammad *v*. Secretary of State. **180 I.C. 969=11 R.L. 732 =40 P.L.R. 655=A I.R. 1938 Lah. 445.**

Question of law.

———S. 100—*Question of law—Conclusions from findings of fact.*

A second appellate Court, though it cannot entertain an appeal upon any question as to the soundness of findings of fact by the lower appellate Court, can nevertheless adjudicate as matter of law upon the soundness of the conclusions which have been derived from those findings. 19 I.A. 228, Rel. on. (*Srivastava, Ag C.J. and Zia-ul-Hasan, J.*) Ram Khelawan *v*. Ram Pal Singh. **166 I.C. 232=9 R.O. 281=1936 O.L.R. 729=1936 R.D. 504=1936 O.W.N. 1057=A.I.R. 1937 Oudh 47.**

———S. 100—*Question of law—Construction of receipt.*

The true construction of a receipt upon which the whole matter in issue between the parties depends, is not a question of fact, but is a question of law. (*Braund, J.*) Jainti Prasad *v*. Nanak Chand. **1940 A.W.R. (H.C.) 372=A.I. R. 1940 All. 441.**

———S. 100—*Question of law—Contract of partnership—Inference from proved facts.*

Under S. 5, Partnership Act, partnership is a legal relationship arising from contract, and when there is no deed of partnership setting out the terms of the contract, the question whether that legal relationship existed between the parties has to be inferred, by consideration of the provisions of S. 6, Partnership Act, from the facts as to the manner in which the business, in which the parties were concerned, was conducted and as to their relationship with one another in connexion with that business. It is a legal conclusion to be drawn from the findings as to the simple facts and the correct inference to be drawn from the proved facts, as to the relationship of the parties towards one another in the business must be a matter of law. (*Dunkley, J.*) Ma Sein *v*. Maung Ba Hmu. **164 I.C. 1100=9 R.R. 180=A.I R. 1936 Rang. 383.**

———S. 100—*Question of law—Construction of decree.*

The construction of a decree is a pure question of law. (*Mockett, J.*) Gopalakrishnayya *v*. Sreeramamurthi. **1937 M.W.N. 292.**

———S. 100—*Question of law—Decision based on surmises.*

Where a decision is based purely on surmises when there is evidence on the record which should have been considered, it entails a question of law. It is a first principle of law that a decision must be based on evidence and not on surmises. (*Davies.*) Habibullah Khan *v*. Mohomad Umar Khan. **1939 A.M L.J. 116.**

———S. 100—*Question of law—Facts necessary for the decision should also be raised and decided.*

In appeals from appellate orders the facts necessary for those decisions should also be raised and decided. Where that is not done, it would not be in the ends of justice for the High Court to decide those questions. (*Wort, Ag. C. J. and Manohar Lall, J.*) Mt Sumitra Kuer *v*. Bhagwat Narain Singh. **180 I.C. 736=5 B.R. 482=11 R.P. 530=A.I.R. 1939 Pat. 19.**

———S. 100—*Question of law—Inference from circumstantial evidence.*

The question as to whether the lower Courts drew the correct inference or not from the circumstantial evidence on a certain point is a pure question of law. (*Nanavutty and Smith, JJ.*) Mahomed Yunus Khan *v*. Special Manager, Court of Wards, Balrampur Estate. **167 I.C. 962=9 R O. 421=1937 O.L.R. 188=1937 O.W. N 438=A.I R 1937 Oudh 301.**

———S. 100—*Question of law—Inferences from facts.*

Whether legal inferences arise from certain facts, whether conclusions in law arising from certain facts are or are not correct, are questions of law which can be considered in second appeal. (*Davis, J.C. and Mehta, J.*) Naraindas Pirumal *v*. Bhojraj Premchand. **I.L.R (1939) Kar. 269 =181 I.C. 888=11 R.S. 244=A.I.R. 1939 Sind 97.**

———S. 100—*Question of law--Inferences from fact—Interference.*

While a Court in second appeal will not interfere with findings of fact of the lower appellate Court, whether right legal inferences have been drawn from those facts, whether, for instance, the possession is adverse or not, whether a transfer is made with intent to defeat or delay within the meaning of S. 53, are questions of law which can be dealt with in second appeal. (*Davis, J.C. and Mehta, J.*) Parmanand Jhanguldas *v*. Jairamdas Sadhuram. **I.L.R. (1939) Kar. 136= 178 I.C. 469=11 R.S 91=A.I.R 1938 Sind 215.**

———S 100—*Question of law—Inference from facts—Interference.*

Though the High Court has no jurisdiction to interfere with findings of fact in second appeal, it is the duty of the High Court to carefully disentangle the findings of fact from inferences which may be drawn from those facts and to review the legal conclusion, if erroneous. The proper effect of a proved fact is essentially a question of law. (*Dhavle and Manohar Lal, JJ.*) Nrisingha Charan Nandy *v* Trigunand Jha. **17 Pat. 507=177 I.C. 564=4 B.R. 841=11 R.P. 161=1938 P.W.N. 818=19 Pat.L.T. 309=A.I.R. 1938 Pat. 413.**

——S. 100—*Question of law—Inference from proved facts.*

Where certain facts are found and an inference is drawn from the facts so found, it is open to the Court in second appeal to consider whether as a matter of law such inference is justified by the facts found. Whether the evidence is directed to prove fraud or conspiracy, this principle will equally apply because that principle applies to all circumstantial evidence and amounts simply to this that the inference drawn from such evidence must be one which necessarily flows from it. (*Fazl Ali, J.*) Narain Pande *v.* Gaya Rai. **174 I.C. 388=4 B.R. 429=10 R.P 510=19 Pat.L.T. 398=A I R. 1938 Pat. 147.**

——S. 100—*Question of law—Inference from proved facts - Interference.*

Where a Court is dealing with the question as to whether from the facts found the legal inference drawn by the lower Courts is correct in cases such as of adverse possession, or under S. 53, Transfer of Property Act, or S. 82, Trusts Act, it is entitled to consider in second appeal whether the facts found by the lower Court justified the conclusions in law that they have drawn. (*Davis, J.C. and Mehta, J.*) Viranbai *v.* Parmanand Jhangaldas. **I.L.R. (1939) Kar. 140=178 I.C. 801=11 R.S. 108=A.I R. 1938 Sind 206.**

——S. 100—*Question of law—Inference from proved facts.*

The proper legal inference to be drawn from the proved facts of a case is a point of law. (*Broomfield and Macklin, JJ.*) Babasaheb Appasheb *v.* Laxmanappa Ramappa. **178 I.C. 854=11 R.B. 198=40 Bom.L.R. 1015=A.I.R. 1938 Bom. 492.**

——S 100—*Question of law—Inference from proved facts—Question whether tenancy is permanent or precarious.*

The inference to be drawn from the proved facts of a case is not a question of fact, but a question of law. The question whether a tenancy is permanent or precarious, which is a legal inference from facts, is not itself a question of fact. It is an inference of law and a question of law for purposes of second appeal. (*Harries, C.J. and Noor, J.*) Zayauddin *v.* Shaikh Dargahan. **18 Pat. 571=184 I.C. 363=12 R.P. 242=6 B.R. 45=1939 P.W.N. 394=20 Pat.L T. 579=A.I.R 1939 Pat. 448.**

——S. 100—*Question of law—Inference of partnership from proved facts.*

The proper legal effect of a proved fact is essentially a question of law, so also s the question of admissibility of evidence and the question of whether any evidence has been offered on one side or the other; but the question whether the fact has been proved, when evidence for and against has been properly admitted, is necessarily a pure question of fact. The Judge of the lower appellate Court in his judgment stated: "There is no evidence of any express contract of partnership but a contract may be implied in the circumstances under which the parties worked together." He then reviewed the circumstances under which the parties worked together and made use of three arguments: the fact of working together, the use of the hammer mark and the fact that no remuneration was paid to person alleging partnership, to justify him in concluding that a partnership between these persons should be implied. *Held*, there was nothing in the evidence from which a partnership could be implied as a question of law. The legal effects of the proved facts did not amount in law to partnership, or to put in another way, there was no evidence in law from which the Judge could come to the conclusion that a partnership had been established. He therefore misdirected himself on points of law and as such a second appeal lay. (*Roberts, C.J. and Leach, J.*) Maung Ba Hmu *v.* Ma Sein. **171 I.C. 718=10 R.R. 183=A.I.R. 1937 Rang. 225.**

——S. 100—*Question of law—Legal effect of proved facts.*

Question as to the proper legal effect of proved facts are questions of law for purposes of second appeal. (*Lord Maugham.*) Gujrat Ginning and Manufacturing Co. Ltd., Ahmedabad *v.* Moti Lal Hirabhai Spinning and Manufacturing Co., Ltd. **63 I.A. 140=63 C L.J. 160=40 C.W.N. 417=1936 A L.J. 145=1936 A W N. 169=160 I.C. 837=1936 R.D. 63=43 L.W. 289 =38 Bom.L R. 353=8 R.P.C. 169=1936 O.L.R. 133=1936 A.L R 237=1936 M.W.N. 314=A.I. R. 1936 P.C. 77=70 M.L.J. 190 (P C.).**

——S. 100—*Question of law—Legal effect of proved or admitted facts.*

Where the lower appellate Court has ailed to properly appreciate the legal effect o certain proved or admitted facts, the question is one of law and therefore it is a good ground for a second appeal. A.I.R. 1930 P.C. 91, Foll (*Jai Lal and Sale, JJ.*) Parmodh Chand *v.* Narain Singh. **163 I.C. 81=8 R.L. 991=A.I R. 1936 Lah. 104.**

——S. 100—*Question of law—Lower Court stating law correctly and coming to particular conclusion—If question of law.*

Where the lower Court Judge states the law correctly and does not misdirect himself and comes to a particular conclusion, he decides the point as a question of law and not as a question of fact. (*Wort and Rowland, JJ.*) Mt. Bibi Zainab *v.* Muhammad Ayub. **161 I.C. 331 (2) =8 R.P. 443=17 Pat.L.T. 366=1936 P.W.N. 140=A.I.R. 1936 Pat. 136.**

——S. 100—*Question of law—Malicious prosecution—Suit for damages—Absence of reasonable and probable cause and presence of malice—Finding on—Finality — Interference in second appeal.*

Though the basis for a finding of absence of reasonable and probable cause and the presence of malice, in a suit for damages for malicious prosecution, consists in matters of fact, the inference that should be drawn from the proved facts and the question whether these facts are sufficient to establish the absence of reasonable and probable cause and the presence of malice, are matters of law upon which interference in second appeal is permissible. (*Wadsworth, J.*) Narayana Mudali *v.* Peria Kalathi. **49 L W. 664=188 I C. 801=41 Cr.L.J. 677=1939 M.W.N. 593 =A.I.R. 1939 Mad. 783=(1939) 2 M.L.J. 296.**

—— S. 100—*Question of law—Nature of property—Mosque, if private or public.*

The question whether a building is a private mosque or a public mosque is not question of fact, but a question of law, that is a question of inference from proved facts. (*Thomas, C.J. and Yorke, J.*) Musaheb Khan *v.* Rajkumar Bakhshi. **1938 O.A. 722=177 I.C. 718=11 R.O. 62=1938 O.L.R. 435=1938 O.W.N. 937=A.I.R. 1938 Oudh 238**

——S. 100—*Question of law—Question as to misconduct.*

The question whether misconduct can be inferred from a set of facts is a question of law. (*Mohammad Noor, J.*) Bengal Nagpur Ry. Co. *v.* Harijiban Iswar Pathak. **1937 P.W.N. 71=169 I.C. 354=3 B.R. 554=10 R.P. 4=A.I.R. 1937 Pat. 289.**

——S. 100—Question of law—Question as to nature of tenancy—If can be gone into in second appeal *See* Landlord and tenant—Permanent tenancy. **A.I.R. 1938 Pat. 333.**

——S. 100—*Question of law—Question as to nature of tenancy.*

The question whether on the facts found a particular tenancy is a permanent one or not is a mixed question of law and fact. (*Agarwala, J.*) Anant Teli *v.* Ramdhan Puri. **179 I.C. 940=5 B.R. 327=11 R.P. 427=A.I.R. 1939 Pat. 350.**

——S. 100—*Question of law—Question, if grove had lost its character as such.*

The nature and quantum of evidence required to prove that what was once grove land has ceased to retain that character is a question of law. Where a Court has misdirected itself on this point, it is impossible to maintain its finding as a finding of fact. (*Thomas, C.J.*) Chandra Bhan Singh *v.* Hubba. **14 Luck. 269=178 I.C. 882=11 R.O. 126=1938 A.W.R. (C.C.) 133=1938 O.W.N. 1211=1938 O.A. 966=1938 R.D. 922=A.I.R. 1939 Oudh 48.**

——S. 100—*Question of law—Question of onus.*

A question of law does not arise every time an inference is made from a set of proved facts. It can only arise if the ultimate inference is itself a question of law and not one of fact. Where the onus is used as the determining factor in the whole case because the tribunal finds the evidence pro and con so evenly balanced or so equally worthless that it can come to no sure conclusion, then the question of onus becomes one of law and not one of fact as it would otherwise be. (*Bose, J.*) Bhagirath Birdi Chand *v.* Vishwasrao Pandalik. **181 I.C. 226=11 R.N. 448=A.I.R. 1938 Nag. 522.**

——S. 100—*Question of law—Question whether entry of rent in settlement rent roll is correct and conclusive—Finding on—If binding in second appeal.*

Where an obvious point of law arises, the practice of some lower Courts of attempting to shut out a second appeal by the use of language designed to clothe a decision on a point of law with the appearance of a finding of fact ought to be deprecated. The question whether an entry of rent in the settlement rent roll is conclusive or whether a party can prove by evidence that it is incorrect, is undoubtedly a point of law which an appellant is perfectly competent to raise in second appeal. The finding of the lower appellate Court on such a question cannot be regarded as binding as a finding of fact. (*Harries, C.J. and Rowland, J.*) Sidhakamal Ramanuj Das *v.* Batakrishna Mahapatra. **18 Pat. 204=183 I.C. 428=5 B.R. 935=12 P.R. 150=5 C.L.T. 10=1939 P.W.N. 37=A.I.R. 1939 Pat. 402.**

——S. 100—*Question of law—Question whether Hindu family has separated in status—Finding on—Second appeal.*

Inferences from facts are not always questions of law. The proper legal effect of a proved fact is essentially a question of law, so also is the question whether any evidence has been offered on one side or the other; but the question whether the fact has been proved when evidence for and against has been properly admitted is necessarily a pure question of fact. The question whether there was an intention among the members of a Hindu family to separate is a pure question of fact even when it is based on inferences drawn from other facts. The actual severance of status is sometimes effected by a formal document such as a deed of partition or by the use of words indicating unequivocal intention to separate. There can be no doubt that that the actual severance, the actual breaking of the legal tie, is a matter of law, just as much as the actual act of transfer in case of sale or gift or mortgage. The construction of the document which effects this legal severance or the interpretation to be placed upon the actual words used when they are known is therefore a question of law. But when there is no document which in itself purports to effect the severance or when we do not know the actual words used, then we are thrown back on other kinds of evidence to determine whether there ever was such a severance; not whether it could be legally effected by the particular form of words used but whether such a transaction ever took place. That is a question of fact pure and simple, and once it is found that there was such a transaction then in the absence of proof of the actual words used, the law presumes that everything was done legally and so the transaction was a legal one. Where it is an admitted fact that there has been cesser of commensality, the parties lived in separate houses, had separate messes, kept separate accounts and ran separate shops, all this is evidence, and very strong evidence of partition in the legal sense of the term. But not one of these facts can itself break the legal tie or legally effect the actual severance in the same way as a deed of partition or the unequivocal expression of an intention to separate nor can they when all are taken together. They are therefore no more than evidence of the main question which in its ultimate issue is simply this: did the parties ever come together and agree to sever their joint status; or did any one of them express an unequivocal intention to do so. Whether they did that or not is a question of fact and not of law. Hence where the question as to partition has been considered of all facts, the decision of the two lower Courts that the family did not separate is conclusive and cannot be the subject of a second appeal. (*Bose, J.*) Ganga Din *v.* Bahoranlal. **171 I.C. 860=10 R.N. 139=A.I.R. 1937 Nag. 230.**

——S. 100—*Question of law—Question whether property forms part of village or urban immovable property—Punjab Pre-emption Act, S. 3.*

The question whether a particular property comes within the definition of village immovable property or urban immovable property as contained in S. 3, is a question of law, but its determination wholly depends on a finding of fact and the legal definition necessarily follows from this finding of fact. So a second appeal does not lie. *(Jai Lal, J.)* Ram Rup *v.* Dalip Singh. **174 I.C. 136=10 R.L. 528 (1)=A.I.R. 1937 Lah. 284.**

——**S. 100**—*Question of law—Wall erected by co-owner on top of joint wall, if joint wall.*

Where one of the owners of a joint wall erects a wall on the top of the joint wall, the question whether the wall so erected acquires the character of a joint wall is a question of law and can be raised in second appeal. *(Bhide, J.)* Onkar Nath *v.* Lala Muni Lal. **182 I.C. 498=12 R.L. 50=41 P.L.R. 267=A.I.R. 1939 Lah. 28.**

Scope.

——**S. 100**—*Scope—If to be read with O. 41, R. 23—Suit for rent by proprietor—Dismissal by trial Court and appellate Court for want of registration of plaintiff's name under S. 78, Bengal Land Registration Act—Registration pending second appeal—If can be taken into account for decreeing suit.*

A Court of second appeal is entitled to take into consideration the effect of the registration of a proprietor's name under S. 78 of the Bengal Registration Act, during the pendency of the second appeal and to decree the suit for rent though the suit has been dismissed by the Courts below for want of registration. S. 100, C. P. Code, must be read with O. 49, R. 33, which is wide enough to enable the appellate Court to take into consideration the fact of subsequent registration under S. 78 of the Land Registration Act. O. 41, R. 33. applies to second appeals as well. *(Fazl Ali and Chatterji, JJ.)* Doman Sahu *v.* Ganga Nayek. **185 I.C. 638=6 B.R. 229=1940 P.W.N. 566=12 R.P. 404=21 P.L.T. 165=A.I. R 1940 Pat. 300.**

Second appeal.

——**S. 100**—Second appeal—Appeal to District Judge under S. 16, Gujarat Talukdars' Act—Decision on—If subject to second appeal. *See* Gujarat Talukdars' Act, S. 16. **39 Bom.L.R. 444.**

——**S. 100**—*Second appeal—"Decree"—Appellant's pleader applying for time being unable to go on with appeal—Refusal of adjournment and dismissal for want of prosecution—If dismissal for default—Remedy of appellant—Second appeal—If lies—Application for restoration—If competent.*

Where the appellant's pleader appears when the appeal is called on for hearing and applies for an adjournment of the appeal on the ground that owing to other engagements he could not prepare the appeal, the file of which is very heavy but the Court rejects his application and dismisses the appeal "for want of prosecution", the disposal of the appeal clearly amounts to a decree, and a second appeal lies under S. 100, C. P. Code. The dismissal is not a dismissal for default, and the appellant has no right in such a case to apply for restoration of the appeal under O. 41, R. 19, C. P. Code. *(Niamatullah, J.)* Mohammadi Husain *v.* Chandro. **1937 A.L.J. 174=1937 A.W.R. 122 =168 I.C. 1001=9 R.A. 697=1937 A.L.R. 439= A.I.R. 1937 All. 284.**

——**S.100**—*Second appeal—Dismissal of appeal under O. 41, R. 11—Right of second appeal.*

The mere fact that an appeal is dismissed summarily under O. 41, R. 11, C. P. Code, is no ground for holding that no second appeal lies. Where the lower appellate Court has in effect written a judgment giving reasons for the dismissal, a second appeal is necessarily maintainable if the other requirements of S. 100, C. P. Code, are satisfied. Where the merits of the case are not dealt with in accordance with law, a second appeal lies and the High Court will interfere. *(Manohar Lall and S. C. Chatterji, JJ.)* Raja Mandar *v.* Rewat Mahto. **174 I.C. 159= 4 B.R. 389=10 R.P. 484=19 Pat.L.T. 305=A.I. R. 1938 Pat. 330.**

——**S. 100**—*Second appeal—Finding of absence of reasonable and probable cause in suit for malicious arrest—Interference in second appeal.*

The High Court has jurisdiction to interfere in second appeal with the findings of Courts below as to absence of reasonable and probable cause and as to the existence of malice in a suit for damages for malicious arrest. *(Manohar Lal, J.)* Madan Lall *v.* Lakshmi Narain. **179 I.C. 790=20 P.L.T. 367=11 R.P. 401=1938 P.W.N. 783=5 B.R. 286=A.I.R. 1939 Pat. 13.**

——**S. 100**—*Second appeal—Order of abatement of appeal.*

An order that the appeal abates not only with regard to the respondent who has died but with regard to all the respondents, comes within the definitian of a decree and as such is appealable. *(S. K. Ghose and Patterson, JJ.)* Sabitribai *v.* Jugal Kishore. **179 I C 95=11 R.C 468=43 C.W.N. 41=A.I.R. 1938 Cal. 639.**

——**S. 100**—Second appeal—Order under O. 21, R. 90. *See* C. P. Code, S. 2 (2) and also O. 21, R. 90 **1936 A.L.J. 959.**

——**S. 100**—*Second appeal—Order under O. 21, R. 92, allowing deposit and setting aside sale.*

A second appeal does not lie from an order of the Court allowing a deposit and setting aside a sale in execution under O. 21, R. 92, C. P. Code. *(Wort, J.)* Nasiruddin Haider *v.* Hakim Muhammad Tahir. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

——**S. 100**—*Second appeal—Question of costs—Competency—Interference—Principles.*

It cannot be said that no second appeal lies against an order for costs. Where in the Courts below wrong principle have been applied or there is some error in awarding costs, then the High Court can interfere in second appeal. If the High Court is satisfied that the lower appellate Court has considered the matter from the right point of view, it would not be open to the High Court to interfere in second appeal. The trial Court has a discretion in the matter of costs and that discretion can be inferred with in appeal only if the trial Court has exercised its discretion improperly. Where the lower Court does not keep this principle in view but considers the matter of costs as if it had been trying the suit itself, that is not the proper way of approaching the question, and the High Court will therefore interfere in second appeal. *(Horwill, J.)* Kozhuvammal Ahmad *v.* Paru Amma. **51 L.W. 538=1940 M. W.N. 445=A.I.R. 1940 Mad. 589=(1940) 1 M. L.J. 764.**

——**S. 100**—*Second appeal—Summary dismissal of appeal under O. 41, R. 11—Second appeal—If lies.*

Quaere.—Whether a second appeal lies to the High Court against the dismissal of an appeal summarily under O. 41, R. 11, C. P. Code? (*Manohar Lall, J.*) Chotoo Lal *v.* Mist. Bibi Sekina. **179 I.C. 292=5 B.R. 208=11 R.P. 339=19 Pat.L.T. 210=A.I.R. 1938 Pat. 608.**

——**S.100**—*Summary rejection of second appeal—If justified.*

A Court before whom a second appeal is filed is entitled to reject it, if in its opinion the case is not covered by the provisions of S. 100, C. P. Code. (*Sathe, J.M.*) Mewa Lal *v.* Paraga. **1940 O.W.N. 550=1940 O.A. 643=1940 A.W.R. (B.R.) 113 (2).**

——**S. 100 (1) (c)**—*Procedure—Defect in—Second appeal—When maintainable*

In order that a second appeal might be maintainable under S. 100 (1) (*c*), C. P. Code, it is not sufficient to show that there was a defect in the procedure of the trial Court. It is necessary to show that the alleged defect in procedure may possibly have praduced error or defect in the decision of the case upon the merits by the lower appellate Court. (*Sulaiman, C.J. and Bennet, J.*) Nandan Singh *v.* Phunesh Singh. **167 I.C. 397=9 R.A. 528=1936 R.D. 543=1936 A.W.R. 1085=1937 A.L.J. 46=1937 A.L.R. 188=A.I.R. 1937 All. 105.**

——**S. 100 (1) (c)**—*"Substantial error or defect in procedure, etc."—Question as to genuineness of document—Finding on—Lower appellate Court requiring too high a standard of proof and differing from trial Court—Interference in second appeal.*

The question whether a document, such as a promissory note is genuine or not, is purely a question of fact, and a decision on that question, being a finding of fact, cannot be interfered with in second appeal. But if the lower appellate Court requires too high a standard of proof for the establishment of any particular fact,—a standard of proof than that laid down by S. 3 of the Evidence Act—that is an error of law or procedure justifying interference under S. 100 (1) (*c*), C. P. Code. If the lower appellate Court differs unnecessarily from the appreciation of the evidence by the trial Court which saw and heard the witnesses, on a mistaken view as to the standard of proof, the High Court will interfere in second appeal. (*King J.*) Pracasaraonaidu *v.* Ramamurtinaidu. **1937 M.W.N. 188.**

——**S. 102**—*Applicability—Money suit* bona fide *framed as mortgage suit.*

S. 102, C. P. Code, does not apply to a suit *bona fide* framed as a mortgage suit, although the only claim which could be established by the plaintiff is a money claim. (*Jack, J.*) Kalipada Bhattacharjee *v.* Kali Kumar Pal. **I.L.R. (1938) 2 Cal. 81=11 R.C. 148=176 I.C. 681=66 C.L.J. 541=42 C.W.N. 381=A.I.R. 1938 Cal. 336.**

——**S. 102**—*Applicability—Order in execution under S. 47—Second appeal by surety for judgment-debtor—Bar of.*

S. 102, C. P. Code, not only applies to appeals, but to orders in execution under S. 47, C. P. Code. The section applies also to second appeals from orders in execution under S. 47. Since a surety for a judgment-debtor is, for the purposes of appeal, deemed a party within the meaning of S. 47, by reason of S. 145, C. P. Code, the bar of appeal under S. 102, would also apply to a surety for a judgment-debtor. (*Davis, J.C. and Tyabji, J.*) Khanchand *v.* Pessumal. **I.L.R. (1939) Kar. 342=185 I.C. 486=12 R.S. 165=A.I.R. 1939 Sind 360.**

——**S. 102**—*Applicability—Suit for money and for injunction—Second appeal.*

S. 102, C. P. Code, bars a second appeal in suits for small sums of money, if the claim is merely to rocover money. But if in addition, the suits are also, and perhaps mainly, for an injunction, a second appeal would lie and would not be barred. (*Burn and Stodart, JJ.*) Audiappa Chetti *v.* Taluk Board of Devakotta. **182 I.C. 908=12 R.M. 208=48 L.W. 512=1938 M.W.N. 931=A.I.R. 1938 Mad. 941=(1938) 2 M.L.J. 589.**

——**S. 102**—*Applicability—Suit of small cause nature—Co-sharer—Suit for rent against tenant—Dispute as to share of plaintiff in land—Other co-sharers made parties to suit—Decision in—Second Appeal—If barred.*

Where in a suit for rent by one of several co-sharers against the tenants, a question arises as to the proper share which the plaintiff is entitled to in the land, and for the purpose of determination of that share, the co-sharers who, though not originally parties, are impleaded as parties to the suit, the suit in substance, so far as the co-sharers are concerned, is one for a declaration of the plaintiff's share to the land. The suit is not of a small cause nature under S. 102, C. P. Code, so as to bar a second appeal. (*Venkataramana Rao, J.*) Vizia Rama Murti *v.* Surya Narayana Murti. **1940 M.W.N. 60=A.I.R. 1940 Mad. 507.**

——**S. 102**—*Cases covered by—Revision.*

As a rule, the Court is not in favour of entertaining revisions from orders of the lower appellate Courts in cases which are covered by S. 102, C. P. Code. These orders are intended by the legislature to be final and to allow an appeal against such orders amounts to circumventing the policy of the legislature. (*Agha Haidar, J.*) Girdhari Lal *v.* Rattan Chand. **165 I.C. 137=9 R.L. 213 (2)=A.I.R. 1936 Lah. 293.**

——**S. 102**—Scope—Suit for rent—Alternative claim for money below Rs. 500—Latter claim cognizable by Small Cause Court—Second appeal in rent suit barred by S. 153, Bengal Tenancy Act—Joinder of two claims for purposes of second appeal—Permissibility. *See* Bengal Tenancy Act, S. 153. **40 C.W.N. 698.**

——**S. 102**—Scope—Suit of small cause nature of value not exceedings Rs. 500—Appeal from order in execution of decree—Dismissal under O. 41, R. 11 (*a*)—Second appeal. *See* C. P. Code, S. 47. **18 Pat.L.T. 321=A.I.R. 1937 Pat. 349.**

——**S. 102**—*Suit for recovery of money of value of bhaoli produce of mahua trees—If Small Cause Suit.*

A suit for recovery of money value of bhaoli produce of some mahua trees standing on a plot of land, is not a suit for rent but is a suit for money, and not being outside the jurisdiction of the Court of Small Causes, no second appeal lies from it under S. 102. A.I.R. 1927 Rang. 94 and A.I.R. 1914 Mad. 362, Foll. (*Varma, J.*) Jhakar Sahu *v.* Raj Kumar Tewari. **160 I.C. 186=8 R.P. 351=17 Pat.L.T. 88=A.I.R. 1936 Pat. 102.**

——S. 102—*Suit of Small Cause nature—Cutting of trees—Suit for damages—Second appeal.*

Before Art. 35 (2) can be deemed to apply to a suit for damages for cutting of trees, it must be shown and alleged not merely that there was a cutting or damage done to trees or other objects, but that it was done with some criminal intent. Where there is no allegation of criminal act or intent, the suits are cognizable by the Court of Small Causes. S. 102 applies and no second appeal lies. (*Stone, C.J.*) Tikaram Gajraj *v.* Santan Lalita. **168 I.C. 596=9 R.N. 261 (1)=A.I.R. 1936 Nag. 276.**

——S. 102—*Suit of small cause nature—Inamdar—Suit to recover dues from khatedar—Second appeal.*

Sums payable by a khatedar to an inamdar as a superior holder are "dues," and a suit to recover such dues is not cognizable by a Court of Small Causes and a decree passed in such suit is therefore subject to a second appeal under S. 102, C.P. Code. (*Lokur, J.*) Narhar Sonajee *v.* Trimbak Shridar. **185 I.C. 608=12 R.B. 255=41 Bom. L.R. 1174=A.I.R. 1940 Bom. 12.**

——**Ss. 102 and 115**—*Suit of small cause nature—Small Cause Court returning plaint to be presented on regular side—Decision of trial Court—Second appeal—Revision.*

Under S. 102, C. P. Code, if a suit is of the nature cognizable by Courts of Small Causes and the value of the suit does not exceed Rs. 500, no second appeal would lie, although the suit has not been tried in a Small Cause Court and although the Small Cause Court returns the plaint under S. 23 of the Provincial Small Cause Courts Act to be presented on the regular side. A second appeal filed in such circumstances cannot be treated as an application for revision under S. 115, C. P. Code, and the decision of the trial Court cannot be reversed on the ground that as the Court had no jurisdiction to try the suit on the regular side, its proceedings are vitiated by lack of jurisdiction, for the simple reason that it is the nature of the suit and not the Court in which the suit is tried that determines the right of second appeal conferred upon a party. (*Nanavutty, J.*) Ram Charan *v.* Kedar Nath. **13 Luck. 204=167 I.C. 557=9 R.O. 397=1937 O.L.R. 149=1937 O.W.N. 263=A.I.R. 1937 Oudh 244.**

——S. 102—*Suit of small cause nature—Suit by landlord for recovery of price of trees cut and misappropriated by defendant-tenant—Second appeal.*

Where in a suit for recovery of the price of certain trees said to have been cut from the land of the plaintiff landlord and misappropriated by the defendants, upon the facts stated in the plaint, the case against the defendants is one of wrongful or illegal cutting of trees which is not necessarily penal so as to bring him within the purview of Ch. 17, I. P. Code, the jurisdiction of the Court of small causes to try the suit is not barred and a second appeal to the High Court from such suit is barred under S. 102, C. P. Code, if the value of the subject-matter of the suit does not exceed Rs. 500. (*Dhavle, J.*) Maheshwari Prashad Bhagat *v.* Mahadeo Roy. **182 I.C. 708=12 R.P. 57=5 B.R. 814=A.I.R. 1939 Pat. 216.**

——S. 102—*"Suit of Small cause nature"—Suit for damages for wrongful attachment and negligence—Second appeal.*

The jurisdiction of a Small Cause Court to try suits for damages for wrongful attachment and negligence is barred by Cl. (*j*) of Art. 35, Provincial Small Cause Courts Act. A Second appeal in such a case is not barred by S. 102, C. P. Code. (*Pollock, J.*) Motiram Tukaram *v.* Nilkanthrao. **I.L.R. (1937) Nag. 19=168 I.C. 463=9 R.N. 254=A.I.R. 1936 Nag. 257.**

——S. 102—*'Suit of small cause nature'—Suit for recovery of terminal tax on movable property valued at less than Rs. 500—Second appeal.*

It is the nature of the suit and not the Court in which it is tried that determines the right of appeal within the provisions of S. 102. Where a suit is for recovery of taxes upon movable property and the subject-matter of the suit is also less than Rs. 500, no second appeal lies. (*Davis, J.C. and Mehta, J.*) Larkana Municipality *v.* Gokaldas. **I.L.R. (1939) Kar. 134=179 I.C. 927=11 R.S. 165=A.I.R. 1939 Sind 35.**

——S. 102—Suit of Small cause nature—Suit for value of *dhani* leaves cut from plaintiff's land—No mention of theft or trespass—Second appeal. *See* Provincial Small Cause Courts Act, Sch. II, Art. 35. **1940 Rang.L.R. 1.**

——S. 103—*Finding based on improperly admitted evidence—Power of High Court to dispose of appeal without remand.*

Where the lower appellate Court has improperly admitted any evidence, the High Court has no right to look at the evidence to decide whether the remaining evidence in a case other than that which has been improperly admitted is sufficient to warrant the finding of the Court below. The only cases which can with propriety be disposed of under such circumstances without a remand, are those where independently of the evidence improperly admitted, the lower Court has apparently arrived at its conclusions upon other grounds. (*Henderson and Biswas, JJ.*) Narendra Narain *v.* Jnanada Dassi. **176 I.C. 429=11 R.C. 106=67 C.L.J. 488=A.I.R. 1937 Cal. 537.**

——S. 103—*Lower Court deciding question of title on inadmissible and other evidence—Courses open to High Court.*

Where the lower Court has decided a question of title, which is one of fact on inadmissible evidence and other evidence, there are two courses which are open to the High Court in second appeal. It can remand the case to the lower appellate Court directing it to record a fresh finding after eliminating and confining itself to the other evidence in the case; or it may proceed under S. 103, C. P. Code, and arrive at its own finding on a perusal of the relevant and admissible evidence. (*Agha Haidar, J.*) Mt. Mulkh Bano *v.* Mahammad Banaras Khan. **166 I.C. 647=9 R.L. 409=A.I.R. 1936 Lah. 788.**

——**S. 103 and O. 41, R. 25**—*Scope of O. 41, R. 25—Remand for further evidence—Finding—High Court if can interfere.*

Order 41, R. 25 refers primarily to first appeals though the rule so far as possible can be applied to second appeals. The rule as it stands allows reference only to the Court from whose decree the appeal is preferred, which in the case of second appeals would be the lower appellate Court. Therefore, it does not follow in the case of second appeals that a finding from a first Court is to be treated on the same footing as a finding from an appellate Court. Where an issue has not been determined by the first appellate Court and in second appeal that issue is remitted on remand to the trial Court the evidence having been found to be insufficient and the trial Court after recording such evidence and giving its finding on that issue returns the case to the High Court, the issue cannot be said to have been determined by the lower appellate Court. Therefore High Court has jurisdiction to determine such issue of fact under S. 103. (*Gruer and Pollock, JJ.*) BRIJMOHAN *v.* CHANDRA CHAGABAI. **182 I.C. 12=11 R.N. 502=1939 N.L.J. 315=A.I R. 1939 Nag 173.**

——**S. 104**—Applicability—Order in contentious proceedings under S. 295, Succession Act. *See* C. P. CODE, O. 41, R. 1, AND S. 104. **A.I.R. 1938 Sind 36 (F.B.).**

——**S. 104**—*Private reference to arbitration—Agreement subsequently filed in Court—Court finding award of majority to be bad and refusing to make it decree of Court—Appeal.*

Certain persons made a private reference to arbitration. Subsequently they made an application to the Court under para. 17 (1) of Sch. II, C. P. Code, that the agreement to refer to arbitration should be filed in Court. That application was dismissed but on appeal the agreement was ordered to be filed in Court. There were three arbitrators. Two of them made one award and the third made a different award. The Court found that the award of majority was bad and refused to make that award a decree of the Court.

Held, that no appeal lay from the order of the Court. (*Addison and Ram Rall, JJ.*) MUL RAJ *v.* TULSI RAM. **I.L.R. (1939) Lah. 541=185 I.C. 632=12 R.L. 309=A.I.R. 1939 Lah. 542.**

——**Ss. 104 and 105 (1)**—*Return of plaint for want of jurisdiction—Remand by appellate Court—Decree—Dismissal of appeal—Second appeal—Competency—Question of jurisdiction—If can be raised.*

In a suit brought in Munsif's Court the defendant pleaded that the Civil Court had no jurisdiction and he amplified that plea by arguing that the Revenue Court had exclusive jurisdiction. The Munsif accepted this argument and ordered the plaint to be returned to the plaintiff for presentation to the proper Court. A first appeal was brought and the appellate Court held that the Civil Court had jurisdiction and remanded the suit for disposal on the merits. The Munsif then decreed the suit and an appeal was brought to the District Judge and the District Judge dismissed that appeal. The defendant then brought a second appeal and took as his first ground that the lower Court had erred in holding that the Civil Court had jurisdiction.

Held, that no appeal lay from the order of the lower appellate Court for the first time when the jurisdiction question came before it, but that as the case had been concluded, a second appeal lay from the decree of the lower appellate Court and under S. 105 (1), C. P. Code, the question of jurisdiction could be raised in second appeal. (*Bennet and Verma, JJ.*) KASHI KAHAR *v.* ASHARFI SINGH. **I.L.R. (1938) All. 754=177 I.C. 450=11 R.A. 199=1938 A.L.R. 747=1938 A.L.J. 720=1938 A.W.R. (H.C.) 522=1938 R.D. 714=A.I.R. 1938 All. 511.**

——**S. 104 and O. 43, R. 1**—Scope—Calcutta High Court—Original Side Rules—Reference by Registrar under R. 50 of Ch. 26—Opinion of Judge on—Appeal. *See* LETTERS PATENT (CAL.) CL. 15. **40 C.W.N. 1264.**

——**S. 104 (1) (a) and (c)**—*Order rejecting objections to award and passing decree on it—Appealability.*

No appeal lies against an order rejecting objections made to an award and passing a decree on the award. Such an appeal cannot be said to be an appeal from a decree nor can it be said to be an appeal under Cl. (*a*), S. 104, as S. 104 (*a*) only refers to orders superseded and not to orders refusing to supersede. Nor can the order be said to be one modifying or correcting the award; it is an order refusing to do so. (*Baguley and Mosley, JJ.*) MA NGWE *v.* U MIN SIN. **163 I.C. 590=9 R.R. 29=A.I.R. 1936 Rang. 240.**

——**S. 104 (1) (c)**—*Scope of appeal under—Objection to award on the ground that arbitrator had no jurisdiction to allow amendment of plaint previously refused by Court—If open.*

An appeal under S. 104 (*c*), C P. Code, from an order modifying an award on arbitration under para. 12 of Sch II, C. P. Code, is one the scope of which is limited; the appellant in such an appeal can attack the order of the Court only in so far as it modifies the award, and must confine himself to points which have a bearing on the modification in the award. Though it is open to the appellant to show that the award could not be modified, he has no right to appeal against the award itself; nor can he attack the proceedings before the arbitrator after a decree has been passed on the basis of the award. He cannot, for instance raise an objection to the award on the ground that the arbitrator had no power to allow an amendment of the plaint which had previously been refused by the Court which referred the suit to arbitration. (*Harries, C. J. and Fazl Ali, J.*) TEJPAL MARWARI *v.* KEDARNATH HIMAT SINGHA. **20 Pat.L.T. 700=1939 P. W.N. 703=6 B.R. 144=185 I.C. 273=12 R.P. 336=A I.R. 1939 Pat. 597.**

——**S. 104 (1) (f)**—*Order filing award given in private arbitration—Second appeal.*

No second appeal lies against the decision of the appellate Court dismissing an appeal under S. 104 (1) (f), C. P. Code, against an order filing an award given in a private arbitration. (*Tek Chand, J.*) JAWALA SAHAI *v.* HARIRAM BAL MOKAND. **175 I.C. 572=10 R.L. 749=39 P.L.R. 117=A.I.R. 1937 Lah. 649.**

——**S. 104 (1) (f) and (2)**—*Application under Sch. II, para. 20—Decree passed on award without recording formal order filing award—Appeal filed against whole decision but directed against only award and not decree—Second appeal—If competent.*

Where on an application filed under para. 20 of Sch. II, C. P. Code, the Court neglected to pass an explicit order filing the award but passed a decree upon the award, and the aggrieved party filed an appeal from the whole decision but directing his objections only against the award and not against the decree, the appeal must be treated as an appeal filed under S. 104 (1) (*f*), C. P. Code, from an implied order filing the award. That being so, the order passed in the appeal is governed by S. 104 (2), C. P. Code, which prohibits a second appeal. (*Sen, J.*) TRAILOKYA NATH *v.* SUKUMAR. **44 C.W.N. 1034.**

——**S. 104 (1) (f) and (2)**—*Order filing award—Validity of reference challenged—Second appeal—If competent.*

The prohibition against a second appeal from an order filing or refusing to file an award contained in S. 104 (2), C P Code, is not removed even though the validity of the reference to arbitration itself is challenged. (*Sen, J.*) TRAILOKYA NATH *v.* SUKUMAR. **44 C.W.N. 1034**

——**S. 104 (1) (f) and Sch. II, Para. 21**—*Relative scope of—Filing followed by judgment and decree—Appeal—Competency.*

S. 104 (f), C. P. Code, permits an appeal from an order filing or refusing to file an award in an arbitration without the intervention of Court. Sch. II, para. 21 does not take away this right of appeal, but only enacts that if a person wants to file an appeal against the decree though the decree is in accordance with the award and not in excess of it, such an appeal will be incompetent. Though the filing of the award is followed by a judgment and decree, the person aggrieved is not thereby disentitled from filing an appeal. (*Puranik, J.*) KESHOLAL *v.* LAXMAN RAO. **1940 N.L.J. 393.**

——**S. 104 (2)**—Order under O. 21, R. 90—Second appeal. *See* C. P. CODE, O. 21, R. 90. **163 I.C. 765.**

——**S. 104 (2) and O. 43, R. 1**—*Return of plaint—Reversal in appeal—Second appeal—Competency—Revision.*

Where an order returning a plaint for presentation to proper Court, is reversed in appeal, no further appeal lies against that order in view of S. 104 (2), C. P. Code, read with O. 43, R 1. But as the matter is one which relates solely to the question of jurisdiction, it can be taken up in revision. (*Zia-ul-Hasan and Yorke, JJ.*) GULZARI SINGH *v.* RAM ADHIN. **1938 R.D. 723=14 Luck. 218=177 I.C. 131=11 R.O. 29=1938 O.L.R. 376 =1938 O.A. 618=1938 A.W.R (C.C.) 75=1938 O.W.N. 801=A.I.R. 1938 Oudh 224.**

——**S. 104 (2)**—Scope—If affects Cl 15 of the Letters Patent. *See* LETTERS PATENT (BOMBAY), CL. 15. **42 Bom.L R. 428.**

——**S. 105**—*Applicability to appeals against orders.*

Though S. 105 refers only to decrees, the provisions of that section also apply to appeals against orders as well. (*Menon, J.*) SWAMINATHA SASTRIAL *v.* NARAYANASWAMI SASTRIAL. **168 I. C. 413=9 R.M. 570=A.I.R. 1936 Mad. 936.**

——**S. 105**—*Order refusing to accept award of arbitrators on reference made by Court—If one affecting decision of case.*

The words "affecting the decision of the case" in S. 105, mean affecting the merits or affecting questions bearing upon the merits of the case and an order refusing to accept an award of the arbitrators, on a reference made by the Court, is an order affecting the decision of the case. (*Mackney, J.*) U PAW *v.* MAYE. **181 I.C. 942=11 R. R. 505=A.I.R. 1939 Rang. 164.**

——**S. 105**—*Scope—Order directing amendment of plaint and payment of additional Court-fee—Plaint amended but Court-fee not paid—Court returning plaint for presentation to proper Court—Appeal—Competency—Order directing amendment—If can be questioned.*

The Court directed the plaintiff to amend the plaint by adding a prayer for a declaration and to

pay additional Court-fee. The plaint was accordingly amended, but no additional Court-fee was paid. As the Court found that the plaint as amended was beyond its precuniary jurisdiction, it returned it for presentation to the proper Court. Plaintiff filed an appeal from this order and challenged the order directing the amendment.

Held, that the order of the trial Court directing the plaintiff to amend the plaint was not appealable. All that the plaintiff could have done was to file a petition in the High Court to revise that order. It could not be said that because he did not take that extraordinary step, he was estopped or precluded from questionin the correctness of that order.

Held further, that plaintiff did not fully comply with the directions of the Court for he did not pay the requisite Court-fee, but only got the plaint amended. It was not as if a person, having obtained the benefits conferred by an order and stood by it, subsequently challenged its correctness. (*Menon, J.*) SWAMINATHA SASTRIAL *v.* NARAYANASWAMI SASTRIAL. **168 I.C. 413=9 R. M. 570=A.I.R. 1936 Mad. 936.**

——**S. 105**—*Scope—Validity of order setting aside award in—If one affecting decision of case on merits.*

The validity or otherwise of an order setting aside an award affects the decision of the case as a simple question of jurisdiction would affect the decision of a case. Hence the validity of an order setting aside an award can be attacked in appeal under the provisions of S. 105. (*Davis, J. C., Lobo and Weston, JJ.*) KISHINCHAND *v.* TAKHITRAM. **I L R. (1940) Kar. 22=183 I.C. 724=12 R S. 75=A.I.R. 1939 Sind 241 (F.B.).**

——**S. 105 (1)**—*"Affecting the decision of the case"—Arbitration—Award—Order setting aside and directing trial of suit by Court—If can be challenged in appeal from decree in suit.*

An order setting aside the award of an arbitrator and deciding that the suit shall be tried by the Court is an order affecting the decision of the case within the meaning of S. 105 (1), C. P. Code, and is therefore liable to be challenged in an appeal against the decree in the suit. (*Harries, J.*) KANCHEDDMAL *v.* GANGA PRASAD. **171 I.C. 398=1937 A.L.R. 837=1937 A.L.J. 651=10 R. A. 271=1937 A.W.R. 589=A.I.R. 1937 All. 582.**

——**S. 105 (1)**—*"Affecting the decision of the case"—Meaning—Order setting aside* ex parte *decree—If can be set aside in appeal from final decree.*

The words "affecting the decision of the case" in S. 105 (1), C. P. Code, mean affecting the decision of the case on its merits. An order setting aside an *ex parte* decree does not constitute an order affecting the decision of the case and cannot, therefore, be set aside in an appeal from the decree finally passed in the suit after the hearing on the merits. 5 R. 80, Overr. (*Roberts, C. J. Leach and Spargo, JJ.*) YEIK LEE *v.* AIHOOR BIBI. **170 I C 43=10 R.R. 62=1937 Rang.L.R. 207= A.I.R. 1937 Rang. 334 (F.B.).**

——**S. 105 (1)**—*Appeal against order of remand—Objection to jurisdiction of lower appellate Court to entertain appeal—Maintainability.*

In an appeal against an *order* of remand, no objection could be taken on the ground that the lower appellate Court had no jurisdiction to entertain the appeal which had abated and to order for substitution of names. The proper stage for such an objection is when the *decree* itself is appealed from. (*Harries and Bajpai, JJ.*) ZAHOOR MOHAMAD KHAN *v.* M. X. DENORONHA. **164 I.C. 730=9 RA. 190=1936 W.R. 520=1936 A.L.J. 538.**

——S. 105 (1)—*Appeal from* ex parte *decree—Matters that can be raised in.*

In an appeal from an *ex parte* decree, S. 105 (1), C. P. Code, entitles the appellant to refer to the order of the trial Court refusing him an adjournment which prevented him from putting up a defence. The refusal did affect the decision of the case. (*Bennet and Verma, JJ.*) JHANDOO MAL & SONS *v.* KHALSA SINGH SAHI. **I.L.R. (1940) All. 192=1940 A.L.J. 269=1940 A.W.R. (H.C.) 161=A.I.R. 1940 All. 305.**

——**S. 105 (1) and (2)**—Applicability to suits and appeals under Agra Tenancy Act. *See* AGRA TENANCY ACT, S. 249. **1937 A.W.R. 1075=1937 A.L.J. 1237.**

——S. 105 (1)—*Construction—"Affecting the decision of the case"—Meaning of—Preliminary issue in suit decided for plaintiff—Reversal by High Court in revision—Suit dismissed in consequence—Appeal to High Court—Order in revision—Correctness of—If can be considered in appeal.*

In a suit by certain worshippers of a temple in the District Court for obtaining the settlement of a scheme under a decree of the Court, the defendant trustee pleaded, *inter alia*, that the Court had no power to frame a scheme. A preliminary issue was framed on this point and the Court found on it in favour of the plaintiff. The defendant applied to the High Court in revision and the High Court held that the suit did not lie and therefore allowed the revision petition and dismissed the suit. The District Judge acting on this, formally dismissed the suit. In an appeal to the High Court against the decree of the District Judge dismissing the suit, a preliminary objection was raised by the respondent to the effect that the order passed in revision was fina and therefore no appeal lay.

Held, that the order of the High Court in revision affected the decision of the case, as the District Judge was left with no other course but to dismiss the suit, and the order directly fell with S. 105 (1), C. P. Code, and it was clearly open to the High Court in appeal to consider its correctness by virtue of S. 105, C. P. Code. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) PICHU AYYANGAR *v.* RAMANUJA JEER SWAMIGAL. **51 L.W. 727=(1940) M.W.N. 575=A.I.R. 1940 Mad. 756=(1940) 1 M.L.J. 882.**

——S. 105 (1)—*"Error, defect or irregularity"—Meaning of.*

An error, defect or irregularity within the meaning of S. 105 must mean an error, defect or irregularity in procedure or in law and not in matters of fact (*Pollock, A. J. C.*) TATYARAO *v.* SHRIKRISHNA LAKSHMINARAYAN. **31 N.L.R. (Supp.) 72=160 I.C. 202=8 R.N. 160=A.I.R. 1936 Nag. 8.**

——**S. 105 (1) and O. 23, R. 3**—*Order refusing to record adjustment—If can be challenged under S.* 105.

The use of the word 'affect' in S. 105 renders it necessary that the word 'decision' should be taken to mean 'a decision upon merits.' An order refusing to record an adjustment is not an order affecting the decision of a case, but is merely an order ensuring that the merits of the case should be determined. It is not therefore open for an appellant to challenge such order in appeal under S. 105 when it has not been appealed against. (*Pollock, A. J. C.*) TATYARAO *v.* SHRIKRISHNA LAXMINARAYAN. **31 N. L. R. (Supp.) 72=160 I.C. 202=8 R.N. 160=A.I.R. 1936 Nag. 8.**

——**S. 105 (1)**—Question of jurisdiction—If can be raised. *See* C. P. CODE, Ss. 104 AND 105 (1). **1938 A.L.J. 720=A.I.R. 1938 All. 511.**

——**S. 105 (1) and O. 43, R. 1 (o)**—*Scope of sub-S.* (1) *of S.* 105—*Right of appeal how affected—Order of refusal to extend time—If appealable after the passing of final decree.*

The opening words of S. 105 (1), C. P. Code, 'save as otherwise expressly provided', govern the whole sub-section and not merely the words which immediately follow them. The sub-section enlarges rights and does not curtail them; on the contrary it expressly saves rights already conferred, that is to say, among other things, the rights of appeal already conferred by S. 104, C. P. Code. Where an application for extension of time fixed by a preliminary mortgage decree is dismissed and a final decree is passed, the order of refusal to extend time is appealable as an order. (*Stone, C.J. and Bose, J.*) SYED ISHAK *v.* KUNJBIHARI SINGH. **188 I.C. 273=12 R.N. 324=1939 N.L.J. 514=A.I.R. 1940 Nag. 104.**

——**S. 107 and O. 23, R. 1**—*Applicability—Appeal—Right to withdraw—Memo of objection by respondent—If bar to withdrawal—Power of appellate Court to permit withdrawal of appeal—O. 41, R.* 22 (4).

There is no express provision in the Code of Civil Procedure as to the withdrawal of an appeal. O. 23, R. 1, C. P. Code, does not in terms apply, nor is the case in any way improved by S. 107, C. P. Code, which merely confers on the appellate Court the powers of an original Court, but none on the parties to an appeal. But an appellant is entitled as of right to withdraw his appeal, provided that the respondent has not acquired any interest thereunder. The fact that there is a cross-objection by the respondent is no bar to the withdrawal in view of the provisions of O. 41, R. 22 (4). But if the respondent has obtained any right under the appeal it is not open to the appellant to withdraw his appeal without permission. The Court, when granting leave to withdraw the appeal may, in proper cases, transpose the parties, making the respondent-appellant and the appellant-respondent, though it is not bound to adopt that course in every case where the appellant withdraws. But it cannot be said that the appellate Court has no jurisdiction to allow the appeal to be withdrawn. (***Beaumont****, C. J. and Wasoodew, J.*) DHONDO *v.* ANNAJI. **I.L.R. (1939) Bom. 66=11 R.B.168=178 I.C. 463=40 Bom.L.R 895=A.I.R. 1938 Bom. 442.**

——**S. 107 and O. 1, R. 10 (2)**—Power of Court—Addition of party as respondent in the appeal. *See* C. P. CODE, O. 1, R. 10 (2) AND S. 107. **1938 .W.N. 75.**

——**S.** 107—*Scope — High Court—Inherent power to remand.*

The High Court has inherent power to remand when the provisions of S. 107 do not apply. (*Vivian Bose, J.*) BALAJI SADASHIV *v.* VISHNU GANAJI. **I.L.R. 1936 Nag 188=179 I.C. 527=10 R.N. 63=A.I.R. 1936 Nag 140.**

——**Ss. 109 and 110**—*Application for leave to appeal—Leave asked for purpose of raising new point for first time—If to be granted.*

Leave to appeal cannot be given in an application for leave to appeal to His Majesty in Council when that leave is asked for for the purpose of raising for the first time a question which was not raised at any time while the litigation was pending, either in the trial Court or the High Court. Such an application for leave to appeal for raising a point for the first time after the whole case has been disposed of would be an abuse which should not be encouraged. (*Pandrang Row and Abdur Rahman, JJ.*) MUHAMMAD SHADAK KOYI SAHIB *v.* VENKATA KOMARAJU. **52 L W. 463=1940 M.W.N. 717=(1940) 2 M.L. J. 433.**

——**S** 109—*Final order—Meaning.*

There is a vast difference between an order made or a judgment passed on the appellate side of a Court and the final order passed on appeal. The latter may be included in the former but the former is necessarily not the same as the latter. (*Wort, Ag. C. J. and Dhavle, J.*) KRISHNA CHANDRA DEB *v.* RAJENDRA NARAYAN. **15 Pat. 659=164 I.C. 287=9 R.P. 107=17 Pat.L.T. 760=A.I.R 1936 Pat. 465.**

——**S.** 109—*Final order — Order dismissing appeal as premature.*

An order dismissing an appeal as premature cannot be said to be a final order within the meaning of S. 109, C. P. Code. (*Thomas, C.J. and Zia-ul-Hasan, J.*) RAGHURAJ SINGH *v.* LALA HARI KISHAN LAL **173 I.C. 865=10 R.O. 231=1938 O.L.R. 143=1938 R.D. 405 (2)=1938 O.A. 231=1938 A.W.R. (C.C) 26=1938 O.W.N. 331 =A.I.R. 1938 Oudh 107.**

——**S.** 109—*"Final order"—Second appeal rejected under O. 41, R. 10 (3)—(Allahabad Amendment) and dismissed for want of prosecution—Subsequent application for restoration also dismissed—Application for leave to appeal from subsequent order—Competency.*

A second appeal was rejected under O. 41, R. 10 (3) (Allahabad Amendment) and was dismissed for want of prosecution. A subsequent application for restoration of appeal was also dismissed. An application for leave to appeal to the Privy Council from the subsequent order, refusing to restore application, was filed, as the application for leave to appeal against the first order was already barred.

Held, that inasmuch as no cardinal point between the parties was decided by the subsequent order nor had the rights of the parties been adjudicated upon in that order, the order in question was not a final order within the meaning of S. 109 (*a*), C. P. Code. Nor was it a fit case for certifying under S. 109 (*c*).

Held also, that the order was not an order passed in appeal, though it was an order passed in the exercise of appellate jurisdiction. (*Sulaiman, C.J. and Bennet, J.*) KRISHNA KANT *v.* LALA AMARNATH. **171 I.C. 29=1937 A.L.J. 796=1937 A.L.R. 815=10 R.A. 243=1937 A.W.R. 695=A.I.R. 1937 All. 566**

——**S** 109—*Leave to appeal—Validity—Committal for finding of contempt for breach of injunction*

A committal for a finding of contempt for breach of an injunction is not criminal in its nature and is properly dealt with under the C. P. Code. Hence in such a case certificate to appeal granted under S. 109 to person inhibited by such injunction is quite valid.

Quaere—Whether a contempt committed not by any person inhibited by injunction for breach of that injunction but by a person said to have aided and abetted a person so inhibited in breaking the injunction is of such a criminal nature as to prevent an appeal. (*Lord Porter.*) BANNERJEE *v.* KUCHWAR LIME AND STONE CO. LTD. **17 Pat. 770=I.L.R.(1939) Kar. 42=43 C.W N. 197 =178 I.C. 490=11 R.P.C. 111=1938 O.L.R. 514 =41 Bom.L R 136=1938 O.W.N 1256=1938 A W.N. 216=1938 A.L.R. 914=5 B.R. 171=1939 M.W.N. 18=68 C.L.J. 488=49 L.W. 10=41 P. L.R. 168=19 Pat.L.T. 857=1938 P.W.N. 895= A.I.R. 1938 P.C. 295=(1939) 1 M.L.J. 715 (P.C.).**

——**Ss. 109 and 110**—*Leave to appeal to Privy Council—Valuation of property — Property at stake a "bhaoli grove"—Proof required.*

It is essential that an applicant for leave to appeal to the Privy Council under Ss. 109 and 110, C. P. Code, should prove that the property at stake is worth Rs. 10,000. Where the property is a "bhaoli grove" which means that the zamindars take half the produce whether fruit or wood, the grove must be proved to be worth Rs. 20,000 before sanction could be given to the application. (*Darling, S.M. and Bomford, J.M.*) NAUBAT TEWARI *v.* JANGLI TEWARI. **1937 R.D. 198.**

——**Ss. 109 and 110**—*Order of winding up of company—Application for leave to appeal to Privy Council—Application not disclosing name of any respondent—Maintainability.*

A company was dissolved by an order of the High Court passed on a petition made by one of the creditors of the company. The petition for the winding up of the company was properly made under S. 162/166, Companies Act. An application was filed by one of the contributories of the company wound up, for leave to appeal to the Privy Council against the order of compulsory winding up. This application for leave to appeal was framed similar to the application made for the winding up of the company. This application did not specifically disclose the names of any respondent, although notices were issued to the Official Liquidator and the original petitioner on whose petition the company was wound up. The point of dispute was if application for leave to appeal was properly constituted and good in law.

Held (Per *Young, C.J., Addison, J.*) (*Tek Chand J.* contra), that an application for leave to appeal to the Privy Council from an order of winding up of a company is not a proceeding in winding up as contemplated by the Rules and Orders of the High Court, and must comply with the provisions of R. 1 of the Rules and Orders made by the Lahore High Court contained in Vol. 5, Chap. 8 in addition to the requirements of O. 45, R. 3 (1), C. P. Code. As such, each person who is sought to be made a respondent ought to be named in the petition. Moreover the company under winding up orders is also a necessary party which should be named in the petition. In all proceedings there should be a right litigated, a person asserting that right,and a person interested to deny it, *i.e.*, an opposite party. If the petition failed to provide the name of even one respondent, such petition would be wholly bad and ought to be dismissed. (*Young, C.J., Addison and Tek Chand, JJ.*) BHARAT INSURANCE CO., LTD. *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **165 I C. 568=9 R.L. 259=A.I.R. 1936 Lah 322 (F.B.).**

——**Ss. 109 and 112**—*Right of appeal—Scope of—Discretion under S. 112.*

S. 109 of the C. P. Code is not only qualified by its opening words and by S. 111 but also by S. 112. It is plain from the terms of the Code that the Indian Legislature was not claiming or proposing to abridge or extend the prerogative. The discretion which S. 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded for either purpose by the provisions of S. 109. (*Sir George Rankin.*) MOHAMMAD AZIM KHAN *v.* SAADAT ALI KHAN. **1939 A.W.R. (P.C.) 76=180 I.C. 1001=1939 O.W.N. 471=5 B.R 570=1939 O.L.R. 262=66 I A. 160 =14 Luck. 252=I.L R (1939) Kar. 234 (P.C.) =43 C.W.N. 733=11 R.P.C. 207=1939 O A. 497=70 C.L.J. 66=41 Bom.L.R. 1036=A.I.R. 1939 P.C. 122=(1939) 2 M.L J. 181 (P.C.).**

——**Ss. 109 and 110 and Oudh Courts Act, S. 12**—*Right of appeal within a chief Court, how affected.*

It is difficult to regard Ss. 109 and 110, C. P. Code, as directed to prohibit an appeal being brought within a chief Court in like manner as a Letters Patent appeal is brought within a Chartered High Court. The two sections taken together seem rather to be intended to provide an appeal to His Majesty on the footing that no further appeal in India is provided. The opening clause of sub-S. (1) of S. 12, Oudh Courts Act, makes the section give way only to a provision which negatives in the particular case either (*a*) the existence of any right to appeal, or (*b*) the right to go to the particular tribunal mentioned, *viz.*, a Bench of the chief Court. An appeal to the appellate Bench of Chief Court of Oudh, from decree passed by single Judge of that Court in exercise of original jurisdiction, is competent under S. 12, Oudh Courts Act, where requirements of S. 110, C. P. Code, as to value are satisfied. Therefore, an appeal from such decree passed by the single Judge does not lie directly to His Majesty in Privy Council. (*Sir George Rankin.*) MAHOMED AZIM KHAN *v.* SAADAT ALI KHAN. **66 I.A. 160=14 Luck 252=I.L R (1939) Kar. 234 (P C.)=43 C.W N. 733=11 R P.C. 207 =1939 O A. 497=70 C L J. 66=41 Bom.L.R. 1036=180 I.C. 1001=1939 O.W.N. 471=5 B.R. 570=1939 O.L.R. 262=1939 A.W.R. (P.C.) 76 =A.I.R. 1939 P.C. 122=(1939) 2 M.L.J. 181 (P.C.).**

——**S. 109 (a)**—*Construction—"Any otherCourt of final appellate jurisdiction"—District Judge hearing appeal from Subordinate Judge under S. 75, Provincial Insolvency Act if such a Court.*

A District Judge hearing and deciding an appeal from the decision of Subordinate Judge under S. 75 of the Provincial Insolvency Act is not a Court of final appellate jurisdiction within the meaning of S. 109 (*a*), C. P. Code. S. 75 of the Provincial Insolvency Act is all comprehensive and self-contained and there is a provision in it for the widest form of revision which enables a High Court to go into facts if it thinks fit. A Court expressly subject to wide powers of revisions and whose decision in certain cases can be questioned in second appeal cannot be regarded as a Court of final appellate jurisdiction for purposes of S. 109 (*a*), C. P. Code. (*Mockett and Horwill, JJ*) OFFICIAL RECEIVER OF MADURA *v.* KUPPUSWAMI CHETTIAR. **177 I.C 177=11 R. M. 269=46 L.W. 416=1937 M.W.N. 762= A.I.R 1937 Mad. 930.**

——**S. 109 (a)**—*Final order—Order of remand —If appealable.*

An order of an appellate Court is not a final order within the meaning of S. 109 (*a*), C. P. Code, unless it finally disposes of the rights of the parties in relation to the whole suit and hence an appeal does not lie from an order under O. 41, R. 23 reversing a decree which dismisses a suit upon a preliminary point and remanding the suit for trial. (*Zia-ul-Hasan, C.J. and Bennet, J.*) HARI SARAN DAS *v.* HAR KISHEN DAS. **14 Luck. 675= 182 I.C 1007=12 R.O. 15=1939 O.A. 568=1939 A.W.R. (C.C.) 92=1939 O.W.N. 659=A.I.R. 1939 Oudh 22.**

——**S. 109 (a)**—*"Final order"—Order of remand—Decision of one issue—If makes order final.*

An order of remand would not fall within the description of final order under S. 109 (*a*), C. P. Code, on the ground that one of the main points or cardinal points in issue has been decided in that order, when that does not dispose of finally the rights of the parties and when the suit is still alive and has to be tried in the ordinary way. The test of finality is whether the order finally disposes of the rights of parties. (*Madhavan Nair, O.C.J. and Krishnaswami Ayyangar, J.*) RAMANATHAN CHETTIAR *v.* PALANIAPPA CHETTIAR. **49 L.W. 713=188 I.C. 892=1939 M.W. N. 597=A.I.R. 1939 Mad. 697=(1939)2 M.L.J. 40.**

——**S. 109 (a)**—*Final order—Order refusing to admit appeal and order dismissing review application.*

An order refusing to admit an appeal and an order dismissing an application for review of that order are both final orders within the meaning of S. 109 (*a*), C. P. Code. (*Drake Brockman, S.M. and Knox, J M.*) JAGDAMBA PRASAD *v.* RAM GOPAL SINGH. **1936 R.D. 120.**

——**S. 109 (a)**—*Final order—Order remanding execution proceeding.*

No appeal lies to His Majesty in Council against an order of the High Court remanding an execution proceeding for re-decision, as there is no final order. (*Addison and Abdul Rashid, JJ.*) SHANKAR DAS SADHU RAM *v.* GURBAKHSH SINGH. **38 P.L.R. 112.**

——**S 109 (a)**—*Final order—Order under O. 41, R. 25.*

Under S. 109 (*a*), C. P. Code, the test of finality is whether the order finally disposes of the rights of the parties. An order of an appellate Court under O. 41, R. 25 remitting an issue to the trial Court whether a certain party rebutted the presumption as to the applicability of a family custom, is not a "final order" within the meaning of S. 109 (*a*), as the rights of the parties have still to be determined and the suit is still a live suit. (*King, C.J. and Zia-ul-Hasan, J.*) Huzur Ara Begam *v.* The Deputy Commissioner of Gonda. **160 I.C. 811=8 R.O. 280=1936 O.W.N. 218=A.I.R. 1936 Oudh 205.**

———S. 109 (a)—*Final order—Test.*

Whether an order is a final order or not within S. 109 (*a*) of the C. P. Code depends upon the effect of the order as made; if it finally disposes of the rights of the parties, the order is final, and where the appellate Court has finally determined that the plaintiff has a good and subsisting cause of action and all that remains is to work out subsidiary questions consequent upon the final determination of the defendant's liability, the order is in substance and effect a final order though the *quantum* of the rights or liability remains to be ascertained. An order of remand under O. 41, R. 23 was held to constitute a final order. (*Mya Bu and Sharpe, JJ.*) Maung Sin *v.* Maung Byaung. **177 I.C. 690=11 R.R. 158=1938 Rang. L.R 330=A.I.R. 1938 Rang. 333.**

———S. 109 (a)—*Order made in revision—Appeal to Privy Council.*

An order made in revision under S. 115, C. P. Code, is not an order made on appeal though it might have been made on the appellate side of the Court and hence High Court has no jurisdiction to give leave to appeal to His Majesty in Privy Council under S. 109 (*a*). (*Wort, Ag. C.J. and Dhavle, J.*) Krishna Chandra Deb *v.* Rajendra Narayan. **15 Pat. 659=164 I.C 287=9 R.P. 107=17 Pat.L.T. 760=1936 P.W.N. 656=A.I.R. 1936 Pat. 465.**

———S. 109 (a)—*Order passed under S. 34, N. W.F.P.Courts Regulation—Appealability to Privy Council.*

Orders passed after calling for the records under S. 34 of the N. W. F. Province Courts Regulation are not passed on appeal. They are passed in exercise of the power of superintendence vested in the Court by this provision of law. Hence the order is not appealable to His Majesty in Council under S. 109 (*a*), C. P. Code. (*Mir-Ahmad, J.*) Feroz Shah *v.* Bundhelkhand Cycle and Motor Agency, Nowshera. **183 I.C. 169=12 R. Pesh. 11=A.I.R. 1939 Pesh. 26.**

———S. 109 (b)—*Applicability—Original civil jurisdiction—Proceedings for enhancement of rent under Madras Estates Land Act—Application to High Court for writ of* certiorari—*Order refusing—Appeal to Privy Council.*

An appeal lies to His Majesty in Council from an order of the High Court refusing to issue a writ of *certiorari* to the Board of Revenue in proceedings under Ch. XI of the Madras Estates Land Act enhancing the rents of certain villages. Such an order is one passed in the exercise of original Civil jurisdiction falling under S. 109 (*b*), C. P. Code. (*Leach, C.J. and Madhavan Nair, J.*) Ryots of Garabandha *v.* Zamindar of Parlakimedi. **I.L.R (1938) Mad. 816=48 L.W. 107=182 I C. 784=12 R.M. 155=1938 M.W.N. 706=A.I.R. 1938 Mad. 722=(1938) 2 M.L.J. 154.**

———S. 109 (c)—*Applicability—Full Bench decision of one High Court differing from that of another—If sufficient to make case fit for appeal to Privy Council.*

The fact that a Full Bench decision of one High Court differs from a decision of a Full Bench of another High Court is not in itself sufficient ground to make a case a fit one for appeal to the Privy Council under the provisions of S. 109 (*c*), C. P. Code. (*Davis, J.C. and Havelivala, A.J.C.*) Mahomed Mahrabkhan *v.* Dur Mahomed Khan. **171 I.C. 630=10 R.S. 114 (2)=A.I.R. 1937 Sind 217.**

———S. 109 (c)—*Applicability—Interlocutory order.*

S. 109 (*c*), C. P. Code, will apply even to an interlocutory order. (*Davis, J.C. and Havelivala, A.J.C.*) Mahomed Mahrabkhan *v.* Dur Mahomed Khan. **171 I.C. 630=10 R.S. 114 (2)=A.I.R. 1937 Sind 217.**

———S. 109 (c)—*Applicability — Question whether certain tribal Chief residing within British territory is Ruling Chief under Ss. 84 and 87, C. P. Code—If fit for appeal.*

In an ejectment suit, the question whether a tribal Chief residing within British territory is a Ruling Chief within the provisions of Ss. 84 to 87, C. P. Code, is not a matter of such private or public importance either to himself or to the public generally or any class or section of the public that a certificate of fitness for appeal to the PrivyCouncil can be given within the provisions of S 109 (*c*), C. P. Code. (*Davis, J.C. and Havelivala, A.J.C.*) Mahomed Mahraabkhan *v.* Dur Mahomed Khan. **171 I.C. 630=10 R.S. 114 (2)=A.I.R. 1937 Sind 217.**

———Ss. 109 (c) and 115—*Applicability of S. 109 (c) to interlocutory orders—Exercise of discretion—Considerations—Substantial question of law being involved—If a ground for leave—Dismissal of revision against order superseding arbitration—Leave, if can be granted.*

Cl. (*c*) of S. 109, C. P. Code, applies even to interlocutory orders and in appropriate cases such orders can be made the subject of an appeal to His Majesty in Council. But before leave could be granted in such cases, the Court must be satisfied that the case is otherwise a fit one for appeal to His Majesty in Council. The discretion vested by Cl. (*c*) of S. 109 on the High Court is to be sparingly exercised and a case cannot be certified as a fit one for appeal on the mere ground that it raises a substantial question of law. It has invariably to be seen whether the permission to appeal is or is not calculated to unduly delay the disposel of the substantive dispute between the parties on the merits. Where an application to revise an order superseding an arbitration is dismissed by the High Court on the ground that there was no 'case' decided within the meaning of S. 115, C. P. Code, on a consideration of the facts of the case it was held that it was not a fit case in which leave to appeal to the Privy Council against the order of dismissal should be granted. (*Iqbal Ahmad and Ismail, JJ.*) Govind Das *v.* Indrawati. **I.L.R. (1940) All 11=12 R.A. 359=1939 A.L.J. 919=1939 A.W.R. (H.C.) 806=185 I.C. 854=A.I.R. 1940 All. 38.**

———S. 109 (c)—*Application under O. 21, R. 100, C. P. Code—Order on—If fit one for appeal.*

Where, in anticipation of delivery of possession to decree-holder, an application under O. 21,

R. 100, C. P. Code, was made by the person in possession and was decided in his favour by the Court according to the principles laid down in Rr. 99 and 101 of O. 21, C. P. Code, the case, though it did not strictly come under O. 21, R. 100, did not raise any question of great public or private importance to which it is impossible to give a money value and hence leave to appeal to the Privy Council could not be granted under Cl. (*c*) of S. 109. (*Wort, Ag. C.J. and Dhavle, J.*) KRISHNA CHANDRA DEB *v.* RAJENDRA NARAYAN. **15 Pat. 659=164 I.C. 287=1936 P.W.N 656=9 R.P. 107=17 Pat.L.T. 760=A.I.R. 1936 Pat. 465.**

——**S. 109 (c)**—*Certificate of fitness—Grant of—Different High Courts holding divergent views—If a ground.*

The fact that different High Courts in India have held divergent views in respect of matters similar to those before the Court is in itself no reason for certifying the case as one fit for appeal to His Majesty in Council. (*Middleton, J.C. Mir Ahmad, A.J.C*) BISHAN DASS *v.* NAND RAM. **167 I.C. 165=9 R. Pesh. 81=A.I.R. 1936 Pesh. 194.**

——**S. 109 (c)**—*Fit case for appeal—Test to decide—Considerations—Pleader—Misconduct—Order striking off the roll—Application for certificate of fitness for appeal to Privy Council—If to be granted.*

When the Court certifies the case as fit for appeal, it is clearly intended to meet special cases such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion evinced by the fitting certificate. Leave therefore under S. 109 (*c*) is not to be granted as a matter of course but the applicant has to prove that his case is a fit one for appeal to His Majesty in Privy Council. Where a pleader's name was struck off from the roll of pleaders on the ground of misconduct.

Held, that the point in dispute was not measurable by money and that it was of great private importance to the applicant-pleader. There being some points of law also raised in the case, it was a fit case to be certified under S. 109 (*c*), as a special case fit for appeal to His Majesty in Council. (*Sulaiman, C.J. and Bajpai, J.*) P. A. PLEADER OF BANSI *v.* JUDGES OF ALLAHABAD HIGH COURT. **167 I.C. 666=9 R.A. 561=1936 A.W.R. 1007=1936 A.L.J. 1272=1937 A.L.R. 212=38 Cr.L.J. 410=A.I.R. 1937 All. 167.**

——**S. 109 (c)**—*Grant of certificate—Principles applicable.*

Under S. 109 (*c*), C. P. Code, a case can be certified to be a fit one for appeal to His Majesty in Council only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who are directly involved in the litigation but also to the public at large. A suit in which the questions for decision are whether the building in dispute is a public mosque or a private place of worship and whether the defendants have established adverse possession of the mosque, cannot be brought within the scope of the above principles. (*Thomas, C. J. and Yorke, J.*) MUSAHEB KHAN *v.* P. RAJ KUMAR BAKSHI. **189 I.C. 93=1940 O. A. 603=1940 O.W N. 632=1940 A.W.R. (C.C.) 309=1940 O.L.R. 413.**

——**S. 109 (c)**—*Privy Council—Leave to appeal—Grant of—Finding of fact—Applicant alleging that lower Courts misinterpreted evidence in finding that applicant was not minor—Leave—If can be granted.*

In an application for leave to appeal to His Majesty in Council, the applicant contended that the various Courts misinterpreted the evidence and found wrongly that he had failed to prove his minority on a particular date. The Courts in fact had carefully considered the evidence led by the parties and came to the conclusion that the applicant had failed to prove that that he was minor, and that he had behaved as a major.

Held, that the case was not a fit one for the grant of a certificate of leave to appeal to His Majesty in Council, as no Court of appeal could interfere with the finding of fact. (*Drake Brockman, S.M. and Knox, J. M.*) JAGDAMBA PRASAD *v.* RAM GOPAL SINGH. **1936 R.D. 120**

——**S. 109 (c)**—*Question of importance—Test.*

A case could be certified to be a fit one for appeal to His Majesty in Council under Cl. (*c*) of S. 109, C. P. Code, only when it is of considerable importance and the principle when finally decided by their Lordships of the Privy Council would be of benefit not only to the people who were directly involved in the litigation but to the public at large. (*Zia-ul-Hasan, C. J. and Bennet, J.*) HARI SARAN DAS *v.* HAR KISHEN DAS **14 Luck. 675=182 I.C. 1007=1939 O.A 568=12 R.O. 15=1939 O.L.R. 490=1939 A.W.R. (C.C.) 92=1939 O.W.N. 659=A.I.R 1939 Oudh 224.**

——**S. 109 (c)**—*Question of jurisdiction of Civil Court—Question as to bar under Sea Customs Act—Appeal to Privy Council—Grant of certificate.*

In a suit in which the amount claimed was more than Rs. 20,000 an objection was taken to the jurisdiction of the Court on the ground that the suit was barred by the Sea Customs Act. The lower Court tried the issue as a preliminary issue, upheld the objection and dismissed the suit. In appeal, the High Court held that the Civil Court was not deprived of jurisdiction in the matter by the Sea Customs Act, and demanded the suit for trial on the merits. This question of jurisdiction was awaiting decision in other suits pending in the province, and there were also other claims of the same kind in which notice of suit had been given and some litigations were pending in other provinces.

Held, that in view of these facts and the fact that the question of jurisdiction was a substantial question of law and one of general importance, the case was a fit case to be certified under Cl. (*c*) of S. 109, C.P. Code. (*Varadachariar and Pandrang Row, JJ.*) SECRETARY OF STATE FOR INDIA *v.* MASK & CO. **182 I.C. 260=12 R.M 34=1938 M.W.N 1132=I.A.R. 1939 Mad. 95=(1938) 2 M.L.J. 904.**

[Reversed on appeal. 67 I.A. 222=(1940) 2 M.L.J. 140=I.L.R. (1940) Mad. 599.]

——**S. 109 (c)**— *Reference by—Income-tax Officer—Whether interest paid to partner on capital borrowed from him is allowable as deduction* *from profits earned—Leave to appeal—If to be granted.*

Before the High Court would grant leave to appeal to His Majesty in Council, it should be satisfied that the case is of such importance as would warrant a certificate under S. 109 (*c*). If it is not, it is justified in refusing the certificate. A reference submitted by the Income-tax Officer as to whether, in a particular case, the interest paid to a capitalist partner on the capital borrowed from him is an allowable deduction from the profits earned, under S. 10 (2) (*iii*) of the Income-tax Act, and the decision given by the Court on it is *prima facie* not of public importance, much less of great public importance so as to make the case, a fit one for granting leave to appeal to the Privy Council, more specially where the amount by which the assessee has benefited is only about Rs. 300. Advisability of the legislature conferring a power upon the High Court to impose a condition in a fit case requiring the appellant to Privy Council to bear the costs of the appeal irrespective of the result of the appeal, at the time of granting leave to appeal to the Privy Council (at any rate in cases falling under S. 66-A (2), Income-tax act) suggested. A.I R. 1927 P. C. 242, Foll.; A.I R. 1923 Mad. 232, Ref. (*Rupchand Bilaram and D.C. Mehta, A.J.Cs.*) COMMISSIONER OF INCOME-TAX, BOMBAY *v.* TEJBHANDAS MOTUMAL. **163 I.C. 275=8 R.S. 193=A.I.R. 1936 Sind 68.**

———**S. 109 (c)**—*Scope—Application under O. 14, R. 2 and O. 15, R. 3 for disposal of certain issues as preliminary issues—Rejection—Revision petition to the High Court—Dismissal—Leave to appeal to Privy Council—If fit case for appeal.*

Where an application is made to a Court under O. 14, R. 2 and O. 15, R. 3, C. P. Code, praying the Court that certain issues, which were not clear cut issues of law but were mixed up with questions of fact, should be heard and disposed as preliminary issues, but the Court rejects the application holding that it was not a case in which it ought to direct those issues to be disposed of before going into the merits of the whole case, and a revision application against such rejection is dismissed by the High Court as no case was made out for interference in revision, it cannot be said that the decision of the High Court gives rise to any point of importance or difficulty which would warrant the grant of a certificate under S. 109 (*c*) of the Code of Civil Procedure. (*Harries, C.J. and Rowland, J.*) NANDAMANI *v.* HARIKRISHNA. **181 I C. 644=5 B R 645=11 R. P. 624=1939 P.W.N. 341=A.I.R. 1939 Pat. 564.**

———**S. 109 (c)**—*Scope—Form of ritual in important public temple—Disputes between two religious sects—If of public and private importance—If certificate to be granted.*

The form of ritual in an important public temple in the country is a matter of both public and private importance falling within S 109 (*c*), C. P. Code, and when the case relates to religious rites and ceremonies at a temple of national importance and raises disputes between two religious sects of a community regarding the conduct and form of worship at the temple, the questions at issue are in themselves of great public importance, so as to justify the grant of a certificate under S. 109 (*c*) permitting an appeal to His Majesty in Council. (*Leach, C.J. and Patanjali*

Sastri, J.) THIRUVENGADA RAMANUJA PEDDA JIYANGARLU *v.* VENKATACHARLU. **1939 M.W.N. 816=188 I.C. 41=12 R.M 773=50 L.W. 252=A.I R. 1939 Mad. 847=(1939) 2 M L.J. 378.**

———**S. 109 (c)**—*Scope—Order striking off name of pleader from roll for misconduct—Leave to appeal to Privy Council.*

Where a pleader's name is struck off the roll of pleaders for misconduct, it has been the practice of Allahabad High Court to treat such order as one falling under S. 109 (*c*), C P. Code, in contrast with the practice of Patna and Calcutta High Courts. (*Sulaiman, C.J. and Bajpai, J.*) P.A. PLEADER OF BANSI *v.* JUDGES OF ALLAHABAD HIGH COURT. **167 I.C. 666=1937 A.L.R. 212=9 R.A. 561=38 Cr.L.J. 410=1936 A.L.J. 1272=1936 A. W.R. 1007=A.I.R. 1937 All. 167.**

———**S. 109 (c)**—*Substantial question of law—Construction of—S. 70, T. P. Act.*

A Court ought not to grant a certificate under S. 109 (*c*), C. P. Code, unless a point of law is involved in the appeal which is not only substantial and important as between the parties but is one of general importance or of such a nature that the decision upon it may govern numerous cases. The question whether the words 'any accession is made to the mortgaged property' in S. 70, T. P. Act, mean any accession made to the mortgaged property by the mortgagor or his representatives in title or any accession to the mortgaged property by whomsoever made, is a question of great public importance having regard to the existing law in India and the large number of cases which must be affected by it. (*Page, C.J. and Mya Bu, J.*) SEIN HTAUNG *v.* V. E. A. CHETTYAR FIRM. **14 Rang. 86=160 I.C. 724=8 R.R. 422=A.I.R. 1936 Rang. 65.**

———**S 109 (c)**—*Two appeals disposed of by one judgment—Judgment proceeding on a common ground—One appeal valued above Rs. 10,000 and the other less—Certificate of fitness in latter case—Whether can be granted.*

Where two appeals arising out of the same suit were disposed of by the High Court by one judgment proceeding on one ground common to all the appellants, and the valuation of one of the appeals was above Rs. 10,000 while that of the other was less than Rs. 10,000.

Held, that as the point involved in both the appeals was a common one, a certificate of fitness can be granted in the latter case under S. 109 (*c*), C. P. Code, although the requirements of S. 110, C. P. Code, were not fulfilled. (*Sulaiman, C.J. and Bennet, J.*) MUKANDI LAL *v.* HASHMAT-UN-NISSA. **I.L.R. (1937) All 105=166 I C. 283=9 R A. 394=1937 A.L.R 18=1936 A.W.R. 883=1936 A.L J. 1025=A.I.R. 1936 All. 832.**

———**S. 110.**

Affirming decree.
Applicability.
Construction.
Substantial question of law.
Valuation.

———**S. 110**—*Affirming decree—Decree for share in property and for account—Decree—Appeal—Property held not divisible and claim negatived—No finding on question of liability to account—Judgment—If one of affirmance as regards second point—Each claim, if separate and distinct subject-matter.*

Plaintiff claimed a fourth share of the property in suit which she alleged belonged to herself and her three sisters, defendants 1 to 3. She also prayed for an account of the management of the property by the first defendant. The first defendant resisted the plaintiff's claim and asserted exclusive title in herself. The lower Court held that the property was divisible into four shares and that plaintiff had a right to a fourth share and as regards the other prayer, held that the first defendant was liable to account only to the property as it existed at the time of the suit. In appeal, the High Court held that the first defendant was solely entitled to the property and thus negatived the plaintiff's title, but gave no finding on the question of liability to account, as there was no need to do so.

Held, that the judgment of the High Court was really a reversing judgment in respect of the whole case, and that it could not be said that in respect of the second part of the claim it was an affirming one within the meaning of S. 100, C. P. Code.

Quaere.—Whether the two claims, one to property and the other to an account, are to be deemed two distinct subject-matters for the purpose of granting leave to appeal to the Privy Council under S 110. (*Venkatasubba Rao and Newsam, JJ.*) Kamalathachi *v.* Meenakshi Achi. **175 I C. 236=10 R M. 759=A I.R. 1937 Mad. 964=(1937) 2 M L J. 543.**

——S. 110—*Affirming decree—Decree modified only or single point and that in favour of applicant—Effect.*

Where the appellate decree affirms the decree of the lower Court in respect of all matters in dispute and modifies it only on a single point and that completely in favour of the applicant for leave to appeal upon the opposite party expressing his agreement that it should be so modified, the decree is one of affirmance, and the applicant cannot be granted leave to appeal to Privy Council in the absence of a substantial question of law. (*Coldstream and Bhide, JJ*) Baboo Lal *v.* Siri Ram. **18 Lah. 268=172 I.C 803=10 R. L. 370=39 P.L.R 877=A.I.R. 1937 Lah. 712.**

——S. 110—*Affirming decree—High Court, on appeal increasing amount of compensation in land acquisition matter—If affirming decree.*

Where, on appeal, the High Court increased the amount of compensation awarded by the lower Court in a land acquisition matter, the High Court has only affirmed the decree of the lower Court and has not varied it and as such unless a substantial question of law is involved, leave to appeal to the Privy Council could not be granted. (*Bennet and Verma, JJ.*) Sri Narain Khanna *v.* Secretary of State. **185 I.C. 513=12 R.A. 334=1939 A L.J. 736=1939 A.W.R. (H.C.) 651=A.I.R. 1939 All. 723.**

——S. 110—*Affirming decree—Leave—Grounds.*

Even if the decree of the High Court affirms the decree of the Subordinate Judge, where the appeal involves substantial questions of law and the value of the subject-matter of the suit and of the appeal is above Rs 10 000, the High Court is justified in granting leave to appeal to the Privy Council. (*Sir Lancelot Sanderson.*) Gaekwar Baroda State Railway *v.* Hafiz Habib-ul Haq. **65 I.A. 182=I L.R. (1938) All. 601=4 B.R 524=10 R.P.C. 262=1938 A.L.R. 352=67 C.L.J. 254=1938 P.W.N. 535=32 S L.R. 531=40 Bom. L.R. 811=19 Pat.L.T. 689=174 I.C 551=1938 M.W N. 481=1938 O.W N 521=1938 A.L.J. 488=42 C.W N 705=1938 O L.R. 218=1938 A. W.R (P.C.) 123=47 L.W 753=A.I.R. 1938 P. C. 165=(1938) 2 M.L J. 11 (P C.)**

——S. 110—*'Affirming decree'—Modification of decree in favour of applicant—Right of appeal.*

It would be anomalous to grant leave to appeal to His Majesty in Council to an applicant on matters in which a High Court has concurred with the trial Court on the mere ground that on other matters the High Court has modified the decree of the trial Court but in favour of the applicant. (*Jai Lal and Abdul Rashid, JJ*) Mt. Shahzadi Bi *v.* Mt. Rahmat Bi **174 I.C. 893=10 R.L. 616=A.I R. 1937 Lah. 761.**

——S. 110—*Affirming decree—Only modification made by appellate Court being in favour of applicant—Effect.*

Where the only modification made by the Court of appeal is in favour of the applicant for leave to appeal to His Majesty in Council, and it is a modification of such a character as to leave the applicant without any further grievance so far as that particular matter is concerned, the applicant cannot, because of that modification, contend that it is not a judgment of affirmance and have a right to an appeal on other points on which both the Courts have been in agreement, without showing a substantial question of law. (*Wort, Ag C.J. and Dhavle, J.*) Mahabir Prasad *v.* Brij Mohan Prasad **15 Pat. 637=1936 P.W N. 587=163 I.C 139=8 R.P. 621=17 Pat.L.T. 602=A I.R. 1936 Pat. 553.**

——S. 110—*Affirming decree—Rejection of appeal owing to insufficiency of court-fee.*

An order of the High Court rejecting an appeal on account of insufficiency of court-fee is one affirming the decision of the first Court within the meaning of S. 110, C. P Code. (*Thomas C. J. and Radha Krishna, J.*) Durga Bux Singh *v.* Ambika Bux Singh. **189 I.C. 87=1940 A.W.R. (C C.) 263=1940 O.L.R. 410=1940 O.A. 506=1940 O.W.N. 616.**

——S. 110—*Affirming decree—Several subject-matters involved in suit—High Court decree confirming decree of lower Court in respect of some but varying it in respect of others—If reversing judgment—Leave to appeal in respect of subject-matters on which the decree of lower Court was confirmed—If can be granted.*

Where there are several subject-matters comprised in the lower Court's decree, each should be regarded separately for deciding whether the High Court's decree is or is not an affirming decree under S. 110, C. P. Code. A single decree may comprise several decisions, and each decision may relate to a distinct subject-matter. The decree embodying these several decisions in respect of different subject-matters cannot be regarded as one and entire. Consequently where the High Court reverses the decisions in respect of some, but affirms the decision in respect of others, the decree of the High Court is an affirming judgment and not a reversing one in respect of the subject-matters as to which the High Court affirms the decision of the lower Court. It cannot be held that because the decree has not been affirmed in its entirety, it cannot be regarded as an affirming decree on the ground that it is one and indivisible (*Venkatasubba Rao and Abdur Rahman JJ.*) VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS. **181 I.C. 988=11 R M. 889=1938 M W.N 298=47 L.W. 393=A.I.R. 1938 Mad. 631=(1938) 1 M.L.J 487.**

———S. 110—*Affirming decree—Suit comprising different subject matters and different sets of defendants—Decree dismissing claim in respect of some and allowing claim in respect of others—Appeals by both parties—Decree allowing one appeal and dismissing other—If one of reversal—Leave to appeal.*

In cases where parties claiming under various alienations are brought before the Court, the mere fact that the rules of procedure permit the claims to be joined in one suit does not justify the decree being treated as one single and inseparable decree when the High Court confirms the lower Court's decree in respect of some of the parties and claims and reverses it as regards others. In a suit by a Hindu reversioner for possession of properties as belonging to the estate of the last male holder, there were two sets of defendants, *viz.*, alienees tracing their title to the mother of the last male holder and another set of alienees who traced their title to the widow of the last male owner. The trial Court dismissed the suit in so far as it related to the properties claimed through the mother of the last male owner, but decreed it in respect of the properties alienated by the widow of the last male owner. Two appeals were preferred one by the plaintiff against the dismissal of part of his claim, and the other by the alienees from the widow who were directed by the decree to surrender possession. The High Court by its decree allowed the plaintiff's appeal, but dismissed the appeal of the alienees from the widow of the last male-holder. The properties involved in each of the two appeals exceeded Rs. 10,000 in value.

Held, that so far as the decree allowed the plaintiff's appeal, the decision of the High Court was one of reversal and therefore a certificate should issue granting leave to appeal to His Majesty in Council; but the decision, so far as it dismissed the appeal of the alienees from the widow, affirmed the decree of the lower Court and therefore no leave to appeal could be granted unless the applicants for leave satisfied the Court that there was a substantial question of law involved. The fact that the two appeals arose out of the same Court was no ground for regarding the decision of the High Court as a single decree so as to entitle the defeated parties to appeal against the whole decree taking the appeals together on the ground that the High Court in part modified the decree of the lower Court. (*Varadachariar and Horwill, JJ.*) RAMAYYA *v.* LAKSHMAYYA **47 L W. 514=1938 M.W.N. 439=177 I C. 248=11 R M. 301=A.I.R. 1938 Mad. 598=(1938) 1 M L.J. 492.**

———S. 110—*"Affirming decree"—Suit comprising several subject-matters—Decisions confirming as regards some and varying as regards others—Right of appeal—If extends to whole decree—Variation of decree as against one of several defendants only—Right of appeal.*

In order to decide whether a decree affirms the decision of the Court below, as contemplated by S. 110, C. P. Code, what is to be regarded is not the decision as a whole, but the decision as it affects the subject-matter in dispute. That is the proper test. Where there are several decisions in respect of several subject-matters in the same suit, the decree embodying those decisions should not, by some fiction, be regarded as one and entire. The right way of construing S. 110 is to read the words "decree or final order" in the third clause in conjunction with, and to treat them as relating to, the subject-matter mentioned in the first clause. Where in a mortgage suit the lower Court passes a decree against *A* and *B* for the full amount claimed and against *C* and *D* for part of the amount, and the High Court on appeal confirms the decree against *A* and *B* and also *C*; but varies as against *D* by holding him liable for a larger amount than was decreed against him by the lower Court, it is open to *D* to appeal to the Privy Council, as the decree is one of reversal so far as he is concerned, but the decree being one of affirmance as against *C*, plaintiff could not be granted leave to appeal to the Privy Council as against *C*, in the absence of a substantial question of law. (*Venkatasubba Rao and Cornish, JJ.*) VENKATASWAMI CHETTIAR *v.* SEKKUTTI PILLAI. **I L R (1937) Mad. 121=166 I C 251=9 R.M. 351=1936 M.W.N. 1051=44 L.W. 533=A.I.R 1936 Mad 881=71 M.L.J. 580.**

———S 110—*Affirming decree—Suit on mortgage—Trial Court decreeing suit in respect of certain items of properties and dismissing it with regard to others—High Court directing on appeal dismissal of entire suit—If affirming decree*

Where the trial Court decreed a suit on a mortgage bond in respect of certain items of the properties covered by the mortgage and dismissed it with regard to the other items, and on appeal by both the parties, the High Court directed the dismissal of the entire suit.

Held, that the decree of the High Court did not affirm the decision of the trial Court and that the decree could not be dissected by holding that in so far as the items of properties in respect of which the suit was dismissed by the trial Court were concerned, there was a decision of affirmance. (*S. K. Ghose and McNair, JJ.*) BANK OF KHULNA, LTD. *v.* JYOTI PRAKASH MITRA. **41 C.W.N 494.**

———S. 110—*Affirming decree—Variation of decree in favour of applicant—Right of appeal.*

Where the High Court on appeal enhances the amount decreed by the trial Court to the applicant for leave to appeal, the variation of the trial Court's decree is no doubt all in favour of the applicant, and he cannot have any appealable grievance against such variation, but nonetheless, the decree of the High Court is not one of affirmance. The applicant is, therefore, entitled to appeal to the Privy Council as of right without showing that some substantial question of law is involved. (*Tek Chand and Skemp JJ.*) HAKIM RAI *v.* GANGA RAM. **181 I.C 248=11 R. L. 794=40 P.L.R 399=A.I.R. 1938 Lah. 836.**

———S. 110—*Affirming judgment on merits—Judges of High Court differing on question of academic interest—If a good ground.*

Where both the Judges of the High Court agree on the merits with the judgment of the Court below, but differ as between themselves on a question of mere academic interest, leave should not on that ground be granted to appeal to

His Majesty in Council. (*Wort, Ag.C.J. and Manohar Lall, JJ.*) Jogendra Narain Singh *v.* Radha Prasad Singh. **178 I.C. 203=5 B.R. 72 =11 R.P. 225.**

———S. 110—*Applicability—Suit for Rs.* 34,300—*Decree for Rs.* 11,950—*Appeal to High Court by both parties—Dismissal of plaintiff's appeal——Defendant's appeal allowed in part and amount reduced to Rs.* 6,080—*Leave to appeal—Grant of.*

In a suit for recovery of Rs. 34,000 the trial Judge passed a decree in favour of the plaintiff for Rs. 11,950. Both the parties appealed to the High Court. Both appeals were heard together and the plaintiff's appeal was dismissed while that of the defendant was accepted in part, the amount of Rs. 11,950 being reduced to Rs. 6,080 The plaintiff applied for leave to appeal and the questions raised in the memorandum of appeal were all questions of fact.

Held, that leave could not be granted as no appeal lay as of right under S. 110. The appeal and the cross-appeal could not be considered together for purposes of S. 110 nor did the fact that a composite decree was prepared in both the appeals make any difference. (*Tek Chand and Skemp, JJ.*) Banarsi Dass & Sons *v.* Delhi Iron Syndicate. **176 I.C. 314=11 R.L. 193= A.I.R. 1937 Lah. 916.**

———S. 110 - *Construction—"Directly or indirectly"—Possible future suits.*

If, in order to make up the prescribed limit of valuation for leave to appeal to the Privy Council, various claims indirectly connected with the subject-matter of the main suit are sought to be added, the indirect relation must not be too remote. The phrase 'directly or indirectly' in S. 110 refers to suits in existence and cannot be stretched to cover suits not yet brought. The indirect relation must be decided with reference to actual circumstances at the time and not to circumstances which are remote. On the other hand the possibility of future suits may be taken into consideration if such suits will be affected by the doctrine of *res judicata*. 35 All. 445; A.I.R. 1925 P.C. 159; A.I.R. 1932 Mad. 125 and A.I.R. 1922 P.C. 257, Disc. and Foll. (*Addison, A C.J. and Din Mahomed, J.*) Bal Raj *v.* Mt. Mahanto. **170 I C. 469=10 R.L. 130=38 P L. R. 767=A.I.R 1936 Lah 31.**

———S. 110—*Construction—"Indirectly"—Possibility of future suits—If enough.*

Under S. 110, C. P. Code, the question whether a decree involves indirectly a claim or question respecting property the value of which is Rs. 10,000 or upwards, must be decided with reference to actual circumstances at the time and not to circumstances, which are remote, and not in particular to a mere possibility that future suits as to all or part of the larger extent of the property alleged to be concerned may be instituted at some time in the future. 43 M.L.J. 728, Foll. (*Costello, Ag.C.J. and Edgley, J.*) Kumar Chandra Singh *v.* Gobinda Das. **42 C. W.N. 298.**

———Ss. 110 and 109 (c)—*Construction—S.* 110 *if to be construed widely—Questions of law involved though valuation less than Rs.* 10,000—*Leave, if can be granted*

'It must always be kept in view that no real mischief can arise from not allowing a very wide construction of S. 110 because such cases, if

worthy of being tried by a higher tribunal, can always be dealt with under sub-S. (*c*) of S. 109. 52 C. 650 (P.C.). Where the value of the subject-matter in dispute on appeal to His Majesty in Council was not upwards of Rs. 10,000 but the value was shown to be about Rs. 9,750 and there were questions of law involved.

Held, leave ought to be granted under S. 109, sub-S. (*c*). (*Roberts, C J. and Dunkley, J.*) Dawsons Bank, Ltd. *v* Maung Mya Thwin. **178 I.C. 447=11 R.R. 236=A.I.R. 1938 Rang. 415.**

———S. 110—*Construction—"Some claim or question to or respecting property of like amount or value"—Meaning of—Increase in value of property between date of trial and date of appeal—If to be taken into account.*

The words "some claim or question to or respecting property, etc." in para. 2 of S. 110, C. P. Code, must be interpreted to mean some claim or question to or respecting property additional to or other than the actual subject-matter in dispute in the appeal. The words cannot be construed to mean that if there were an increase in the value of the property between the date of the trial and the date of the appeal, so that property which was worth less than Rs. 10,000 at the time of the original suit was worth more than that sum at the time of the appeal, there would for that reason be a right of appeal to the Privy Council. That would be a result which the legislature did not evidently intend. (*Broomfield and Tyabji, JJ.*) Govindbhai *v.* Dahyabhai. **I L.R. (1937) Bom 402=170 I.C. 717=10 R.B. 113= 39 Bom.L R. 332=A.I.R. 1937 Bom. 326.**

———S. 110—*Substantial question of law.*

Where the questions sought to be agitated before His Majesty in Council have been subject of consideration by the Courts in the Punjab for a period of over 70 years and the Courts have uniformly arrived at one decision on them and the predecessor-in-interest of the petitioner was a party in several of the cases in which those questions arose and on the strength of those decisions titles have been created for a long time, no substantial question of law is involved in the appeal nor is the case otherwise fit for appeal to His Majesty in Council. (*Tek Chand and Skemp, JJ.*) Ahmad Mukhtar *v.* Hari Ram. **174 I C 265= 10 R L. 363=39 P.L.R. 972=A.I.R. 1937 Lah. 758.**

———S. 110—*"Substantial question of law"—Application of legal principles authoritatively settled.*

Where the legal principles governing the case do not admit of any doubt having been settled authoritatively by the highest tribunal and the real question is one of the application of these principles to the particular facts of the case, no "substantial question of law" arises, on which a certificate for appeal to His Majesty in Council can be granted. (*Tek Chand and Dalip Singh, JJ.*) The Municipal Committee, Amritsar *v.* Rallia Ram. **165 I.C. 735=9 R.L. 296.**

———S. 110—*Substantial question of law—Construction of documents—Question whether property belongs to God or archaka service inam turning upon construction of inam papers—Leave to appeal—If can be granted.*

The question whether the property in suit was a gift to the God or was an archaka service inam, which turns upon the effect of the inam proceedings and upon a construction of the various inam papers cannot be held to involve any substantial question of law so as to justify the grant of leave to appeal to His Majesty in Council. *(Venkatasubba Rao and Abbur Rahaman, JJ.)* VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS. **181 I.C. 988=11 R.M. 889=1938 M.W.N. 298=47 L.W. 393=A.I.R. 1938 Mad. 631=(1938) 1 M.L.J. 487.**

——S. 110—*Substantial question of law—Construction of statute—Decision based on clear language of statute and in accordance with prior Bench decisions—Leave to appeal—If to be granted.*

Where the decision on a point is based on the clear language of a section of a statute in accordance with the view taken previously by several Benches of the High Court, it is hardly proper to treat the matter as involving a substantial question of law within the meaning of S. 110, C. P. Code. *(Venkatasubba Rao and Abdur Rahman, JJ.)* VELAYYA *v.* PRESIDENT, H. R. E. BOARD, MADRAS. **181 I.C. 988=11 R M. 889=1938 M. W.N. 298=A.I.R. 1938 Mad. 631=47 L.W. 393 =(1938) 1 M.L J. 487.**

——S. 110—*Substantial question of law—Decree for arrears of rent against alleged minor—Question whether remedy of minor is suit under S. 99, Agra Tenancy Act, or suit to set aside original decree—If fit one for appeal.*

The applicant against whom a decree for arrears of rent had been obtained by his landlord brought a suit under S. 99 of the Agra Tenancy Act for recovery of possession, alleging that he was a minor on the date of the decree. He was nonsuited on the ground that his proper remedy was a suit to set aside the original decree for rent. Applicant applied for leave to appeal to His Majesty in Council contending that his remedy was a suit under S. 99 of the Agra Tenancy Act and that it was a substantial question of law.

Held, that it having been held by the Court that the proper remedy in such cases was to apply to have the decree set aside and not to sue under S. 99 for recovery of possession, that must be taken to be good law, and that the question involved was not an important or substantial question of law which required a reference to the Privy Council. *(Drake Brockman, S. M. and Knox, J. M.)* JAGADAMBA PRASAD *v.* RAM GOPAL SINGH. **1936 R.D. 120.**

——S. 110—*Substantial question of law—Interpretation of previous decision.*

Where the decision regarding the title to certain property is contained in a decision to which the petitioner was a party but the petitioner seeks to show that no decision was given in respect of his title, this is not a question of law but is a question of the interpretation of that decision. *(Middleton, J. C. and Mir Ahmad, A.J. C.)* SECRETARY OF STATE *v.* RADHA DEVI. **169 I. C. 926=10 R. Pesh. 11=A.I.R 1937 Pesh. 61.**

——S. 110—*Substantial question of law—Matter in dispute settled by statute.*

Where the whole object of the appeal which is sought to be argued before the Privy Council is to challenge the act of the Executive Government in taking the estate of the applicant under the management and superintendence of the Court of Wards, a matter which is settle by statute law contained in the U. P. Court of Wards Act, the appeal does not involve a substantial question of law such as would justify the High Court in granting leave to the applicant to appeal to His Majesty in Council. *(Nanavutty and Zia-ul-Hasan, JJ.)* JAI INDRA BAHADUR *v.* DEPUTY COMMISSIONER, KHERI. **12 Luck. 15=160 I.C. 171=8 R.O. 249=1936 O.W.N. 191=A.I.R. 1937 Oudh 132.**

——S. 110—*Substantial question of law—Misapplication of well defined legal principles.*

Where the legal principles such as were applied in the case are well defined a misapplication of such principles does not raise any substantial question of law. *(Stone, C. J. and Niyogi, J.)* GANPATRAO *v.* ISHWAR SINGH. **I.L.R. (1940) Nag 29=180 I.C. 827=11 R N. 399=A.I.R. 1938 Nag. 482.**

——S. 110—Substantial question of law—Purchase of decree—Zarpeshgi lease for term of years in lieu of part consideration for sale—Interest on Zarpeshgi in shape of rents and profits—If expenditure incurred solely for earning income—If can be set-off against interest on decree amount—Question as to—If fit one for appeal to Privy Council. *See* INCOME-TAX ACT, Ss. 10 AND 12. **1939 I.T.R. 260.**

——S. 110—*Substantial question of law—Question of proof of custom, though incidentally involving interpretation of documents.*

Where the proof of an alleged custom is confined to two documents, though their interpretation is challenged in appeal, it could not be said that a substantial question of law is involved within the meaning of S. 110, C. P. Code, as the real question is whether the custom set is proved or not and the interpretation of the documents was only incidental thereto. *(Thomas, C. J. and Zia-ul-Hasan, J.)* CHHAB NATH KUAR *v.* SETRAJ KUAR. **178 I.C. 658=11 R.O. 122=1938 O.W. N. 1132=1938 O.A 913=1938 A.W.R. (C.C.) 129=A.I.R 1939 Oudh 60.**

——S. 110—*Substantial question of law—Rejection of affidavit filed by debtor under R. 79, Calcutta Insolvency Rules.*

Where an Insolvency Judge rejected an affidavit of the debtor which purported to be a notice under R. 79, the Calcutta Insolvency Rules, 1910, on the ground that it was filed out of time.

Held, that there was no substantial point of law within the contemplation of S. 110, C. P. Code, whether or not the Judge was right in rejecting the affidavit. *(Costello, A. C. J. and Edgley, J.)* AHMAD MAHOMED PARUK *v.* PRAPHULLA NATH TAGORE. **I.L.R. (1938) 1 Cal. 13=181 I.C. 251=11 R.C. 795=A.I.R. 1939 Cal. 35.**

——S. 110 — *Valuation—Ascertainment—Immovable property — Multiples prescribed by United Provinces Encumbered Estates Act, if applicable.*

The market value of immovable property is usually determined with reference to instances of sales. The multiples prescribed by the Encumbered Estates Act were fixed. For the purposes of that particular act and as such they cannot be made the basis of calculating values of properties generally. *(Thomas, C. J. and Zia-ul-Hasan, J.)* RAFI UDDIN AHMAD *v.* KANIZ ABID. **1938 A.W. R. (C.C.) 112=1938 O.W.N. 1101=1938 O.L.R.**

478=1938 O A. 922=178 I.C. 250=A.I.R. 1939 Oudh 1.

——S 110—*Valuation—Amount or value of the "subject-matter" of the suit in the Court of the first instance—Meaning of.*

The words 'the amount or value of the subject-matter of the suit in the Court of the first instance' mean the amount or value at the institution of the suit, and not at the date of the decree in the Court of first instance which meaning is not affected by the alternative condition which follows in the section. 57 I A 56, Foll. (*Addison, A. C. J. and Din Mahomed, J.*) BAL RAJ *v.* MT. MAHANTO **170 I.C. 469=10 R.L. 130=38 P.L. R. 767=A.I R. 1936 Lah 31.**

——S. 110 — *Valuation—Computation of—Mortgage decree—Appeal—Validity of mortgage affirmed but rate of interest varied—Amount of variation less than Rs.* 10,000—*Leave, if can be granted.*

Where a trial Court grants a decree on a mortgage, but the Court of appeal while affirming the validity of the mortgage, varies the rate of interest decreed but the amount of variation is less than Rs. 10,000 leave to appeal to the Privy Council cannot be granted, for the question of interest is not of sufficient value to amount to Rs. 10,000 and as to the validity of the mortgage the findings of both the Courts were concurrent. (*Bennet and Verma, JJ.*) WIQAR ALI KHAN *v.* NARAIN DAS. **I.L R (1939) All. 443=182 I C 367=12 R.A. 1=1939 A.L J 62=1939 A.W.R. (H C.) 115=A I.R. 1939 All 322.**

——S. 110—*Valuation—Construction of agreement embodied in compromise decree—Dispute as to—Decision affecting party's interest in property worth over Rs.* 10,000—*Right to grant of certificate.*

Where the construction of an agreement between the parties embodied in a compromise decree is in dispute and the decision of the High Court affects the interest of a party in the suit property, which is of far greater value than Rs. 10,000, that party is entitled to a certificate under the second clause of S. 110, C. P. Code, permitting an appeal to His Majesty in Council. (*Leach, C. J and Somayya, J.*) GURUVAPPA NAICKER *v.* MOUNAGURUSWAMI NAICKER. **I.L.R (1939) Mad 838=1939 M.W.N. 607=187 I C. 731=12 R.M. 739=49 L.W 786=A.I.R. 1939 Mad. 742=(1939) 2 M.L.J 36 (2).**

——S. 110—*Valuation—Partition suit—Whole estate valued at over Rs.* 25,000—*Plaintiff's share valued at less than Rs.* 10,000—*Dismissal of suit—Appeal—Decree allowing claim to property worth less than Rs.* 10,000—*Leave to appeal to Privy Council—Competency.*

In order to satisfy the conditions as to valuation in S. 110, C. P. Code, the suit must involve rights and claims to property which rights and claims are worth Rs. 10,000 or upwards. In a partition suit it is the particular share claimed which has to be looked at and not the entire estate for purpose of valuation. In a suit for partition, the plaintiff valued the entire estate as a whole at over Rs. 25,000 and his own share at Rs. 8,662-5-4. The defendants denied that the plaintiff was a coparcener and their plea was upheld and the suit was dismissed. On appeal, the High Court held that the plaintiff was a coparcener and allowed his claim to property of the value of Rs. 5,162-5-4. The defendants applied for leave to appeal to the Privy Council.

Held, that the relief being at less than Rs 10,000, the decree in appeal did not involve any claim or question respecting property of the prescribed value, and that leave to appeal should not be granted; the fact that the decree in appeal directed partition of an estate worth over Rs. 25,000 did not bring the case within the second clause of S. 100 and did not justify the grant of leave to appeal. (*Leach, C.J. and Madhavan Nair, J.*) SUKKIRA GOUNDAN *v.* PALANI GOUNDAN. **I.L R. (1938) Mad 923=47 L W. 591=182 I C. 913=12 R.M. 166=1938 M.W.N. 433=A.I.R. 1938 Mad. 666=(1938) 1 M.L.J. 728.**

——S. 110—*Valuation—Suit property worth less than Rs.* 10 000—*Decree for mesne profits of suit property obtained in separate suit—Decretal amount, if can be added.*

The subject-matter of a suit in the Court of the first instance was less than Rs. 10,000. In order to make up the prescribed valuation for appeal to the King in Council, it was sought to add the amount of the decree for mesne profits of the property, which decree was obtained in a separate suit.

Held, that the decretal amount could not be added so as to increase the value of the appeal to the Privy Council as it did not fall within Cl. 2, S. 110. 39 M. 843 and 57 I.A 56, Rel. on. (*Addison, A.C.J. and Din Mahomed J.*) BAL RAJ *v.* MT. MAHANTO. **170 I C. 469=10 R L. 130=38 P.L. R. 767=A.I.R. 1936 Lah. 31.**

——S. 110—*Valuation—Partition suit—Share valued at Rs.* 5,500—*Decree awarding share to plaintiff and to one defendant—Appeal—Reversal and dismissal of suit—Shares of plaintiff and of one defendant—If to be taken into account for purposes of valuation for leave to appeal to Privy Council.*

A suit for partition and recovery of the plaintiff's one-sixth share which was valued at Rs. 5,500 for purposes of jurisdiction was decreed by the trial Court, the decree also providing that defendant No. 4, who was a brother of the plaintiff, should also recover his one sixth share, with mesne profits equally with the plaintiff, on payment of the necessary stamp duty. Defendants 1 to 3 appealed to the High Court, valuing the appeal at Rs. 5,500 for purposes of jurisdiction. The High Court set aside the decree of the trial Court and dismissed the suit. Plaintiff and defendant No. 4 applied for leave to appeal to the Privy Council.

Held, that for purposes of S. 110, the decree to be looked at was the decree as it affected the interests of the party or parties prejudiced by it, that the decree having affected the interests of both the plaintiff and defendant No. 4, it involved a question respecting property of the value of Rs. 10,000 or upwards, and that though the share of defendant No. 4 was only involved indirectly, that was sufficient for the purpose of the second paragraph of S. 110, C. P. Code, and the applicants were therefore entitled to leave under the section, irrespective of the question whether there was a substantial question of law, as the High Court had reversed the decree of the trial Court. (*Broomfield and Sen, JJ.*) APPA TRIMBAK *v.* VAMAN GOVIND. **I.L.R. (1937) Bom. 705=168**

I.C. 599=9 R.B. 373=39 Bom.L.R. 156=A.I.R. 1937 Bom. 181.

——S. 110—*Valuation—Plaintiff putting lower valuation on plaint—Whether estopped from varying the valuation for purposes of appeal to Privy Council.*

The mere fact that a lower valuation was put on the plaint for the purposes of court-fee does not operate as estoppel against the plaintiff for the purposes of a Privy Council appeal so as to prevent him from showing that the real value of the subject-matter in suit in the Court of first instance was Rs. 10,000 or upwards, provided the question of valuation has not been raised and decided at an earlier stage by the Court and provided also the defendant has not been led to act upon such valuation for the purpose of choosing forum for his appeal. (*S. K. Ghose and McNair, JJ.*) RADHIKA NATH BISWAS *v* MIDNAPORE ZAMINDARI CO., LTD. **41 C W N. 289=64 C. L.J. 561=171 I.C. 163=10 R. C. 228=A.I.R 1937 Cal. 292.**

——**S. 110** — *Valuation—Rent suit — Decision allowing abatement of rent for diminished area.*

If the decision in a suit for rent goes to the root of the contractual relation between the parties and determines the rights and liabilities of the parties on the basis of the lease for all time to come, the real value of the subject-matter of the suit could be taken to be beyond its apparent value. But this principle has no application where what the Court decides in substance is that there was failure on the part of the landlord to put the tenant in possession of some part of the demised land, and for the period in suit, he is entitled to reduced rent corresponding to the area in actual possession of the tenant. In such a case, the sum of money actually at stake in the suit would represent its true value. (*S. K. Ghose and Mukherjea, JJ.*) RAM LAL DUTTA *v.* DHIRENDRA NATH ROY. **43 C.W.N 239.**

——S. 110—*Valuation given in plaint—If can be enhanced by plaintiff applicant.*

Where the plaintiff applies for leave to appeal to the Privy Council, it is not open to him to allege that the valuation given by him in his own plaint was too low and ask for its enhancement for the purposes of S. 110, C. P. Code. (*Bennet and Varma, JJ.*) SRI KRISHNA MOHAN *v.* PURSHOTTAM DAS. **185 I.C. 690=12 R.A. 346=1939 A. W.R. (H.C.) 648=1939 A.L.J. 751=A.I.R. 1939 All. 695.**

——**S. 110, Para. 1**—*Valuation of subject-matter in suit and appeal—Suit for declaration, injunction, possession and mesne profits—Claim valued at less than Rs.* 10,0 0 *in suit and appeal—Application for leave to appeal—Value of properties exceeding Rs.* 10.000—*Right to certificate —Valuation in lower Court—If bar to right—Approbate and reprobate—Applicability of rule.*

In a suit for declaration of title to certain properties, for an injunction and possession and mesne profits, plaintiff valued his claim at Rs. 9,760-5-6 as follows: Rs. 200 for declaration and injunction; Rs. 4,427-5-6 for possession of the properties in defendant's possession calculated at 7½ times the assessment; Rs. 333 for his share of the properties sold; and Rs. 4,800 for mesne profits. The suit was dismissed and plaintiff appealed to the High Court adopting the same valuation The appeal was also dismissed. The plaintiff then applied for leave to appeal to the Privy Council under para. 1 of S. 110, C. P. Code, claiming that the amount or value of the subject-matter of the suit and appeal was more than Rs. 10,000. It was found that the real value of the properties involved was far above Rs. 10,000.

Held, that the prayer for a declaration could only be valued on a notional basis, and in the present case the suit as a whole could only have a notional valuation even for purposes of jurisdiction; that the plaintiff was not estopped nor barred by the rule that a man cannot approbate and reprobate from showing that the value of the subject-matter of the suit and the appeal was Rs. 10,000 or upwards within the meaning of S. 110, C. P. Code, and the plaintiff was consequently entitled to a certificate of leave to appeal under S. 110, para. 1. (*Broomfield and Tyabji, JJ.*) GOVINDBHAI *v.* DAHYABHAI. **I L.R. (1937) Bom. 402=170 I.C. 717=10 R.B. 113=39 Bom. L.R. 332=A.I R. 1937 Bom. 326.**

——**S. 110, Para. 2**—*Applicability—Conditions.*

The condition laid down in the second paragraph of S. 110, C. P. Code, is independent and self-sufficient and is not in any way dependent on the fulfilment of both or either of the conditions in the first paragraph. The requirements of the second paragraph will be complied with, if there is some claim or question directly or indirectly by the High Court's order either as to or respecting property of Rs. 10,000 or upwards. Where the plaintiff claims to enforce a charge and obtain a decree for sale with option to sell any part of the mortgaged property, there would be an appeal as of right under the second paragraph, if the total value of the property sought to be sold exceeds Rs. 10,000, even though the pecuniary liability of the property is limited to a sum less than Rs. 10,200. (*Sulaiman, C.J. and Bennet, J.*) NADIR HUSAIN *v.* MUNICIPAL BOARD, AGRA. **I L. R. (1937) All. 405=167 I C. 670=9 R A. 558= 1937 A.L.J 38=1936 A.W R. 1297=1937 A.L.R. 214=A.I.R 1937 All 169.**

—— **S. 110, second clause**—*Construction.*

The second clause of S. 110, C. P. Code, does not authorise an appeal to His Majesty's Privy Council in respect of property for which no claim has ever been made or in respect of which no question has ever arisen in any Court. The words "or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value" refer to suits in existence and not to suits in *gremio futuri.* (*King, C.J. and Zia-ul-Hasan, J.*) MADHO PRASAD SINGH *v.* SHER BAHADUR SINGH, **12 Luck 27=160 I.C. 799=8 R.O. 274=1936 O.W N. 181=A I.R. 1936 Oudh 181.**

——**S. 110, Para. (2)**—*Interpretation.*

Where the value of the subject-matter in dispute on appeal to the Privy Council is admittedly below Rs. 10,000, but the petitioner alleges that there is another appeal pending on behalf of another party affected by the decree and that the value would be more than Rs. 10,000 if the value of the property in that appeal be taken into account but it is admitted that the decision in appeal, for which leave is sought, could have no effect on the other appeal whether by way of *res judicata* or in any other way, the order cannot be held directly or indirectly to involve a claim or question to or respecting property involved in the other appeal within the meaning of Cl. (2), S. 110

and appeal to the Privy Council does not lie. (*Addison and Abdul Rashid, JJ.*) PUNJAB NATIONAL BANK, LTD. *v.* MT. JIWAN. **171 I.C. 433=10 R.L. 204=A.I.R. 1937 Lah. 95.**

———**S. 110, Para. (2)**—*'Property'—Meaning of—Suit by some of heirs for maintenance allowances—Other heirs, though parties, not making claim—Plaintiffs, if can rely on value of entire allowances payable to all heirs.*

The word 'property' in the second paragraph of S. 110, C. P. Code, must be taken to be the property of the applicants and it is the extent to which the decree has operated to the prejudice of the applicants that determines the value of the property for the purpose of the section. In a suit by some of the heirs of a certain person for maintenance allowances, the plaintiffs are entitled to rely only upon the value of their own share and not upon the value of the entire monthly allowances payable to all the heirs, when the other heirs, though made parties, have not made any claim. In such circumstances, it cannot be said that the decision in the suit will involve directly or indirectly the interests of others who have made no claim. (*S.K. Ghose and Mukherjea, JJ.*) SAYEDULLA *v.* K. HABIBULLA. **43 C.W.N. 432.**

———**S. 111**—*Scope—Decision of single Judge—Leave to appeal to Division Bench refused—Appeal to Privy Council.*

The prohibition in S. 111 is unconditional. Where therefore the decision sought to be appealed from is a decision of a single Judge of the High Court, leave to appeal from it to Division Bench having been rejected, an appeal to His Majesty in Council is prohibited by S. 111. (*Wort and Rowland, JJ.*) PARMESHWAR DAYAL SINGH *v.* BRINDABAN CHANDRA SARKAR. **160 I.C. 150 (1)=8 R.P. 343 (1)=17 Pat.L.T. 173=A.I.R. 1936 Pat 106.**

———**S 112**—Scope of discretion under. *See* C. P. CODE, Ss. 109 AND 112—RIGHT OF APPEAL. **1939 A.W.R. (P.C.) 76=A.I.R. 1939 P.C. 122=(1939) 2 M.L.J. 181 (P.C.).**

———**Ss. 114 and O. 47, R 1**—*Applicability—Second appeal—Application for review on ground of discovery of material evidence—Maintainability.*

Though both S. 114 and O. 47, R. 1, C. P. Code, are general in their terms and apply to second appeals, yet it is not open to the High Court to entertain an application for review in a second appeal on the ground of discovery of material evidence, especially when the applicant for review is not shown to have acted diligently in the matter. (*Fazl Ali, J.*) BADRI DAS *v.* BEHARI LALL KAMANI. **1939 P.W.N. 909.**

———**S. 115.**

- **Amendment of decree.**
- **Appeal barred.**
- **Appealable order not appealed against.**
- **Applicability.**
- **Application under.**
- **Arbitration and award.**
- **Burden of proof.**
- **Case decided.**
- **Commission.**
- **Construction of document.**
- **Conversion of appeal.**
- **Court.**
- **Court-fee.**
- **Declaring ex parte.**
- **Defective judgment.**

- **Delay.**
- **Discretion.**
- **Erroneous decision.**
- **Error of law.**
- **Ex parte decree.**
- **Finding of fact.**
- **Illegality or material irregularity.**
- **Interference.**
- **Interlocutory order.**
- **Jurisdiction.**
- **Leave to sue as pauper.**
- **Limitation.**
- **Locus standi.**
- **Material irregularity.**
- **Miscellaneous proceedings.**
- **New case.**
- **New issue.**
- **New plea.**
- **Other remedy open.**
- **Powers of High Court.**
- **Procedure.**
- **Revision.**
- **Scope.**
- **Stay of suit.**
- **Subordinate Court.**

Amendment of decree.

———**S. 115**—*Amendment of decree—Application for—Rejection by lower Court—Revision.*

A revision lies against an order of the lower Court rejecting an application for amendment of a decree. A.I.R. 1929 Lah. 400, Ref. to. (*Coldstream, J.*) MT. SANTI *v.* MULKH RAJ. **39 P.L.R. 769=175 I.C. 634=10 R.L. 28=A.I.R. 1937 Lah. 894.**

———**S. 115**—Amendment on application under Ss. 151 and 152—Amended decree appealable—Revision—Competency. *See* C. P. CODE (1908), **Ss. 47** AND **115. A.I.R. 1938 Lah. 4.**

———**S. 115**—Amendment of decree—Substantial amendment—If revisable. *See* C. P. CODE, Ss. 152 AND 115. **1938 A.M.L.J. 88.**

———**S 115**—Amendment of pleadings—Interference—Grounds. *See* C. P. CODE, O. 6, R. 17 AND S. 115. **1940 O.W.N. 500.**

Appeal barred.

———**S. 115**—Appeal barred—Order declaring appeal has abated—Second appeal and reference incompetent—Appeal—If can be treated as revision. *See* AJMERE COURTS REGULATION, S. 15. **1935 A.M.L.J. 102.**

Appealable order not appealed against.

———**S. 115**—*Appealable order not appealed against—Revision—Interference.*

It is the settled practice of the Patna High Court that the revisional powers of the High Court are not exercised in cases in which a party entitled to appeal has not appealed. (*Khaja Mohamad Noor and Chatterji, JJ.*) RAZAUR RAHMAN *v.* UDIT SINGH. **18 Pat. 694=185 I.C. 135=12 R.P 303=20 Pat.L.T. 492=1939 P.W.N. 530=A.I.R. 1939 Pat. 570.**

Applicability.

———**S. 115**—*Applicability—Application to Civil Court under S. 476, Cr. P. Code, in respect of offence committed in civil proceeding—Procedure governing—Revision—If governed by S. 115, C.P. Code or S. 439, Cr. P. Code.*

A Civil Court does not cease to be a Civil Court when it is considering an application made to it under S. 476, Cr. P. Code, in respect of offences, alleged to have been committed in relation to a proceeding in that Court, and if for the purpose of that application it remains a civil Court, it must be governed by the provisions of the C. P. Code. An application for revision arising out of proceedings in a civil suit must therefore be dealt with as a civil revision petition and similar application arising out of a criminal proceeding must be dealt with as a criminal revision petition. (*Leach C.J., King and Krishnaswami Ayyangar, JJ.*) Kumaravel Nadar *v.* Shanmuga Nadar. **51 L.W. 542 (2)=1940 M.W.N. 472 (2)=A.I.R. 1940 Mad. 465=(1940) 1 M.L.J. 719 (F.B.).**

——**S. 115**—Applicability—Order of Civil Court under S. 476-B, Cr.P. Code—Revision—Procedure—If governed by S. 115 or S. 439, Cr. P. Code—Nature of proceedings. *See* Cr. P. Code, S. 439. **40 Bom.L R. 297 (F.B.).**

——**S. 115**—Applicability—Order of Munsif refusing to set aside sale under S. 174, B. T. Act—Revision. *See* B. T. Act, S. 174. **18 Pat.L.T. 938=A.I R. 1938 Pat. 21 (S.B.).**

——**S. 115**—*Applicability—Presidency Small Cause Court.*

S. 115, C. P. Code, applies to suits and proceedings in the Presidency Small Cause Court. 41 Cal. 323, Doubt, but Foll. (*Lort Williams, J.*) Mahomed Yusuf *v.* Abdul Majid. **I.L.R. (1938) 2 Cal. 162=178 I.C. 111=42 C.W.N. 602=11 R. C. 322=A.I.R. 1938 Cal. 671.**

——**S. 115**—*Applicability—Proceedings under Madras Estates Land Act—Revision—Order refusing to set aside rent under Ss.* 131 *and* 205.

It is open to the High Court to interfere in revision with an order of the Sub-Collector refusing to set aside a rent sale under S. 131 of the Madras Estates Land Act or with an order of the Collector under S. 205 of the Act on revision against it. (*Varadachariar, J.*) Ellappa Naiker *v.* Sivasubramania Maniagaran. **169 I.C. 244=9 R.M. 725=1936 M.W.N. 1175=44 L.W. 567=A.I.R. 1937 Mad. 293=71 M.L.J. 607.**

Application under.

——**S. 115**—*Application under—Omission to produce copy of decree or order sought to be revised—If fatal—Copy of decree should ordinarily be affixed to application—Failure to do so is not however fatal to application.*

In case of a revision application against an order confirming an award and ordering a decree to be drawn up, ordinarily a copy of the decree should be annexed to the application, for the decree is drawn up in the terms of the award, and it is the decree which is to be set aside if the application is successful, but failure to do so is not fatal to the application and it should not be rejected on that ground alone. (*Davis, J. C. and Lobo, A J.C.*) Hassomal Villaitrai *v.* Kishinchand Chotemal. **30 S.L.R. 271=166 I.C. 365=9 R.S. 142=A.I.R 1936 Sind 172.**

Arbitration and award.

——**S. 115**—*Arbitration—Application to revoke submission on ground of want of jurisdiction of arbitrator—Refusal of Court to decide question of jurisdiction—Effect—Revision—Interference.*

Where a party to a submission to arbitration applies for leave to revoke the submission on the ground that the matter in dispute was beyond the jurisdiction of the arbitrators, it is essentially a question which the Court should decide; and if it refuses to decide the question of jurisdiction, the refusal amounts to a failure to exercise a jurisdiction affording a ground for interference by the High Court in revision under S. 115, C. P. Code. (*Cornish, J.*) Madura Mills Co., Ltd. *v.* Krishna Ayyar. **1937 M.W.N. 518=45 L.W. 405=10 R.M. 390=171 I.C. 690=A.I.R. 1937 Mad. 405.**

——**S. 115**—*Arbitration—Arbitrators claiming certain amount as fees—Amount grossly reduced by Court without hearing them—Material irregularity.*

Arbitrators in a case claimed a certain amount as their fees for their work in the case. The Court thinking the fees excessive reduced the amount to less than 1/7th without giving any opportunity for the arbitrators to put up their case.

Held, that failure of the Court to hear the arbitrators fell within purview of Cl. (*c*) of S. 115, C. P. Code. 53 I.A. 27 Rel. on. (*Rupchand Bilaram and D. C. Mehta, A. J. Cs.*) Khan Chand Gopaldas *v.* Mulchand Khialdas. **110 I.C. 361 (2)=8 R.S. 121=A.I.R. 1936 Sind 1.**

——**S. 115**—*Arbitration—'Award'—Court referring matter to arbitrator and umpire on refusal of another arbitrator to act—Decree on such award—Revision—If lies.*

The parties to the suit agreed to refer their dispute to two arbitrators and on difference between them the award of the umpire agreeing with that of one of the arbitrators was to be final. On refusal of one of the arbitrators to act, the Court on the defendant's application asked the other arbitrator and the umpire to make the award in spite of an objection by the plaintiff. A decree on award was passed and the plaintiff came in revision.

Held, that the only remedy open to the plaintiff to challenge the order complained against was to go in revision after the decree was passed. The order passed by the Court complained against referring the dispute to arbitrator and the umpire being an interlocutory order would not have been open to revision before the decree on award. The revision after the decree on award was therefore proper. (*Rupchand Bilaram and Haveliwala, A J.Cs.*) Kishnomal Hundomal *v.* Waparimal Jethomal. **170 I.C. 487=10 R.S. 62=A I.R. 1937 Sind 171.**

——**S. 115**—*Arbitration—Award—Court erroneously construing—Material irregularity.*

A Court acts with material irregularity in the exercise of its jurisdiction in placing a construction on an award which is not in accordance with the evidence given by the arbitrator himself. (*Bhide, J.*) Kanhaya *v.* Sheo Karan. **39 P.L. R. 582.**

——**S. 115**—*Arbitration—Award—Revision.*

The High Court is generally reluctant to interfere with awards made in arbitration, the parties having been content to submit the matter in dispute to lay Judges of their own choosing. But if there is a question of jurisdiction involved which is important and which goes to the root of the matter, the High Court may and will interfere to remedy injustice. (*Davis, J.C. and Mehta, A.J C.*) Ganga Ram *v.* Keshavdas. **170 I C. 102=10 R. S. 32=30 S L.R. 478=A.I.R. 1937 Sind 174.**

——**S. 115**—*Arbitration—Award—Decree on—Revision.*

A revision should not be entertained against a decree passed in terms of an award, when the policy of the law is that there should be no appeal from such a decree. (*Agha Haidar, J.*) MUSLIM BANK OF INDIA, LTD., LAHORE *v.* MUHAMMAD HAYAT **38 P.L.R. 783.**

——S. 115—Arbitration—Award—Decree on, overruling objection to validity of reference—Interference in revision. *See* C. P. CODE, SCH. II, PARAS. 15 AND 16. **1936 A.W.R 1223=1936 A.L.J. 1333=A.I.R. 1937 All. 65 (F.B.).**

——S. 115—*Arbitration—Award—Execution of award which is a nullity—Revision.*

Where the executing Court dismissed the application for execution of an award as being nullity and District Judge on appeal directed that execution should proceed,

Held, the question went to the root of the jurisdiction. If decree was nullity no Court had jurisdiction to execute it and hence revision lay. (*Bhide, J.*) MT GHULAB BANO *v.* ANJUMAN IMDAD BAHMI QARZA. **169 I.C 879=10 R.L. 53 =39 P.L.R 139=A.I.R. 1937 Lah. 63.**

——S. 115—*Arbitration—Award—Objection to filing of unregistered award not taken in lower Courts—Award filed—Interference in revision.*

Where no objection was taken in the lower Courts to the filing of a private award on the ground that it was not registered,

Held, that powers of revision could not be exercised as had this point been raised in the trial Court the award could have been registered during the trial and this could have cured the irregularity. (*Jack and Patterson, JJ*) BRINDABAN CHANDRA *v.* KASHI CHANDRA. **171 I.C. 507 =10 R.C. 272=A.I.R. 1937 Cal. 201.**

——S. 115—*Arbitration—Award—Order on award—Interlocutory order*

The arbitration proceedings referred by a Court during the pendency of a suit or merely a ramification of the main suit which is still pending and which would be disposed of on the termination of these proceedings. The order of the Court passed on an award of the arbitrator is therefore an interlocutory order and no revision lies against it. (*Agha Haidar, J.*) ASA *v.* MT. BHURAN. **163 I.C. 380=9 R.L. 10=38 P.L.R. 725=A.I.R. 1936 Lah. 466.**

——S. 115—*Arbitration—Award—Order refusing to set aside award—Revision.*

Though, ordinarily, a revision application will not lie to set aside an award, a revision application will lie under S. 115, C. P. Code, on the question of jurisdiction. (*Davis, J.C. and Lobo, A.J.C.*) HASSOMAL VILLAITRAI *v.* KISHINCHAND CHOTEMAL **30 S.L.R 271=166 I.C. 365=9 R.S. 142=A.I.R 1936 Sind 172.**

——S 115—*Arbitration—Award—Order setting aside award.*

An application for revision is not maintainable against an order setting aside an arbitration award while the case has not been fully decided. (*Sulaiman, C.J. and Bajpai, J.*) TULSHI RAM *v* BINDA BAN DAS. **58 All 946=164 I.C. 722=9 R.A. 185=1936 A.W.R 487=1936 A.L.J. 547.**

——S. 115—*Arbitration—Order superseding, reference to arbitration.*

Arbitration proceedings taken in the course of a pending suit are an integral part of the suit or a branch of the same and are not separate "cases" distinct from the main suit. An order superseding the reference to arbitration is, therefore, not open to revision. (*Agha Haidar, J.*) GULAB SINGH JOHRI MAL *v.* DHARMPAL DALIP SINGH. **160 I.C 1052=8 R.L. 655=38 P.L.R. 121=A.I.R. 1936 Lah. 538.**

——S. 115—Arbitration—Setting aside of award and supersession of arbitration—If a case decided. *See* C. P. CODE, S. 115—CASE DECIDED. **1938 A.L.J 813 (F.B.).**

——S. 115 and Sch. II, Para. 15—*Arbitration—Award—Order setting aside—Revision, if lies.*

The proceedings for arbitration in the course of a pending suit are of an interlocutory character and part of the suit itself and hence an order setting aside an award filed by an arbitrator is not revisable by the High Court. (*Hamilton and Bennet, JJ.*) BAIJNATH *v.* CHANDIKA PRASAD. **1939 O.W.N 751=183 I.C 837=12 R.O. 80 (1) =1939 O.L.R. 575=1939 O.A. 639=1939 A.W.R. (C.C.) 108.**

——S. 115—*Arbitration—Award—Revision—Powers of Court.*

The powers of a Court of revision are strictly confined within the limits prescribed by S. 115, C. P. Code, and, unless a judgment is vitiated by any of the defects specified therein, no interference with it can be made by the revising Court. This principle is all the more applicable in cases of revision from an order making an award a rule of Court. (*Addison and Din Mohammad, JJ.*) TEJA SINGH *v.* ATMA SINGH. **177 I.C. 351=11 R.L. 299=40 P.L.R. 651=A.I.R. 1938 Lah. 434.**

——S. 115 and Sch. II, Para. 15—*Arbitration—Award—Setting aside award and superseding arbitration—Revision if lies.*

An order passed under Sch. II, Para. 15, C. P. Code, in a pending suit setting aside an award and superseding the arbitration, is not open to revision under S. 115. C. P. Code. The powers of the High Court are discretionary and in view of the fact that the order can be challenged in the appeal from the decree it would lead to unnecessary prolongation of the proceedings in the trial Court if a revision is entertained and so should be avoided. (*Hamilton and Srivastava, JJ*) NABI MAHOMED KHAN *v.* MAHOMED HASAN. **183 I.C. 378=1939 O.A. 594=1939 A.W.R. (C.C.) 101=1939 O.L.R. 503=12 R.O. 31=1939 O.W.N. 716=A.I.R. 1939 Oudh 238.**

Burden of proof.

——S. 115—*Burden of proof—Mistake as to—Revision.*

A mistake as to onus of proof gives rise to a revision petition. (*Dalip Singh, J.*) SHIB LAL *v.* MST. GOPANDI **41 P.L.R. 513=185 I.C. 613=12 R.L. 305=A.I.R. 1939 Lah. 562.**

——S. 115 -*Burden of proof wrongly laid—Material irregularity.*

When there is a perverse decision on a question of law or procedure, a decision being perverse when it is a conscious departure of some rule of law or procedure, Courts will interfere. Where a mortgage bond was on the face of it discharged, and in the possession of the obligor,

Held, it was material irregularity to make the latter prove the fact of discharge. It was for the plaintiff, who sued on mortgage to prove the loss of the document and further to show that the debt was subsisting. (*Stodart, J.*) NATESAN CHETTIAR *v.* MARIYAYEE AMMAL. **163 I.C. 809=9 R.M. 67=A.I.R. 1936 Mad. 526.**

Case decided.

——**S. 115**—*"Case decided"—Application for stay under S. 7 (1) (a), U.P. Encumbered Estates Act—Dismissal—Revision.*

The proceeding started by the filing of an application under S. 7 (1) (*a*) of the U. P. Encumbered Estates Act is a fresh proceeding and, therefore, a case which terminates as soon as the application is dismissed. There is, therefore, a "case decided" within the meaning of S. 115, C. P. Code, justifying interference by the High Court in revision. (*Sulaiman, C.J. and Harries, J.*) BABU RAM *v.* MANOHAR LAL. **I.L.R. (1938) All. 22=173 I.C. 157=1938 A.L R 98=10 R.A. 466=1937 A.L.J 886=1938 R.D. 84=1937 A.W. R. 986=A.I R. 1938 All. 6.**

——**S. 115**—*"Case decided"—Arbitration—Award—Order setting aside—Revision*

Whether an order does or does not decide a case within the meaning of S. 115, C.P.Code, must be considered in each case. An order of the Court setting aside an award under Para 15 of Sch. II, C. P. Code, and fixing the suit for final hearing does not decide a case within the meaning of S. 115. (*Davis, J.C, Lobo and Weston, JJ.*) KISHINCHAND *v.* TAKHITRAM. **I.L.R. (1940) Kar. 22=183 I C. 724=12 R S. 75=A I.R. 1939 Sind 241 (F.B.).**

——**S. 115**—*'Case decided'—Arbitration—Award—Setting aside of award and supersession of arbitration—Revision—Competency.*

A Court cannot be considered to have decided a case within the meaning of S 115, C. P. Code, where it has set aside the award and superseded the arbitration pending a suit which is consequently to be tried by the Court. (*Bennet, Ag C.J., Ismail and Verma, JJ.*) GOVIND DAS *v* INDRAWATI. **I.L.R (1938) All. 805=1938 A.L.J 813=177 I.C 981=11 R.A. 238=1938 A.W.R (H C.) 605=1938 A.L.R. 804=A.I.R. 1938 All. 557 (F.B.).**

——**S 115**—Case decided—Arbitration—Reference through Court—Award—Award of fees to arbitrator by Court—Revision—Competency—Interference. *See* C. P. CODE, SCH. II, PARA. 13. **I.L.R. (1940) Kar. 34.**

——**S. 115**—*'Case decided'—Dismissal of application under S. 7 of the U. P. Encumbered Estates Act.*

The dismissal of an application under S. 7 of the U. P. Encumbered Estates Act is the termination of a proceeding and hence comes within the purview of the words 'case decided' within the meaning of S 115 C. P. Code. (*Rachhpal Singh and Ismail, JJ.*) MOHAMMAD MAQSUD ALI KHAN *v.* ROOP CHAND. **1940 A L.J. 351=1940 A.W.R. (H.C.) 364=A.I.R. 1940 All. 387.**

——**S. 115**—*"Case decided"—Execution proceedings—Application for stay of stranger not party to suit or execution—Refusal—Revision.*

Where in the course of execution of a decree, an outsider to the suit and to the execution proceedings, makes an independent application for stay of execution, the proceedings which begin with such an application for stay by a person not a party to the suit and not originally a party to the execution proceedings and which terminate with an order of refusal have the character of a 'Case' complete in itself; and an order passed on such an application, refusing to stay the execution is a "case decided" within the meaning of S. 115, C. P. Code, and is subject to revision by the High Court. (*Collister and Bajpai, JJ.*) JWALA PRASAD *v.* HAR PRASAD. **172 I C. 285=10 R A 373=1937 A.L J. 877=1937 R.D. 498=1937 A.W.R. 778=A.I.R. 1937 All. 658.**

——**S. 115**—Case decided—Final decision on application under O. 33, R. 1. *See* C. P. CODE, O. 33, R. 1 AND S. 115. **1938 O.W.N. 561.**

——**S. 115**—*Case decided—Framing or refusing to frame issues.*

A Court in framing issues or refusing to frame issues is, in the language of S. 115, deciding a case, if the onus of proof is involved in the form of the issues. (*Stodart, J.*) NATESAN CHETTIAR *v.* MARIYAYEE AMMAL. **163 I.C. 809=9 R.M. 67=A.I.R. 1936 Mad. 526.**

——**S. 115**—*'Case'—If includes interlocutory orders.*

The word 'case' used in S. 115 is wide enough to include an interlocutory order and the High Court will interfere even in the case of such orders provided they otherwise fulfil the requirements of S. 115. (*Bose, J.*) KRISHNA KUMAR *v.* RADHEDAL. **175 I.C. 107=I L R. (1940 Nag. 463=10 R.N. 433=A.I R. 1938 Nag. 210.**

——**S. 115**—*Case decided—Leave to sue in forma pauperis—Application for—Rejection of—Revision.*

A revision is maintainable against an order rejecting an application for permission to institute a suit "*in forma pauperis*". (*Smith and Madeley, JJ.*) SUNDER BABU *v.* MOHAN DEI. **13 Luck. 560=170 I.C 956=10 R.O 61=1937 O. L.R. 494=1937 O.W.N. 971=A.I.R. 1937 Oudh 481.**

——**S. 115**—*"Case decided"—Lower Court assuming jurisdiction not vested in it and threatening to interfere with vested rights of subject—Revision—High Court's powers of interference.*

A "case decided" within the meaning of S. 115, C. P. Code. might fall within the category of orders passed in the assumption of jurisdiction not vested in the Court by law. Where an invasion of vested rights of the subject is threatened by a Court assuming a jurisdiction which it does not possess, and it is about to resort to the use of the machinery at its disposal, the High Court will, as a superior Court, exercise its powers under S. 115, C. P. Code, and will not restrict its jurisdiction. (*Wassoodew, J.*) BABURAO *v.* HARIHARRAO. **183 I C. 556=12 R.B. 113=41 Bom.L.R 490=A.I.R. 1939 Bom. 279.**

——**S. 115**—*Case decided—Matter still under investigation and not finally decided by lower Court—Revision—Interference.*

Where the matter under revision is still under investigation and the lower Court has not finally decided any question, and the points raised by the petitioner can still be urged before the lower Court, it would be undesirable to interfere in revision even if the High Court had the power to interfere. (*Fazl Ali and Meredith, JJ.*) HRIDAYNATH SINGH *v.* LAHAR SINGH. **187 I.C. 838=6 B R. 558=12 R.P. 646=21 Pat.L.T. 629.**

——**S. 115**—*Case decided—Meaning of.*

The word 'case' in S. 115 has a wider connotation and includes something more than a suit. (*Davis, J. C. and Lobo, A.J.C.*) INDO PERSIAN TRADING CO. *v.* PERMANAND HARNAMSINGH. **166 I.C. 541=9 R.S. 146=A.I.R. 1936 Sind 205.**

——S. 115—*'Case decided'—Order as to amendment of plaint—When 'case decided'.*

The question whether an order allowing an amendment of the plaint is a 'case decided' depends upon the facts of the particular case. Where a plaintiff is permitted to amend his plaint in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of suit is sought to be altered, the order allowing such an amendment is a 'case decided' for in effect the original suit has been withdrawn and has been displaced by a different suit. (*Weston.*) Nihal Chand *v.* Amar Chand. **1937 A.M.L.J. 104.**

——S. 115—*"Case decided"—Order by Judge reviewing decision of predecessor in exercise of inherent powers—Revision—Interference by High Court.*

Both O. 47, and S. 151 are to be construed strictly, and are not intended to be used, and are not to be used, to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. Where a Judge sets aside an order passed by his predecessor dismissing suit as against one of the defendants in a suit, his order is one without jurisdiction, inasmuch as he usurps an appellate jurisdiction which he does not possess. Such order, although alleged to be passed under S. 151, is in substance one reviewing the judgment of his predecessor. Although an appeal against such order is not strictly maintainable, such an appeal, treated as revision application, is competent. The order sought to be set aside is not an interlocutory order so as to bar an application in revision, inasmuch as it sets aside an order which is not an interlocutory order. In any case, it is an order deciding a case within the meaning of S. 115, C.P. Code, and a revision application against it is maintainable. (*Davis, J.C. and Weston, J.*) Mir Haji Ghulam Shah *v.* Khanchand. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

——S. 115—*Case decided—Order disallowing amendment of pleading.*

No revision lies from an order merely refusing to allow an amendment of a pleading. Cases where the amendment comes under some other order of the Code, for example, the addition or substitution of parties, or striking off a pleading may amount to a case decided; but an order passed purely under O. 6, R. 17 is not. (*Sulaiman, C.J., Bennet and Bajpai, JJ.*) Suraj Pali *v.* Ariya Pretinidhi Sabha, U. P. **I.L.R. (1937) All 17=165 I.C. 1=9 R.A. 257=1936 A.L.J. 923=1936 A.W.R. 776=A.I.R. 1936 All. 686 (F.B.).**

——S. 115—*Case decided—Order dismissing an application to be made a party to a suit under O. 34, R. 1.*

The order of a Court dismissing the application of a party to be made a party to a suit under O. 34, R. 1, though interlocutory, has decided a case and a revision petition lies against such an order. (*Srivastava, C.J. and Zia-ul-Hasan, J.*) Sheo Prasad Lal *v.* Prakash Rani. **13 Luck 625=171 I.C. 434=1937 O.L.R. 558=1937 O.W.N. 1118=A.I.R. 1938 Oudh 10.**

——S. 115—*Case decided—Order giving leave to defend conditionally under O. 37, R. 3—Revision.*

An order giving leave to defend conditionally under O. 37, R. 3, C. P. Code, is an interlocutory order and does not amount to a "case decided" within the purview of S. 115, C. P. Code. Even assuming the order not to be an interlocutory order, the Court cannot be said to act illegally or with material irregularity in the exercise of its jurisdiction in giving leave to defend conditionally, and the order is not, therefore, open to revision under S. 115, C. P. Code. (*Addison and Abdul Rashid, JJ.*) Manohar Lal *v.* Karobar Khandan Mushtarka. **I.L.R. (1938) Lah. 289=177 I.C. 778=10 R.L. 361=40 P.L.R. 69=A.I.R. 1938 Lah. 548.**

——S. 115—*"Case decided"—Order holding application competent.*

Quaere.—Whether a decision that an application is maintainable can be called "case decided" within the meaning of S. 115, is at least open to doubt. (*Pollock, J.*) Ramchandra Rao *v.* Madhorao. **I.L.R. (1937) Nag. 428=167 I.C. 122=9 R.N. 166=A.I.R. 1936 Nag. 280.**

——S. 115—*Case decided — Order holding certain reliefs claimed as time-barred.*

An order by Court holding the suit of a plaintiff time barred in respect of certain reliefs claimed by him is a 'case decided' to that extent. (*Din Mohammad, J.*) Diwan Chand *v.* Behari Lal. **178 I.C. 799=11 R.L. 498 (2)=A.I.R. 1938 Lah. 507.**

——S. 115—*Case decided—Order refusing to stay suit under S. 10, C. P. Code—Revision—Competency.*

No application in revision will lie against an order of a Judge under S. 10 refusing to stay proceedings and directing a suit to proceed. Such an order is not a case decided within the meaning of S. 115, C. P. Code. (*Davis, J.C. and Tyabji, J.*) Ramchand Virmal *v.* Lilaram. **185 I.C. 765=12 R.S. 175=A.I.R. 1939 Sind 291.**

——S. 115—Case decided—Order that suit cannot proceed against one of the defendants. *See* C. P. Code, O. 7, R. 11. **A.I.R. 1937 Lah. 800**

——S. 115—*Case decided—Order under O. 6, R. 17, refusing amendment—Revision.*

An order refusing an amendment of a plaint is a "case decided" within the meaning of S. 115, C. P. Code, and a revision against such an order is therefore competent. (*Weston.*) Chand Mal *v.* Mohammad Hussain. **1935 A.M.L.J. 100.**

——S. 115—*Case decided—Order under O. 9, R. 13 setting aside* ex parte *decree—Revision.*

An order purporting to set aside an ***ex parte*** decree under O. 9, R. 13 is an order deciding a case within the meaning of S. 115, C.P. Code, and revision therefore lies. The fact that an appeal lies against an order made under O. 9, R. 13 refusing to grant an application to set aside an ***ex parte*** decree and that no appeal lies against an order granting an application to set aside a decree does not exclude the remedy by revision in the latter case, much more restricted though the remedy by revision is. (*Davis, J.C. and Lobo, J.*) Zenab *v.* Mahomed Haji Allahdino. **32 S.L.R. 703=174 I.C. 572=10 R.S. 264=A.I.R. 1938 Sind 76.**

——S. 115—*Case decided—Proceedings dismissed in default—Order on application for restoration.*

Orders relating to an application for restoration of proceedings dismissed in default constitute a 'case' within the meaning of S. 115, C. P. Code. (*Bhide, J.*) Mahomed Sadiq *v.* Mt. Sami-ul-nisa **161 I.C. 212=8 R.L. 690=A.I.R. 1936 Lah. 618.**

——**S. 115**—'Case decided'—Rejection of plaint in part. *See* C. P. Code, O. 7, R. 11 (*a*). **A.I.R. 1936 Lah. 1021.**

——**S. 115**—*Case decided—Subordinate Court—Order by District Judge under S. 36, Legal Practitioners' Act declaring person tout—Revision—Jurisdiction of High Court—Interference—Grounds—Cr. P. Code, S. 439—Government of India Act, S. 224 (2).*

S. 36 of the Legal Practitioners' Act confers a special jurisdiction on Subordinate Court; and an order passed by a District Judge under S. 36 declaring a person a tout is an order which the High Court has power to revise under S. 115, C. P. Code, being a case decided by a Court subordinate to the High Court. S. 439 of the Cr. P. Code does not apply to such a case. Nor can it be revised under the Government of India Act, 1935. The jurisdiction to revise is, however, of an exceptional character and cannot be invoked except in furtherance of justice. If the Judge in passing the order had no clear conception of the law on the subject or if he has failed to apply the law to the facts of the case and bases his finding on mere suspicion or conjecture, the High Court would interfere with the order. (*Abdur Rahman, J.*) Somanna, *In re.* **I L R. (1938) Mad. 988=177 I C. 456=11 R M. 334=1938 M.W.N. 426=47 L.W 578=A I.R. 1938 Mad. 634=(1938) 2 M.L.J. 100.**

——**S. 115 and O. 6, R. 17**—*Case decided—What may amount to—Rejection of application to explain array of parties—Revision, if lies.*

Where an amendment comes under some provision other than O. 6, R. 17, C. P. Code, *e.g.*, 'the addition or substitution of parties or striking off a pleading' the order may amount to a case decided. Where an application is in fact and in substance one to elucidate the array of the parties as described in the plaint, it is not an application for amendment of a pleading and the rejection of such an application constitutes the decision of a case within the meaning of S. 115, C. P. Code and is revisable by the High Court. (*Iqbal Ahmad and Bajpai, JJ.*) Jagdish Saran *v.* Bhagwat Saran. **1940 A W.R. (H.C.) 410=1940 A L.J. 445=A.I.R. 1940 All 448.**

Commission.

——S. 115—*Commission—Refusal to issue—Interlocutory order—Interference.*

An interlocutory order is subject to revision. An order refusing to issue without sufficient reason, a commission for the further cross-examination of a witness partly cross-examined and who happened to live more than 200 miles away, is also subject to revision, the ground being that much harm may accrue to a party from such a refusal. (*Davies, I. C. S.*) Jamna Dhar Potdar and Co. *v.* Gulab Chand **1938 A.M.L.J. 123.**

Construction of document.

——**S. 115**—*Construction of document—Omission to consider clause in bond—Revision.*

The High Court will interfere in revision with the decree of the lower Court where it has misunderstood the case and has not considered the effect of a clause in a bond on which the plaintiff relied. (*Bhide, J*) Ganpat Ram Durga Prasad *v.* Debi Sahai. **41 P.L.R. 909.**

——S. 115—*Construction of document—Revision.*

Where a document cannot possibly bear the construction that has been placed by the lower Court on it, the High Court has jurisdiction to revise its decree. (*Jai Lal, J*) Kan Labhaya *v.* Fateh Ali **164 I.C. 888=9 R.L. 179=38 P.L.R. 349=A.I.R. 1936 Lah. 801.**

Conversion of appeal.

——**S. 115**—Conversion of app allowed—Second appeal not competent. *See* C. P. Code, Ss. 102 and 115. **A.I.R. 1937 Oudh 244.**

Court.

——**S. 115**—"Court"—Collector's order under S. 20-A, Madras Estates Land Act—Revision—Jurisdiction to interfere. *See* Madras Estates Land Act, S. 20-A. **50 L.W. 162=(1939) 2 M. L.J. 292**

——**S. 115**—"Court"—District Judge and Assistant Judge disposing of appeal relating to amendment of voters under Bombay District Municipal Act—Orders in—Revision. *See* Bombay District Municipal Act, Ss. 11 (1) (*c*) (*iv*) and 22. **A.I.R 1938 Sind 153.**

——**S. 115**—*"Court"—Judge of Civil Court acting as Commissioner under Workmen's Compensation Act—Order by—Revision.*

S. 115, C. P. Code, relates only to the records of cases decided by Courts subordinate to the High Court. A Commissioner under the Workmen's Compensation Act is not a Subordinate Court for the purpose of S. 115. A Judge of Civil Court passing an order as a Commissioner under the Workmen's Compensation Act is a *persona designata* and no revision application under S. 115 lies against an order passed by him. The effect of the amendment of the Workmen's Compensation Act by Act V of 1929 is not to make the Commissioner a subordinate Court for the purpose of S. 115. He is to be deemed a Court only for the limited purposes set out in S. 23, Workmen's Compensation Act. (*Davis, J.C. and Mehta, A J.C.*) Century Flour Mills, Shikarpur *v.* Amir Bakhsh. **30 S L.R. 351=166 I.C. 986=9 R S. 161=A.I.R. 1937 Sind 6.**

——**S. 115**—"Court"—Judge of Karachi Small Cause Court—Order in election dispute made under Ss. 16 and 17, Karachi City Municipal Act—Revision—Powers of High Court to interfere. *See* Karachi City Municipal Act, Ss. 16 and 17. **I.L.R. (1939) Kar. 131.**

——**S. 115**—"Court"—Land acquisition—Collector acting under Land Acquisition Act—Order refusing to make reference under S. 18, Land Acquisition Act—Revision. *See* Land Acquisition Act, S. 18. **A.I.R. 1937 Nag. 12.**

——**S. 115**—Court—Land Acquisition Collector—Order declining to make reference—Revision. *See* Land Acquisition Act, S. 18. **41 C W.N. 1301.**

——S. 115—*Court subordinate to High Court—Collector acting under S. 204, Orissa Tenancy Act—Order in appeal in case valued below Rs. 100—Revision—High Court's powers.*

The High Court has no power to revise the order of the Collector passed in appeal in a case in which the subject-matter is valued at less than Rs. 100 and to which the provisions of Cl. 3 of S. 204 apply as in these circumstances the Collector cannot be held to be subordinate to High Court. (*Fazl Ali and Manohar Lall, JJ.*) Puni Sethi *v.* Gangadhar Patro. **189 I.C. 419=6 B. R. 804=A.I.R. 1940 Pat 249.**

Court-fee.

——S. 115—Court-fee—Appeal requiring *ad valorem* court-fee valued and miscellaneous appeal—Application by respondent after disposal of appeal and remand for order staying proceedings until payment of full court-fee—Rejection—Revision — Interference. *See* Court-Fees Act (as amended in Bihar and Orissa) Sch. I, Art. 1 and Sch II, Art. 11. **18 Pat L.T. 864.**

——S. 115—*Court-fee—Decision as to—Revision.*

Where the decision on a question of court-fee also bears upon the valuation of the suit for purposes of jurisdiction, and the suit may have to be filed in a higher Court if the court-fee question should be decided in a different way, the High Court is justified in interfering in revision, although the point has been decided in plaintiff's favour. (*Varadachariar, J*) Sellammal *v.* Jothimani Nadar. **161 I C. 679=8 R.M. 851=43 L W. 582=1936 M W.N. 148=A.I.R. 1936 Mad. 411=70 M.L.J. 398.**

——S. 115—*Court-fee—Decision as to—Revision—Decision favourable to plaintiff and decision unfavourable to plaintiff—Distinction—Jurisdiction—Refusal to exercise.*

The High Court has power to interfere and will interfere in revision against an erroneous decision of the trial Court adverse to the plaintiff in the matter of Court-fee. The question of court-fee is not a matter which really concerns the defendant, though he may raise that question, and the Court in deciding a question of court-fee is deciding an issue not as between the plaintiff and the defendant, but is deciding an issue as between the Crown and the plaintiff. If the decision be adverse to the plaintiff, it amounts to a refusal to exercise the jurisdiction to try the issues as between the plaintiff and the defendant, and is subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. Where, however, the decision is in favour of the plaintiff, it is not open to the defendant to apply to the High Court in revision, because in the first place he is not a party to the dispute between the Crown and the plaintiff, and, secondly, he has a remedy, should the decision on the merits be against him, in bringing the matter of the court-fee duty to the notice of the appellate Court under S. 12 of the Court-Fees Act; and, thirdly and most important, as between the plaintiff and the defendant the trial Court has not refused to exercise its jurisdiction to decide the case on the merits. (*Courtney Terrell, C.J., James and Manohar Lal, JJ.*) Ramkhelawan Sahu *v* Bir Surendra Sahi. **16 Pat 766=172 I.C. 840=4 B R. 178=10 R P. 349=18 Pat L T 977=1937 P.W.N. 989=A.I.R. 1938 Pat. 22 (F B).**

——S. 115—*Court-fee—Erroneous decision as to Court-fees resulting in dismissal of appeal.*

The appellate Court undoubtedly has jurisdiction to decide the correct amount of court-fee but if its decision on the point results in its refusal to exercise jurisdiction in respect of the merits of the appeal before it, and if that decision is wrong, it results in a refusal to exercise jurisdiction vested in it. (*Middleton, J.C. and Mir Ahmad, A.J C*) Mukarab Khan *v.* Rab Nawaz Khan. **163 I.C. 462=9 R. Pesh. 3=A.I. R. 1936 Pesh 140.**

——S 115—*Court fees—Order as to.*

A revision petition is competent and lies against an order directing payment of additional court-fees. (*D R. Norman.*) Janwat Mal *v.* Mohri Lal. **1937 A M L J 28.**

——S 115—*Court-fee—Order demanding additional court fee for memorandum of appeal—Revision—Order favourable to appellant—Distinction.*

An order demanding additional court-fee on a memorandum of appeal is revisable under S. 115, C. P. Code, as it amounts to a refusal to exercise jurisdiction; but an order accepting the court-fee paid as sufficient is not open to revision as then there is no refusal to proceed with the appeal. In such a case jurisdiction is not affected, nor is the other side damnified. (*Stone, C J., Bose and Gruer, JJ*) Balaji Dhumnaji *v.* Mst. Muktabai. **I L R 1938 Nag 106=173 I C. 329=10 R N 298=1938 N.L J. 1=A.I R. 1938 Nag. 122 (F.B.).**

——S. 115—*Court-fee—Order determining and holding plaint to be insufficiently stamped—Revision.*

An order of a trial Court determining the proper court-fee payable on a plaint and holding that it is insufficiently stamped is not revisable by the High Court; and such an order, which by itself does not fall under S. 115, C. P. Code, cannot be revised by the High Court merely because it is bound to be followed by some other order which may be without jurisdiction. (*Burn, J.*) Manaithunainatha Desikar *v.* Gopala Chettiar. **49 L.W. 270=186 I.C 153=12 R.M 596=1939 M. W N. 205=A.I R 1939 Mad. 380=(1939) 1 M. L.J 317.**

——S. 115—*Court-fee—Order of Court calling upon plaintiff to make good deficiency in court-fee—Revision, if lies.*

Where the trial Court requires the plaintiff to make good the deficiency in court-fees, no revision lies against such order either under S. 115, C. P. Code, as, on rejection of the plaint on non-compliance with such order, an appeal lies under S. 224, Government of India Act, 1935, as the High Court cannot interfere with the judicial order in the exercise of its administrative functions under that section. (*Bhide, J.*) Peoples Bank of Northern India *v.* Kanaya Lal. **I L. R. (1938) Lah. 377=176 I C. 764=11 R L. 234=40 P.L.R. 1039=A.I.R. 1938 Lah. 80.**

——S. 115—*Court-fee—Order to pay additional court fee—Revision.*

An order to pay additional court-fee is an interlocutory order and cannot be the subject of a revision. (*Skemp, J*) Ghulam Ali *v.* Niaz Ali. **18 Lah. 430=172 I.C. 497=10 R.L. 333=39 P.L.R. 819.**

——S. 115—*Court-fee—Question of classification of suit—Decision adverse to plaintiff—Interference—Jurisdiction of High Court.*

The High Court has jurisdiction to interfere in revision with the decision of the lower Court on the question of the classification of the suit for purposes of Court-fee, where such decision has been adverse to the plaintiff. (*James and Rowland, JJ.*) Sital Prasad Sah *v.* Ramdas Sah.

18 Pat. 267=5 B R. 893=183 I.C. 281=12 R.P. 122=1939 P.W.N 197=A.I R. 1939 Pat. 274.

Declaring ex parte.

——S. 115—*Declaration as* ex parte—*If revisable—Subsequent* ex parte *decree, not appealed against—Remedy—Proper procedure.*

Where the petitioners were declared *ex parte*, even if the order was wrong on the merits, the High Court has no jurisdiction under S. 115, C. P. Code, to interfere with such an order. Where a decree is passed after declaring certain persons as *ex parte* the proper procedure for those persons is to have preferred an appeal against the decree and not to come by way of revision under S. 115 against the order declaring them *ex parte*. (*Madhavan Nair, J.*) Thavasikannu Thevar *v.* Sankaralingam Pillai. **176 I.C. 825=11 R M. 169=1938 M.W.N. 17=A.I R. 1938 Mad. 217.**

Defective judgment.

——S. 115—*Defective judgment—Interference.*

Where there had not been any real consideration of the evidence at all before the lower appellate Court and all that the Judge did was to seize hold of a rule of law about the burden of proof, a rule which incidentally loses most of its significance when there is evidence for consideration and then to seize hold of two or three superficial points in the case and rest content with that.

Held, that that was not what an appellate Judge was there for, especially when he was reversing a well considered finding of a lower Court and that interference in revision was necessary. (*Bose, J*) Kisangopal *v.* Umrao Kesheo Rao. **175 I.C. 430 =10 R.N. 456=A.I.R 1938 Nag. 216.**

Delay.

——S. 115—*Delay—Practice of Oudh Chief Court.*

Interference in revision being discretionary the practice of the Chief Court is to refuse to entertain applications for revision if they are made too late and to demand an explanation from the applicant for the delay in case the application is made more than ninety days after the passing of the order. But where the applicant was not a party to the order which he seeks to revise and the order was passed behind his back and without notice to him, the delay is excusable and should be condoned. (*Srivastava and Nanavutty, JJ.*) Birendra Bikram Singh *v* Basdeo **12 Luck. 52 =160 I.C 814=8 R O 281=1936 O W.N. 262=1936 O.L.R. 109=A.I R 1936 Oudh 185.**

Discretion.

——S. 115—*Discretion—Exercise of discretion under S. 5, Limitation Act—Interference.*

Where the lower Court has purported to exercise a discretion vested in it by S. 5, Limitation Act, in admitting an appeal presented out of time, the High Court will not interfere in revision. (*Mir Ahmad, A.J C*) Bundhelkhand Motor and Cycle Agency *v.* Peoples Bank of Northern India, Ltd, Lahore **162 I.C. 416=8 R. Pesh. 197=A.I R 1936 Pesh. 197**

——S. 115—*Discretion—Interference in revision.*

Where the question relates to the exercise of discretion which is vested by law in the lower Court except in very exceptional cases, it is not proper for a Court of revision to interfere with the way in which the lower Court has exercised its discretion. (*Varadachariar, J.*) Venkayya *v* Venkata Rao. **I.L.R. (1939) Mad. 317=179 I.C 963=11 R M. 644=1938 M.W.N. 925=48 L.W 517=A.I.R. 1938 Mad. 979=(1938)2 M.L.J. 642**

——S. 115—*Discretion—Interference—Principles.*

In matters of judicial discretion, the revising Court will not interfere unless there are either no grounds whatever for its exercise or unless its exercise produces manifestly unfair result. (*Norman.*) Amar Chand *v.* Bhola Nath. **1939 A.M L.J. 17.**

——S. 115—*Discretion—Interference in revision—Limitation Act, S. 5.*

It is not the practice of the High Court to interfere in revision in the exercise of discretion by the Court below under S. 5, Limitation Act, even when the exercise of that discretion is founded on a mistaken view of the law. (*Agarwala, J.*) Thakur Singh *v.* Dinanath Sah. **4 B R. 54=10 R.P. 236=171 I.C. 700=A.I.R. 1937 Pat. 528.**

——S. 115—*Discretion—Order accepting security—Interference.*

Accepting or refusing to accept security furnished by a person appointed as a guardian of property of a minor is a matter within the discretion of the Court. Where the Court in exercise of its discretion accepted the security and it is not shown that the Court has acted with material irregularity in the exercise of its jurisdiction, no revision lies against the order accepting the security. (*Bhide, J.*) Mt. Amrati *v.* Bishamber Das. **41 P.L.R. 592=A.I.R. 1939 Lah. 170.**

——S. 115—*Discretion—Order admitting evidence after close of case and pending judgment—Revision.*

Though an order allowing further evidence to be led will only be interfered with very reluctantly, if the Court, assuming that it has discretion to allow evidence to be led by a party at a late stage after the close of the case and pending judgment, has not exercised its discretion judicially, the order is revisable and liable to be set aside. (*Weston.*) Sheo Chand *v.* Girdhari Lal. **1935 A.M.L.J. 118**

——S. 115—*Discretion—Order allowing amendment of plaint—Revision.*

No revision lies against an order allowing an amendment of the plaint. (*Tek Chand, J.*) Ismail *v* Rulia Ram **41 P.L.R. 146.**

——S. 115—*Discretion—Order disallowing application by person directly affected by suit to be impleaded as defendant—Interference.*

Where a Court does not apply its mind to the real dispute in the case and wanders into discussion of extraneous matters and disallows an application by a person who is directly affected by the result of the suit, to be impleaded as defendant, and, directs him to seek his remedy by separate suit and thus fails to apply the well-recognized rule that one object of impleading parties is to avoid multiplicity of suits, its order cannot be sustained and is open to revision. Certain persons claiming to be the rate-payers of a Municipality instituted a suit against the Secretary of Municipal Committee for a perpetual injunction against the defendant restraining him from paying a certain sum as pay and allowance to an Executive Officer of the Committee on the ground that he was not a legally appointed servant of the Municipality, his term of office, having been illegally extended by the Ministry for Local Self-Government. The Secretary of State for India applied to be impleaded as a defendant in the suit contending that he was directly affected by the result of the suit, as the object of the plaintiff was to have the orders of the Government set aside by challenging their validity. The Court refused the application of the Secretary of State for India to be impleaded as party and decreed the suit on confession of judgment by the Municipal Committee. It appeared that the suit was a collusive suit to get round the orders of the Government by improper means.

Held, that the order of the Court refusing to implead the Secretary of State for India could not be sustained. The Local Government and, therefore, the Secretary of State, was directly affected by the result of the suit as it was the legality of the action of the Government in appointing and renewing the appointment of the officer that was the real matter in controversy in the suit and was a proper party to the suit (*Young, C.J. and Jai Lal, J.*) SECRETARY OF STATE *v.* CH. JAMALUDDIN. **164 I.C. 882=9 R.L. 180=A.I.R. 1936 Lah. 619.**

———S. 115—Discretion—Order imposing condition of security in granting leave to defend under O. 37, R. 3 (2)—Revision. *See* C. P. CODE, O. 37, R. 3 (2). **70 M L J. 241.**

———S. 115—*Discretion—Order refusing stay of suit under S.* 19, *Arbitration Act—Interference in revision.*

Where the trial Judge, in the exercise of the discretion vested in him, refuses to stay the suit under S. 19 of the Arbitration Act on the ground that complicated questions of law are likely to arise which can better be determined by the Court than by the arbitrators, the High Court will not interfere in revision with the discretion exercised by him. (*Jai Lal, J.*) LAUL *v* GANGA SUGAR CORPORATION, LTD. **163 I.C. 854=9 R.L. 55=38 P.L.R. 846=A.I.R. 1936 Lah. 904.**

———S. 115—*Discretion—Order refusing to try preliminary issue of law—Interference.*

Interlocutory matters are certainly matters of discretion of the lower Court but that discretion must be exercised according to proper principles of justice but it is the duty of the High Court to interfere when the discretion has not been according to judicial principles. Where a Court summarily rejects a prayer to try a preliminary issue on a point of law and in its summary jurisdiction has not even expressed any opinion as to whether the question of law would be sufficient to dispose of the case, to refuse to exercise the revisional jurisdiction in such case might give rise to the gravest hardship. The injured party has no right of appeal and refusal to exercise jurisdiction would mean that the lower Court's unfetted decision might put the injured party to the enormous expense in going into the issues which were unnecessary on the mere contention that the ultimate decision would be open to appeal. (*Courtney Terrell, C.J.*) JANKI DAS *v.* KALU RAM. **162 I.C 486=8 R.P. 538=17 Pat.L.T. 253=1936 P. W.N. 209=A.I.R. 1936 Pat. 250.**

———S. 115—Discretion—Order rejecting application to be added as intervener of person depositing landlords fee under S. 26 (*o*), Bihar Tenancy Act. *See* BIHAR TENANCY ACT, S. 26 (*o*). **A.I.R. 1937 Pat. 38.**

———S. 115—*Discretion—Order rejecting application under O.* 1, *R.* 10 (2).

An order under O. 1, R. 10 can be revised under S. 115, C. P. Code, when the Court fails to exercise a discretion vested in it and when its failure is due to error. (*Stodart, J.*) RANGANAYAKI AMMAL *v.* JANAKI AMMAL. **1937 M.W.N. 375=171 I.C. 798=10 R.M. 399=A.I.R. 1937 Mad. 338**

———S. 115—*Discretion — Order that advocate could not appear on behalf of party by reason of his interest in opposite party—Interference in revision.*

Where a Judge orders that an advocate could not with propriety appear on behalf of a party by reason of the fact of his having been interested on behalf of the other side in matters which were collateral to the suit in question and there was upon the record proof of ample material before him upon which he could make such an order and there was no suggestion that whether he was right or wrong he did not do so *bona fide*, then it is not a case for the High Court to intervene.

Per *Mosely, J.*—The order is admittedly a 'judgment' as defined in S. 2 (9) of the Code, and therefore the powers of the Court are restricted as laid down in S. 85, Government of Burma Act and the question cannot be agitated in addition as one of general superintendence over the Courts as provided in S. 85 (1) of that Act. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) TAJENDRA CHANDRA DHAR *v.* TAJENDRA LAL GHOSH **1939 Rang. L R. 514=182 I C. 77=11 R.R. 512=A.I.R. 1939 Rang. 183 (S.B).**

———S. 115 — Discretion—Wrong exercise of discretion under S. 5, Limitation Act—Interference. *See* LIMITATION ACT, S. 5. **19 Pat.L.T. 309.**

Erroneous decision.

———S. 115—*Erroneous decision—Interference.*

If the facts and the law applicable to the case have been duly considered by the lower Court, then, although its decision may be erroneous, the error cannot be corrected on revision. If, on the other hand, the lower Court has failed to consider the law or the facts, it has acted illegally and its decision may be revised. (*Ba U, J.*) KO SAN PAW *v.* KO PO YI. **187 I.C. 350=12 R.R. 315=A.I.R 1940 Rang. 75.**

———S. 115—*Erroneous decision—Order as to* locus standi *of person to apply under O.* 21, *R.* 89.

The Court has jurisdiction to decide whether a certain person is entitled to apply to have the sale set aside under O. 21, R. 89, C. P. Code. The Court may be wrong in its decision, but it cannot be said that in the exercise of its jurisdiction, it acted illegally or with material irregularity so as to call for any interference in revision. (*Nanavutty, J.*) SHANKAR PERSHAD *v.* MOHAMMAD TAQI. **8 R.O 330=161 I.C. 424=1936 O.W.N. 344=1936 O.L R 179=A.I.R 1937 Oudh 108.**

———S. 115—*Erroneous decision—Point of law —Lower Court assuming jurisdiction and deciding wrongly—Revision.*

If a Judge assumes jurisdiction of the matter and proceeds to decide a question of law, however erroneous this decision may be, the High

Court cannot interfere in revision. But if before assuming jurisdiction he determines a question of law or fact to determine the question of jurisdiction, a wrong decision in a case of this kind is certainly revisable by the High Court. (*Wort, J.*) Nasiruddin Haider *v.* Hakim Muhammad Tahir. **161 I.C. 26=8 R.P. 428=A.I.R. 1936 Pat. 119.**

———**S. 115**—*Erroneous decision—Revision.*

Jurisdiction necessarily gives the power to decide wrongly as well as to decide rightly. Hence the fact that the High Court, if it had been the trial Court, might have come to a different conclusion, is not sufficient to justify interference under S. 115. (*Davis, J.C. and Lobo, A.J.C.*) Indo Persian Trading Co. *v.* Parmanand Harnamsingh. **166 I.C. 541=9 R.S. 146=A.I.R. 1936 Sind 205.**

Error of Law.

———**S. 115**—*Error of law.*

Where the custody Court decided that certain person is not entitled to any priority, no revision is competent even if the decision is erroneous in law as the custody Court has jurisdiction to decide such question. Further the petitioner has remedy to file a regular suit. (*Addison and Abdul Rashid, JJ.*) Simla Banking and Industrial Co., Ltd. *v.* Ditta Mal Hardial. **163 I.C. 584=9 R.L. 23=38 P.L.R. 800=A.I.R. 1936 Lah. 521.**

———**S. 115**—*Error of law.*

A revision petition is incompetent if the question involved is one of law and not of jurisdiction. (*Addison and Abdul Rashid, JJ.*) Mahabir Singh *v.* Jagat Singh. **40 P.L.R. 461.**

———**S. 115**—*Error of law.*

Even where lower appellate Court has committed an error of law in drawing certain presumptions and in arriving at certain conclusions it would not afford any ground for revision. (*Addison and Din Mohammad, JJ.*) Hukam Chand *v.* Ramji Das **180 I.C. 555=11 R.L. 699 =A.I.R. 1938 Lah. 357.**

———**S. 115**—*Error of law.*

Mere commission of error of law by the lower Court would not by itself be sufficient to justify interference in revision. (*Bhide, J.*) Mt. Malan *v.* Dayal Singh. **41 P.L.R. 578=A.I.R. 1939 Lah. 162.**

———**S. 115**—*Error of law.*

No revision lies where the Courts have decided certain questions of law and of fact even though they might have decided them wrongly because they had jurisdiction to decide them and have not committed any illegality or material irregularity in the exercise of their jurisdiction. (*Spargo, J.*) Maung Ko *v.* Maung Lu Doke. **167 I.C. 479 (2)=9 R.R. 321=A.I.R. 1937 Rang. 61.**

———**S. 115**—*Error of law—If ground for revision.*

An error of law is not a ground for interference by the High Court under S. 115, C. P. Code. (*R. C. Mitter, J.*) Bankim Chandra Deb Sarkar *v.* Madan Mohan Deb. **40 C.W.N. 698.**

———**S. 115**—*Error of law—Ignoring or misreading of provision of law—Revision—Interference.*

If the Judge of a lower Court has, in coming to his conclusion, entirely ignored a provision of Statute law or if he has given to a provision of Statute law an obviously impossible interpretation that would justify interference in revision by the High Court. But if he has considered the law and his interpretation of it is a possible one, even though contrary to the interpretation put upon it in decided cases, there is no justification for interference in revision. (*Norman.*) Kintoo Lal *v.* Daulat Ram. **1936 A.M.L.J. 4.**

———**S. 115**—*Error of law—Misinterpretation of limitation law—If ground of revision.*

A mere error of law does not bring a case within the provisions of S. 115, C.P. Code, and misinterpretation of the law of limitation is not a ground for maintaining an application in revision under S. 115. (*Leach, C.J. and Somayya, J.*) Ramaswami Chettiar *v.* Meyyappan Servai. **50 L.W. 159=1939 M.W.N. 700=188 I.C. 187=12 R.M. 810=A.I.R. 1939 Mad. 740=(1939) 2 M.L.J. 353.**

———**S. 115**—*Error of law—Order on question of* res judicata.

The question whether the decision of a lower appellate Court that a suit was barred by *res judicata*, was correct, cannot be raised in revision. (*Tek Chand, J.*) Mt. Hasan Jan *v.* Qamar-ud-Din. **11 R.L. 664=180 I.C. 126 (1) =41 P.L.R. 176=A.I.R. 1939 Lah. 48.**

———**S. 115**—*Error of law—Order under S. 151 made without jurisdiction—Interference.*

The High Court will not generally interfere with a decision on a question of law, as the lower Court has jurisdiction to decide a question of law either rightly or wrongly. But the decision on a question of law can be interfered with if in fact a question of jurisdiction does arise. Where a lower Court makes an order under S. 151, C.P. Code, which it has no jurisdiction to make, the order will be set aside in revision. (*Wort and Varma, JJ.*) Phulchand Ram Marwari *v.* Naurangi Lal Marwari. **16 Pat. 729=10 R.P. 320=172 I.C. 225=1937 P.W.N. 836=18 Pat.L. T. 826=A.I.R. 1937 Pat. 647.**

———**S. 115**—*Error of law—Revision.*

In a case under S. 115 even an error of law is not a sufficient ground for interference by the High Court. 11 Cal. 6, Rel. on. (*M. C. Ghose, J.*) Majaharali *v.* Mafijaddi Sardar. **166 I.C. 127 =9 R.C. 474=A.I.R. 1936 Cal. 706.**

———**S. 115**—*Error of law—Revision.*

Where the lower appellate Court decreed permanent reduction in assessment though according to the provisions of Municipal Act there could not be any permanent reduction in the assessment, once the assessment has been made.

Held, that at best it was a point of law and High Court would not be justified in interfering in revision. (*Varma, J.*) Chairman of the Commissioners of Chakradharpur Municipality *v.* Murlidhar Marwary. **166 I.C. 743=9 R.P. 345 =3 B.R. 221 (2)=A.I.R. 1937 Pat. 25.**

———**S. 115**—*Error of law—Revision, if competent.*

The fact that the lower Court erred in law in coming to its findings, does not render a revision petition competent under S. 115, C. P. Code. (*Addison, J.*) Emperor *v.* Ghani. **I.L.R. (1938) Lah. 125.**

———**S. 115**—*Error in law—Scheme — Wrong construction of its terms—Revision.*

If a Court on an interpretation of a scheme framed under S. 92, C. P. Code, holds that it authorized the appointment of a trustee in place of a deceased trustee, no question of jurisdiction arises in the case. Even if it be assumed that it has not put a correct construction on its terms, it cannot be regarded as anything more than a mistake of law, but that cannot be a ground for interference with the order under S. 115, C. P. Code. (*Srivastava, Ag. C. J. and Smith, J.*) SAADAT HUSAIN *v.* MOHAMMAD HAIDAR **13 Luck. 81=166 I C 215=9 R.O. 291=1937 O W.N. 39 =1936 O.L.R. 725=A.I.R. 1937 Oudh 193.**

——**S. 115**—*Error of law—When ground for revision.*

Where a Judge has refused to consider the objection to sale in the erroneous belief that it was not entertainable in view of Proviso 2 to O. 21, R. 90, C P. Code, the error of law in such case affects the jurisdiction of the Court and in the circumstances the petition for revision is competent. (*Bhide, J*) SARWAN SINGH *v* MAN SINGH. **41 P.L.R. 553=A I.R. 1939 Lah. 222.**

Failure to exercise jurisdiction vested by law.

——**S. 115 and O. 21, R. 88**—*Failure to exercise jurisdiction vested by law—Misconception as to law—Revision, if lies.*

Where a Court has proceeded on a wrong view of the law as regards the scope and object of O. 21, R. 88, C. P. Code, it must be deemed to have failed to exercise jurisdiction vested in it by law and must be interfered with in revision. (*Puranik, J.*) MUNNALAL *v.* GOPILAL. **1940 N.L. J. 453.**

Finding of fact.

——**S. 115**—*Finding of fact—Finding as to care taken by bailee—Contract Act, S.* 151.

A finding of the lower Court about the bailee having taken necessary care of the goods such as is required by S. 151 of the Contract Act is a finding of fact which is not open to question in revision. (*Srivastava, J.*) SITLA BAKHSH SINGH *v.* BAIJ NATH. **12 Luck. 128=161 I.C. 417=8 R. O. 327=1936 O.W.N. 334=1936.O.L.R. 176= A.I.R. 1936 Oudh 264.**

——**S. 115**—*Finding of fact—Genuineness of document.*

A finding of the appellate Court that a certain document is not genuine is a finding of fact, and a Court sitting in revision cannot go behind it. (*Agha Haidar, J.*) BUR SINGH *v.* ANJUMAN DEHI SOHAL. **161 I.C. 21=8 R.L. 662=A.I.R. 1936 Lah. 725.**

——**S. 115**—*Finding of fact—Interference—Findings arrived at in claim proceeding.*

The High Court will not interfere under its revisional powers with an order disallowing a claim preferred under O. 21, R. 58, C. P. Code, where the Court below has gone over the whole question and has arrived at certain findings of fact which so far as the proceeding is concerned are conclusive. (*Mohammad Noor, J.*) KAMALA BALA DEBI *v.* HARI GOPAL MAZUMDAR. **167 I.C. 672=9 R.P. 411=3 B.R. 302.**

——**S. 115**—*Finding of fact—Powers of interference—Concurrent finding of fact.*

The power of interference in revision is much more limited than that in case of second appeals. Hence a concurrent finding of fact of the lower Court based on evidence cannot be interfered with. (*Mahomed Noor, J.*) CHUNI LAL *v.* RAM RANVIJOY PRASAD SINGH. **167 I.C. 225=9 R.P. 393=3 B.R. 280=A.I.R. 1936 Pat. 558.**

——**S. 115**—Finding of fact—Sufficient cause under O. 9, R. 13—Finding as to—Interference. *See* C. P. CODE, O. 9, R. 13. **1937 A.W.R. 726= A.I.R. 1937 All. 691.**

High Court.

——**S. 115**—*High Court—Interference—Order based on decided cases.*

Where the order of the lower Court is passed following certain reported ruling of the High Court, such an order should not be interfered with by the High Court in revision. (*Bennet and Verma, JJ.*) KALIAN DATT *v.* SITA RAM. **1940 A.W.R. (H.C.) 62.**

——**S. 115**—*High Court—Powers of—Application by party—If necessary.*

The powers of the High Court under S. 115 are wide and action can be taken under S. 115 even without application by the party aggrieved. (*Agarwala and Madan, JJ.*) MT. BIBI MARIM *v.* SURAJMAL. **15 Pat. 738=165 I.C. 927=9 R.P. 228=1936 P.W.N. 694=18 Pat.L.T. 39=A.I.R. 1936 Pat. 591.**

——**S. 115**—*High Court—Powers of—Interference* suo motu.

Though the High Court does not ordinarily interfere in revision except at the request of one of the parties to a suit, the powers conferred upon it by S. 115, C. P. Code, are very wide and in fit cases it is open to the High Court to interfere even *suo motu* in order to remedy injustice. (*Rupchand Bilaram and J. C. Mehta, A.J.Cs.*) KHAN CHAND GOPALDAS *v.* MULCHAND KHIALDAS. **160 I.C. 361 (2)=8 R.S. 121=A.I.R. 1936 Sind 1.**

——**S. 115**—*High Court—Powers of—Remand under for further evidence and findings—Power to review evidence after return of findings.*

When High Court as a Court of revision, under its inherent powers remands a case for further evidence on an issue and findings, retaining seizin of the case, it has no power to scrutinize or review the evidence. The powers of that Court are limited by S. 115 and all it can do is to determine whether the lower Court exercised its jurisdiction with material irregularity in arriving at the finding it did on the issue remanded to it for trial. (*Vivian Bose, J.*) BALAJI SADASHIV *v.* VISHNU. **I.L.R. (1936) Nag. 188=170 I.C. 527 =10 R.N. 63=A.I R. 1936 Nag. 140.**

Illegality.

——**S. 115** — *Illegality — Appeal — Dismissal under O. 41, R. 11 (2) summarily—Absence of judgment expressing acceptance of finding of trial Court—Revision—Interference.*

The law does not require that an appellate Court when dismissing an appeal summarily under O. 41, R. 11 (1), C. P. Code, should write a judgment, though it would be better if it says explicitly that the lower Court's decision appears to be correct for the reasons given therein. But S. 115, C. P. Code, will not justify interference by the High Court in revision simply on the ground that the appeal has been dismissed without expressing in definite words the appellate Court's acceptance of the findings of the first Court. (*Rowland, J.*) JAMUNA PRASAD RAI *v.* RAJBALLAM RAI. **18 Pat.L.T. 321=1937 P.W. N 340=169 I.C. 359=3 B.R. 558=10 R.P. 9= A.I.R. 1937 Pat. 349.**

——**S. 115**—*Illegality—Failure to apply obvious law.*

Where the Judge omits to apply an obvious principle of law he acts illegally in the exercise of his jurisdiction and therefore revision lies. (*Jai Lal, J.*) Imam Din *v.* Bhag Singh. **166 I.C. 302=9 R.L. 358 (2)=A.I.R. 1936 Lah. 746.**

——S. 115—*Illegality—Lower Court refusing to follow ruling by which it is bound—Revision.*

When the lower Court commits an illegality in the exercise of its jurisdiction in refusing to follow a ruling of the Chief Court by which it is bound, it is incumbent on the High Court to interfere in revision. (*Mosely, J.*) C. T. A. C. T. Firm *v* Maung Aye. **171 I.C. 527=10 R.R. 161 =A.I.R. 1937 Rang. 197.**

——S. 115—Illegality—Order refusing to receive plaint insufficiently stamped on last day of limitation—Revision—Stamps of required denomination not available—Duty of Court. *See* Court-Fees Act, S. 27. **71 M.L.J. 804.**

Illegality or material irregularity.

——S. 115—*Illegality or material irregularity—Court allowing application on wrong view of law—Revision—Interference.*

Where the Court passes an erroneous order on a wrong view of the law, allowing an application, when it ought to reject it for non-compliance with the requirements of the statute, the error amounts to such an illegality or material irregularity in the exercise of jurisdiction as to call for the interference of the High Court under S. 115, C. P. Code. That is a fit case for the exercise of the revisional jurisdiction of the High Court. (*Rowland, J.*) Hanuman Singh *v.* Baijnath Prasad Singh. **172 I C 8=10 R.P. 298=4 B.R. 129=18 Pat.L.T. 409=1937 P.W.N. 497=A.I.R. 1937 Pat. 537.**

——S. 115—*Illegality or with material irregularity—Erroneous decision—Interference.*

The Court certainly has jurisdiction to decide whether it has or has not jurisdiction to pass an order and even if it decides this question wrongly, there is no ground for revision. In an execution case an application to set aside the sale under O. 21, R. 89, C. P. Code, was dismissed as time barred. On appeal the Court found that the land sold being State land was not saleable under S. 60, C. P. Code, and therefore the sale must be set aside irrespective of the time when the deposit was made.

Held, no revision lay. The Court had jurisdiction to decide whether State land was saleable property and it did not extend limitation but merely pointed out that the period of limitation did not apply to such a case. The Court may have decided these questions wrongly. But that did not amount to exercising jurisdiction illegally or with material irregularity. (*Spargo, J.*) Ma Bi Bi *v.* Saya Hattie. **174 I.C. 691=10 R.R. 418=A.I.R. 1937 Rang. 537.**

——S. 115—*Illegality or material irregularity—Framing of issues—Jurisdiction—Wrong decision as to placing of burden of proof—Interference by High Court.*

It is by law the duty of the trial Court to frame issues in a suit. It is not any part of the legitimate duties of the High Court to help lower Courts to frame issues. They alone have jurisdiction to frame the issues in the suits which come before them for trial, and they have jurisdiction to decide wrongly as well as rightly. The fact that a wrong decision is made is never a ground for interference in revision under S. 115. (*Burn, J.*) Manickavachakam Chettiar *v.* Official Receiver, East Tanjore. **186 I.C. 120 =12 R.M. 590=1939 M.W.N. 608=50 L.W. 459 =A.I.R. 1939 Mad. 733=(1939) 2 M.L.J. 44.**

——S. 115—*Illegally and with material irregularity—Allowing plea cutting at root of plaint but not raised in pleadings and deciding same without amendment of pleading or raising relevant issues—Revision—Interference*

A Court acts improperly when, without directing an amendment of the pleadings or revising the relevant issues, it allows a question to be argued before it which cuts at the very root of the plaintiff's suit, but which is not raised in the pleadings at all and decides it; in doing so it ignores some of the most material provisions of the C. P. Code. The High Court in such a case will interfere under S. 115, C. P. Code. (*Davis, J.C. and Weston, J.*) Mir. Haji Ghulam Shah *v.* Khanchand. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R 1939 Sind 137.**

——S. 115—*Illegally or with material irregularity—Court having jurisdiction to decide but deciding wrongly—If ground for revision by High Court.*

If a Court has jurisdiction to decide a matter, it does not at all follow that if it has decided an issue wrongly it has acted illegally or with material irregularity in the exercise of its jurisdiction so as to call for interference under S. 115, C. P. Code. (*Harries, C J. and Rowland, J.*) Nandamani *v.* Harikrishna. **181 I.C. 644=11 R P. 624=5 B.R. 645=1939 P.W.N. 341=A.I.R. 1939 Pat. 564.**

——S. 115—*Illegally and with material irregularity—Order based on no evidence—Lower Court having no clear conception of law and not applying law to facts—Revision.*

The High Court as a Court of revision is not expected to weigh the evidence which is led before the lower Court. But when it is found that there is no evidence at all from which the inference as drawn by the lower Court could be deduced, the High Court has no alternative but to interfere. Further where the lower Court has acted without any clear conception of the law on the subject or has failed to apply the law to the facts of the case, it acts illegally, and in any case with material irregularity, justifying interference by the High Court in revision. (*Abdur Rahman, J.*) Adiraju Somanna, *In re.* **I.L.R. (1938) Mad. 988=47 L.W. 578=1938 M.W.N. 426=177 I.C. 456=11 R M. 334=A.I.R. 1938 Mad. 634= (1938) 2 M.L.J 100.**

——S. 115—*Illegally or with material irregularity—Order dismissing application as barred by limitation—Disregard of S. 4, Limitation Act and refusal to apply it—Revision—Interference.*

Where a Court dismisses a suit or an application on the ground of limitation it does not refuse to exercise jurisdiction. On the contrary it takes cognizance of the suit and exercises jurisdiction by holding that on a point of law the suit fails. To ignore the plain terms of S. 4 of the Limitation Act is to deprive a litigant of the statutory privilege given to him by that section; and a refusal to apply the section in a case in which it does apply amounts to exercising jurisdiction illegally and with material irregularity, justify-

ing interference in revision under S. 115, C. P. Code. (*Beaumont, C J*) VEERAPPA *v.* IRATAPPA. **175 I.C 221=10 R B 529=40 Bom.L.R. 152= A.I.R. 1938 Bom. 209.**

———S. 115—"*Illegally or with material irregularity*"—*Order holding person pauper under O. 33, R. 1—Revision—Wrong view as to "necessary wearing apparel"—If justifies interference.*

The High Court has no authority to interfere in revision with an order of a Court declaring a party to be a pauper for purposes of O. 33, R. 1, C. P. Code. The fact that the lower Court wrongly holds that the ornaments worn by a female applicant are her necessary wearing apparel cannot be a ground for holding that it has acted illegally or with material irregularity in adopting that view. (*James, J.*) WASI AHMAD *v.* MT. JAMILA KHATOON. **180 I.C. 363=11 R.P. 503 (1)=5 B.R 383=19 Pat.L.T. 844=1938 P.W.N. 804= A.I R. 1939 Pat. 95.**

———S. 115—*Illegally or with material irregularity—Refusal to decide some issue as preliminary issues in suit—Revision—Interference.*

A Court does not act illegally or with material irregularity in refusing to dispose of certain issues in a case as preliminary issues without going into the merits of the whole case, when the issues in question are not clear cut issues of law but are mixed up with questions of fact. (*Harries, C.J. and Rowland, J.*) NANDAMANI *v.* HARIKRISHNA. **181 I.C. 644=11 R.P. 624= 5 B.R. 645=1939 P.W N. 341=A.I.R. 1939 Pat. 564.**

Interference.

———S. 115—Interference—Grounds—Failure to consider relevant point—If justifies interference. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 9 (5). **A.I.R. 1938 Mad. 321.**

Interlocutory order.

———S. 115 — Interlocutory order — Decree against legal representative—Execution—Order rejecting application by posthumous son to be impleaded as legal representative—Revision. *See* C. P. CODE, S. 47. **A I.R. 1936 Sind 166.**

———S 115—Interlocutory order—Interference. *See* C. P. CODE, S 115—COMMISSION—REFUSAL TO ISSUE. **1938 A.M.L J. 123.**

———S. 115—*Interlocutory order—Interference—Principles.*

Though an order is interlocutory, if it goes to the root of all subsequent proceedings, the High Court would not decline to consider whether the Court passing the order in question had jurisdiction to pass it. (*Weston.*) KISHAN LAL *v.* MAN MAL. **1938 A.M.L.J. 97.**

———S. 115—*Interlocutory orders—Order allowing application for leave to sue* in forma pauperis *—Revision application by defendant—Interference—Discretion of High Court.*

According to the practice of the High Court of Patna a revision petition does lie under S. 115, C. P Code, against an order granting leave to sue *in forma pauperis*. The fact that the order is an interlocutory order or that the government have not moved in the matter is no bar to the High Court exercising its discretion in revision. (*Dhavle and Varma, JJ.*) BIHARI SAHU *v.* SUDAMA KUER. **175 I.C 505=1938 P.W.N. 163= 4 B.R. 598=10 R.P. 632=19 Pat.L.T. 101=A.I. R. 1938 Pat. 209.**

———S. 115—Interlocutory order—Order on application under S. 19, Arbitration Act—Revision. *See* ARBITRATION ACT, S. 19. **A.I.R. 1936 Sind 205.**

———S. 115—*Interlocutory order—Order permitting plaintiff to continue suit without additional court-fee—Interference.*

The general practice in all the High Courts is not to interfere with interlocutory orders unless in exceptional circumstances when such order may result in irreparable injury to one or other of the litigant parties. An order permitting a suit to proceed does not injure any party. When a suit is allowed to proceed on an insufficient court-fee it is not either of the litigant parties who suffers but the revenue. It is not the object of a fiscal statute to enable litigants to be defeated on technicalities. (*Agarwala and Varma, JJ.*) RAGHUNANDAN GIR *v.* DEORAJ GIR. **15 Pat. 340=161 I. C. 22=8 R P. 431=17 Pat.L.T. 9=1936 P.W.N. 9=A.I.R 1936 Pat. 85**

———S. 115—*Interlocutory order—Order refusing stay proceedings under S. 10—Revision.*

No revision lies from an order refusing to stay proceedings under S. 10, C. P. Code, as the order is an interlocutory one. A.I.R. 1924 Lah. 425 (F. B.), Rel. on. (*Jai Lal, J.*) DURGA DAS *v.* GOBIND SINGH. **165 I.C. 131=9 R.L. 215 (1)=A.I.R. 1936 Lah. 569.**

———S. 115—*Interlocutory order—Order refusing to stay suit.*

No petition for revision is competent against an order under S. 10, C. P. Code, refusing to stay a suit, as the order is of an interlocutory nature. (*Bhide, J.*) PUNJAB NATIONAL BANK, LTD. *v.* BIRI MAL JAIN. **41 P.L.R. 883.**

———S. 115—*Interlocutory order—Order staying suit.*

An order staying further proceedings in a suit is an interlocutory order, and no revision petition can be preferred against such an order. (*Abdul Rashid, J.*) BIR BAL DAS *v.* CANTONMENT BOARD, LAHORE. **41 P.L.R. 55.**

———S. 115—*Interlocutory order—Pendency of revision—Duty of trial Court.*

Where a trial Court is informed that a revision petition has been filed against an interlocutory order refusing an amendment asked for, it is the duty of that Court to postpone the dismissal of the suit until the decision of the revision petition. (*Davies.*) CHUCKERBUTTY *v.* SUKHLAL NAIKSE LAL. **1940 A M L.J. 45.**

———S. 115—*Interlocutory order—Question of jurisdiction involved—Interference.*

Though an order is interlocutory, the Court will not decline to hear or interfere, if a question of jurisdiction is involved. (*Weston.*) HARI SINGH *v.* KUNDAN MAL. **1938 A.M.L. J. 74.**

———S. 115—*Interlocutory order—Rejection of evidence by trial Court—Revision.*

The High Court will not entertain an application on the ground that evidence is being, or will be, rejected by the trial Court. No doubt an interlocutory order may decide a case and may be subject to revision if it does irreparable damage to a party, but that cannot be said in the case of rejection of evidence. It is open to the party to question the decision in appeal which is the proper time at which the error, if any, should be remedied. (*Mya Bu and Mosely, JJ.*) RAM OUDH *v.* GOVERNMENT OF BURMA. **1939 Rang.L.R. 591=**

185 I.C. 574=12 R.R. 207=A.I.R. 1939 Rang. 448.

——**S. 115**—*Interlocutory order—Revision.*

In order to justify interference with an interlocutory order, it must be shown that the order, besides otherwise falling within the scope of S. 115, C. P. Code, also causes irreparable injury. It is not the law that any and every order which would, if incorrect, cause irreparable injury, is open to revision by the High Court. (*Norman.*) Kintoo Lal *v.* Daulat Ram. **1936 A.M.L.J. 4.**

——**S. 115**—*Interlocutory order—Revision.*

The expression "case which has been decided" in S. 115 is wide enough to include an interlocutory order, and even though there may be an appeal from the final decree, that consideration will not prevent in a proper case interference in revision. The Court will not however interfere unless it seems that there has been a grave and culpable error likely to inflict grave injustice and cause irreparable injury. A.I.R. 1931 Rang. 136, Rel. on. (*Mackney, J.*) Maung Po Nyein *v.* Maung Tha Saing. **181 I.C. 527=11 R.R. 471 =A.I.R. 1939 Rang. 92.**

——**S. 115**—*Interlocutory orders—Revision—Preliminary order as to jurisdiction—Interference in revision—Jurisdiction of High Court.*

The High Court, while it should be very slow to interfere in its revisional jurisdiction with orders which are merely interlocutory, has certainly jurisdiction to do so, and the jurisdiction can be exercised in a proper case. A revision application is therefore competent in respect of a preliminary order passed by a Subordinate Court, where that preliminary order goes to the jurisdiction of the Court. (*Beaumont, C.J.*) Jamnadas *v.* Chandulal. **I.L.R. (1937) Bom. 623=168 I.C. 449=9 R.B. 369=39 Bom. L.R. 138=A.I.R. 1937 Bom. 167.**

Jurisdiction.

——**S. 115**—Jurisdiction—Absence of—Appeal entertained against non-appealable order—Revision. *See* C. P. Code, O. 21, R. 103. **17 Pat.L.T. 815.**

——**S. 115**—Jurisdiction—Absence of—Appeal from decree dismissing pauper suit—Appellant paying court-fee on appeal—Order by appellate Court for payment of court-fee due on plaint and other costs of Government in trial Court—Default—Order dismissing appeal—Revision—Interference. *See* C. P. Code, O. 33, Rr. 12 and 13. **1937 A.W.R 113=A I R 1937 All. 280.**

——**S. 115**—*Jurisdiction—Absence—Appeal incompetent but entertained—Order of appellate Court—Interference—Order of original Court itself without jurisdiction—Effect of—If can be restored.*

The High Court under S. 115, C.P. Code, ought not obviously to interfere in revision so as to restore an order which itself is without jurisdiction or founded on irregularity in the exercise of jurisdiction, although the order under revision is one without jurisdiction. (*Rowland, J.*) Rameshwar Lal Jhunjhunwala *v.* Ramcharan Prasad Sahu. **178 I.C. 41=11 R.P. 204=1938 P.W.N. 313=5 B.R. 49=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447.**

——**S. 115**—Jurisdiction—Absence of—Appeal wrongly entertained against non-appealable order—Revision. *See* C. P. Code, S. 47. **17 Pat.L.T. 810.**

——**S. 115**—Jurisdiction—Absence of—Application for leave, to sue *in forma pauperis*—Court embarking one elaborate enquiry into complicated questions of *res judicata*, etc.—Revision—Interference. *See* C. P. Code, O. 33, R. 7. **1937 M.W.N. 415.**

——**S. 115**—Jurisdiction—Absence of—Award of arbitrator under Co-operative Societies Act—Execution by Civil Court—Proceedings set aside—Order remitting award for rectification—Revision. *See* C. P. Code, S. 47. **40 C.W.N. 89.**

——**S. 115**—*Jurisdiction—Absence of—Collector's order in appeal under S. 23 (2), Mamlatdars' Courts Act setting aside order of Mamlatdar on findings of fact—Revision—Interference.*

The High Court under S. 115, C. P. Code, has jurisdiction to interfere with an order passed by the Collector under S. 23 (2) of the Mamlatdars' Courts Act, setting aside in appeal the order of the Mamlatdar disagreeing with the latter's findings of fact. The Collector in setting aside the order of the Mamlatdar exercises a jurisdiction not vested in him and the case therefore falls within the terms of S. 115, C. P. Code. (*Beaumont, C.J.*) Bavaji *v.* Bala Fakira Mahar. **I. L.R. (1938) Bom. 259=173 I.C. 808=10 R.B. 381 =40 Bom.L.R. 104=A.I.R. 1938 Bom. 159.**

——**S. 115**—Jurisdiction—Absence of—Execution—Delivery of property effected—Subsequent obstruction—Fresh order for delivery—Jurisdiction—Revision. *See* Execution—Jurisdiction. **A.I.R. 1937 Rang. 449.**

——**S. 115**—*Jurisdiction—Absence of—Grant of review in the absence of sufficient reason under O. 47, R. 1—Revision—Competency.*

Where a Court grants a review when there is no sufficient reason for granting a review under O. 47, R. 1, C. P. Code, it is certainly a case in which a question of jurisdiction is incidentally involved, which would entitle the High Court to interfere in revision under S. 115, C. P. Code, if the question of jurisdiction involved is not covered by O. 47, R. 7. (*Kunhi Raman, J.*) Venkayya *v.* Suryanarayana. **50 L.W. 903=A.I.R. 1940 Mad. 203.**

——**S. 115**—*Jurisdiction—Absence of—Lower Court entertaining appeal which is incompetent—Revision.*

Where a Court entertains and decides an appeal which in law does not lie and is incompetent, the High Court will interfere in revision and set aside the decree and judgment passed by such Court. (*R. C Mitter, J.*) Sidheswar Ghosal *v.* Tarak Das Mukherjee. **62 C.L.J. 530.**

——**S. 115**—*Jurisdiction — Absence—Interference—Duty of High Court even if no miscarriage of justice results—Deposit beyond time—Acceptance by Court—Effect.*

Where a Court acts without jurisdiction, *e.g.*, when it receives a deposit made by a party beyond the time fixed in a case where time is of the essence of the contract or compromise in pursuance of which it is made, the High Court must interfere in revision, though no real miscarriage of justice has occurred, because the acceptance of the deposit is clearly an act without jurisdiction. (*Harries, C. J.*) Biswambher Sahu *v.* Hari Naik. **5 C.L.T. 29.**

———S. 115—*Jurisdiction—Absence of—Judge setting aside order passed by his predecessor by way of review—Revision—Interference.*

Ordinarily, the Court of the Judicial Commissioner will not interfere in revision when a remedy will lie by way of appeal, but where one Judge sits in appeal on a judgment or decree of his predecessor and usurps a jurisdiction which he does not possess, it is the duty of the Judicial Commissioner's Court not to permit the case to proceed upon the jurisdiction so snatched, which has no basis or justification in law, and, it should set aside the order in revision as being one without jurisdiction. The Court has also power to set aside, in the revision proceedings, the original order when it is one deciding a case within the meaning of S. 115, and where the papers relating to the case are before the Court and it is necessary in the interests of justice to do so. (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I L R. (1939) Kar. 330=182 I.C. 154=12 R.S. 250=A.I.R. 1939 Sind 137.**

———S. 115—Jurisdiction—Absence of—Order allowing withdrawal of suit under O. 23, R. 1 on ground of defect of substance—Revision—Power of High Court to interfere. *See* C. P. CODE, O. 23, R. 1 (2) (*a*) AND (*b*). **42 Bom L.R. 143 (F.B.).**

———S. 115—Jurisdiction—Absence of—Order of reference to arbitration in pending suit—Order in anticipation that if award is not filed by fixed date, trial must go on that day—Award not filed—Suit decreed *ex parte*—Jurisdiction—Refusal to set aside *ex parte* decree—Revision—Interference. *See* C. P. CODE, SCH. II, PARA. 8. **71 M.L.J. 648.**

———S. 115—*Jurisdiction—Absence of—Order without jurisdiction—Revision.*

Where a Court makes an order which it has no jurisdiction to make, the order is revisable by the Court in revision. (*Wort, J.*) MIR SYED HUSAIN *v.* RASOO SINGH. **5 B.R. 704=181 I.C. 896=11 R.P. 647=A.I.R. 1939 Pat. 518.**

———S. 115—Jurisdiction—Absence—Reference under S. 18, Land Acquisition Act—Termination by decree in suit declaring acquisition invalid—Subsequent order of compensation under S. 48 of Land Acquisition Act—Jurisdiction to make—Revision—Interference. *See* LAND ACQUISITION ACT, S. 48. **1938 N.L.J. 54.**

———S. 115—Jurisdiction—Absence of—Summary dismissal of appeal under O. 41, R. 11—Revision—Interference. *See* C. P. CODE, O. 41, R. 11. **18 Pat.L.T. 812.**

———S. 115—Jurisdiction—Absence of—Surety under S. 55—Court ordering discharge of—Subsequent order directing execution—Revision. *See* C. P. CODE, S. 115. **18 Pat.L.T. 357.**

———S. 115—Jurisdiction—Application for leave to appeal *in forma pauperis*—Rejection—Order for payment of court-fee and rejection of appeal for default in payment—Propriety—Revision. *See* C. P. CODE, S. 149 AND O. 44, R. 1. **A.I.R. 1936 Pesh. 69.**

———S. 115—*Jurisdiction—Assumption of, owing to erroneous interpretation of law—Revision—Order by appellate Court setting aside execution sale—Misinterpretation of law—If ground for revision.*

Where a Court by a misinterpretation of a provision of law assumes jurisdiction in respect of a matter over which it would have no jurisdiction on a correct interpretation of the law, the High Court will interfere in revision under S. 115, C. P. Code, and set aside the order which is without jurisdiction. An order setting aside an execution sale by an appellate Court on a misunderstanding of the law with regard to execution sales is therefore liable to be set aside in revision. (*Varma, J.*) DEONANDAN THAKUR *v.* MST. HANSO KUER. **167 I.C. 63=9 R.P. 375=3 B.R. 261=1936 P.W.N. 825=17 Pat.L.T. 852=A.I.R. 1937 Pat. 104.**

———S. 115—*Jurisdiction—Court having jurisdiction to decide—Revision.*

Where the lower Court undoubtedly has jurisdiction to decide the question and there has been no illegality or material irregularity in its decision, the application for revision must fail. (*Pollock, J.*) RAMCHANDRA RAO *v.* MADHORAO. **I.L.R. (1937) Nag. 428=167 I.C. 122=9 R.N. 166=A.I.R. 1936 Nag. 280**

———S. 115—*Jurisdiction—Courts holding that they have no jurisdiction to try suit—Revision—Competency.*

Where the Court of a Munsif returns a plaint for presentation to the Revenue Court holding that it has no jurisdiction to try the suit, and on appeal the District Judge also holds the same view and dismisses an appeal, the aggrieved party is entitled to come up to the High Court in revision. The question involved, namely whether the Munsif's Court had jurisdiction to entertain and try the suit filed in his Court, is directly one relating to the jurisdiction of his Court, and the High Court in such a case has power to interfere in revision under S. 115, C. P. Code. (*Niamatullah and Harries, JJ.*) DEOKINANDAN PANDEY *v.* RAM CHANDRA TEWARI. **I.L.R. (1938) All. 40=173 I.C. 180=10 R.A. 470=1938 A.L.R. 107=1937 A.L.J. 905=1937 R.D. 511=1937 A.W.R. 919=A.I.R. 1938 All. 17.**

———S. 115—*Jurisdiction—Error affecting jurisdiction—Court setting aside sale contrary to proviso to O. 21, R. 90—Interference in revision.*

Where the Court below sets aside a sale contrary to the proviso to O. 21, R. 90, C. P. Code, without determining whether the applicant has sustained substantial injury, there is an error affecting jurisdiction calling for interference by the High Court in revision. (*Rowland, J.*) GAYA PRASAD SINGH *v.* PARICHHAN SAHU. **167 I.C. 492=9 R.P. 404=3 B.R. 301=1937 P.W.N. 489=A I.R. 1937 Pat. 357.**

———S. 115—Jurisdiction — Execution sale — Agreement by parties for payment by particular date—Provision for setting aside sale on payment and on default for confirming sale—Order on application—Revision. *See* C. P. CODE, O. 21, R. 89. **17 Pat.L.T. 940 (F.B.).**

———S. 115—*Jurisdiction—Exercise of jurisdiction not vested—Appellate Court reversing finding of fact arrived at in another suit.*

Where in a suit by an assignee of a creditor against the debtor a simple money decree is passed against debtor in spite of his plea of payment but he does not appeal against it, the appellate Court in a separate suit by the debtor cannot reconsider the finding as to payment and give a finding that payment was made and cannot pass a declaratory decree in favour of the debtor particularly when there is no credible evidence to support such finding. If such finding is given, the appellate Court assumes jurisdiction not vested in it by law and revision is competent. (*Middleton, J.C.*) AMOLAK RAM *v.* MAHOMED ALI. **164 I.C. 856=9 R. Pesh. 29=A.I.R. 1936 Pesh. 176.**

——S. 115—*Jurisdiction—Existence—Decision as to—Revision.*

Where the lower Court itself has to determine whether it has jurisdiction or not to try the case, and it exercises its discretion wrongly and proceeds to try the case, the High Court has power to interfere in revision. (*Pollock, J.*) NATIONAL PETROLEUM CO., LTD., BOMBAY *v.* MEGHRAJ RAMKARANJI GOLCHA. **174 I C. 582=10 R.N. 406=20 N.L.J. 247=A I.R. 1937 Nag. 334.**

——S. 115—Jurisdiction—Failure to exercise—Application to set aside sale under O. 21, R. 90, by attaching creditor—Rejection on the ground of non-compliance with O. 21, R. 54 (2)—Revision. *See* C. P. CODE, O. 21, R. 90. **63 C.L.J. 560.**

——S. 115—*Jurisdiction—Failure to exercise—Court declining jurisdiction wrongly—Revision.*

Where the orders of the lower Court amounted to refusing to try the case and to exercise a jurisdiction that is vested in it, the High Court has power to interfere under Cl. (*b*) of S. 115, C. P. Code. (*Pollock, J.*) MT. KANIJ JOHRA *v.* RAJA HUSSAIN. **I.L.R. (1937) Nag. 97=167 I.C. 700=9 R.N. 201=A.I.R. 1937 Nag. 39.**

——S 115—*Jurisdiction—Failure to exercise—Material irregularity—Lower appellate Court not dealing with points raised—Revision.*

It is the duty of an appellate Court to properly dispose of an appeal and this necessarily involves dealing with the points raised by the appellant and looking into the record, so far as may be necessary, after making an effort to understand and appreciate the appellant's case. Where the appellate Court fails to do so, its failure in these respects means either that there was no more than a colourable exercise of jurisdiction by it or that it acted with material irregularity and in either event the High Court has power to interfere in revision. (*Dhavle, J.*) MAHESHWARI PRASHAD BHAGAT *v.* MAHADEV ROY. **182 I.C. 708=5 B.R. 814=12 R P. 57=A.I.R. 1939 Pat. 216.**

——S. 115—Jurisdiction—Failure to exercise—Refusal to enquire claim under O. 21, R. 58. *See* C. P. CODE, O. 21, R. 58—ENQUIRY. **1938 A.M.L. J. 23.**

——S. 115—Jurisdiction—Failure to exercise—Refusal to order rateable distribution—Interference. *See* C. P. CODE, Ss. 73 AND 115. **177 I.C. 269.**

——S 115—*Jurisdiction—Failure to exercise—Trial Court granting alternative relief—Appellate Court dismissing appeal without going into question of right of plaintiff to primary relief—Revision.*

Where the plaintiff asks for an alternative relief, "in case of failure" (*ba surat digar*) of the primary relief and the alternative relief is granted by the trial Court, primary relief being refused, and the appellate Court dismisses the appeal by the plaintiff without going into the question whether the plaintiff is entitled to the primary relief on the ground that it is not necessary as the alternative relief is granted, it amounts to failure on the part of the appellate Court to exercise jurisdiction vested in it and the plaintiff is entitled to come up in revision. 4 P.R. 1915 and A.I.R. 1924 Cal. 445, Dist. (*Middleton, J.C.*) AMARDAS *v.* TAUS. **162 I.C. 658=8 R. Pesh. 201=A.I.R. 1936 Pesh. 38.**

——S. 115—*Jurisdiction—Failure to exercise—Wrong view of law—Interference.*

Where the lower Court by a misunderstanding of the legal position and by a wrong interpretation of law fails to exercise its proper jurisdiction, the High Court will interfere in revision. (*Varma, J.*) PARYAG *v* CHANDRACHUR. **179 I.C. 845=11 R P. 416=1939 P.W.N. 50=5 B.R. 304=A I.R. 1939 Pat. 263.**

——S. 115—*Jurisdiction—Illegal exercise of—Lower Court giving to litigant benefit of contract to which he was not party.*

There must be some limit to the latitude to be given to the principle that a Judge has jurisdiction to come to a wrong decision as well as to a right one. It is not possible to stretch the principle to the extent of holding that it precludes the High Court from interfering in a case where a Judge has given a litigant the benefit of a contract to which he has found that litigant was not a party. That is an illegal exercise of jurisdiction or at any rate a material irregularity. (*Panckridge, J.*) JOGENDRANATH DAS *v.* PURSHOTTAM SHAH. **41 C.W.N. 601.**

——S. 115—Jurisdiction—Irregular exercise of—Application for commission—Pardanashin lady living beyond jurisdiction—Order refusing application and insisting an examination at place of Court—Revision. *See* C. P. CODE, O. 26, RR. 1 AND 4. **A.I.R. 1937 Pat. 21.**

——S. 115—*Jurisdiction—Meaning of—Finding that party is not competent to sue—If a finding which affects Court's jurisdiction.*

S. 115 of the Code clearly refers in Cls. (*a*) and (*b*) to jurisdiction, which means the jurisdiction of the Court and not the competence of any party to sue. A finding that a party is not competent to sue is not therefore a finding affecting the Court's jurisdiction. (*Blacker, J.*) LORINDA RAM *v.* BHAWANI MAL. **165 I.C. 278=9 R.L. 235=38 P.L.R. 315=A.I.R. 1936 Lah. 783.**

——S. 115—*Jurisdiction—Non-exercise of—Refusal by Court to entertain defence which law allows defendant to raise—Interference in revision.*

If the defendant has a defence which the law allows him to raise, and the Court refuses to entertain it, its action goes to the root of jurisdiction, whatever the reasons given. It is a case of non-exercise of jurisdiction, and the High Court has power to interfere under S. 115, C. P. Code. (*Bose, J.*) RAM NARAYAN *v.* RAMJIWAN. **I.L.R. (1937) Nag. 159=165 I.C. 926=9 R.N. 100=A.I.R. 1937 Nag. 267.**

——S. 115—*Jurisdiction—Order allowing rateable distribution—Revision.*

The Court executing the decree has jurisdiction to decide the question of rateable distribution as between rival decree-holders; and the High Court will not therefore interfere in revision with an order allowing rateable distribution, as no question of jurisdiction is involved in the matter. (*Wort and Varma, JJ.*) DEBI BUX *v.* RAMESHWAR PRASAD NARAIN SINGH. **172 I.C. 195=1937 P.W.N. 823=10 R.P. 305=18 Pat.L. T. 817=A.I.R. 1937 Pat. 651.**

——S. 115—*Jurisdiction—Order as to starting point of limitation.*

Jurisdiction is entirely independent of the manner of its exercise. The former involves the power to act at all, and is independent of the decision reached in the exercise of that power. The latter is confined to the authority to act in the particular way in which the Court does act. Where, therefore, what the Court has done is only to decide the starting point of limitation, it has every power to do so and such an order is not revisable. (*Vivian Bose, J.*) DEVIDAS *v.* NILKANTHRAO. **I.L.R. (1936) Nag. 73=164 I.C. 848=9 R.N. 36=A.I.R. 1936 Nag. 157.**

——**S. 115**—*Jurisdiction—Order declaring person to be tout under S. 36, Legal Practitioners Act—Jurisdiction to revise—Cr. P. Code, S. 439—Government of India Act* (1935), *S.* 224 (2).

S. 36 of the Legal Practitioners Act confers a special jurisdiction on Subordinate Courts, and inasmuch as the attendance in Court is an important valuable civil right of a citizen, it cannot be taken away from him by a Court if its jurisdiction has been exercised either illegally or with material irregularity. Consequently an order of a District Judge under S. 36 declaring a person to be a tout is capable of being revised by the High Court under S. 115, C. P. Code. The District Judge in making the order under S.36 of the Legal Practitioners Act is acting as a Court and not in an administrative capacity, and his order therefore falls within the scope of S. 115, C. P. Code. This revisional jurisdiction of the High Court is, however, necessarily of an exceptional character, and cannot be invoked except in furtherance of justice. S. 439 of the Cr. P. Code has no application to the case, and the order cannot be revised under that section. Nor can the order be revised under the Government of India Act of 1935, by reason of sub-cl. (2) to S. 224 of the Government of India Act of 1935. (*Abdur Rahman, J.*) SOMANNA, *In re.* **I.L.R. 1938 Mad. 988=47 L.W. 578=1938 M.W.N. 426=177 I.C. 456=11 R.M. 334=A.I.R. 1938 Mad. 634=(1938) 2 M.L.J. 100.**

——**S. 115**—Jurisdiction — Order dismissing appeal under O. 41, R. 10 (2)—Revision. *See* C. P. CODE, O. 41, R. 10 (2). **A.I.R. 1936 Rang. 109.**

——**S. 115**—Jurisdiction—Refusal to exercise—Acting illegally and with material irregularity—Transferee of property pending sale in execution under mortgage decree—Order by Collector on application by transferee under S. 4, U. P. Encumbered Estates Act—Case forwarded to Special Judge—Application by transferee for stay of execution—Refusal by executing Court—Revision—Competency. *See* U. P. ENCUMBERED ESTATES ACT, S. 7. **1937 A.W.R. 778.**

——**S. 115**—*Jurisdiction—Refusal to exercise—Application for scaling down debt under Madras Agriculturists' Relief Act. rejection on the ground that applicant not competent to apply—Revision—Interference.*

An order of a Court rejecting an application under the Madras Agriculturists' Relief Act on the ground that the applicant is not competent to apply for the benefits of the Act is in effect a refusal to exercise the jurisdiction invoked by the applicant, and the High Court will interfere in such a case under S. 115, C. P. Code. (*Wadsworth, J.*) SOORYANARAYANA *v.* RAMAMMA. **52 L.W. 301=1940 M.W.N. 831=(1940) 2 M.L.J. 291.**

——**S. 115**—Jurisdiction—Refusal to exercise—Application to set aside sale in execution—Prayer for permission to give landed property as security instead of cash deposit—Refusal without fixing amount of security and without applying mind to the case—Revision—Interference. *See* C P. CODE, O. 21, R. 90 (1) (PATNA AMENDMENT), PROVISO (1) (*b*). **17 Pat. 107**

——**S. 115**—*Jurisdiction—Refusal to exercise—Court declining to further proceed with execution on wrong view of law—Revision—Interference.*

If a Court, taking a wrong view of the law, assumes jurisdiction or declines to exercise jurisdiction, it is a matter for interference under S. 115, C. P. Code. Where a Court refuses to proceed further with a pending application for execution, erroneously holding on a wrong view of the law, that it has no jurisdiction to deal with it, and dismisses the same, it acts illegally in declining to exercise its jurisdiction by refusing to proceed further; and its order is liable to revision by the High Court under S. 115, C. P. Code. (*Burn and Venkataramana Rao, JJ.*) KRISHNAN *v.* NARAYANAN NAYAR. **182 I.C. 515 =12 R.M. 101=1938 M.W.N. 330=47 L.W. 786=A.I.R. 1938 Mad. 555=(1938) 1 M.L.J. 715.**

——**S. 115**—*Jurisdiction—Refusal to exercise—Order erroneously rejecting reference under S.* 18 *of Land Acquisition Act as incompetent.*

An order of a District Judge rejecting a reference made under S. 18 of the Land Acquisition Act in the erroneous view that the party at whose instance the reference was made was not entitled to demand a reference, is open to revision under S. 115, C. P. Code. (*Mukherjea and Roxburgh, JJ.*) COMILLA ELECTRIC SUPPLY, LTD. *v.* EAST BENGAL BANK, LTD. **I.L.R. (1939) 2 Cal. 401=43 C. W. N. 973=186 I. C. 17=12 R.C. 424=A.I.R. 1939 Cal. 669.**

—— **S. 115**—Jurisdiction—Wrong exercise of—Erroneous decision on valuation of suit—Interference. *See* COURT-FEES ACT, S. 7 (*iv*) (*c*). **42 C.W.N. 192.**

Leave to sue.

——**S. 115**—*Leave to sue—If revisable.*

An order allowing a person to sue as a pauper is revisable if it otherwise fulfils the provisions of S. 115. (*Bose, J.*) KRISHNA KUMAR *v.* RADHELAL. **I.L.R. (1940) Nag. 463=175 I. C. 107=10 R.N. 433=A.I.R. 1938 Nag. 210.**

——**S. 115**—*Leave to sue* in forma pauperis—*Order granting—Revision—Grounds.*

Where in an application under O. 33, R. 1, C. P. Code, the lower Court in deciding the question as to whether a cause of action is disclosed as required by cl. (*d*) of R. 5 of O. 33, does commit an irregularity in relying on a statement made by the defendant contesting the application and in fact in permitting him to be cross-examined with a view to elicit such an admission, that would not be a sufficient ground for setting aside in revision an order granting leave to sue ***in forma pauperis*** where apart from the admission of the defendant there was in fact sufficient material in the plaintiff's allegations to justify the lower Court in coming to the conclusion that it did. (*Hamilton and Yorke, JJ.*) DURGA PRASAD *v.* GUR DULAREY. **14 Luck. 116=175 I.C. 63=1938 O.A. 487=1938**

O.W.N. 561=1938 O.L.R. 265=10 R.O. 301=A.I.R. 1938 Oudh 146.

——S. 115—*Leave to sue as a pauper—Refusal—Revision.*

In the case of an application for leave to sue as a pauper, a Court has jurisdiction either to allow or disallow it and when once it has exercised its jurisdiction and decided whether rightly or wrongly, there can be no revision under S. 115, C. P. Code. (*Zia-ul-Hasan and Hamilton, JJ.*) BADRI NATH *v.* RAMCHANDRA. **14 Luck. 442=179 I.C 1001=1939 O.A. 231=11 R.O. 219=1939 O.L.R. 110=1939 O.W.N. 193=A.I.R. 1939 Oudh 129.**

——S. 115—*Leave to sue* in forma pauperis—*When revisable.*

An order on an application for permission to sue *in forma pauperis* is not revisable by the High Court unless there has been an exercise of jurisdiction not vested by law, or failure to exercise a jurisdiction so vested or an exercise of jurisdiction illegally or with material irregularity in the sense in which the words "illegally or with material irregularity" have been construed by past decisions of the Chief Court of Oudh and of their Lordships of the Privy Council. (*Thomas, C.J., Zia-ul-Hasan and Hamilton, JJ.*) SUNDAR BHARTHI *v.* TRUST MANDIR NAGESHAR NATH. **1940 O W.N. 259=186 I C. 381=12 R. O. 306=1940 A.W.R. (C.C.) 133=1940 O.A 239=1940 O.L.R. 118=A.I.R. 1940 Oudh 148 (F.B.).**

——**S. 115 and O. 33, R. 1**—*Leave to sue as pauper—Order on application—Revision if lies and when can succeed—Decision that there was no cause of action—Revision, if lies.*

There could be a revision against an order on an application for leave to sue *in forma pauperis* but for it to succeed, there must be an exercise of jurisdiction not vested by law or a failure to exercise a jurisdiction vested by law or an exercise of jurisdiction illegally or with material irregularity, which depends on the facts of each case. Where a Court has refused to grant leave on the ground that the plaint did not disclose a cause of action, it is a decision on a question or point of law and it is not a ground on which a revision would lie. (*Thomas, CJ. and Hamilton, J.*) KANHAIYA LAL *v.* BISHESHWAR NATH. **189 I.C. 224=1940 O W.N. 626=1940 O.A. 501=1940 A.W.R. (C.C.) 259=1940 O.L.R. 416=A.I. R. 1940 Oudh 353.**

Limitation.

——**S. 115**—Limitation—Decision on point of—Revision. *See* SCOPE, *infra.* **A.I.R. 1936 Nag. 157.**

——**S. 115**—Limitation—Erroneous decision on point of law—Wrong decision on question of limitation—Interference—Power of High Court—Provincial Small Cause Courts Act, S. 25—Distinction. *See* PROVINCIAL SMALL CAUSE COURTS ACT, S. 25. **1936 A.M.L.J. 68.**

——**S. 115**—*Limitation—Filing of revision—Practice of Rangoon High Court.*

It is a rule of practice in Rangoon High Court that revisions may be filed at any time within 90 days of the date of the decree sought to be revised, and the applicant is entitled to untilize that rule of practice to the full. (*Dunkley, J.*) DAW PO *v.* U PO HMYIN. **1940 Rang.L R. 237=187 I.C. 875=12 R.R. 345=A.I.R. 1940 Rang. 91.**

——S 115—*Limitation—Order without adjudicating on question of limitation—Interference.*

High Court can interfere in revision in a case which is on the face of it time-barred and where the lower Court has made an order without adjudicating on the question of limitation. A.I.R. 1916 Cal. 651, Rel. on. (*Roberts, C J. and Sharpe, J.*) CHATTAL TRADING CO. LTD. *v.* BABU MAHIM CHANDRA. **176 I.C. 134=11 R.R. 31 (1)=A.I. R. 1938 Rang. 87.**

——S. 115—*Limitation—Practice—Application beyond three months—When entertainable.*

While ordinarily it is the practice of Courts not to entertain revision applications preferred more than three months after the order appealed against, in suitable cases this practice should not be rigorously enforced. (*Weston.*) MANGI LAL *v.* GOPI NATH. **1937 A.M.L.J 107.**

Locus Standi.

—— S. 115—Locus standi *to apply under—One of many decree-holders applying for stay of execution—Dismissal—Judgment-debtor, if can seek to revise that order.*

Where one of many decree-holders applies for stay of execution proceedings against the judgment-debtor, and it is not granted, the person aggrieved by such an order is that decree-holder and if he does not choose to agitate it further the judgment-debtor has no *locus standi* to prefer a revision under S. 115 against that order. (*Wort, A C.J. and Manohar Lal, J.*) VASISTHA NARAIN SINGH *v.* KANDHAI LAL DURGA PRASAD. **177 I.C 138=4 B R. 793=11 R P. 129.**

Material Irregularity.

——S. 115—*Material irregularity—Application for leave to appeal* in forma pauperis—*Order rejecting it on Munsiff's report without hearing applicant—Revision.*

Where on an application for leave to appeal *in forma pauperis* the District Judge directs the Munsif to make an enquiry and on his report that the applicant is not a pauper rejects the application without hearing the applicant, he acts in the exercise of his jurisdiction with material irregularity and the order passed by him cannot, therefore, be supported. Although the applicant has appeared before the Munsiff, he is entitled to show to the Judge that the report of the Munsiff is wrong. (*Fazl Ali, J.*) RAM JANAM MAHTO *v.* BENDHYACHAL KUER. **6 B.R. 300=186 I.C. 170=12 R.P. 455=A.I.R. 1940 Pat. 263.**

——S. 115—Material irregularity—Application for leave to sue as pauper—Death of applicant—Application by heir to continue—Refusal—Revision. *See* C. P. CODE, O. 33, R. 1. **A. I. R. 1936 Pat. 591.**

——S 115—*Material irregularity—Application under S. 30, U. P. Agriculturists' Relief Act—Order on—Revision—Competency—Failure to consider material provisions of law—If justifies revision.*

Where a Court in an application under S. 30 of the U. P. Agriculturists' Relief Act fails to apply its mind to all the mandatory provisions of the law, it acts with material irregularity in the exercise of its jurisdiction and a revision petition would lie to the High Court. But if the Court merely decides the case wrongly no application in revision would lie. (*Sulaiman, C.J., Thom and Bennet, JJ.*) RAGHUBIR SINGH *v.* MULCHAND. **I.L.R. 1937 All. 805=1937 A.W.R. 710=1937 A**

L.J. 671=170 I.C. 567=1937 A. L. R. 741=1937 R.D. 428=10 R.A. 175=A. I. R. 1937 All. 598 (F.B.).

———S. 115—*Material irregularity—Conclusions based on surmises.*

A Court acts with material irregularity in basing its conclusions on surmises for which there is no justification from the evidence on the record. (*Srivastava and Nanavutty, JJ.*) Sabiha Khatun *v.* Anwarul Hasan. **1936 O.W.N. 237.**

———S. 115—*Material irregularity— Discretionary order—Refusal to issue commission under O. 26, R. 4, to examine witness living more than 200 miles from Court house—Revision—Interference.*

Where a witness cited by a party to the suit is a public servant in Government employ and serving at a place more than 200 miles from the Court where the suit is pending, O. 16, R. 19, C. P. Code, is a bar to the Court obtaining the presence of the witness by summoning. In such a case, the Court should exercise its discretion by issuing a commission to examine that witness under O. 26, R. 4, C. P. Code, especially when the witness is an important witness though he may be the husband of a party to the suit. If the Court in such a case refuses a commission, it acts with material irregularity and the High Court will interfere in revision under S. 115, C. P. Code. (*Agarwala and Rowland, JJ.*) Zohada Begum Saheba *v.* Haji Dawood Ayub. **189 I C. 463=6 B.R 840=21 Pat.L.T. 197=A.I. R. 1940 Pat. 437.**

———S. 115—*Material irregularity—Dismissal of pauper application as barred by S. 47, C. P. Code —Irregular use of information regarding execution proceedings—Revision.*

Where the Court, to which an application under O. 33, R. 1 for leave to sue *in forma pauperis* is presented, dismisses the application although satisfied that the applicants are paupers, holding that the suit is not maintainable in view of the provisions of S. 47, and where in coming to this conclusion, it not only refers to certain proceedings mentioned in the proposed plaint but makes use of the information obtained therefrom, the use of such information is irregular and it amounts to a material irregularity in the conduct of the proceedings in the lower Court which vitiates the order passed therein.

Per *Mackney, J.*—Where the execution proceedings have been referred in the plaint, the Court may be entitled to look at these proceedings, but on looking into them, the Court can only discover what defence is likely to be used; it cannot at that stage, consider the validity of that defence. (*Mya Bu and Mackney, JJ.*) Karim *v.* Kyauktaga Grant Ltd. **178 I. C. 896=11 R.R. 286=A.I.R 1938 Rang. 453.**

———S. 115—*Material irregularity—Execution sale—Court committing mistakes which result in substantial injury—Interference.*

Where in execution proceedings for the sale of property there has been misunderstanding as regards the legal position and the Courts commit serious mistakes in ignoring many important factors in connection with the property put up for sale, and are largely carried away by the fact that there is no substantial injury but where the various material irregularities in fact cause substantial injuries, the irregularities must be deemed to have resulted in miscarriage of justice and High Court can in such case interfere by way of revision. (*Mir Ahmad, J.*) Bundhelkhand Cycle and Motor Agency *v.* People's Bank of Northern India, Ltd. **181 I. C. 542=11 R. Pesh 70=A.I.R. 1939 Pesh. 9.**

———S. 115—*Material irregularity—*Ex parte *decree—Order setting aside on insufficient grounds —Revision—Interference.*

The applicant sued for a declaration that she was validly divorced from her husband. The dispute was referred to arbitration and extension of time was granted until certain date. On that date applicant was present through her pleader but the defendant was not present and the reference was superseded. The case was fixed for hearing for a certain date. Again the defendant was not present and an *ex parte* decree was passed. The defendant applied to have the *ex parte* decree set aside alleging various grounds for his non-appearance. The Judge before whom the case then came allowed the application and set aside the *ex parte* decree on the ground that his predecessor made no order that the suit was to be put down for *ex parte* hearing.

Held, that the Judge acted with material irregularity in setting aside the *ex parte* decree. (*Davis, J. C. and Lobo. J.*) Zenab *v.* Mahomed Haji Allahdino **32 S L.R. 703=174 I.C. 572=10 R.S. 264=A I R. 1938 Sind 76.**

———S. 115—*Material irregularity—Failure by appellate Court to notice important ground of appeal.*

An appellate Court failing to notice an important ground of appeal when dealing with the appeal, commits a meterial irregularity in the exercise of jurisdiction vested in it as an appellate Court, and orders passed by it in appeal are liable to interference on the revision side. (*Mir Ahmad, A.J.C.*) Bundhelkhand Motor and Cycle Agency *v.* People's Bank of Northern India, Ltd., Lahore. **162 I.C. 416=8 R. Pesh. 197=A.I.R. 1936 Pesh. 97.**

———S. 115—Material irregularity—Grant of temporary injunction under O. 39, R. 1—Revision —Interference. *See* C. P. Code, O. 39, R. 1. **1939 M.W.N. 621.**

———S. 115—*Material irregularity — Lower Court decreeing suit on case inconsistent with pleadings.*

Where the lower Court decrees the suit on a case which is not to be found in the pleadings and is inconsistent therewith, it acts illegally in the exercise of its jurisdiction and with material irregularity. (*Dunkley, J.*) Mutuswamy *v.* Kayamboo Konar. **14 Rang. 511=163 I.C. 668 =9 R.R. 45=A.I.R. 1936 Rang. 235.**

———S. 115—*Material irregularity—Misreading evidence.*

If the lower Court, misreads the evidence on record and failing to take notice of a vital fact appearing therein, comes to an erroneous conclusion, it would be deemed to have acted with material irregularity and its decision is open to revision by the High Court. (*Mackney, J.*) Dwarika *v* Bhagawati. **186 I.C. 530=12 R.R. 270=A I.R. 1939 Rang. 413.**

———S. 115—Material irregularity—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Interference. *See* C. P Code, S. 151. A.I R. 1938 Rang. 241.

——S. 115—*Material irregularity—Omission to consider oral evidence.*

A lower appellate Court acts with material irregularity in the exercise of its jurisdiction in not considering the oral evidence produced by the parties. (*Bhide, J.*) Des Raj *v* Ladha Ram. **172 I.C. 752=10 R.L. 366=39 P.L.R. 499 (2).**

——S. 115—*Material irregularity—Omission to refer to material evidence.*

A Court acts with material irregularity in the exercise of its jurisdiction if it arrives at a finding without reference to unequivocal evidence on record. (*Addison, J.*) Jubliee Chamber of Commerce, Ltd., Rawalpindi *v.* Lala Amrit Shah. **42 P.L.R. 48=A.I.R. 1940 Lah 180.**

——S. 115—*Material irregularity—Omission to write judgment in accordance with law.*

It is obligatory on Court to record a proper judgment complying with the requirements of law even in dismissing an appeal under O. 41, R. 11, C. P. Code. Where the appellate Court simply dismisses the appeal with the remark that there was ample material to support the order passed by the trial Court, its order is liable to be set aside in revision. (*Bhide, J.*) Mohammad Arif *v.* Mohammad Ishaq. **168 I.C. 688=9 R.L. 664 =38 P.L.R. 431=A.I.R. 1937 Lah. 352.**

——S. 115—*Material irregularity—Pre-emption suit—Court importing irrelevant considerations.*

Where in a pre emption suit the lower Courts import irrelevant considerations into the discussion of evidence and refuse to give the vendee the full sum proved to have been paid, merely because those considerations raise suspicions in the minds with regard to genuineness of the price paid, it commits a material irregularity. (*Mir Ahmad. A.J C.*) Ali Akbar *v.* Multan. **160 I.C. 452=8 R. Pesh. 116=A.I.R. 1936 Pesh. 12.**

——S. 115—*Material irregularity—Reference to arbitration by next friend of minor plaintiff—Failure to conform to O. 32, R. 7—Revision—Interference.*

A Court which does not follow the provisions of O. 32, R. 7, C. P. Code, in a matter of a reference to arbitration by the next friend of a minor plaintiff exercises its jurisdiction with material irregularity, and the High Court can and will interfere in revision under S. 115, C. P. Code, even though the question of jurisdiction was not raised in the Court below. (*Davis, J.C. and Weston, J.*) Loung Tahir *v.* Ramsingh Takhatram. **I. L.R. (1940) Kar. 327.**

——S. 115—*Material irregularity—Refusal to give relief under Agriculturists' Relief Act—Revision.*

A Court acts with material irregularity in refusing to give an applicant the benefits and relief to which he is entitled under the Agriculturists' Relief Act. The High Court in such a case will interfere in revision. (*Thom, J.*) Narain Singh *v.* Banke Behari Lal. **I.L.R 1937 All. 943=172 I C. 224=10 R.A. 386=1937 All.L.R. 974=1937 R.D 489=1937 A L.J. 842=1937 A.W.R 849=A.I.R. 1937 All. 753.**

——S. 115—*Material irregularity—Refusal to stay trial of suit pending decision of Special Judge under U. P. Encumbered Estates Act—If revisable.*

S. 115, C. P. Code, gives the Chief Court a discretion to make such order in the case as it thinks fit where it is of opinion that the Subordinate Court has acted in the exercise of its jurisdiction illegally or with material irregularity. Where an ordinary Civil Court finds that its jurisdiction to proceed with the trial of a suit is temporarily ousted by the provisions of the U. P. Encumbered Estates Act, and it elects nonetheless to proceed with the hearing of the suit, it acts with material irregularity, and its order is revisable. (*Yorke and Radha Krishna, JJ.*) M. Mohammad Intisham Ali *v.* Lachhman Prasad. **1940 O.L.R. 259=187 I C. 835=12 R.O. 401=1940 O.A. 521=1940 O. W.N. 610=1940 A.W.R. (C.C.) 284=A.I.R. 1940 Oudh 342.**

——S. 115—*Material irregularity—Suit on mortgage—Addition of new party and new issue—Order dissallowing question on new issue and striking off party added—Revision.*

In a suit brought on a mortgage executed by a father, his son was added as a defendant along with the father. After the son was added as a party, an issue was framed whether the mortgaged property was the self-acquired property of the father or the property of joint family. The trial Court however disallowed the question put on behalf of the defence whether the mortgaged property was the self-acquired property of the father or the property of the joint family and removed the name of the son from the category of the defendant on the imaginary ground of inconvenience and hardship.

Held, that the Court acted with material irregularity in disallowing the question and further, striking off the party, and hence his order was revisable under S. 115. (*Dhavle, J.*) Durga Dutt Jha *v.* Asharifilal Mahtha. **180 I.C. 203 =5 B.R. 362=11 R P 475=A.I.R. 1939 Pat. 74.**

——S. 115—*Material irregularity—Throwing burden of proof on wrong party in disregard of statute—Revision—Interference with order framing issues.*

Where a statute specifically puts the burden of proof upon a certain party, the Court in placing the burden of proof the other way is acting with material irregularity in the exercise of its jurisdiction, and the High Court may in a proper case interfere in revision to set right an issue framed in such a manner as to disregard the statutory provision regarding burden of proof. To disregard the direction of the statute with regard to burden of proof is a perverse decision and conscious departure from the rule of procedure. (*Mokett, J.*) Varisa Muhammad Rowther *v.* Marungapuri Estate. **1939 M.W N. 395=A.I. R. 1939 Mad. 644=(1939) 1 M.L.J. 334.**

——S. 115—*Material irregularity—What is.*

It is a material irregularity in the exercise of jurisdiction, if the Court holds that the defendant has admitted a certain claim of the plaintiff when the defendant has not done any such thing; it is also a material irregularity to hold an item proved which the trial-Court has held not proved without stating on what evidence the appellate Court relies for the proof of the item. (*Dalip Singh, J.*) Abbas Tea Company *v.* Ishar Das. **41 P.L.R. 492=A.I.R. 1939 Lah. 470.**

Miscellaneous proceedings.

——S. 115—Miscellaneous proceedings—Appellate order under S. 45, U. P. Encumbered Estates

Act—Revision, if lies. *See* U. P. ENCUMBERED ESTATES ACT, S. 45 (5). **1940 O.A. 468 (F B.).**

——S. 115—Miscellaneous proceedings—Orders under S. 3, Charitable and Religious Trusts Act—If revisable. *See* CHARITABLE AND RELIGIOUS TRUSTS ACT, S. 3. **1938 O.W.N. 1054.**

New case.

——S. 115—*New case—Execution of instalment decree—Application based on default clause—New case that it relates to unpaid instalments within three years—If can be entertained in revision.*

Where in an application for execution of an instalment decree filed beyond three years from the date of the first default, the decree-holder bases his cause of action on the default clause in the decree and wants to save limitation by certain payments made by the judgment-debtor which he fails to prove he cannot set up in revision a new case that his application is for realisation of the unpaid instalments within three years from the date of his application. (*Bartley and Nasim Ali, JJ.*) K. C. MUKERJEE *v.* JOGIA LOHARIN. **42 C, W.N. 437.**

New issue.

——S. 115—*New issue—Framing of new issue—Practice.*

Where in revision the petitioner urged that a new issue which was already covered by the issues under consideration should be framed.

Held, that petitioner could not be granted a further opportunity of doing that which with common care and attention he must have known he had to do from the start. (*Middleton, J.C.*) ELAHI BAKHSH *v.* YAKUB. **164 I.C. 189=9 R. Pesh. 9 (2)=A.I.R. 1936 Pesh. 157.**

New plea.

——S. 115—*New plea—Interference—Practice.*

It is not the practice to interfere in revision on a point not raised or argued in the lower Court (*Puranik, J.*) BULAKHIDAS *v.* MURLIDHAR. **1940 N.L.J. 340.**

——S 115—*New plea—Question of jurisdiction.*

A question of jurisdiction can be raised even on revision. (*Mir Ahmad, A.J.C.*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I. C.416=8 R. Pesh. 197=A.I.R.1936 Pesh. 97.**

Orders.

——S. 115—Order granting discharge to guardian—If revisable. *See* GUARDIAN AND WARDS ACT, S. 41 (3) AND (4). **(1938) M W.N. 188 (F B.).**

——S. 115—*Order rejecting review application—Revision.*

An order of Court rejecting an application under O. 47, R. 1, C. P. Code, after considering the grounds of review is not open to revision. (*Wazir, J.*) HASHMAT ALI *v.* ISHER DASS. **40 P. L.R.J. & K. 31.**

——S. 115—Order returning appeal for presentation in proper Court—Revision. *See* C. P. CODE, O 43, R. 1 AND S. 115. **42 P.L.R. 364.**

——S. 115—Order of Revenue officer under S. 26-G (6) of Bengal Tenancy Act—If revisable by High Court under S. 115, C. P. Code. *See* BENGAL TENANCY ACT, S. 26-G (6). **44 C.W.N. 191.**

——S. 115—Order under O. 41, R. 6 (2)—Revision. *See* C. P. CODE, O. 41, R. 6 (2). **44 C.W. N. 701.**

Other remedy open

——S. 115—*Other remedy—Appeal competent—Revision—Interference.*

It is the practice of the High Court to refrain from dealing with a matter in revision where a definite remedy is provided to the parties in the form of an appeal. (*Fazl Ali and Meredith, JJ.*) HRIDAYNATH SINGH *v.* LOHAR SINGH. **187 I.C. 838=6 B.R. 558=12 R.P. 646=21 P.L.T. 629.**

——S. 115—Other remedy open—Appealable order—Revision—Competency. *See* C. P. CODE, Ss. 2 (2), 115 AND 144. **A.I.R. 1936 Cal 812**

——S 115—Other remedy—Appealable order not appealed against—Revision—Order under Ss. 144 and 151—If open to revision. *See* C. P. CODE, Ss. 144 AND 151. **19 Pat.L.T. 118.**

——S. 115—*Other remedy open — Appeal—Conditional decree in pre-emption suit—Subsequent order dismissing suit for default—Revision.*

A decree passed in a suit for pre-emption in favour of the plaintiff for possession of the land in dispute on payment of a certain amount to the vendee on or before a certain date failing which the suit is to stand dismissed, is no doubt a conditional decree. But it is complete in itself and fully disposes of the suit. An order subsequently passed by the Court dismissing the suit for non-compliance with the terms of the decree cannot be treated as a decree against which an appeal could be preferred. Consequently a revision is competent against the subsequent order. (*Tek Chand, J.*) SHER SINGH *v.* DURGA DAS. **41 P. L. R. 381=A.I.R. 1939 Lah 376.**

——S. 115—*Other remedy open—Appeal competent—Revision—Interference—When justified.*

Though the High Court will not ordinarily interfere in revision when a remedy lies by way of appeal, the High Court will interfere if a defect of law and a grave wrong are manifest, for the High Court will not permit a case to proceed on jurisdiction snatched, and having no basis or justification. (*Davis, J. C. and Weston, J*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I.L.R. (1939) Kar. 330=182 I. C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

——S. 115—*Other remedy open—Appeal competent to Subordinate Court not availed of—Revision—Erroneous view of law leading to non-exercise of jurisdiction—Powers of revision.*

Where a lower Court, by an erroneous decision on a point of law has refused to exercise a jurisdiction which is vested in law, the case falls undoubtedly under Cl. (*c*) of S. 115. C. P. Code, if not under Cl. (*b*); and the High Court can interfere in revision. The revisional power under S 115 is a bar only when an appeal lies to the High Court itself. The fact that an appeal lies to a lower appellate Court will not take away the revisional powers of the High Court. (*R. C. Mitter, J.*) SASHI KANTA ACHARYA BAHADUR *v.* NASIRABAD LOAN OFFICE CO **168 I.C. 849=9 R. C. 819=63 C.L.J. 105=A.I.R. 1936 Cal 786.**

——S. 115—*Other remedy open—Appeal competent to District Court but no appeal to High Court—Revision—Jurisdiction of High Court.*

The High Court has jurisdiction to entertain a revision application under S. 115, C. P. Code, if no appeal lies to it; and it can interfere with the order of the first Court if no appeal lies to the High Court, although an appeal might lie from the first Court to the District Court. (*Sulaiman, C.J. and Harries, J.*) BABU RAM *v.* MANOHAR LAL. **I.L.R (1938) All. 22=173 I.C. 157=10 R. A. 466=1938 A.L.R. 98=1937 A L.J 886=1938 R.D. 84=1937 A.W.R. 986=A.I.R. 1938 All. 6.**

——S 115—*Other remedy open—Appeal not availed of*—Ex parte *decree—Application to set side—Order declining—Failure to appeal—Revision against order—Maintainability.*

A defendant who suffers an *ex parte* decree to be passed against him, and fails to appeal against an order refusing to set aside the *ex parte* decree under O. 9. R. 13, cannot thereafter invoke the revisional powers of the High Court to get the order declining to restore the suit set aside in revision. (*Das and Rois, JJ.*) GOBINDA KOET *v.* SHIBA PROSAD SINGH. **18 Pat.L.T. 374.**

——S. 115—*Other remedy open*—Ex parte *decree—Revision against—Interference — "Case decided."*

The High Court will not entertain a revision application against a decree which could come before the High Court in second appeal. An *ex parte* decree passed by a Court which is subject to appeal and second appeal is not a decree which is subject to revision under S. 115, C. P Code. Such a case cannot be said to be a case which has been decided by any Court subordinate to the High Court and in which no appeal lies (*Collister and Bajpai, JJ.*) A. H. GHAZNAVI *v.* GURCHARAN SINGH. **172 I.C. 72=10 R.A. 369=1937 All.L. R. 932=1937 A.L.J. 831=1937 A.W.R. 726=A. I.R. 1937 All. 691.**

——S. 115—*Other remedy open—Interference.*

Although there is no bar to the exercise of powers under S. 115, C. P. Code, yet the powers being discretionary the High Court should be reluctant to entertain an application for revision when the aggrieved party had a remedy by way of an appeal in the Subordinate Court which he failed to pursue. (*Wazir, J.*) JUMNA *v.* AHMED JOO. **40 P.L.R.J. & K 29.**

——S. 115—*Other remedy open—Interference in revision.*

Where a petitioner in revision has another remedy open, it depends upon the facts of each particular case whether or not the High Court will interfere in revision on that ground (*Varma, J.*) PARYAG *v.* CHANDRACHUR. **179 I.C 845=11 R.P. 416=1939 P.W.N. 50=5 B R. 304=A.I.R. 1939 Pat. 263.**

——S. 115—*Other remedy open—Interference in revision—Practice*

There is no inflexible rule that the High Court will not interfere in revision when other remedy is open by way of suit. High Court even in such cases can interfere in revision to avoid multiplicity of litigation and hardship to the parties. (*Tek Chand, J.*) MT. BHAGWANTI *v.* SANT SINGH. **182 I.C. 560=12 R.L. 58=41 P.L.R 374=A.I.R. 1939 Lah. 52.**

——S. 115—*Other remedy open—Non interference—Limits of rule.*

High Court will not interfere in revision where there is another remedy open to the party. But the other remedy which is open to the applicant in revision must be a certain and conclusive remedy allowed by law. (*Roberts, C.J. and Dunkley, J.*) MAUNG AHMIN *v.* MAUNG SAUNG. **178 I.C. 789=11 R.R. 281=A.I.R. 1938 Rang. 360.**

——S. 115—*Other remedy—Order dismissing suit under O. 9, R. 8—Revision.*

No revision lies against an order dismissing a suit under O. 9, R. 8, C. P. Code, as another remedy is open to the plaintiff by way of an application for restoration of the suit with an appeal against the order, if that application is dismissed. (*Blecher, J.*) MAHOMED SHAH *v.* SHIB DYAL SINGH. **41 P.L.R. 102.**

——S. 115—Other remedy open—Order for rateable distribution under S. 73—Revision. *See* C. P. CODE, S. 47—APPEAL. **A.I.R. 1936 Pesh. 52.**

——S. 115—*Other remedy open—Order on application under O. 21, R. 100—Revision—Interference.*

A revision petition will no doubt lie at the instance of a party aggrieved by an order on an application under O. 21, R. 100, C. P. Code. But the High Court will not interfere unless there are cogent reasons for such interference. The normal remedy of a party aggrieved by such an order is by way of suit as laid down by O. 21, R. 103; and a suit is ordinarily as cheap as and more convenient than a revision petition, besides being a more satisfactory way of adjudicating on the dispute as well as on points of law. When the applicant has not lost his remedy by way of suit by lapse of time, and when it will not work any hardship on him, if he were driven to file a suit, the High Court will not interfere in revision. (*Horwill, J.*) KESAVALU NAIDU *v.* JAYAGANAPATI MUDALI. **167 I.C. 413=9 R.M. 449 (1)=1936 M. W.N. 1120=44 L.W. 703=A.I.R. 1936 Mad. 940.**

——S. 115—Other remedy open—Order on claim petition—Power of High Court to revise if precluded by right of suit under O. 21, R. 63. *See* C. P. CODE, O 21, RR. 58, 60 AND 63 AND S. 115. **1938 A.L J 1118=A.I.R. 1939 All. 117.**

——S. 115—*Other remedy open—Order on claim petition—Revision.*

The High Court will not ordinarily interfere in revision with an order passed on a claim petition; but where the executing Court has not addressed itself properly to what it has to do in a claim petition, the High Court will interfere. (*Venkataramana Rao, J.*) VOIKARAN *v.* KOTHANDAPANI PILLAI. **1937 M.W.N. 320 (1).**

——S 115—*Other remedy open—Order passed in suit under S 9 of the Specific Relief Act—Revision, if competent.*

No revision is competent against an order dismissing a suit brought under S. 9 of the Specific Relief Act, as the remedy by way of a regular suit is open to the plaintiff. (*Zia-ul-Hasan, J.*) SITLA DIN *v.* MOHAN. **13 Luck 18=165 I.C. 908 =9 R.O. 271=1936 O.W N. 1228=1936 O.L.R. 700=A.I R 1937 Oudh 183.**

——S. 115—*Other remedy open—Order rejecting application for amendment of decree—Revision.*

When an application for amendment of a decree under S. 152, C. P. Code, is dismissed, the proper remedy is to appeal against the decree. The order rejecting amendment is not open to revision. (*Norman, I.C.S.*) ABDUL RAHMAN *v.* DIDAR BUX. **1936 A.M.L.J. 117.**

——S. 115—Other remedy—Order refusing delivery under O. 21, R. 99—Rent—Interference. *See* C. P. CODE, O. 21, R. 103. **18 Pat.L.T. 833.**

——**S. 115**—*Other remedy open—Order under S. 73—Interference in revision.*

Where the remedy by suit is open to the applicant under S. 73 (2), C. P. Code, the High Court should not exercise the revisional jurisdiction vested in it under S. 115. *(King, C.J. and Nanavutty, J.)* HAR NARAIN SETHI *v.* BIRD & CO. **12 Luck 19=8 R O. 240=1936 O.L.R. 35=160 I.C. 36=1936 O.W.N. 116=A.I.R. 1936 Oudh 132.**

——**S. 115**—*Other remeds open—Order under S. 73—Interference in revision.*

An application under S. 115, C. P. Code, is not maintainable where the applicant has his remedy by a suit under S 73 (2), C. P. Code. *(Srivastava and Nanavutty, JJ.)* BIRENDRA BIKRAM SINGH *v.* BASDEO **12 Luck 52=160 I.C. 814=8 R.O. 281 =1936 O.W.N. 262=1936 O.L.R. 109=A.I.R 1936 Oudh 185.**

——**S 115**—*Other remedy open—Order under O. 21, R. 60—Revision, when competent.*

It is a general principle that an application under S. 115 will not ordinarily be entertained when there is another certain and conclusive remedy open to the aggrieved party. A party against whom an order under O. 21, R. 60 is passed has a special remedy by way of suit under O 21, R 63 and no application in revision can be entertained against an order made under Rr. 60 and 61 or R. 62, O. 21, although no appeal lies from it, unless it can be shown that the Judge passing the order has in passing it failed to exercise jurisdiction vested in him by Rr. 58 to 62, O. 21. Where the Court has so failed to exercise its jurisdiction its order is open to revision. *(Dunkley, J)* VEDNATH SINGH *v.* U. BA DIN. **14 Rang 516=164 I.C. 638=9 R.R. 116=A.I.R. 1936 Rang. 306.**

——**S. 115**—*Other remedy open—Order under O. 21, R. 63—Revision.*

When a remedy lies by way of a suit the High Court will not interfere in revision. An order under O. 21, R. 63, allowing an objection to attachment preferred under O. 21, R. 58, C. P. Code, is not open to revision by the High Court, as the party adversely affected has a remedy by way of suit. *(Davis, J.C. and Mehta, A.J.C.)* GHANSHAMDAS *v* SHIVALDAS. **160 I C. 383=30 S L.R. 288=8 R.S. 126=A I.R. 1936 Sind 2.**

——**S. 115**—*Other remedy open—Revision.*

Where a party to a civil proceeding seeks to exercise the discretionary powers of the High Court under S. 115, C. P. Code, he must satisfy the Court that he has no other remedy open to him to set right what he alleges to have been done illegally, irregularly or without jurisdiction by a Subordinate Court. 11 All 383 and 15 All. 405, Rel. on. *(Mackney, J.)* BANK OF CHETTINAD, LTD. *v.* MAUNG PO LU. **161 I.C. 258=8 R.R. 463 =A.I.R. 1936 Rang 12.**

——**S. 115**—*Other remedy open—Revision.*

Ordinarily the High Court ought not to interfere in revision when another remedy is open to the applicant; but where the order of lower Court is obviously wrong, it is open to the High Court to interfere in revision if litigation will thereby be shortened. *(Pollock, J.)* GHANSHYAMDAS BALKISAN *v.* SHEOKISANDAS. **I L.R. (1937) Nag. 82=167 I.C. 502=9 R.N. 189=A.I.R. 1937 Nag. 30.**

——**S. 115**—*Other remedy open—Revision, if not maintainable.*

It is not and should not be an invariable rule that revision should not be entertained whenever there is another remedy open to the party, for there seems to be no warrant for this either in S. 115 or in any other provision of the C. P. Code *(Zia-ul-Hasan and Yorke, JJ.)* LYALLPUR BANK, LTD. *v.* RAMJI. **15 Luck. 332=185 I C. 889=12 R.O. 270=1940 O W.N. 132=1940 A W.R. (C. C) 63=1940 O.L.R. 75=1940 O.A. 132=A.I.R. 1940 Oudh 237.**

Powers of Court.

——**S. 115**—*Powers of Court—Amendment of decree*

The Chief Court has power under its revisional jurisdiction to amend a decree so as to make it conform with the judgment. *(Thomas, C J. and Zia-ul-Hasan, J.)* RAGHURAJ SINGH *v* LADA HARI KISHAN LAL. **14 Luck. 13=1938 O.A. 231 =1938 A.W.R. (C.C.) 26=1938 O.W.N. 331= 1938 O.L.R. 143=178 I.C 865=1938 R.D. 405 (2)=10 R.O. 231=A.I.R. 1938 Oudh 107.**

——**S. 115**—*Powers of Court—Power to act on its own motion.*

The Judicial Commissioner's Court in an appropriate case can exercise powers of revision on its own motion if it appears that there had been any material irregularity in the exercise of its jurisdiction by the lower Court. *(Almond, J.C.)* KANSHI RAM *v.* GOBIND RAM. **178 I.C. 776=11 R.Pesh. 58=A.I.R. 1938 Pesh. 81.**

——**S. 115**—*Powers of High Court—Appeal from decree not immediately lying to it—Revision, if barred—"In which no appeal lies thereto"—Interpretation.*

Per *Nasim Ali, J.*—S. 115, C, P. Code, authorises the High Court to revise an order of a Subordinate Court in any case "in which no appeal lies thereto". Where a decree can be appealed against to the District Judge from whose decree a second appeal can be filed in the High Court, it is not a case in which no appeal lies to the High Court at all, although no appeal can be filed from the original decree of the first Court direct. There is no ground for restricting the scope of the words "in which no appeal lies thereto" to cases where no appeal lies from the order sought to be revised. So long as a party has a right to come up to the High Court by way of an appeal and has failed to avail himself of that opportunity by first going up to the District Judge and then coming up to the High Court, he cannot ask the High Court to interfere in revision.

Per *Rau, J.*—Are we to interpret the expression "in which no appeal lies" as if it were equivalent to the expression "in which no appeal lies or may in future lie"? I hesitate to place so wide a construction upon these words. According to the alternative interpretation, revision is barred only where an appeal, whether first or second, lies immediately to the High Court; where no such immediate appeal lies, the High Court has jurisdiction to intervene in revision, although whether it will exercise this jurisdiction or not, will depend upon the urgency of the need for intervention. *(Nasim Ali and Rau, JJ.)* NAFAR CHANDRA SARDAR *v.* KALIPADA DAS. **I L.R. (1940) 1 Cal. 393=188 I.C. 483=13 R.C. 1=44 C.W.N. 364= A.I.R 1940 Cal. 257.**

——**S. 115**—*Power of High Court—Execution sale—Absence of application to set aside along* *with deposit of decretal amount—Refusal to set aside—Interference in revision—Power of High Court—Hardship—If ground of interference.*

The High Court has no power under S. 115, C. P. Code, to interfere with an order of a lower Court refusing to set aside an execution sale in the absence of an application to set aside the same though the full amount of the decree and compensation have been deposited in time. The fact that it is a hard case does not permit the High Court to interfere where it has no power so to do. (*Harries, C. J. and Rowland, J.*) BHARI JENA *v.* GAURANGA CHARAN SAHU. **18 Pat. 210 =186 I.C 143=6 B.R. 290=12 R.P. 453=A.I. R. 1940 Pat. 87.**

——S 115—Powers of High Court—Execution sale—Order confirming sale for want of application to set aside though deposit made under O. 21, R. 89—Order rejecting application for review—Revision—Interference, *See* C. P. CODE, O. 21, R. 89. **5 C.L.T. 27.**

——S. 115—*Powers of High Court—Order of Sessions Judge in revision from order of Magistrate under Bombay Municipal Boroughs Act—Revision to High Court—Interference—Grounds.*

The High Court has power to interfere in second revision from an order passed by a Sessions Judge in revision against an order of a Magistrate under the Bombay Municipal Boroughs Act, though such interference should be rare. When the question involved is one of construction of a General Act and is of considerable importance to Municipalities and rate payers, the High Court will interfere, (*Beaumont. C. J.*) BOROUGH MUNICIPALITY OF AHMEDABAD *v.* AHMEDABAD MANUFACTURING AND CALICO PRINTING CO., LTD. **I.L.R. 1939 Bom. 701=41 Bom.L.R. 1015=186 I.C. 456=12 R.B. 341=A.I.R. 1939 Bom. 478.**

——S. 115—*Powers of High Court—Perverse order—Interference in revision.*

The High Court will not ordinarily exercise its revisional powers even though the lower Court has decided a question of fact or law erroneously; but its hands are not tied when it finds that the order of the Court below is entirely and absolutely unjustifiable and is almost perverse. (*Wort, J.*) DEOKI SINGH *v.* RAGHVINDRA BHAGWAN. **183 I.C. 371=5 B.R. 922=12 R.P. 135= 1939 P.W.N. 229=A.I.R. 1939 Pat. 430.**

Procedure.

——S. 115—Procedure—Error in procedure—Court entertaining application instead of suit without demanding *ad valorem* Court-fee—Revision—Interference. *See* B. T. ACT, S. 26-J. **63 C.L.J. 103.**

Revision.

——S. 115 and O. 41, R. 3—*Rejection of appeal before registration—Revision.*

Where the appellate Court rejects a memorandum of appeal on the ground that it is out of time before registering the appeal, the appellate Court assumes a jurisdiction which it does not possess, as the Civil Procedure Code does not authorize the appellate Court to pass such order at that stage. The order rejecting the appeal can therefore be interfered with in revision under S. 115 of the Code. (*Biswas, J.*) SUDHANSU BHUSAN PANDEY *v.* MAJHO BIBI. **176 I.C. 361= 11 R.C. 92=42 C.W.N. 72=A.I.R. 1937 Cal. 732.**

——S. 115—*Remand order—Revision.*

An order of remand under O. 41, R. 23, C. P. Code, will become final if not attacked by way of appeal or revision. A petition for revision of the order is, therefore, competent. (*Dalip Singh, J.*) FIRM RALLA RAM DAULAT RAM *v.* JASWANT RAI. **189 I.C. 464=42 P.L.R. 201=A.I.R. 1940 Lah. 290.**

——S. 115—*Revision—Competency—Order rejecting auction purchaser's application for confirmation of sale.*

An order rejecting an auction purchaser's application for confirmation of the sale is not an appealable matter, nor can it be revised. (*Burn and Lakshmana Rao, JJ.*) SATYANANDAM *v.* NAMMAYYA. **183 I.C. 33=12 R.M. 216=47 L. W. 51=1938 M.W.N. 656=A.I.R. 1938 Mad. 307.**

——S. 115—Revision — Competency— Orders under S. 5 of U. P. Agriculturists' Relief Act. *See* U. P AGRICULTURISTS' RELIEF ACT, S. 5 (2). **A.I.R. 1938 All. 456.**

——S. 115—*Revision—Competency— Revision against finding—Decision in favour of applicant.*

No revision lies against a finding where the decision of the Court is in favour of the party presenting the petition for revision. (*Mir Ahmad, A. J. C.*) BUNDHLKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I.C. 416=8 R. Pesh. 197=A. I.R. 1936 Pesh. 97.**

——S. 115—*Revision—Competency— Suit of small cause nature.*

Where the decision of a suit involves the decision of legal inferences to be drawn from the established facts and the question is an important question of law, revision is competent even if the suit is of a small cause nature. (*Almond, J. C.*) SECRETARY OF STATE *v.* ATAULLAU KHAN. **163 I.C. 448=9 R. Pesh 1=A.I.R. 1936 Pesh. 148.**

——S. 115—*Revision—Dismissal of objections under O 21, R. 58, C. P. Code—Interference.*

High Court will not, save in most exceptional cases, exercise its revisional jurisdiction in favour of a party to whom there is open another certain and conclusive remedy. Hence the High Court would not interfere in revision against the dismissal of objections of a party to attachment under O 21, R. 58, C. P. Code, as such party has a conclusive remedy by filing a suit under O 21, R. 63. (*Roberts, C. J. and Dunkley, J.*) T. K. ROY CHOWDHURY *v.* BIHARILAL. **177 I.C. 891=11 R.R. 181=A.I R. 1938 Rang. 319.**

——S. 115—*Revision—Expediency— Rejection of amendment.*

The mortgaged property had been erroneously described in the mortgage deed and the error therein had been repeated in the plaint, the preliminary decree, the final decree and in the execution application. Following upon the passing of the final decree, the plaintiffs applied to the Court for the amendment of the decrees, the plaint and the mortgage deed. This application was rejected. Subsequently a puisne mortgagee who claimed to be a transferee of the decree passed in favour of the plaintiffs made an application for amendment. The application being rejected, the applicant made an application under S. 115 against the order rejecting amendment.

Held, that in these circumstances it was not expedient that the High Court should interfere with the order of the lower Court in virtue of its powers under S. 115. (*Thom, C. J., Ganga Nath and Mohammad Ismail, JJ.*) Gauri Shanker *v.* Shyam Sunder Lal. **176 I.C. 879 (1)=1938 A.L.J. 854=1938 A.L.R. 678=11 R.A. 152=1938 A.W.R. (H.C.) 460=A.I.R. 1938 All. 466 (F.B.).**

——**S. 115**—*Revision—Grounds—New point not raised in Court below—If open as ground of interference.*

It is not the practice of the High Court to interfere in revision on a point, which has never been taken in the Court below (*Broomfield, J.*) Shripad Baji *v.* Dattatraya Vithal. **183 I.C. 753=12 R.B. 128=41 Bom.L.R. 485=A.I.R. 1939 Bom 296.**

——**S. 115**—*Revision—Interference — Finding on unrebutted oral evidence.*

Where a lower Court had come to the conclusion that a person is an agriculturist on the oral evidence of a plaintiff which was not rebutted on the other side by any evidence, the chief Court held that in the circumstances there was no reason to interfere with the findings of the lower Court. (*Zia-ul-Hasan, J.*) Gopal Das *v.* Puttu Lal. **1939 O.A. 425.**

——**S. 115 and O. 9, R. 13**—*Revision—Interference—Summons, duty served on defendant—Suit transferred at defendant's instance to another Court*—Ex parte *decree—District Judge in appeal restoring case to file on sufficient ground—Revision—Interference—Sufficient cause.*

In a suit the defendant was duly served. At his instance the suit was transferred to another Court. At the hearing the defendant not appearing, the suit was decreed *ex parte.* The defendant applied to set aside the *ex parte* on the ground that he had no notice of the date fixed for hearing in the transferee Court. The trial Court found he could not be excused for the gross negligence. In appeal the District Judge, finding sufficient ground for the appellant's non-attendance, restored the suit to file. In revision the plaintiff urged that the application to set aside *ex parte* decree was barred as the defendant was duly served.

Held, the circumstances of the case were peculiar and interference was not justified. The action of the trial Court bore a close analogy to proceeding *ex parte*. It was not unreasonable to treat the case as practically one of non-service of summons on the defendant. (*Macpherson, J.*) Kapileswar Maharana *v.* Abdur Rahman. **164 I.C. 854=9 R P 142=A.I.R. 1936 Pat. 490.**

——**S. 115**—*Revision—Interlocutory matter—Interference by High Court.*

The High Court would not ordinarily exercise its revisional jurisdiction in a purely interlocutory matter, namely, about the admission of a certain piece of evidence. It may however do so when the question is one of general importance and no objection is taken by the opposite party as to the competency of the Court to entertain the petition. But such case must not be regarded as a precedent for interference in purely interlocutory matters of procedure which do not affect jurisdiction, and do not inflict irreparable injury. (*Bose, J.*) Bhaiya Saheb *v.* Ramnath. **I.L.R. 1940 Nag. 280=A.I.R. 1938 Nag. 358.**

——**S. 115**—*Revision—Order granting review under inherent powers.*

Where the Court discharges a defendant without his specifically asking for the same and without giving the plaintiff an opportunity to state his case and such order is set aside on review, the defendant has no right of revision from such order as the *status quo* is restored and his revision application is premature. (*Bose and Puranik, JJ.*) Karnidan Hansraj *v.* Askaran Jhabak. **I,L.R. (1938) Nag. 395=172 I.C. 433 =10 R N. 208=A I.R. 1937 Nag. 385.**

——**S. 115**—*Revision—Order returning plaint for presentation to proper Court—Appeal—Order rejecting—Revision.*

A plaint was returned for presentation to proper Court. Appeal against this order was dismissed by District Judge.

Held, a revision to the High Court was not competent. A.I.R. 1934 Lah. 536; A I.R. 1935 Pat. 191 and 11 Cal. 6 (P.C), Rel. on. (*Middleton, J. C.*) Jaimal Singh Harbans Singh *v.* Kamla Parshad. **161 I.C. 355=8 R. Pesh. 172=A.I.R. 1936 Pesh. 78.**

——**S. 115**—*Revision—Power of Board of Revenue under Oudh Rent Act.*

The Board of Revenue have no authority under S. 115 to call for the record of cases disposed of under the Oudh Rent Act and pass such orders thereon as it may think fit. [20 S. D. 1891; 1 R. D. (R. E.) 116, Foll] (*Darling, S. M. and Bomford, J. M.*) Hari Narain *v.* Raj Bahadur Lal. **1937 O W N. 1164=1937 R.D. 556.**

——**S. 115**—Revision—Refusal to consolidate suits—Interference. *See* Practice—Consolidation of Suits. **177 I.C. 799.**

——**S. 115**—*Revision—Undue delay — Interference.*

Ordinarily the High Court does not entertain applications for revision made after undue delay. (*Niamatullah and Ismail, JJ.*) Ram Saran Das *v.* Banwari Lall. **I.L.R (1938) All. 148=173 I.C. 729=10 R.A 499=1938 A L.R. 171=1937 A L.J 1181=1937 A.W.R. 1116=A.I.R. 1938 All. 98.**

Scope.

——**S. 115**—*Scope—Appeal expressly prohibited by law—Power to treat appeal as revision application—Question of law or construction of document or wrong decision—If sufficient ground.*

S 115, C. P. Code, was only intended to relate to questions of jurisdiction and not to questions of law or construction of document, or a wrong decision by a Judge. These are not matters affecting jurisdiction and cannot constitute sufficient grounds for treating an appeal as an application in revision, when an appeal is expressly prohibited by law. S. 115 is intended only to supplement the Code in relation to matters on which the Code is silent, and not to provide the parties with a right of second appeal. (*Davis, J. C. and Tyabji, J.*) Khanchand *v.* Pessumal. **I.L R. (1939) Kar 342=185 I C. 486=12 R. S. 165=A.I.R. 1939 Sind 360.**

——**S. 115**—*Scope—Application under S. 32, Land Acquisition Act, for investment of money in purchase of lands—Dismissal—Applications for review and for opportunity to adduce fresh evidence—Rejection—Revision against latter orders —Competency—Proper Procedure.*

On an application made by the trustees of a Devaswom under S 32 of the Land Acquisition Act for the investment of moneys in deposit in the purchase of other lands for the Devaswom, the Court, acting on the report of the Collector who stated that the lands proposed to be purchased were insufficient for the amount in deposit, refused to make an order for the purchase and dismissed the application. The trustees then filed petitions for review of the order of dismissal and for an opportunity of adducing fresh evidence as to the sufficiency of the land. The Court holding that it was bound by the Collector's report declined to review the order and rejected the applications. Against that rejection the trustees applied to the High Court under S. 115, C. P. Code.

Held, that the revision applications against the latter orders were incompetent and that the proper procedure was to have the order dismissing the original application corrected by the High Court. (*Venkataramana Rao, J.*) NARAYANAN NAMBUDRI *v.* SUB-COLLECTOR AND LAND ACQUISITION OFFICER, MALAPURAM. **173 I.C. 502=10 R. M. 597=1937 M.W.N. 1167=46 L.W. 403=A.I. R. 1937 Mad. 948=(1937) 2 M L.J. 429.**

——S. 115—Scope—Case under S. 9, Specific Relief Act — Competency of revision. *See* SPECIFIC RELIEF ACT, S. 9. **1938 A.W.R. (H.C.) 588=1938 A.L.J. 864.**

——S. 115—*Scope—Case under S. 9, Specific Relief Act—Revision—Interference.*

Although the High Court will not ordinarily interfere in revision in a case under S. 9, Specific Relief Act, where there has really been no trial of the case at all and the suit has been dismissed under a misapprehension of the scope of S. 9, the High Court will interfere in revision. (*Pollock, J.*) AJODHIYA PRASAD *v.* GHASIRAM. **173 I.C. 746=10 R.N. 324=20 N.L.J. 189=A.I.R. 1937 Nag. 326.**

——S. 115—Scope—Execution case—Order of dismissal for non-prosecution—Revision. *See* C. P. CODE, S. 2 (2). **A.I.R. 1936 Cal. 267.**

——S. 115—*Scope—High Court, when may interfere.*

Clause (*c*) of S. 115, C. P. Code, means that a High Court may interfere in a case where a Court subordinate to it has performed some action, even though while correctly exercising its jurisdiction, contrary to the law or in such a manner as to import a material irregularity into the proceedings. The High Court will not necessarily interfere in every case of illegality or irregularity and ordinarily it will make any order as it thinks fit only where the illegality or irregularity is serious or where material injustice has been caused thereby. (*Davis, I.C.S.*) GIRDHAR LAL *v.* BISHEN DEI. **1938 A.M.L.J. 115.**

——S. 115—*Scope—Decision on point of limitation—Revision.*

Even Cl. (*c*) cannot be invoked "when the question of jurisdiction is not involved" or at least a question of procedure, for example, proceeding in the absence of a necessary party to the suit. It must be something independent of the decision itself, an irregularity or illegality in the manner of arriving at it, not in the conclusion reached. A good working test is whether if the decision had been the other way, the illegality would still be there. If not, the flaw must lie in the decision, and not in the manner in which it is reached. Consequently it would not be revisable, and this test would not work in every case. But where it does, it could be decisive. The decision, whether on the question of limitation, or the character of the suit, or the starting point of limitation, is therefore not revisable under S. 115. (*Vivian Bose, J.*) DEVIDAS *v.* NILKANTHRAO. **I.L.R. (1936) Nag. 73=164 I.C. 848=9 R.N. 36=A.I.R. 1936 Nag. 157.**

——S. 115—*Scope—Interference—Principles—Award—Order refusing to set aside—Revision.*

Where the High Court is invited to exercise jurisdiction under S. 115, it will not deal with the case as if it is dealing with objections to a Commissioner's report or an appeal on facts in first or even in second appeal. Jurisdiction under S. 115 is not to be lightly exercised. It is an extraordinary jurisdiction and should be used only on appropriate occasions. The Court should not exercise its revisional jurisdiction in case of an application for setting aside an award in view of the principle of finality in cases of arbitration. 29 Cal. 167 (P.C.), Ref. (*Davis, J.C. and Lobo, A.J.C.*) HASSOMAL VILLAITRAI *v.* KISHINCHAND CHOTEMAL. **30 S.L.R. 271=166 I.C. 365=9 R. S. 142=A.I.R. 1936 Sind 172.**

——S. 115—Scope—Order amending decree under Ss. 151 and 152—Revision—Maintainability. *See* C. P. CODE, S. 2 (2). **41 Bom.L.R. 800.**

——S. 115—*Scope—Order filing award and directing decree to be drawn up after overruling objection on ground of want of leave under O. 32, R. 7, C. P. Code—Revision.*

Where a Court overrules objections raised against the validity of an award in arbitration on the ground that no leave of Court was obtained under O. 32, R. 7, C. P. Code, and directs a decree to be drawn up in terms of the award, dismissing an application to set aside the award under Sch. II, para. 15, its order is revisable by the High Court under S. 115, C. P. Code, provided it is shown that the Court below has exercised a jurisdiction not vested in it by law, or failed to exercise a jurisdiction so vested or has acted in the exercise of its jurisdiction illegally or with material irregularity. The order of reference to arbitration which has been made without the leave of the Court being expressly recorded is itself open to revision. (*Broomfield, J.*) SHRIPAD BAJI *v.* DATTATRAYA VITHAL. **183 I.C. 753=12 R.B. 128=41 Bom. L.R. 485=A.I.R. 1939 Bom. 296.**

——S. 115—*Scope—Order granting permission to withdraw suit with permission to file fresh suit under O. 23, R. 1—Interference.*

Where a Court gives leave to withdraw a suit with liberty to bring a fresh suit under O. 23, R. 1, C. P. Code, in a case in which it has no power to grant leave to file a fresh suit, it acts without jurisdiction. Where the Court does not at all purport to consider whether it has jurisdiction or not, and does not indicate any ground for granting permission and gives no finding that there was a defect in the plaint, the High Court can interfere in revision. (*Horwill, J.*) JAGADAMBAL *v.* SUNDARAMMAL. **1940 M.W.N. 806=(1940) 2 M.L.J. 398.**

——S. 115—*Scope—Order under S. 151—Revision—Power of High Court.*

An order passed under S. 151, C. P. Code, is capable of being revised by the High Court under S. 115, C. P. Code. (*Varma, J.*) RAGHUNANDAN

LOHAR *v.* BACHU SINGH. **6 B.R. 397=186 I.C. 798=12 R.P. 531=A.I.R. 1940 Pat. 475.**

Stay of suit.

———S. 115—*Stay of whole suit under S. 7 of Encumbered Estates Act—Plaint disclosing two sets of causes of action—Failure to order separate trial—Revision, if lies.*

Where the plaint disclosed two sets of causes of action, but the Court had ordered the stay of the suit in its entirety under S. 7 of the Encumbered Estates Act.

Held, that the Court had acted with material irregularity and also that it failed to exercise a jurisdiction which it undoubtedly possessed in ordering a separate trial of the two sets of causes of action and as such the High Court could interfere in revision under S. 115 of the C. P. Code. (*Niamatullah and Ismail, JJ.*) MUKAND SARUP *v.* KRISHNA CHANDRA SINGH. **I.L.R. (1938) All. 153=173 I. C. 654=10 R.A. 488=1938 R.D. 34 =1938 A.L.R. 155=1937 A.L.J. 1139=1937 A. W.R. 1118=A.I.R. 1938 All. 86.**

Subordinate Court.

———S. 115 — *Subordinate Court — Appellate officer appointed under S.* 40 *of Bengal Agricultural Debtors Act.*

There is no connecting authority under which an appellate officer appointed by the Local Government under S. 40 of the Bengal Agricultural Debtors Act may be said to be subordinate to the High Court. Consequently the jurisdiction of the High Court under S. 115, C. P. Code, cannot be invoked against his order. (*Nasim Ali and Edgley, JJ.*) MD. ABDULLA SHAH *v.* GIRDHARI LAL MUNDA. **176 I.C. 616=11 R.C. 138=68 C. L.J. 407=42 C.W.N. 507=A.I.R. 1938 Cal. 448 (1).**

———S. 115—Subordinate Court—Assistant Collector of second class—Powers of Chief Court. *See* OUDH RENT ACT, S. 116. **163 I.C. 930.**

———S. 115—*"Subordinate Court"—Chief Judge of Small Causes Court deciding appeal under S. 217 of the City of Bombay Municipal Act—If Court subordinate to High Court — Revision—Competency.*

The Chief Judge of the Bombay Small Causes Court acting under S. 217 of the City of Bombay Municipal Act acts as a *persona designata*, and not as a Court hearing an appeal, and hence an application for revision under S. 115, C. P. Code, against his decision is not competent. (*Macklin and Lokur, JJ.*) MULJI SICKA & CO. *v.* MUNICIPAL COMMISSIONER OF BOMBAY. **187 I.C. 8=12 R.B. 395=3 Fed. L.J. 61 (H.C.)=41 Bom. L.R. 984=A.I.R. 1939 Bom. 471.**

———S. 115—Subordinate Court — Collector under S. 18, Land Acquisition Act. *See* LAND ACQUISITION ACT, S. 18. **A.I.R. 1940 Lah. 299.**

———S. 115—Subordinate Court—Commissioner appointed under Workmen's Compensation Act. *See* WORKMEN'S COMPENSATION ACT, S. 23. **A.I. R. 1938 Lah. 855.**

———S. 115—*Subordinate Court—District Judge acting under R.* 62 (1) *of Burma Municipal Rules —Transfer by him of case without jurisdiction—Interference.*

No doubt whatever a District Judge does within the exercise of his powers as a *persona designata* cannot be questioned by the High Court in revision but he must not go beyond the limits of these powers as laid down. Where on a petition being filed before him as a *persona designata* under R. 62 (1) of the Burma Municipal Rules by an unsuccessful candidate at an election in the municipality, the District Judge transfers the case in contravention of R. 62 (1)(*a*) to the Additional District Judge, who is not subordinate to him but is co-ordinate with him, for being heard and disposed of, whatever the Additional District Judge does in that behalf, if it were a ministerial action, can only be regarded as nullity and the High Court is entitled to interfere in revision, inasmuch as it has before it what purports to be an order passed without jurisdiction of a Court subordinate to the High Court in a case within the meaning of S. 115, C. P. Code. The absence of jurisdiction would be the want of power to transfer the case to the Additional District Judge. (*Roberts, C.J. and Mosely, J.*) HABIB SAHIB *v.* SHEIK BUDHOO. **180 I.C. 931=11 R.R. 445=A.I. R. 1939 Rang. 143 (S.B.).**

———S. 115—*Subordinate Court — District Magistrate acting under special Act.*

Obiter.—A District Magistrate when normally functioning as a Court exercises jurisdiction in criminal matters and not in civil matters. When therefore some new function is imposed upon him by some special Act, although he acts as a Court and not as an individual, that Court is not subject to the civil jurisdiction of the High Court within the contemplation of S. 115, C. P Code. (*Costello, Ag.C.J. and Edgley, J.*) SACHINDRA NATH DAS *v.* SURYA KANTA MISRA. **176 I.C. 515 =11 R.C. 114=42 C.W.N. 54=A.I.R. 1937 Cal. 720.**

———S. 115—*"Subordinate Court"—Judge or presiding officer of Court exercising functions but as distinguished from Court itself—If "Court" or* persona designata.

It is clear that where a Judge or presiding officer of a Court, as distinguished from the Court itself, is performing any function as vested in him, such a Judge may be considered as a *persona designata*, and cannot be regarded as a Civil "Court subordinate" to the High Court, within the meaning of S. 115, C. P. Code. In considering whether the Judge acts as a Court or as a *persona designata*, the important point to be investigated is what is the source of his authority. The nature of the proceedings and the action taken therein may also be relevant and may be considered. (*Wassoodew, J.*) BABURAO *v.* HARIHARRAO. **183 I.C. 556=12 R.B. 113=41 Bom.L.R. 490=A.I.R. 1939 Bom. 279.**

———S. 115—*Subordinate Court—Land Acquisition Collector—Land Acquisition Act, S.* 18.

A Land Acquisition Collector, assuming that he is a Court while dealing with applications under S. 18 of the Land Acquisition Act, is not a Court subordinate to the High Court, and the High Court has, therefore, no jurisdiction to interfere with his order under that section in revision under S. 115, C. P. Code. (*Bartley and Nasim Ali, JJ.*) GOPINATH SHAH *v.* FIRST LAND ACQUISITION COLLECTOR, CALCUTTA. **177 I.C. 866 =11 R.C. 284=42 C.W.N. 212=A.I.R. 1938 Cal. 250.**

———S 115—*Subordinate Court—Land Acquisition Deputy Collector—Order refusing to make reference to Civil Court under S. 18, Land Acquisition Act—Interference by High Court—Jurisdiction.*

The High Court has no jurisdiction under S. 115, C. P. Code, to revise an order passed by the Land Acquisition Deputy Collector refusing to refer an objection to an award under the Land Acquisition Act for determination by the Civil Court. Even assuming that the Collector acts judicially in making or declining to make a reference under S. 18 of the Land Acquisition Act, he cannot be regarded as necessarily a Court. Even if he is a Court, it is clear that he is not a Court subordinate to the High Court under S. 115, C. P. Code. The mere fact that the Deputy Collector might have been acting judicially gives the High Court no right whatsoever to interfere with his order under S. 115. Nor would the fact that the aggrieved party may have no remedy unless revision lies be a ground for holding that the High Court can interfere in its revisional jurisdiction. (*Harries, C.J., Dhavle and Manohar Lall, JJ.*) JAGARNATH LALL *v.* LAND ACQUISITION DEPUTY COLLECTOR, PATNA. **19 Pat. 321=186 I.C. 560=12 R P. 514=21 Pat L.T. 29=6 B R. 373=1940 P.W.N. 9=A.I.R. 1940 Pat. 102 (F.B.).**

——S. 115—"*Subordinate Court*"—*Meaning of.*

For the purposes of S. 115, C. P. Code, a Court subordinate to a High Court is one over which the High Court has appellate jurisdiction. (*King, C.J. and Nanavutty, J.*) HAR NARAIN SETHI *v.* BIRD & CO. **12 Luck. 19=8 R.O. 240=1936 O. L.R. 35=160 I.C. 36=1936 O.W.N. 116=A.I.R. 1936 Oudh 132.**

——S. 115—*Subordinate Court — Order by Sessions Judge under S.* 111, *Bombay Municipal Boroughs Act—Revision to High Court—Competency—Interference—Grounds.*

A Sessions Judge acting under S. 111 of the Bombay Municipal Boroughs Act in revision from a decision of the Magistrate under S. 110 of that Act, is a Court subordinate to the High Court within the meaning of S. 115, C. P. Code, and a revision application would therefore lie to the High Court under S. 115, against an order passed by the Sessions Judge under S. 111 of the Municipal Boroughs Act; but such an application being a second application in revision, the High Court would not interfere unless it appears that there has been some grave abuse of its power by the Sessions Court, or the decision is manifestly erroneous or unjust. (*Norman, J.*) SURAT BOROUGH MUNICIPALITY *v.* HAMIDUDDIN. **175 I.C. 891=11 R.B. 6=40 Bom.L.R. 387=A.I.R. 1938 Bom. 301.**

——S. 115—Subordinate Court—Order of Revenue Officer—Revision. *See* B. T. ACT, S. 26-G (6). **44 C.W.N. 191.**

——S. 115—*Subordinate Court—Revenue Court—Orders of—If revisable by Chief Court.*

As no Court of revenue can be said to be subordinate to the chief Court, in a matter in which no appeal lies to that Court, an order passed by an Assistant Collector is not revisable by the Chief Court under S. 115, C. P. Code. (*Zia-ul-Hasan, J.*) RIYASAT RAM NAGAR *v.* SOEMBER SINGH. **181 I.C. 58=1939 O.W.N. 412=1939 R.D. 258=11 R O. 278=1939 A W.R. (C.C.) 77=1939 O.L.R. 239=1939 O.A. 386=A.I.R. 1939 Oudh 177.**

——S. 115—"*Subordinate Court*" — *Sessions Judge—Order under S.* 111, *Bombay Municipal Boroughs Act in revision from Magistrate's order under S.* 110—*Jurisdiction of High Court to entertain.*

The High Court has jurisdiction under S. 115, C. P. Code, in a proper case to entertain an application in revision against an order in revision passed by the Sessions Judge under S. 111 of the Bombay Municipal Boroughs Act against an order of a Magistrate under S. 110 of that Act, but such applications should be very sparingly entertained. (*Beaumont, C.J. and Wadia, J.*) LOKMANYA MILLS, LTD. *v.* MUNICIPAL BOROUGH OF BARSI. **I.L.R. (1939) Bom. 571=185 I.C. 519=12 R.B. 247=41 Bom.L.R. 937=A.I.R. 1939 Bom. 477.**

——S. 115—*Technical defect—Interference—Order granting permission to sue in* forma pauperis.

The High Court will not be justified in interfering in revision with an order granting permission to the plaintiff to sue in *forma pauperis* on the ground that the power of attorney granted by the plaintiff to the Mukhtar who filed the application was technically defective, when the plaintiff has been in fact found to be a pauper. (*Bhide, J.*) DWARKA DAS *v.* BIBI NAND RANI. **42 P.L.R. 227.**

——Ss. 115 and 151—*United Provinces Encumbered Estates Act—Agreement as to the forum for settlement of disputes—Suit as per agreement—Special Judge if can restrain party by injunction from proceeding with.*

Where the parties to a mortgage transaction agree that in case of disputes, suit should be instituted only at Bombay, there is nothing in the agreement which is forbidden by the United Provinces Encumbered Estates Act. When such a suit is filed and the other party applies under the United Provinces Encumbered Estates Act and obtains from the Special Judge an order restraining the opposite party from proceeding with his suit at Bombay, the order of the Special Judge is not in consonance with the spirit of S. 151, C.P. Code, under which he has purported to act and as such is revisable by the High Court under S. 115, C. P. Code. No Court has unrestricted jurisdiction under S. 151, C. P. Code. (*Thom, C.J. and Ganga Nath, J.*) GOVIND RAM GORDHANDASS *v.* MAJOR A. U. JOHN. **185 I.C. 791=12 R.A 353=1939 A.W.R. (H.C.) 489=1939 R D. 372=1939 A.L.J. 675=A.I.R. 1939 All. 668.**

——S. 115 (c)—*Court-fee — Decision as to court-fee but affecting jurisdiction—Revision—Interference—Power of High Court.*

The High Court, no doubt, generally does not interfere with a decision in a matter of court-fee which is favourable to the plaintiff, when there is only a simple question involved as to how much court-fee the plaintiff shall pay. But where a question of jurisdiction is raised and that expressly depends on a decision as to proper court-fee, the High Court can and will interfere in revision to prevent the trial of a case by a Court which has no jurisdiction, when an appellate Court has wrongly directed that Court to assume a jurisdiction which it has not got. (*Wadsworth, J.*) SYED SABJUMIAH HUSAIN *v.* KALAYIGAR ABDUL VAHAB SAB. **1940 M.W.N. 817=52 L.W. 146=(1940) 2 M.L.J. 176.**

——S. 116—Interlocutory order—Order refusing commission to examine witness under O. 26,

R. 5—Interference. *See* C. P. Code, O. 26, Rr. 4 and 5. (1938) **1 M.L.J. 769.**

——**S.** 129—*Bombay High Court Rules, R. 874—Payment order in favour of solicitor—Executability as decree.*

S. 129, C. P. Code, expressly authorizes the Bombay High Court to make rules to regulate its own procedure in the exercise of its original civil jurisdiction. A payment order under R. 874 in favour of a solicitor when validly made can be executed as a decree. (*Jai Lal, J.*) Shiv Dial Baktawar Lal *v.* Kanga & Co. **162 I.C. 489=8 R.L. 908=38 P.L.R. 1101=A.I.R. 1936 Lah. 369.**

——**S.** 135 (2)—*Scope and object of—Reasonable time — Wide interpretation of section if justified.*

The plain interpretation of S. 135 (2) of C. P. Code is that the exemption from arrest under civil process is limited in point of time taken by a party, witness, etc., in going to or attending or in returning from the tribunal mentioned in the clause. As to what is a reasonable time, it is a question of fact and must depend on the circumstances of each case. S. 135 has been enacted in public interest with a view to ensure smooth and speedy administration of justice and so cannot be given a wide interpretation to help a judgment-debtor who has deliberately managed to avoid execution of the decree. (*Iqbal Ahmad and Harries, JJ.*) Achuta Nand *v.* Mahabir Prasad. **175 I.C. 781=11 R.A 24=1938 A.L.R. 521 =1938 A.W.R. (H.C.) 317=1938 A.L.J. 500= A.I.R. 1938 All. 356.**

——**S.** 136—*Issue of order of attachment to Court other than District Court—Legality.*

Under S. 136, C. P. Code, the order of attachment is to be sent to the District Court within the local limits of whose jurisdiction the property is situate. No District Court or a Court with the powers of a District Court under the Civil Procedure Code has been established in the Shan States to which the order of attachment before judgment in question can be sent. Where therefore the Court of Mandalay sent an order of attachment before judgment to the Court of Assistant Superintendent at Kalaw.

Held, that such Court was not a District Court and hence the issue of order was wrong. (*Mosely, J.*) Desraj Chanan Lal *v.* Ramjashar Madanchand. **171 I.C. 806=1937 Rang.L.R. 249=10 R.R. 190=A.I.R. 1937 Rang. 367.**

——**S.** 136—*Scope—Warrant of arrest endorsed not to District Court but to Munsif of District where it is to be executed—Propriety—Arrest in pursuance of—Legality—Escape from custody of arresting officer—Offence—Penal Code, S. 225-B.*

When a Court exercises the extraordinary powers conferred on it by S. 136 (1), C. P. Code, the provisions of that section must be strictly observed; the warrant of arrest must be endorsed to the District Court outside the jurisdiction of the issuing Court, in which the warrant is to be executed. If such a warrant is endorsed not to the District Judge, but to a Munsif in that District, it is defective warrant, and the persons arrested in execution of such a warrant cannot be treated as being in lawful custody for purposes of S. 225-B, I. P. Code. If the arrested person escapes from custody, he cannot be convicted under the section. (*James and Madan, JJ.*) Bansropan Singh *v.* Emperor. **171 I.C. 894=10 R P. 258=4 B.R. 85=39 Cr.L.J. 2=18 Pat.L.T. 760=A.I R. 1937 Pat. 603.**

——**S.** 141—*Applicability—Execution proceedings—Sch. II—Application of.*

S. 141, C.P. Code, does not apply to applications for execution of a decree which are proceedings in the suit. It applies only to original matters in the nature of suits, such as proceedings in probate, guardianship and so forth, S. 141 cannot therefore be invoked to make Sch. II of the Code applicable to execution proceedings. (*Rangnekar, J.*) Narayan Ramchandra *v.* Dhondiba Tukaram. **I.L.R. (1937) Bom. 144=167 I.C. 750=9 R.B. 338=38 Bom.L.R. 1303=A.I.R. 1937 Bom. 111.**

——**S.** 141—Scope—Execution proceedings—Application by transferee of decree to be brought on record as transferee-decree-holder—If proceeding in suit or original proceeding. *See* **C. P.** Code, O 26, R. 4. **49 L.W. 549.**

——**S.** 144.

Appeal.
Applicability.
Application for.
Award of interest.
Consequential claims.
Construction.
Costs.
Court-fee.
Decree passed by Court.
Inherent powers of Court.
Jurisdiction.
Limitation.
Mesne profits.
Order under.
Pre-emption suit.
Principle of restitution.
Refund.
Restitution.
Right to apply.
Scope.
Stranger.

Appeal.

——**S.** 144—*Appeal — Application under on Original Side of High Court—Long delay—Order thereon—Appealability.*

A application on the Original Side of the High Court under S. 144, C. P Code, for restitution in execution proceedings made long after the suit has been determined and the rights of the parties fully settled by a final judgment is not an application in a suit at all nor is the order made on it a judgment. It is not a final judgment, such a judgment having been already delivered; it cannot be said to be either preliminary or interlocutory judgment. It is merely an order and not a judgment under the Letters Patent and is not appealable. Even if the order be regarded as a decree, there would be no right of appeal, the matter being governed by the Letters Patent and not by C. P. Code. (*Roberts, C.J. and Braund, J.*) Visuvasam *v.* Nadar Mahajana Co-operative Credit Society, Ltd. **178 I.C. 562=11 R.R. 246=A.I.R. 1938 Rang. 446.**

——**S** 144—Appeal—Order not strictly coming under S. 144, passed under S. 151—If appealable. *See* C. P. Code, Ss. 151 and 144. **1939 O.W.N. 765.**

Applicability

——**S. 144**—***Applicability—Decree affected by a subsequent decree passed in another suit.***

S. 144, C. P. Code, applies where a decree has been reversed or varied upon appeal, revision or by a review. Where the consequence of a decree has been affected by a subsequent decree passed in another suit, there is no variation or reversal of the earlier decree within the meaning of this section, and it has, therefore, no application. (*Harries, J.*) Bhawani Shankar *v.* Mahmud Ali. **168 I.C. 148=1937 A.L.J. 34=9 R.A. 620=1937 A.L.R. 301=1937 A.W.R. 34=A.I.R. 1937 All. 232.**

——**S. 144**—*Applicability—Decree for possession of estate—Reversal on appeal—Execution—Subsequent restoration of decree of original Court on appeal to Privy Council—Right to restitution—Extent of right—Trial Court refusing to pass decree for future mesne profits—If bars claim to future mesne profits by way of restitution.*

The plaintiff sued to recover an estate as the son of the last holder and got a decree in the trial Court. His claim for mesne profits for the period before and after suit till date of delivery was, however, disallowed on the ground that no issues were framed on the point and that the question as to mesne profits must be deemed to have been given up. Both parties appealed to the High Court, and pending the appeal a receiver was appointed and he took possession. The original defendant having died, his widow was brought on the record and carried the appeal. The High Court allowed the defendant's appeal and dismissed the plaintiff's suit. Pending an appeal against this decision to the Privy Council the defendant (widow) was handed over possession on furnishing security. Plaintiff's appeal to the Privy Council succeeded and the trial Court's judgment was restored. Plaintiff executed the decree and obtained possession of the estate. He then applied for restitution, impleading as parties to the application, the widow (defendant) and the sureties who had executed the security bonds in the High Court. The plaintiff claimed (1) the restoration of the amounts drawn as allowances by the widow during the litigation, (2) restoration of the amounts wrongly appropriated by the defendant while in possession, (3) return of records and the accounts from the receiver, and (4) for recovery from the sureties the amounts covered by their security bonds. Prayers 1 and 3 were not pressed. It was pleaded that S. 144, C. P. Code, did not apply, and that in any case no order for restitution could be made against the sureties.

Held, by *Wadsworth, J.*, on difference of opinion between *Burn and Stodart, JJ.*, (*i*) that S. 144, C. P. Code, applied in terms and that the plaintiff was entitled to claim restitution of any profits realised by the defendant's legal representative (widow) which could be called properly consequential upon the wrong decree unless she was entitled to resist the claim either by showing that she had a superior claim to those profits or by showing that the plaintiff's claim was barred by reason of the failure to establish his right to future profits in the trial Court; (*ii*) that the correct procedure was to take the position as stood immediately before the wrong decree and to award to the successful party restitution in the shape of any profits wrongfully received under the erroneous decree or as a direct consequence thereof; (*iii*) that it was impossible to hold on the facts of the case that the widow would be entitled to appropriate the whole of the amounts due to her for arrears of and future maintenance on the basis of the provisional orders passed pending appeal to the High Court, that those orders came to an end on the termination of that appeal and the plaintiff was therefore entitled to restitution on that basis, and on the basis of the position immediately before the wrong decree; (*iv*) that there was no bar to the plaintiff's claim by reason of his failure to get a decree for future profits before the trial Court. The High Court having passed an erroneous decree as a result of which the receiver was dispossessed and the widow was put in possession, the profits which accrued due to her as a result of this erroneous decree were not profits which could have been claimed in the original suit. (*Wadsworth, J., on a difference of opinion between Burn and Stodart, JJ.*) Zamindar of Sannokhemidi *v.* Susi Iamala Patta Mahadevi. **1940 M.W.N. 723=52 L.W. 214=(1940) 2 M.L.J. 47.**

——**Ss. 144 and 151**—*Applicability—Execution sale—Purchase money paid to decree-holder—Subsequent decree holding title to property in third person—Refund of money to purchaser—Order for restitution—Appeal—If falls under S.* 144.

S. 144, C. P. Code, is confined to cases in which the decree of a trial Court has been varied or reversed by some superior Court or by reason of some order passed by a superior Court. In other cases the order for restitution would come under S. 151, and is not appealable unlike an order under S. 144. After an execution sale was confirmed and the money deposited by the purchaser paid out to the decree-holder, a third party brought a suit and got a decree establishing his title to the property sold in execution. The auction purchaser applied to the Court to get back his money, and the Court passed an order allowing him to recover the amount which the decree-holder had drawn out. An appeal was preferred against this order, and the appellate Court reversed it.

Held, (1) that the order of the first Court for restitution was one passed under S. 151, C. P. Code, in the exercise of inherent powers and was not appealable, and the order of the appellate Court setting aside that order was without jurisdiction, the remedy of the decree-holder if aggrieved, being by way of revision in the High Court; (2) that though the order of the first Court was unsustainable as it stood, for the reason that the execution sale not having been set aside, the purchaser had no independent right to obtain a refund, the petitioner should not be penalised for the mistake, and that it was a case for allowing such an amendment to be made as would enable the matters in controversy to be properly heard and decided; and (3) that the order of the appellate Courts should in the interests of justice be set aside and the purchaser should be allowed to amend his application for refund by adding a prayer for setting aside the sale and adding facts relied on for avoiding the bar of limitation. (*Rowland, J.*) Rameshawar Lal Jhunjhunwala *v.* Ramcharan Prasad Sahu. **178 I.C. 41=11 B.P. 204=5 B.R. 49=**

1938 P.W.N. 313=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447.

———**Ss. 144 and 151**—*Applicability*—Ex parte *decree for arrears of rent against tenant—Ejectment in execution—Subsequent setting aside of* ex parte *decree—Application for restitution and restoration of possession—Competency—Suit under S.* 108 (10), *Oudh Rent Act.*

S. 144, C. P. Code, only applies when the original order has been reversed by a superior Court in appeal, revision or reference. A tenant who has been ejected in execution of an *ex parte* decree for arrears of rent, but who gets the *ex parte* decree set aside and files a suit under S. 108 (10) of the Oudh Rent Act cannot invoke S. 144, C. P. Code, for restoration of possession. Nor will the Board of Revenue interfere under S. 151, C. P. Code, because S. 108 (10) provides an adequate remedy for the tenant. (*Bomford, J.M.*) Phulbasa *v.* Murlidhar. **1935 R.D. 563.**

———**S. 144**—*Applicability—Liability to restore.*

In a suit for possession of certain property, *A*, the plaintiff, got a decree against *B* and his usufructuary mortgagees. That decree being reversed on appeal *B* was given possession instead of mortgagees. The mortgagees in execution petition filed by them claimed from *B* the property by way of restitution.

Held, that it was *A* who obtained possession under the wrong decree and not *B* who was given possession not under the reversed lower Court's decree, but under the reversing appellate Court's decree, that the mortgagees misconceived their remedy and *B* was not bound to restore property. (*Venkatasubba Rao and Cornish, JJ.*) Anantharam Singh *v.* Thara Chand. **164 I.C. 379=9 R.M. 111=1936 M.W.N. 973=44 L.W. 265=A.I.R. 1936 Mad. 634.**

———**S. 144**—*Applicability—Mortgage suit*—Ex parte *decree—Subsequent setting aside and re-trial ending in new decree—Execution taken out by mortgagee decree-holder prior to re-trial—Sale—New decree awarding amount less than that realised by decree-holder by sale—Restitution—Right to—Application by mortgagee defendant—Limitation—Limitation Act, Art.* 182 (7).

Where an *ex parte* decree in a mortgage suit is set aside and a fresh trial is ordered, there is, strictly speaking, no variation or reversal of the decree that has been set aside. The decree made on re-trial is a new decree, and when the new decree declares that the plaintiff is only entitled to an amount less than what he has actually realised by a sale of the mortgaged property under the prior *ex parte* decree which has been set aside, he is in equity bound to restore the excess to the defendant. Though S. 144, C. P. Code, may not strictly apply to the case, on the equitable principle underlying S. 144 and in pursuance of the inherent power of the Court, an order for restitution can be made by the Court. An application for restitution is in reality an application for execution of a decree to which Art. 182 and not Art. 181 of the Limitation Act is the appropriate article. When the new decree as in the case of a mortgage decree, fixes a date for payment of the amount declared due, the application for restitution is governed by Cl. (7) of Art. 182 of the Limitation Act; and limitation for an application for restitution begins to run not from the date when the *ex parte* decree is set aside, but from the date fixed for payment in the new decree passed after re-trial. (*Cornish, J.*) Kandasami Mudali *v.* Annamalai Reddi. **167 I.C. 258=9 R.M. 438=1936 M.W.N. 1119=44 L.W. 798=A.I.R. 1937 Mad. 150=71 M.L.J. 795.**

———**S. 144**—Applicability—Order confirming sale set aside—Application by auction-purchaser for compensation for improvements. *See* C. P. Code, Ss. 151, 144 and 47. **A.I.R. 1940 Lah. 59.**

———**S. 144**—*Applicability—Order on appeal setting aside sale of judgment-debtor's property.*

An order passed on appeal setting aside the sale of a judgment-debtor's property is a decree and S. 144 is wide enough to cover such order. (*Jai Lal, J.*) Telu *v.* Raja Ram. **177 I. C. 430=11 R.L. 322=40 P.L.R. 692=A.I.R. 1938 Lah. 456.**

———**S. 144**—Applicability—Order under O. 21, R. 93—If falls under—Appeal—Competency. *See* C.P. Code, S. 2 (2). **42 Bom.L.R. 367.**

———**S. 144**—*Applicability—Party taking possession of property unlawfully in pursuance of injunction order—No delivery through Court—Application for restitution—If barred—Proper remedy—Suit.*

No application for restitution can properly lie where a party, taking advantage of an order of injunction, unlawfully takes possession of properties to which he is not entitled. The proper remedy of the persons aggrieved by such unlawful act is by way of suit and not by way of restitution. No question of restitution arises when there has been no delivery of property through Court. (*Venkataramana Row, J.*) Govinda Chettiar *v.* Muniswami Chettiar. **1937 M.W.N. 409=45 L.W. 398=168 I.C. 926=9 R.M. 59=A.I.R. 1937 Mad. 315.**

———**S. 144**—*Applicability—Pauper suit—Order on defendant to pay court-fees to Government—Reversal on appeal—Restitution—Award of interest—Power of Court—S.* 151—*Discretion to refuse interest.*

Money paid by a defendant in a pauper suit as court-fees due to Government under an order of Court which is reversed on appeal is not money liable to be dealt with by way of restitution under S. 144 of the C. P. Code, and therefore no interest can be awarded on such amount under S. 144. S. 151 will, however, apply to such a case; but that section being discretionary the Court may refuse to award interest in view of the particular circumstances of the case. (*Mockett and Lakshmana Rao, JJ.*) Mahalakshmamma *v.* Ramayya. **44 L.W. 873=168 I.C. 717=9 R.M. 627 (1)=A.I.R. 1937 Mad. 178=(1937) 1 M.L.J. 21.**

———**S. 144**—*Applicability — Payment under O.* 21, *R.* 89 *to set aside Court sale—Subsequent reversal of decree on appeal or setting aside of decree in suit brought for the purpose—Claim for restitution by refund of amount paid—Maintainability—Contract Act, S.* 72.

If a judgment-debtor or any other person bound by a decree makes a deposit under O. 21, R. 89, C. P. Code, to have a sale of his property held in execution set aside, it cannot be held that his claim for restitution made either under S. 144, C. P. Code, or under the general law, after the decree has been reversed in appeal or set aside in a suit brought for the purpose is unsustainable. There can be no pretence for saying that the payment made by him was voluntary. It would be a clear case for awarding relief to him under S. 72 of the Contract Act. (*Patanjali Sastri, J.*) Raman Adiyoty *v.* Kannan Nambiar. **1940 M. W.N. 657=52 L.W. 226=A.I.R. 1940 Mad. 725 =(1940) 1 M.L.J. 340.**

———**S. 144**—*Applicability—Property of* takia *handed over by Court to a certain person—Objection by* F *who claimed it as Mutwalli overruled—F subsequently obtaining decree declaring him as Mutwalli—Remedy by way of restitution.*

In a dispute about *takia*, a person was declared to be a Sajjadanashin and another a Mutwalli. They were allowed to take over the property of the *takia* and give security for the same till the decision of an appeal from the order declaring them to be Mutwalli and Sajjadanashin. The Mutwalli took charge of some of the property and died. The Court allowed the Sajjadanashin to take over the remaining property in spite of the objections of one *F* who claimed to have been appointed as a Mutwalli. Afterwards this *F* obtained a decree declaring him to be a Mutwalli, and made an application under S. 144, C.P. Code, for restitution to him of the property of the *takia.*

Held, that a declaratory decree to the effect that a person is a Mutwalli was incapable of execution and that a Mutwalli entitled to get the property under a declaratory decree could not have his remedy under S. 144, C. P. Code. (*Bhide, J.*) Fateh Mahomed *v.* Sardar Ali Shah. **161 I.C. 444=8 R.L. 752=A.I R. 1936 Lah. 48.**

———**S. 144**—*Applicability—Right to apply under—Conditions of—Decree—Setting aside in a different suit not between same parties—Restitution—Application for—Competency.*

In order to entitle a party to apply under S. 144, C. P. Code, he has to show that there was a decree in consequence of which some party to the record had obtained a benefit to the detriment of the applicant; and, secondly, that that decree having been varied or reversed, the applicant is entitled to be restored to the position in which he would have been but for the decree which ultimately has been declared to be erroneous. It is also clear that the reversal or variation must be in the same proceedings between the parties,—it may be as the result of a successful appeal or an application for review or in any other manner provided by the Code—and it is also clear that the decree must be between the same parties and the reversal or modification must be in favour of the applicant or some one claiming under him. If in some other suit not connected with the suit in which the application for restitution is made, the decree under which a party has been deprived of property or other benefit is set aside, the section cannot apply. If a decree is set aside by a decree in a different suit between some of the parties to the former decree and strangers, an application for restitution under S. 144 will not lie. (*Rangnekar, J.*) Shivappa Dhondappa *v.* Ramlingappa. **39 Bom.L R. 112=168 I.C. 810=9 R. B. 401=A.I.R. 1937 Bom. 173.**

———**S. 144**—*Applicability—Sale set aside after confirmation—Application by judgment-debtor for mesne profits.*

S. 144 contemplates restitution, where, and in so far as, a decree has been varied or reversed. An order of the executing Court confirming a sale which is afterwards set aside does not amount to a decree and therefore the application for mesne profits payable in consequence of that order cannot be made under S. 144. (*Tek Chand and Abdul Rashid, JJ.*) Ganesh Datta *v.* Model Town Society. **185 I.C. 125=12 R.L. 268=A.I. R. 1939 Lah. 508.**

———**S. 144**—*Applicability—Specific performance refused in trial Court but decreed on appeal—Execution for costs in the meanwhile—Delay in execution of sale deed owing to defendant's objections—Compensation for if can be obtained by application under S.* 144—*Proper remedy—Refund of costs recovered— Limitation—Suspension — Rule as to.*

Pending an appeal against the dismissal of a suit for specific performance, one of the defendants realised by execution the costs awarded to him. The appellate Court decreed specific performance and directed the necessary deposits within a specified time and also decreed costs only in case the deposit was made in time. The deposit was so made but owing to the objections of the defendants which were upheld by the lower Court but which were ultimately rejected by the appellate Court the execution of the sale deed was considerably delayed. The plaintiff applied under S. 144, C. P. Code, not only for the refund of the costs recovered from him, but also for compensation for the loss occasioned by the delayed execution of the sale deed. It was held that the use of the words 'damages, compensation and mesne profits' in S. 144, C. P. Code, indicated that the possession obtained under an erroneous decree subsequently reversed is wrongful possession and hence on a reversal of the decree the judgment-debtor would be entitled not only to possession but also to mesne profits during the period he was kept out of possession, but that as the suit was for specific performance of a contract to sell which did not by itself create any interest in the property and the decree only entitled the decree-holder to the execution of a sale deed, S. 144 had no application. Further, any loss that might have been suffered by the plaintiff owing to the delay caused by the defendant's objections in the matter of the execution of the sale deed, could not be said to be 'properly consequential' on the reversal of the decree; it would be a remote and indirect loss which was outside the scope of S. 144, C. P. Code. The remedy of the decree-holder if any was by way of suit and not by way of restitution under S. 144. That as regards the refund of costs recovered, the period during which the objections of the defendants were being agitated should be deducted in computing the period of limitation on the general principles of suspension of limitation applicable to cases where a party is prevented under certain circumstances from taking action in pursuance of his rights. (*Harries and Misra, JJ.*) Badruddin Khan *v.* Mahyar Khan. **I.L.R. (1939) All. 103 =180 I.C. 633=11 R.A. 491=1939 A.W.R. (H. C.) 87=1938 A.L.J. 1189=A.I.R. 1939 All. 66.**

———**S. 144**—*Applicability—Sureties.*

S. 144 was not intended to apply to sureties but only to the parties to the suit or their representatives. The surety only undertakes to return the property, namely, the material object and not the liability for safeguarding the rights of the owner in respect of the property. If any loss is caused to the owner by reason of the property not being returned in the condition in which it was when it was taken, or if for any other reason the owner suffers damages, that has nothing to do with the execution of the decree as such. (*Stone, C.J. and Niyogi, J.*) Syed Fakir Syed Hussain *v.* Abdul Samad Khan. **I.L.R. (1938) Nag. 354 =10 R.N. 285=173 I.C. 155=A.I.R. 1938 Nag. 101.**

——S. 144—Applicability—Tenants ejected in proceedings under S. 79, Agra Tenancy Act—Order of ejectment cancelled—Subsequent restoration of ejected tenants to possession. *See* Agra Tenancy Act, Sch. IV, Group F, Serial No. 5. **1937 R.D. 509.**

Application for.

——**S. 144**—*Application for—Order to file in record-room—Effect — Restitution application—Nature of—Course of proceedings—Applicability of Limitation Act.*

Where on receipt of an order from the High Court staying all proceedings with reference to an application for restitution, the lower Court merely directed that it should be filed for the present in the record room, it is merely an administrative order and not a judicial one. It is in no sense a final disposal of the case. An application under S. 144, C. P. Code, is a miscellaneous case and once initiated that miscellaneous case does not give rise to any application of the Limitation Act during the course of its disposal. As long as that remains pending, there is no question of the application of the Limitation Act to its proceeding. Attention of the Court that orders may be passed on the pending application, is all that is necessary and for that there can be no limitation. (*Bennet and Verma, JJ.*) Ramakant Malviya *v.* Satya Narain. **177 I.C. 695 =11 R.A. 213=1938 A.L.R. 776= 1938 A.W. R. (H.C.) 542=A.I.R. 1938 All. 552.**

——**Ss. 144 and 102**—*Application for restitution relating to rent decree—Order on—Second appeal—B. T. Act, S. 153.*

A second appeal from an order passed on an application for restitution under S. 144, C. P. Code, relating to a rent decree, is not barred either by S 102, C. P. Code or by S. 153, B. T. Act. (*Edgley, J.*) Satish Chandra *v.* Protiva Nath Roy. **43 C.W.N. 859=A.I.R. 1939 Cal. 612.**

——**S. 144**—*Application under—Form of—O. 21, R. 11—Applicability.*

Application for restitution may be made in such manner as the nature of each case might require and need not follow in every case the procedure in O. 21, R. 11, C. P. Code. (*Venkataramana Rao, J.*) Palaniyandi Pillai *v.* Rasappa Pillai. **167 I.C. 458=9 R.M. 453=45 L.W. 522=1936 M.W. N. 1122=A.I.R. 1937 Mad. 173=(1937) 2 M.L. J. 108.**

——**S. 144**—*Application under—Nature of.*

An application under S. 144, C. P. Code, being in substance one made for seeking the aid of the Court in working out the final decree should be regarded as an application for execution of the decree passed in appeal. 7 O.W.N. 1153, Foll. (*Srivastava and Nanavutty, JJ.*) Birendra Bikram Singh *v* Basdeo. **12 Luck. 52=160 I.C. 814=8 R.O. 281=1936 O.W N. 262=1936 O.L. R. 109=A.I.R. 1936 Oudh 185.**

——**S. 144**—Application under—Nature of—Limitation applicable. *See* Limitation Act, Arts. 181 and 182. **71 M.L.J. 795.**

Award of interest.

——**S. 144**—*Award of interest—Power of Court—Deposit by judgment-debtor on condition of stay of execution—Decree-holder unable to furnish security for withdrawing amount deposited—Reversal of decree in appeal—Application for restitution—Right to interest.*

The basis of restitution is the loss suffered by the judgment-debtor by reason of the wrongful decree and the orders resulting therefrom. A judgment-debtor apprehending steps in execution applied for stay of execution pending his appeal and stay was ordered on condition of his furnishing security for the decree amount. He found difficulty in furnishing security and instead deposited the full amount of the decree in Court requesting the Court to take security from the decree-holder before permitting him to withdraw the amount from Court. The Court accordingly made such an order; the decree-holder was unable or unwilling to furnish security with the result that the money remained in Court and the decree remained stayed. Eventually the decree was reversed in appeal and the judgment-debtor applied for restitution claiming interest, on the amount deposited by him for the period it remained in Court.

Held, though the act of the judgment-debtor in making the deposit instead of furnishing security as ordered by the Court was due to his own initiative, the Court having accepted the deposit and treated it as the basis for the stay order and imposing certain terms on the decree-holder, the order of the Court for the retention of the money in Courts formed part of an act of the Court resulting directly from the decree which had been held to be erroneous. Since that order in fact deprived the judgment-debtor of the use of the money, he was entitled to interest on the amount from the decree-holder. (*Wadsworth, J.*) Sitaramayya *v.* Venkanna. **187 I.C 30=12 R.M. 700=1939 M.W.N 961=50 L.W. 432=A.I.R 1940 Mad. 15=(1939) 2 M.L.J. 509.**

Consequential claims.

——**S. 144**—*Consequential claims—Decision of Court—Reversal of decree for possession—Restitution—Claims to mesne profits—When to be made—If arises immediately on reversal of decree or only on decree after trial on remand of suit—Considerations for Court.*

Ordinarily, upon reversal of a decree for possession, the judgment-debtor would be entitled to possession, if claimed. He would also be entitled to mesne profits during the period he was wrongfully kept out of possession. But it cannot always be said upon reversal of the decree unless it gives a clear indication of the fact that the possession taken under the decree is wrongful. S. 144 makes a distinction between restitution which is properly consequential on the variation or reversal of the decree and restitution which is not. Discretion is vested in the Court to make an order for mesne profits which are properly consequential on such variation or reversal. There may be a reversal which does not imprint on the possession taken a wrongful character within the meaning of the definition of "mesne profits" contained in S. 2 (12), C. P. Code. If in the order of reversal the character of that possession has been determined, then the question ceases. But if it is not, and the Court remands the suit for the determination of that question afresh or further inquiry, then it would be premature for the Court of restitution to make an order for mesne profits in the application for restitution, as that would amount to determining a question which is *sub judice*. S. 144 does not enunciate the doctrine of restitution in an unqualified form and does not contemplate a complete and unqualified restitution with all consequential reliefs. The Court has to regard the nature of the claim, the relief granted, the variation introduced in appeal, and the manner in which the ultimate decision might affect the rights of the parties to the subject-matter in dispute. These considerations have to be borne in mind in exercising the discretion vested in the Court in determining the claim to ancillary relief by way of refund of costs, payment of interest, damages or compensation and mesne profits. (*Wassoodew, J.*) GANPAT GATLU *v.* NAVNITLAL. **187 I.C. 354=12 R.B. 426=41 Bom.L.R. 1204=A.I.R. 1940 Bom. 30.**

Construction

——**S. 144**—*Construction—"Any party"—Right to restitution—If confined to parties in appeal which reversed decree or order—Party to suit in trial Court not impleaded in appeal—Right to apply—Party to suit—Recovery of costs under decree—Reversal of decree on appeal—Party not impleaded in appeal—Right to restitution.*

The expression "any party" in S. 144, C. P. Code, is not confined to parties in the appeal in which the decree has been reversed or modified. It includes every person against whom the decree appealed from was passed, though he was not a party to the appeal, provided the appeal is in effect and substance in favour of such person. The conditions on which restitution can be granted under S. 144 are: (1) that the applicant must be a party to the litigation which has terminated according to law; (2) that he has lost, or been deprived of something by reason of the decree or order which has been subsequently varied or reversed; and (3) that on the final pronouncement of his rights, the party applying is entitled to the benefit of restitution. The section does not in terms state or require that the applicant must be a party to the proceeding which has resulted in the original decree being reversed or varied; nor does it require that the final decree should provide for a right in him to apply for restitution. All that is necessary is that the final decree must be such that it would be inequitable to allow his opponent to retain what he has obtained from the former on the strength of a decree which ultimately is held to be erroneous or wrong. A party to the suit from whom costs have been recovered, is therefore entitled to apply for restitution on the reversal of the decree finally in appeal, though he himself has not been a party to the subsequent stages of the litigation in appeal. (*Rangnekar, J.*) GURUNATH *v.* VENKATESH. **I.L.R. (1937) Bom. 150=38 Bom.L.R. 1326=168 I.C. 629=9 R.B. 886=A.I.R. 1937 Bom. 101.**

——**S. 144**—*Construction—"Place the parties in the position which they would have occupied but for such a decree"—Meaning of.*

The words "place the parties in the position which they would have occupied but for such a decree," in S. 144, C. P. Code, must be construed as meaning that the parties are to be put in the position which they would have occupied had it not been that a wrong decree had been passed. There is nothing in the section which would justify the Court in holding that the claimant to restitution has to be given any better position than that which he occupied at the time when the wrong decree was passed or that he must base his claim on the theory that he is entitled only to what he would have got had there been no decree at all and had the proceedings been pending right up to the time when the final decision set the matter at rest. (*Wadsworth, J., on a difference of opinion between Burn and Stodart, JJ.*) ZAMINDAR OF SANNOKHEMIDI *v.* SUSI IAMALA PATTA MAHADEVI. **1940 M.W.N. 723=52 L.W. 214=(1940) 2 M.L.J. 47.**

Costs.

——**S. 144**—Costs—Right of party to restitution of, though not impleaded in appeal. *See* S. 144 — CONSTRUCTION, *Supra*. **I.L.R. (1937) Bom. 150.**

Court-fee.

——**S. 144**—*Court-fee—Appeal against order under section.*

A memorandum of appeal against an order of restitution passed under S. 144, C. P. Code, must be stamped *ad valorem*. It does not come under the exempting provision of Financial Department Notification No. 41, dated the 19th September, 1921, which reduces the fee chargeable on appeals from orders under S. 47, C. P. Code. An application under S. 144 does not execute an existing decree, but it unexecutes a decree which had ceased to exist. (*Baguley and Mosely, JJ.*) MA HTWE *v.* U TOKE. **1938 Rang.L.R. 635=179 I.C. 464=11 R.R. 319=A.I.R. 1939 Rang. 32.**

——**S. 144**—*Court-fee—Appeal against order under section.*

An appeal against an order made on an application under S. 144, C. P. Code, ought to bear an *ad valorem* court-fee. (*Henderson, J.*) BIRENRA NATH *v.* SURENDRA NATH. **42 C.W.N. 152.**

——**S. 144**—*Court-fee—Order rejecting application for restitution—Appeal—Court-fee payable—Restitution proceedings—Nature of—If execution proceedings—Bengal Government Notification, No. 1872-J, dated 23rd May, 1921—Applicability.*

Restitution proceedings are not execution proceedings. They are miscellaneous proceedings in the nature of suits, where large amounts claimed as damages might be involved. A memorandum of appeal from an order refusing restitution must be stamped with *ad valorem* Court-fee under Sch. I, Art. 1 of the Court-Fees Act. Art. 11 of Sch. II has no application to the case. The notification of the Bengal Government, No. 1872-J, dated 23rd May, 1921, providing for a court-fee of rupees two under Art II, Sch. II, in respect of appeals from orders under S, 47, C. P. Code, cannot be held to include appeals from order under S. 144, C. P. Code. Even where an application for restitution is taken as falling under S. 151, C. P. Code, there is no difference as regards court-fee on appeal, as an order under S. 151, is not appealable. It is only an order under S. 144 that is appealable, and the appeal must be stamped under Sch. I, Art. 1, Court-Fees Act. (*M. C. Ghose and Mukerjea, JJ.*) TARAK CHANDRA RAY *v.* PANCHANAN BANERJEE. **I.L.R. (1937) 1 Cal.**

637=65 C.L.J. 165=171 I.C. 212=10 **R.C.** 242=41 C.W.N. 157=A.I.R. 1937 Cal. 152.

Decree passed by Court.

——Ss. 144, 47 and 151—*Decree passed by Court* A—*Purchase of judgment-debtor's property by decree-holder in execution at* A—*Sale set aside —Decree transferred to Court at* B—*Appeal against order setting aside sale allowed—Meanwhile decree executed in Court at* B—*Application by judgment-debtor for restitution in Court* B—*If lies.*

A decree was passed in the Court at *A* and was executed by the sale of the judgment-debtor's property which was purchased by the decree-holder. Subsequently the sale in the Court at *A* was set aside and hence the decree-holder appealed against the order setting aside the sale and simultaneously got the decree transferred to another Court at *B* and executed it there and realized the amount on the decree at *B*. His appeal against the order setting aside the sale in the Court at *A* was allowed and he got the sale confirmed in his name. The judgment-debtor finding that he had paid the decree-holder twice over, once by sale of his property in the Court at *A* and again in execution in the transferee Court at *B*, applied for restitution to the Court at *B* alleging that he was entitled to restitution under Ss. 47, 144 and 151, C. P. Code.

Held, that the Court at *B* could not grant restitution because as soon as it executed the decree its purpose was finished and it no longer remained an executing Court; so S. 47 was of no use. Again that Court not being the Court of first instance, proper remedy if available under S. 144 was to the Court at *A* and as other remedy was available S. 151 could not be invoked. (*Derbyshire, C.J. and Mukerjea, J.*) KISHORI MOHAN SHADHU *v.* KUMAR BRAHMA NIRANJAN CHAKRAVARTY. **A.I.R. 1938 Cal 554.**

——**Ss. 144 and 151**—*Decree varied in appeal by compromise—Restitution—Inherent power.*

Even if a decree is varied by the appellate Court not after contest but by a compromise between the parties, the Court can allow compensation on the principle of S. 144, C. P. Code, in the exercise of inherent jurisdiction. The measure of compensation will be the profit which the party in possession actually derived or could have derived by exercise of due diligence from the date on which he should have surrendered possession under the compromise. (*Tek Chand and Bhide, JJ.*) ALLAH JOWAI *v.* JINDAN BIBI. **42 P.L.R. 429.**

——**S. 144 and Oudh Rent Act (1886), S. 108 (9)**—Ex parte *ejectment—Restoration of suit by appellate Court—Claim for compensation—Proper remedy.*

Where by an *ex parte* decree under S.. 61 of the Oudh Rent Act, a defendant is ejected but the suit is ultimately restored by the appellate Court and the defendant regains possession under a compromise during the rehearing of the suit, a claim by him for compensation does not come within the provisions of S. 144, C. P. Code. There is no doubt that an application under S.144 can lie when the original order has been varied or reversed by a superior Court. If varied or reversed by the original Court the proper remedy is by a regular suit under S, 108 (9) of the Rent Act. (*Harper, S.M. and Sathe, J.M.*) DEO NARAIN *v.* MADAN MOHAN LAL. **1940 R.D. 245=1940 O.W.N. 506=1940 O.A. 697.**

Inherent power of Court.

——S. 144—Inherent power of Court—Order holding surety liable for payment—Reversal—Application by surety for restitution. *See* C. P. CODE S, 151—RESTITUTION. **40 P.L.R. 289.**

Interest.

——S. 144—*Interest—Award of—Power of Court.*

Although ordinarily interest is a part of the normal relief given in restitution, it would not be proper to allow interest when there is no direction for its payment in the order of the final Court of appeal. (*Mitter and Roxburgh, JJ.*) BIRENDRA NATH BASU *v.* SURENDRA KUMAR BASU. **I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438=71 C.L.J. 127=A.I.R. 1940 Cal. 260.**

Jurisdiction.

——S. 144—*Jurisdiction—"Court of first instance"—Meaning of—Court which passed decree ceasing to have jurisdiction over area owing to transfer of territorial jurisdiction in respect of future business—Transfer not affecting pending cases—Decree passed in pending suit—Appeal—Reversal after notification—Application for restitution—Jurisdiction to entertain.*

The words "Court of first instance" as used in S. 144, C. P. Code, are used in contradistinction to a "Court of appeal" and mean the Court which passed the decree, or if that Court has ceased to exist, the Court to which the proceedings are transferred in substitution for the Court which passed the decree. Where, however, Government issues a notification redistributing the jurisdiction of Courts in a district and transferring certain areas from one Court to another in respect of "future business" and the notification expressly provides that it should not affect suits or cases pending in the Court, at the time, an application for restitution arising out of a suit which was pending in one Court at the time of the notification must be presented to that Court and that Court only, because when that Court still exists, and the suit giving rise to the application has not been transferred to any other Court, the Court which passed the decree is the only Court, and the proper Court, which can entertain the application, being the "Court of first instance" within the meaning of S. 144, C. P. Code. An application for restitution is not "future business" contemplated by the notification, though the cause of action for the application might arise only after the Notification. (*Harries and Rachhpal Singh, JJ.*) SKINNER *v* SKINNER. **I.L.R. (1937) All. 670=1937 A W.R 510=1937 A.L.J. 588=1937 A.L.R. 713=170 I.C. 706=10 R.A. 515=A.I.R. 1937 All 515.**

——S. 144—Jurisdiction—Objection to jurisdiction on the ground that Court which passed decree in suit alone has exclusive jurisdiction —Omission to raise at early stage—If fatal. *See* C. P. CODE, S. 21. **1937 A.W.R. 510.**

Limitation.

——S. 144—Limitation—Application for restitution—If one in execution—Limitation—Starting point. *See* LIMITATION ACT. ART. 182. **41 Bom.L.R. 1204.**

——**S. 144**—*Limitation—Commencement of—Application under—Nature of—"Where and in so far as a decree is varied or reversed"—Meaning* *of—Application for mesne profits by successful party—Starting point of limitation.*

An application under S. 144, C. P. Code, is not an application for execution and is governed for purposes of limitation by Art. 181 of the Limitation Act; and time runs from the date of the decree of the appellate Court when the first Court's order was "reversed" and the right to apply for restitution accrued. But where the application is for the recovery of mesne profits time does not begin to run till possession has been restored to the successful party. The words "where and in so far as a decree is varied or reversed" in S. 144 must be construed as meaning where the decree is reversed either temporarily or finally. (*Darling, S.M. and Bomford, J.M.*) KADIR BUX *v.* BEHARI. **1937 R.D. 21.**

——**S. 144**—Limitation—Restitution—Application for, in consequence of order of His Majesty in Council. *See* LIMITATION ACT, ARTS. 181 AND 183. **44 C W.N. 438=71 C.L.J. 127.**

——**S. 144**—Limitation—Suspension—Principles governing. *See* C. P. CODE, S. 144—APPLICABILITY. **1938 A.L.J. 1189=A.I.R. 1939 All. 66.**

——**S. 144**—Limitation—Tenant ejected but restored to possession on appeal or revision—Application for mesne profits for period of dispossession—Limitation — Starting point. *See* LIMITATION ACT, ART. 181. **1938 R.D. 182=1938 A.W.R. (B.R.) 113.**

Mesne profits.

——**S. 144**—*Mesne profits—Landlord taking possession of tenanted land in execution of decree in ejectment—Decree subsequently reversed—Mesne profits payable to tenant—Assessment of—Landlord's right to deduction of rent.*

When a landlord has taken possession of the tenanted land in execution of a decree in ejectment against his tenant, and the decree is subsequently reversed, the landlord must pay to the tenant by way of mesne profits under S. 144, C. P. Code, the amount of rents and profits which he could have, with due diligence, realised from the sub-tenants on the land in suit during the period that he was in possession. He is, however, entitled to claim by way of deduction the rent payable to himself by the tenant during that period. (*S. K. Ghose and R. C. Mitter, JJ.*) P. C. TAGORE *v.* MATHURA KANTA DAS. **173 I.C. 391=10 R.C. 512=41 C.W.N. 1015=A.I.R. 1937 Cal. 478.**

——**S. 144**—Mesne profits—Right to, by way of restitution—Sale of property on wrong date. *See* SCOPE, *infra*. **A.I.R. 1937 Mad. 694.**

Order under.

——**Ss. 144 and 151**—*Order under—Appeal—Revision.*

In a proceeding started under S. 144, C. P. Code, the Court held that S. 144 did not apply but granted relief under S. 144 read with S. 151.

Held, that the Court having decided the rights of the parties and in effect given a decree which was capable of execution, the order was appealable, though it was styled as falling under S. 144 or S. 151 or under both Ss. 144 and 151 No application in revision lay againt such order. (*Manohar Lall, J.*) JAGANRATH DAS *v.* SRIKANT MISSIR. **19 Pat L.T 118=1938 P.W.N. 310.**

Pre-emption suit.

——**S. 144**—*Pre-emption suit—Order permitting creditors of pre-emptor to withdraw deposit in Court—Reversal—Liability to refund.*

Where the creditors of the pre-emptors were parties to an order permitting them to withdraw amount deposited in Court, when that order is reversed, are in justice and equity liable to make restitution and refund the amount withdrawn by them. They cannot resist restitution on the plea that they were not parties to the pre-emption suit, for the word 'parties' in S. 144, C. P. Code, must be taken to include their representatives and further representative does not mean only a party's legal representative but means his representative in interest. (*Thomas, C J and Zia-ul-Hasan, J.*) BADRI DAS *v.* RAJA BIRENDRA BIKRAM SINGH **14 Luck. 106=175 I.C. 169=1938 O.A. 461=1938 O.L.R. 276=10 R.O. 313=1938 A.W.R. (C.C.) 61=1938 O.W.N. 722=1938 R.D. 708 =A.I.R. 1938 Oudh 169.**

Principle of restitution.

——**S. 144**—*Principle of restitution.*

The power of a Court to direct restitution is inherent in the Court itself. It rests on the principle that a Court of justice is under a duty to repair the injury done to a party by its Act. The right of a party to have restitution and the duty of the Court to give him restitution do not rest on the provisions of S. 144 of the Code. which defines the procedure only in one class of cases requiring restitution by enacting that the application for restitution is to be made in the Court of first instance. The other part of the section gives the measure of restitution and empowers that Court to determine the form and amount of restitution. (*Mitter and Roxburgh, JJ.*) BIRENDRJ NATH BASU *v.* SURENDRA KUMAR BASU. **I.L.R. (1940) 1 Cal. 486=44 C.W.N. 438 =71 C.L.J. 127=A.I.R. 1940 Cal. 260.**

Refund.

——**S. 144**—*Refund—Right of auction-purchaser.*

The right of the auction-purchaser to a refund of the money paid by him arises both under S. 144, C.P. Code, and also on principles of equity and justice and if the case does not come under S. 144, the Court can exercise its inherent jurisdiction to direct a refund of the money to the auction-purchaser. (*Jai Lal, J.*) RANBIR SEN *v.* MOHAMMAD DIN. **166 I.C. 381=9 R.L. 362=A.I.R. 1936 Lah. 497.**

Restitution.

——**Ss. 144 and 151**—*Restitution—Decree not reversed or varied—Court cannot grant restitution.*

Where a decree has not been varied or reversed a Court has no power to grant restitution under S. 144, C. P. Code, or under its inherent powers under S. 151. (*Bose, J.*) NARAYAN *v.* MST. RADHABAI. **169 I.C. 311=9 R.N. 319=I.L.R. 1937 Nag. 153=A.I.R. 1937 Nag. 151.**

——**Ss. 144 and 145**—*Restitution—Joint and several decree against two defendants—Appeal by both—Stay of execution—Deposit of decree amount by one—Amount drawn out by plaintiff on execution of surety bond by sureties—Bond reciting that "if the defendants succeed in the appeal" they would be liable for the amount—Construction—Appeal successful as regards one defendant only—Right of latter to restitution—Liability of sureties, if arises—Undertaking—If to both defendants jointly.*

Appellant, who was the second defendant, was sued along with his mother-in-law, the 1st defendant, for conversion of certain article, and a decree was made against them fixing them with a joint and several liability. They appealed, and applied for stay of execution pending appeal. The Court ordered them to deposit the decree amount in Court. The appellant paid the amount into Court. The plaintiff was directed to take it out on furnishing security for the amount. The 1st and 2nd respondents became sureties for the plaintiff and executed a surety bond for the amount which recited that 'the defendants deposited the said amount in Court," and that "if the *defendants* should succeed in the appeal, we agree that the said amount may be recovered, etc." The appellant, 2nd defendant alone succeeded in the appeal, the decree against him being set aside, but the decree against the 1st defendant was confirmed. Appellant then applied for restitution, under S. 144, C. P. Code, of the money he had paid into Court, both against the plaintiff and against the sureties under the surety bond.

Held, (1) that the appellant was entitled to restitution of the money from the plaintiff; (2) that the surety bond must be construed as an undertaking by the obligors to the obligees jointly, and that the liability of the sureties was conditioned upon the "*defendant*", *i.e.*, both of them, succeeding in the appeal, and that as only one of the defendants had succeeded, the appellant was not entitled to restitution as against the sureties by enforcement of their bond against them, because the sureties could not, upon the language of the bond, be held to have undertaken a liability except upon the condition that the appeal of both the defendants succeeded. (*Cornish, J*) Veerasalingam *v.* Subbarayudu. **166 I.C. 890=9 R.M. 406=44 L.W. 838=A.I.R. 1937 Mad. 229.**

——**S. 144**—*Restitution—Right to—Realisation from surety—Refund on reversal if can be ordered when surety is not a party.*

Where the security, furnished by a surety in the matter of the result of a pending appeal, was after the dismissal of the appeal sold and the money realised by the decree holder and the decree was subsequently reversed by the High Court, an application under S. 144, C. P. Code, by the original juggment-debtor for refund of the amount realised could not be ordered in the absence of the surety concerned whose property was sold. (*Davies, I.C.S.*) Bal Kishan *v.* Ale Rasul Ali Khan. **1938 A.M.L.J. 127.**

——**Ss. 144, 151 and 47**—*Restitution in a case not falling under S. 144—Relief—Basis—Execution and realisation pending appeal—Remand on appeal—Decree for smaller amount on remand—Application for refund of excess recovered—Limitation—Starting point.*

Restitution in a case not strictly falling within the terms of S. 144, C. P. Code, should be made upon the equitable principle underlying S. 144 and in exercise of the inherent power of the Court to prevent abuse of its process. A decree passed against a defendant was set aside in appeal preferred by him and the case was remanded for trial on 23rd November, 1931. In the meantime, plaintiff applied for execution of the decree and the defendant deposited a certain amount which was subsequently withdrawn by the plaintiff. On remand, the Court passed a decree on 25th March, 1933, for an amount lesser than what defendant had deposited. So, on 16th March, 1936, defendant applied for refund of so much of the amount as was received by the plaintiff in excess of what was due to him under the fresh decree.

Held, that although S. 144 did not in terms apply, Court could grant refund upon the principle of S. 144 under its inherent powers.

Held, further. that defendant's application was in time as the right to claim refund accrued to him only when the fresh decree was passed after remand and not from the order of appellate Court remanding the suit.

Held also, that S. 47 also applied to the facts of the case, as the defendant was claiming only the surplus left after satisfying the decree and as such the matter related to execution, discharge and satisfaction of the decree. (*Niyogi, J.*) W. R. Pandit *v.* S. R. Pandit. **I.L R. (1939) Nag. 492=182 I.C. 66=11 R.N. 497=1939 N.L.J. 193=A.I.R. 1939 Nag. 101.**

Revision.

——**S. 144**—Revision—Order rejecting application under—Competency. *See* C. P. Code. Ss. 2 (2), 115 and 144. **A.I.R. 1936 Cal. 812.**

Right to apply.

——**S. 144**—*Right to apply—Preliminary mortgage decree—Amendment—Revision—Final decree during pendency of—Possession obtained—Amendment set aside—Application under S. 144, C. P. Code, if competent.*

Where a revision has been preferred against the amendment of a preliminary decree in a suit for foreclosure and during its pendency a final decree in terms of the amended preliminary decree is passed and possession obtained in execution thereof, and subsequently the revision is allowed and the amendment set aside, it is competent to the judgment-debtor to apply under S. 144, C. P. Code, for restitution. (*Collister and Bajpai, JJ.*) Gobind Behari *v.* Shujaat-Mand Khan. **I L.R. (1938) All. 494=176 I.C. 81=1938 A.L R. 537=11 R.A. 29=1938 A.L.J. 477=1938 A.W.R. (H.C.) 304=A.I.R. 1938 All. 364.**

Sale.

——**S. 144**—*Sale in execution of* ex parte *decree—Judgment-debtor setting it aside by deposit under O. 21, R. 89*—Ex parte *decree also afterwards set aside—Judgment-debtor's right to refund of compensation deposited for auction purchaser.*

If a judgment-debtor against whom an *ex parte* decree was passed chooses to set aside the sale held in execution of that decree by making the necessary deposit under O 21, R. 82, C. P. Code, and afterwards the *ex parte* decree also is set aside, the judgment debtor would not be entitled to claim a refund of the amount which he had deposited as the auction-purchaser's compensation. Such a deposit is not made by him directly in connection with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides. This being the case, he is not entitled to a refund of such compensation money as a benefit by way of restitution within the meaning of S. 144, C. P. Code. (*Edgley, J.*) Gorakhyanath *v.* Narayan Chandra. **43 C.W.N. 104.**

Scope.

——**S. 144**—*Scope*.

S. 144, C. P Code, contemplates a case in which the decree, or it may be, the order, of a trial

Court has been put in execution and the decree or order has afterwards been varied or reversed in appeal. Restitution sought under S. 144 must be in respect of the decree which has been reversed or varied. (*Zia-ul-Hasan, C.J. and Srivastava, J.*) BRIJ MOHAN SINGH *v.* RAMESHAR SINGH. **183 I. C. 709=12 R.O. 58=1939 A.W.R. (C.C.) 127=1939 O.W.N. 765=1939 O.A. 636=1939 O.L.R. 544=A.I.R. 1939 Oudh 273.**

——**Ss. 144 and 151**—*Scope—Decree against Hindu father and sons based on compromise—Sale of family property in execution—Purchase by decree-holder—Full satisfaction of decree entered—Subsequent suit by sons to declare compromise decree not binding on them—Decree releasing half share in property—Decree and sale remaining as a whole—Application by decree-holder for compensation—Maintainability.*

In execution of a compromise decree against a Hindu father and his sons, joint family property of the father and sons, was put up for sale and purchased by the decree-holder, the sale was duly confirmed and full satisfaction of the decree entered. The minor sons then commenced an action claiming that the compromise decree was not binding on them and succeeded in it with the result that their share in the property, amounting to eight annas interest was released, though the decree stood against the father as a joint and several decree and the sale, which itself was not affected, stood as a whole. The decree-holder then made an application for compensation to the extent of half the amount purchased by him under S. 151, C. P. Code. He had previously applied for execution of the decree, but that was refused on the ground that he could not take out execution of the decree which had already been satisfied.

Held, (1) that an auction purchaser at an execution sale must abide by his bargain, that the Court selling the property would not guarantee the title, and the maxim *caveat emptor* applied; (2) that the fact that the sons brought an action for declaration of the invalidity of the decree as against them did not affect the principle of *caveat emptor,* and that the case had to be considered as if there was no decree at all against the sons; (3) that restitution on the analogy of S. 144, C. P. Code, could, if at all, be claimed only against the sons and not against the father and that on no principle was the decree-holder entitled to compensation against the father judgment-debtor under S. 151, C. P. Code. (*Wort and Varma, JJ.*) PHULCHAND RAM MARWARI *v.* NAURANGI LAL MARWARI. **172 I.C. 225=16 Pat. 729=10 R.P. 320=1937 P.W.N. 836=18 Pat.L.T. 826=A.I.R 1937 Pat. 647.**

——**S. 144**—*Scope of—Decree entitling party to take charge of institution—Execution—Possession of building in which institution is located also taken under colour of decree—Reversal of decree—Duty to restore possession of building—Plea that building was taken possession of by force or otherwise—If open.*

A party taking possession of any thing under colour of his decree is bound to make restitution of everything that he takes possession under colour of the decree on reversal of that decree. Where a party entitled under his decree to hold charge of an institution, also takes possession of the building in which the institution is located under colour of the decree, such possession naturally and necessarily following the taking of charge, he is under an obligation to restore possession of the building, or reversal of the decree, to the persons who were admittedly in possession at the time the suit was instituted. He cannot be allowed to plead that he took possession only of the institution under the decree, and that he took possession of the building by force or otherwise and thus resist restitution. The object and purpose of S. 144, C. P. Code, is that the parties shall be restored to the position which they originally occupied. (*Collister, J.*) ARYA PRATINIDHI SABHA *v.* CHHOTTEY LAL. **171 I.C. 709=10 R.A. 305=1937 A.W.R. 912=1937 A.L.J. 1107=1937 A.L.R. 878=A.I.R. 1937 All. 728.**

——**S. 144**—*Scope—Money due under decree—Payment to vakil of party—Subsequent reversal of decree—Application for restitution against party— Maintainability—Payment to vakil not certified to Court—If bar to restitution.*

Where money due to a party under a decree is paid to his vakil whose vakalat implies a power to receive money out of Court on his client's behalf that is sufficient to support an application by the opposite party on reversal of the decree to apply for restitution against the party to whose vakil the money was paid. S. 144 of the C. P. Code is sufficiently wide to cover such a case. The fact that payment to the vakil is not certified to the Court will not defeat the application for restitution. (*Burn and Stodart, JJ.*) HANUMANTHAPPA *v.* GOOLAPPA. **179 I.C. 994=11 R.M. 646=1939 M.W.N. 736 (2)=48 L.W. 945=A.I.R. 1939 Mad 176.**

——**Ss. 144 and 151**—*Scope — Restitution—Powers of Court—Sale of property on wrong date—Setting aside—Restitution—Power to award mesne profits by way of restitution.*

The rule that a *bona fide* purchaser at a sale held under a Court's decree or order which is subsequently reversed is not affected by the reversal and the remedy by way of restitution does not lie against him, has no application to cases where through a mistake or material irregularity of the Court the property has been sold, such as when one property has been attached and another has been sold or where the property is sold on the one date whereas it ought to have been sold on another date. In such cases restitution is ordered not strictly under S. 144 but under the inherent powers of the Court under S. 151, C. P. Code; in ordering restitution of the property under S 151, C. P. Code, it is open to the Court to grant restitution also of the profits of the said property. If the Court has jurisdiction to grant restitution, there is no reason why the restitution should be limited to the property alone and the judgment-debtor denied the restitution of the profits which he has been deprived of. A sale was set aside on an application by the Judgment-debtor on the ground of material irregularity committed by the Court selling the property on the old date fixed instead of the date to which it was postponed. The judgment-debtor filed an application for restitution by re-delivery of possession and mesne profits of the property from the auction-purchaser.

Held, that that judgment-debtor was entitled to mesne profits for the period during which he was out of possession of the property. (*Venkatara-*

mana Rao, J.) RADHA BAI *v.* JAGANNADHA NAIDU. 169 I.C. 783=10 R M. 113=1937 M.W. N. 342=A.I.R. 1937 Mad. 694.

——Ss. 144 and 151—*Scope—Suit for declaration of title—Property in custody of Court—Plaintiff given possession for harvesting crops—Undertaking to pay value of crops whenever called upon—Decree ultimately in favour of defendants—Application by latter for mesne profits during suit and appeal—Power to order restitution.*

Pending a suit for declaration of title to land and for an injunction or in the alternative for possession, the parties agreed not to enter on the suit property which was in *custodia legis*. The Court gave the property over to the plaintiff for specific purposes subject to the control of the Court, for raising and harvesting crops. Plaintiff undertook to the Court to pay the Court the value of the crops raised whenever ordered by the Court to do so. The suit ended in the trial Court in a decree in the plaintiff's favour and he was found to be in possession, but on appeal the defendants were found to have title. The latter then applied to the Court for mesne profits by way of restitution during the period of the suit and of the appeal.

Held, that the plaintiff having put himself under the direction of the Court could not be heard to say that the Court had no power to make orders for the disposal of the money which he undertook to pay; and though S. 144, C. P. Code, was not strictly applicable to the case the Court was under S. 151, entitled to make such orders as were just and proper for the disposal of the profits enjoyed by the plaintiff under the orders of the Court during the suit and the appeal. (*Wadsworth, J.*) RAMIREDDI *v.* SATYAM. 167 I.C. 356 =9 R.M. 446=1936 M.W.N. 503=43 L.W. 773 =A.I.R. 1936 Mad. 636.

Strangers.

——S. 144—*Strangers—Restitution—Principles of—Power of Court under inherent jurisdiction—Payment made to wrong person—Duty to order restitution.*

One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors. This statement of the law is general enough to cover a case where the executing Court has been made to take a wrong step by an erroneous decision passed by another Court. The non-applicability of S. 144 would not prevent a Court from granting restitution in the exercise of its inherent powers. Where a Court has wrongly paid the money to a person not entitled thereto, it has not only the power but it is also its duty to recover it from him. *A* brought a suit against *B* for possession of property and mesne profits for one particular year. Receiver was appointed in the suit who collected profits for the year pending the suit and deposited them in Court. *A* claimed those profits but Court refused to grant the relief because *A* had not claimed future profits. *A* appealed. During the pendency of the appeal one *C* also obtained a decree against *B* and attached the deposit in Court, and was given over the money that was in Court deposit. Ultimately *A* succeeded in his appeal after contest with *B* and claimed restitution from *C*. *C* contended that as he was not a party to the appeal by *A*, any order passed on the appeal was not binding on him.

Held, that the claim of *C* to the deposit was in the right of *B* and as the order passed in appeal was passed after active contest between *B* and *A*, *C* must take the deposit subject to the decision of the appeal. As the order in appeal negatived the title of *B*, *C* also lost his title and was bound to make restitution to *A*. (*Venkataramana Rao, J.*) RATNAJI CHANDANMALL *v.* RAMAKRISHNAYYA. 167 I.C. 67=9 R.M. 417=1936 M.W.N. 1199= A.I.R 1937 Mad 95.

——S. 144—*Successive applications—Maintainability—Application after reversal of decree on appeal—Grant of—Subsequent reversal of appellate decision—Appellate decision restored on Letters Patent Appeal—Fresh application for restitution—If lies.*

In a suit by *A* for recovery of an annuity, a decree was passed in his favour and a property was put to sale, *A* himself being the purchaser. *B* who had purchased the property pending the suit made an application under O. 21, R. 89 and the sale was set aside. The decree in favour of *A* was reversed on appeal by the District Judge. Consequently *B* made an application for restitution of the amount deposited by him and the application was granted. *A* preferred an appeal against the decision of the District Judge and the decision was reversed, but on Letters Patent appeal the decree of the District Judge was restored *B* therefore made a second application for restitution of the amount deposited. The trial Court dismissed the application on the ground that there was already an order for restitution and *B* ought to have made an application for execution. On appeal,

Held, that the decision was wrong. The first application for restitution was filed by virtue of the decision of the District Judge. That decision was upset in appeal. Therefore *B* could not maintain the first application which had become infructuous. Till the decision in Letters Patent appeal *B* could not have applied for restitution. Therefore the second application for restitution after decision in the Letters Patent appeal was sustainable. (*Venkataramana Rao, J.*) PALANIYANDI PILLAI *v* RASAPPA PILLAI. 167 I.C. 458= 9 R M. 453=1936 M.W.N. 1122=45 L.W. 522= A.I.R. 1937 Mad. 173=(1937) 2 M.L.J. 108.

——S. 145—*Applicability—Bond under O. 32, R 6—Enforcement—Mode of—Suit—Maintainability.*

A bond given to the Judge of a Court in pursuance of an order of the Court under O. 32, R. 6, C. P. Code, must be enforced by a suit upon the bond. Such a bond is not enforceable by execution in the manner provided by S 145, C P. Code. A suit is the proper means of enforcing it. (*Cornish, J.*) SATYAM *v.* SATYANARAYANA. 167 I.C. 692 (2)=9 R M. 473=1936 M.W.N. 1127= 44 L.W. 621=A.I.R. 1936 Mad. 953=71 M.L.J. 675.

——S. 145 and O. 38, R. 5—*Attachment before judgment—Surety — Bond undertaking to pay amount under decree that may be passed—If illegal—Liability of surety—Objection to validity of bond—If competent.*

O. 38, R. 5 no doubt contemplates security for the production in Court of the property sought to be attached before judgment or its value at a future time when called upon and the amount of the security demanded should ordinarily be commensurate with the value of the property sought to be attached, and not the decretal amount. But the object of the legislature for providing for attachments before judgment was to secure the prospective decree-holder in matter of realisation of the money that might be eventually found by the Court to be due to him. Where, therefore, a Court makes a demand for and takes security for the prospective decretal amount, at most it is only an irregular manner of the exercise of its jurisdiction. But the surety who has executed the surety bond in that form cannot raise the objection to the bond in the course of execution proceedings started against him under the provisions of S. 145 of the Code. (*R. C. Mitter, J.*) Amulya Ratan *v.* Prosad Chandrakar. **162 I. C. 619=8 R.C. 614=40 C.W.N. 657=A.I.R. 1936 Cal. 143.**

——**S. 145**—*Bond by custodian of attached goods—Undertaking to deliver on Court's order—*Bona fide *delivery without Court's order—Liability to pay compensation.*

Where after attachment the goods are delivered to a custodian in pursuance of an order of Court for safe custody on his executing a bond undertaking to produce the goods in Court when required or to deliver them to judgment-debtor if so ordered and binds himself to pay compensation on his failure to discharge the liability under the bond, such custodian is liable to pay compensation if without the orders of Court he delivers the goods of others although he *bona fide* believed such others to be entitled to the goods as their claims to such goods had been allowed in execution proceedings. (*R. C. Mitter and Khundkar, JJ.*) Gurmukh Rai Ghanasyamdas *v.* E. F. Lawson. **182 I.C. 865=12 R C 114=A. I.R. 1939 Cal. 316.**

——**S. 145, O. 21, R. 43 and O. 21-A (Cal.), R. 3**—*Custodian to whom goods are delivered by attaching officer on Court's order—If a surety.*

A surety is one who takes upon himself, and guarantees the performance of an obligation which rests primarily upon another. His obligation is an accessory one. S. 145 has no application unless the person sought to be proceeded against has taken upon himself the liability of another. It need not be the liability of either the judgment-debtor or the decree-holder but it may be the liability of an officer of the Court charged with the conduct of the execution proceedings. It is however essential that he should have undertaken to discharge another's obligations. When an officer of the Court seizes the goods under O. 21, R. 43 the attachment is complete, and at once an obligation on that officer is imposed by law. This obligation means that he must keep it safe and produce it in Court for being made available for sale. When the attaching officer exercises his discretion under R. 3 of O. 21-A and leaves the property in the custody of a custodian, the latter undertakes to perform the duty (*i.e.*, to produce the attached goods in Court) which the law had cast upon the Court's officer who had attached the goods. The obligation of the custodian is in such a case not an original but an accessory one. But where in leaving the goods in the custody of such person the attaching officer does not exercise his discretion but acts upon an order of the Court directing the goods to be delivered to such person on his furnishing security and the goods are so delivered in pursuance of the said order, the normal liability of the attaching officer to keep safe the attached goods and to produce them in Court is discharged and the responsibility is transferred from his shoulders to that of the custodian whose liability under the bond cannot be regarded as an accessory one. In such circumstances the custodian is not a surety and S. 145 has therefore no application. (*R. C. Mitter and Khundkar, JJ.*) Gurmukh Rai Ghanasyamdas *v.* E. F. Lawson. **182 I.C. 865=12 R. C. 114=A.I.R. 1939 Cal. 316.**

——**S. 145**—*Decree against judgment-debtor—Execution against surety.*

A decree against the judgment-debtor can be executed against his surety who has, by means of a statement made before the Court, undertaken to satisfy the liability of the judgment-debtor. It does not matter that the name of the surety is not mentioned in the decree. (*Jai Lal, J.*) Parkash Chand Mahajan *v.* Madan Theatres, Ltd. **164 I.C. 281=9 R.L. 98=38 P.L.R. 623=A.I.R. 1936 Lah. 463.**

—— **S. 145**—*Execution against surety—Notice to surety—Necessity of.*

There must be notice to the surety of some kind before his property can be attached in execution of the decree, attachment of the surety's property without notice being *ultra vires*. It is immaterial however whether such notice is given by the Court which passed the decree or the Court to which it is sent for execution. (*Addison, J.*) Sheikh Rahim-ud-din *v.* Murli Dhar. **I.L R. 1938 Lah 624=177 I C. 379=11 R.L. 372=40 P.L.R. 530=A.I.R. 1938 Lah. 593.**

——**S. 145**—*Father's liability as surety—Son's interest—If can be proceeded against.*

S. 145 permits the execution of a decree (passed against a stranger) against the surety as though it were a decree passed against the surety. It may be that he is a party only for a limited purpose. Hence where a father has become liable as surety for a decree passed against a stranger, the interest of surety's sons can be taken in execution of the decree. The fact that the decree-holder has power to sue the surety instead of taking recourse to execution under S. 145 does not preclude the decree-holder seeking a shorter and less expensive remedy of execution under S. 145. (*Stone, C.J. and Puranik, J.*) Pandurang Gadiba Kunbi *v.* Abdul Hussain Isaji Bohri. **I.L R (1939) Nag. 536=173 I.C. 950=10 R.N. 333=A.I.R. 1938 Nag. 148.**

——**S. 145**—*Liability of surety—Compromise of suit under O. 21, R. 63—Default in payment undertaken by plaintiff—Execution of decree against him—If open.*

Where a suit under O. 21, R. 63 is compromised and the plaintiff defaults in making the payment undertaken by him, it is certainly open to the decree-holder to take out execution against such a plaintiff also; for his position is that of a surety who by virtue of the compromise became liable for the payment of the decree amount. (*Rachhpal Singh and Ismail, JJ.*) Raj Bahadur *v.* Sohan Pal Munna Lal. **184 I.C. 815=1939 A. W.R. (H.C.) 462=1939 A.L.J. 801=A.I.R. 1939 All. 517.**

———S. 145—*Notice of attachment in writing—If necessary*

S. 145, C. P. Code, does not lay down that the notice of attachment should be in writing. All that is necessary under the law is that before the attachment actually takes place, the surety should have notice of the order directing attachment, the object being that he may be able to raise objections, if any, to the validity of the order. If the objection of want of notice is not raised before the executing Court, it must be taken to have been waived. (*Tek Chand, J.*) NANAK CHAND RAMJI DAS *v* IBRAHIM. **174 I.C. 965=10 R.L. 646=40 P.L.R. 38=A.I.R. 1937 Lah. 772.**

———S. 145—*Property given in security—Extent to which security can be enforced.*

Where the property is given in security for due performance of decree in particular amount the effect of the subsequent transfer of the property is that the decree-holder can enforce the security bond only to the extent of the amount secured thereunder by the sale of the property specified therein, and any sale for more than the amount specified in the bond will be without jurisdiction in the absence of the transferee and will not bind him, and such a sale can be set aside on the alienee depositing the amount due under the bond. (*Venkataramana Rao, J.*) JAGANNATHA KONE *v.* RAMACHANDRA NAIDU. **165 I.C. 453=9 R.M. 251=1936 M.W.N. 443=A.I.R. 1936 Mad. 589.**

———Ss. 145 and 47—*Regular suit against surety—If barred.*

S. 145 simply enables a party for whose benefit security has been given to enforce the surety bond against the surety by way of execution to the exent to which the surety has rendered himself personally liable, and no more. If an order for or in the course of execution is made against a surety who is within the ambit of S. 145. he is at liberty to appeal against that order as though he were a party to the suit within the meaning of S. 47; but in other respects he is not deemed to be a party within S. 47. Hence S. 145 does not bar a regular suit against surety. (*Skemp, J.*) BHAGHAT RAM KHANNA *v.* MOHAMMAD BAKHSH. **I.L.R. (1939 Lah. 470=183 I.C. 495=12 R.L. 121=41 P.L.R. 589=A.I.R. 1939 Lah. 175.**

———S. 145—*Scope—Application for execution against surety—Breach of particular condition of bond alleged—Breach of another condition pending proceedings—Power of Court to order execution on basis of latter breach.*

An application for execution of a decree against a surety under S. 145, C. P. Code, is an application for the enforcement of the bond as such, and even if it is occasioned by and mentions only the breach of one condition, execution can be ordered by the Court if, in the course of the proceedings arising out of that application, it appears that a breach of any one or other of the conditions has occurred. (*Davis, J.C. and Lobo, A.J.C.*) SADIKLALI MOOSAJI *v.* HASSASINGH TAHILSINGH. **30 S.L.R. 177=166 I.C. 268=9 R.S. 133=A.I.R. 1936 Sind 244.**

———S. 145—Security bond — Procedure for enforcement. *See* SURETY—SECURITY BOND. **I. L.R. (1937) 2 Cal. 698.**

———S. 145—*Security bond under—Enforcement—Procedure—Execution—Suit—If necessary.*

Where defendant furnishes security for the performance of a decree in a particular sum, being the probable amount of mesne profits and costs, by executing a security bond in favour of the Court by which certain immovable property is given as security for the amount, the security bond does not constitute a mortgage within the meaning of the Transfer of Property Act so as to attract the procedure laid down in that Act and consequent necessity of a suit to enforce it. The bond can be enforced in execution by sale of the property. And even if the property is alienated subsequent to giving the bond, it makes no difference, and the same procedure obtains in spite of alienation (*Venkataramana Rao, J.*) JAGANNATHA KONE *v* RAMACHANDRA NAIDU **165 I.C. 453=9 R.M. 251=1936 M.W.N. 443=A.I.R. 1936 Mad 589.**

———S. 145—*Supurdar—Duty of.*

A supurdar cannot exonerate himself from the liability imposed on him on the ground that he in good faith handed over the properties which had been given under his charge to a third person. It is his duty to obtain the instructions of the Court before handing them over. (*Sulaiman, C.J. and Bennet, J.*) GENDA MAL *v.* SUKHDARSHAN LAL. **164 I.C. 200=9 R.A. 125=1936 A.L.J 736=1936 A W.R. 531=1936 A.L.R. 713=A I.R. 1936 All. 555.**

———S. 145—*Surety—Liability of—If ceases on dismissal of execution application against judgment-debtor.*

There is nothing in S. 145, C. P. Code, or in any other section to prevent the decree holder from proceeding against a surety by reason of the dismissal of his execution application against the judgment-debtor, in respect of a liability incurred by the surety before the dismissal of the execution application. Such dismissal has no retrospective effect so as to excuse the surety from any liability incurred before the dismissal. (*Davis, J.C. and Tyabji, J*) PEOPLE'S BANK NORTHERN INDIA *v.* NANIKRAM. **I.L.R (1939) Kar. 401=185 I.C. 573=12 R.S. 166=A.I.R. 1939 Sind 270**

———S. 145—Surety bond—Construction—Liability—Decree against two defendants—Appeal—Deposit of decree amount pending appeal—Withdrawal by plaintiff—Sureties undertaking to repay if "the defendants" succeed in the appeal—Appeal successful only as regards one defendant—Right to enforce bond. *See* C. P. CODE, Ss. 144 AND 145. **44 L W. 838.**

———S. 145—*Surety bond for costs of appeal—Appellant unsuccessful in appeal—Execution against surety—Separate decree against surety—If necessary.*

A person became surety for another who was ordered to give security for the costs of an appeal. No property was specifically mortgaged in the surety bond. On the dismissal of the appeal, the respondent proceeded against the surety in execution.

Held, the respondent can take execution against the property of the surety without obtaining a separate decree against the surety, if he fails to get his money from the unsuccessful appellant. (*Darling, S.M. and Bomford, J.M.*) IMAMUDDIN BEG *v.* GAZAFFAR HUSAIN. **1937 R. D. 518.**

———**S. 145**—*Surety bond—Enforcement—Procedure.*

Where a person has executed a bond as surety for a receiver and has become liable under the bond, the order of the Court to pay up the amount due on the bond falls within the scope of S. 145 and can be enforced by procedure prescribed in that section. (*Roberts, C.J. and Dunkley, J.*) M. L. R. M. LETCHMANAN CHETTYAR *v.* T. S. N. CHOCKALINGAM CHETTYAR. **189 I.C. 177=A.I.R. 1940 Rang. 151.**

———**S. 145**—*Surety for judgment-debtor—Judgment debtor given time to pay decree, without surety's consent—Liability of surety.*

Where a judgment-debtor was without the consent of the surety, given time after time to pay the decretal amount, the surety cannot be held liable for the decretal amount on the failure of the judgment-debtor to appear on a particular hearing. (*Addison and Ram Lall, JJ.*) CHHAKKAN RAM *v.* JOINT HINDU FAMILY OF UDHO DAS. **188 I.C. 172=12 R.L. 504=41 P.L.R. 282=A.I.R. 1939 Lah. 368.**

———**S. 145**—*Surety for judgment-debtor—Liability.*

Where the judgment-debtor was not told specially to be in attendance on a particular day on which he was absent, but his counsel who could have done all that was required was present, there is no default which renders the surety liable to pay the decretal amount. If his personal attendance is necessary on that day, the surety should be given notice to produce him. (*Addison and Ram Lall, JJ.*) CHHAKKAN RAM *v.* JOINT HINDU FAMILY OF UDHO DAS. **188 I.C. 172=12 R.L. 504=41 P.L.R. 282=A.I.R. 1939 Lah. 368.**

———**Ss. 145 and 147**—*Surety, position of—Enforcement of surety bond—Jurisdiction—Determination of.*

The right to enforce a surety bond in execution is conferred by S. 145, C. P. Code. The surety must be regarded as a party to the suit as well as to the decree, by reading Ss. 145 and 147 together, and the same consideration which apply to the judgment-debtor should also apply to him as well in matters of execution. (*Stone, C. J. and Bose, J.*) NILKANTHRAO *v.* KRISHNARAO. **1940 N.L.J. 244.**

———**S. 145**—Surety under—Discharge of—Execution barred against principal judgment-debtor—Effect of. *See* CONTRACT ACT, Ss. 134 AND 137. **40 C.W.N. 465.**

——— **S 145, Proviso**—*Notice under—Service of—Proof—Record of service and of appearance of party in order of Court—Sufficiency.*

A mere record in the order-sheet of the Court that a notice has been served on a particular person may not be evidence of service of such notice. But when the order in the order-sheet records that the party served has appeared in Court, the order is proof of his appearance, and the effect of the order is conclusive of the fact that the person has in fact been served with a notice. (*R. C. Mitter, J.*) BIRENDRAJIT SAHA *v.* RENUPADA SAHA. **40 C.W.N. 465.**

———**S. 145, Proviso**—*Notice to surety—Fresh notice in respect of each execution—Necessity.*

Obiter.—The law requires one notice to be served on the surety under S. 145, C. P. Code, and if such a notice has been served, other execution proceedings are maintainable against the surety without fresh service of such a notice. (*R.C. Mitter, J.*) BIRENDRAJIT SAHA *v.* RENUPADA SAHA. **40 C.W.N. 465.**

———**S. 145 (c)**—*Powers of Court—Suit for permanent injunction—Application for temporary injunction—Agreement by parties to allow defendant to be in possession—Undertaking to pay profits to plaintiff, if latter succeeded in suit—Security bond and consent order—Decree in favour of plaintiff—Jurisdiction of Court to enforce bond.*

Immediately after filing a suit for a permanent injunction restraining the 1st defendant from interfering with the plaintiff's possession of the suit property, the plaintiff applied for a temporary injunction restraining the 1st defendant from interfering with his possession during the pendency of the suit. The parties entered into an agreement in and by which the 1st defendant was to be in possession of the land in dispute pending suit, and to pay plaintiff the profits of the land in case plaintiff's title was declared. A consent order was passed by the Court and the 2nd respondent executed a security bond which was accepted and which stipulated that in case plaintiff succeeded the amount of bond could be recovered from him in execution, "treating this as part of such decree and by executing such decree." The suit resulted in a decree in favour of the plaintiff who accordingly applied to recover the amount of the profits.

Held, that the plaintiff was clearly entitled to ask for the relief by way of a temporary injunction, and that the Court having general jurisdiction over the subject-matter of the suit had jurisdiction to pass such order in question which it deemed fit to give proper relief to the plaintiff during the pendency of the suit, that it was competent to the parties to come to an understanding and for the Court to give effect to it, and the Court had jurisdiction to enforce the obligation under the bond, which under the circumstances must be considered as "proceedings in Court imposing a certain liability to be enforced in the suit against the defendant to that suit."

Held, further, that the 1st defendant and the 2nd defendant having undertaken the obligation, it would not be open to them to resile from it. (*Venkataramana Rao, J.*) MUTHUSWAMI PILLAI *v.* MANIKKA MOOPAN. **166 I.C 670=9 R.M. 390=1936 M.W.N. 1160=44 L.W. 717=A.I.R. 1936 Mad. 990.**

———**S. 146**—*Applicability—Hindu co-parcener—If claims under manager.*

S. 146 is not intended to apply to a co-parcener while the manager or *karta* in a joint Hindu family is alive so as to allow the co-parcener to sue in his place. There is no devolution of interest in such a case as is contemplated by S. 146 of the Code. (*Davis, J. C. and Mehta, A. J.C.*) KALLIANESHWAR BHAGWANDAS *v.* SHEWARAM NANDARAM. **30 S.L.R. 467=168 I.C. 801=9 R.S. 246=A.I.R. 1937 Sind 94.**

———**S. 146**—*Power of Court under—Suit by benamidar—Dismissal—Appeal by real owner—Permissibility.*

A real owner can be allowed under S. 146, C. P. Code, to file an appeal against the dismissal of a suit instituted by his benamidar who has released his right in the property claimed in the suit by a deed which recites that the appellant is the real purchaser of the property. The Court has ample powers under S. 146 to permit the person in whose favour the plaintiff has released his rights in the property to file an appeal. (*Wadsworth, J.*) Sivaswami Chettiar *v.* Marudaiya Goundan. **186 I.C. 632=12 R.M. 660=50 L.W. 429=1939 M.W.N. 962=A.I.R. 1940 Mad. 16=(1939) 2 M.L.J. 759.**

———**S. 148**—*Applicability—Failure to pay deficit Court-fee under O. 7, R. 11 (c)—Power to extend time.*

In view of S. 148 the time granted to pay deficit Court-fee can be enlarged from time to time. This section expressly empowers the Court to extend any time fixed by it even after the expiry of the period originally fixed. (*Mukerji and S. K. Ghose, JJ.*) Mahommed Fateh Nasib *v.* Saradindu Mukherjee. **162 I.C. 689=8 R.C. 643=40 C.W.N. 747=A.I.R. 1936 Cal. 221.**

———**S. 148**—*Applicability—Final order in judgment—Order that sale would be set aside if money is deposited within certain time—Jurisdiction to extend time.*

If on an application by the judgment-debtor for setting aside a sale, an order is passed that if the decretal amount is deposited within a certain time the sale would be set aside and on failure to deposit that sum within the stipulated period, the application would stand dismissed, the Court ceases to have jurisdiction and has no power to grant the judgement-debtor an extension of time to put in the decretal amount, unless he files a properly constituted application for the review of the order. S. 148, C. P. Code, can have no application in a case of this nature in which a final order has been passed in a judgment. The provisions of O. 20, R. 3, would apply. (*Edgley, J.*) Syed Mahomed Asraf Ali *v.* Nabijan Bibi. **I.L.R. (1939) 1 Cal. 468=12 R.C. 317=184 I.C. 848=43 C.W.N. 417=A.I.R. 1939 Cal. 581.**

———**S. 148**—Applicability — Periods fixed in O. 45, R. 7 (1), C. P. Code, as applied to Federal Court appeal—Extension of—Power of Court. *See* Limitation Act, S. 4. **1939 P.W.N. 807 (F. B.)**

———**S. 148**—Applicability—Time for deposit of decretal amount fixed in order of Court—Extension of—Jurisdiction of Court. *See* Bengal Tenancy Act, S. 174 (3) (*b*). **44 C.W.N. 449.**

———**S. 148**—Conditional order granting leave to withdraw suit with liberty to file fresh one—Extension of time. *See* C. P. Code, O. 23, R. (2) **66 C.L.J. 275.**

———**Ss. 148 and 149**—*Discretion of Court—Time for payment of deficit Court-fee on plaint—Grant of—Extension—Right of plaintiff to claim.*

When time is fixed by the Court for payment of deficit Court-fee on a plaint, it is not open to the plaintiff to demand as a matter of right that the time should be extended. The power to grant extension vests in the Courts either under S. 148 or S. 149, C. P. Code, under either of these sections the question is one of the Court's discretion and not the plaintiff's right. S. 149 expressly provides for defective documents being retrospectively validated. The Court must, however, exercise its discretion, not capriciously, but judicially and reasonably. (*Venkatasubba Rao, J.*) Venkanna *v.* Atchutaramanna. **182 I.C. 953=12 R.M. 195=1938 M.W.N. 259=47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610.**

———**S. 148**—*Excuse of delay—Execution application—Delay in re-presentation—Condonation of delay—If to be implied from registration of application.*

The mere registration of a darkhast which is re-presented beyond the time fixed by the Court does not *per se* amount to condonation of delay. Condonation of delay is a judicial act to be performed after hearing both parties. The registration of the darkhast only means that the delay is condoned subject to objections by the judgment-debtor at hearing. (*Norman, I.C.S.*) Ram Dutt *v.* Chatur Bhuj. **1936 A.M.L.J. 110.**

———**S. 148**—Expiry of time to pay deficit court-fee—Power to grant further extension of time. *See* C. P. Code, O. 7, R. 11 (*c*) and S. 148. **66 C. L.J. 78.**

———**S. 148**—Power of Court—Conditional order under O. 9, R. 9—Extension of time. *See* C. P. Code, O. 9, R. 9. **1936 A.L.J. 566=A.I.R. 1936 All. 477.**

———**Ss. 148 and 149 and O. 20, Rr. 3 and 6**—*Power to extend time—Existence of jurisdiction—Necessity—Preliminary decree fixing time for payment of deficient court-fee—If can be extended.*

To extend time under Ss. 148 and 149, C. P. Code, the Court must have a case before it in regard to which it has jurisdiction. The expressions 'from time to time' in S. 148 and 'at any stage' in S. 149 clearly indicate this. The jurisdiction of a Civil Court commences when a plaint is filed and comes to an end when judgment is pronounced under O. 20, R. 3. Where a preliminary decree for dissolution of partnership fixed a time for payment of deficient Court-fee and stated, that on default the decree would become a nullity, the time so fixed cannot be extended either under S. 148 or S. 149, C. P. Code, as the jurisdiction of the Court has come to an end on pronouncing of the judgment and signing of the same. Such a judgment cannot according to O. 20, R. 3 which is imperative, be altered except as provided by S. 152 or by review. Because of O. 20, R. 6 during the time between the signing of the judgment and the decree, nothing could be altered. (*Bennet and Verma, JJ.*) Beni Prasad *v.* Om. Prakash. **177 I.C. 824=1938 A.W.R. (H.C.) 495=11 R.A. 218=1938 A.L.R. 785=1938 A.L.J. 673=A.I.R. 1938 All. 497.**

———**S. 148**—*Scope—Compromise decree fixing time for deposit—Power of Court to extend time on the application of one party only.*

When there is decree based on an agreement between the parties, an essential term of that agreement embodied in the decree cannot be changed by an act of the Court on the application of only one of the parties, but the consent of both the parties to the original agreement would be necessary for its modification. Where a definite period is fixed for the performance of an obligation as an essential part of the contract, the Court has no power to vary the terms and to grant an extension of time, if the time stipulated is an essential part of the terms of the contract embodied in the decree and not a mere threat of a penal nature. (*Wadsworth, J.*) Mooriantha-

Kath *v.* Mathankandy Vattakkayil Pokkan. **52 L.W. 336=1940 M.W.N. 720=(1940) 2 M.L.J. 311.**

——**S. 148**—Scope—Extension of time for payment of deficit court-fee—Jurisdiction to grant after appeal is filed. *See* C. P. Code, Ss. 2 (2) and 148. **1937 A.L.J. 1346=1938 A.W.R. (H.C.) 13.**

——**S. 148**—*Scope—Time for payment of deficit court-fee—Power of Court to extend.*

It is a general rule that where a party is required to do something under a decree and time limit is prescribed for doing it, the Court which passed the decree has no jurisdiction to extend the time limit, but it is subject to the qualification that where the decree or order which fixes the time is not intended to be final and the Court still retains control over the proceeding, the Court may extend time under S. 148. Whether the Court still retains control over the proceeding or not must be determined upon the nature of the proceeding and the order passed therein. Where the Court decreed a suit and made an order for deficit Court-fees in these words: "The plaintiffs must file deficit court-fee within a fortnight from to-day otherwise they will not be entitled to have the aforesaid decree and the suit will be dismissed."

Held, that a final order had not been passed in the suit and so the Court having still retained control over the proceeding, had jurisdiction to accept the deficit court-fee after the period fixed. (*Harries, C.J. and Fazl Ali, J.*) Surajmal Marwari *v.* Bhubaneshwar Prasad. **186 I.C. 870=12 R.P. 548=6 B.R. 410=A.I.R. 1940 Pat. 50.**

——**S. 149**—*Appeal—Deficient Court-fee in appeal—Extension of time to pay—Discretion of Court.*

Where an application for extension of time to make up the deficient Court-fee is not made by the pleader till after about 7 months since the discovery of deficiency and the appeal is time-barred by that time, the question of Court-fee not being difficult and the error of Counsel not being *bona fide*, it is not a fit case for granting extension of time. (*Bhide, J.*) Ghulam Mohammad *v.* Barkat Ali. **167 I.C. 756=9 R.L. 552=39 P.L.R. 443=A.I.R. 1936 Lah. 935.**

——**S. 149 and O. 7, R. 11 (c)**—*Appeal on insufficiently stamped paper filed within limitation—Prayer along with appeal to grant time to make good deficiency—Order dismissing appeal as time barred ignoring prayer—Legality.*

The appellate Court has discretion under S. 149, C. P. Code, to allow the appellant reasonable time within which to make good the deficiency before dismissing his appeal under O. 7, R. 11 (*c*) of C. P. Code. Where the appellant filed an appeal within limitation but on an insufficiently stamped paper and along with the appeal he prayed for granting him time to make good the deficiency, but without taking any notice of the prayer the appellate Court dismissed the appeal as time-barred for not having made up the deficiency within limitation.

Held, that the order dismissing the appeal was bad as the appellate court could have granted time to the appellant not only under S. 149 but also under O. 7, R. 11 (*c*). (*Thomas and Zia-ul-Hasan, JJ.*) Hussain Ali Khan *v.* Ambika Prasad. **13 Luck. 397=169 I.C. 794=10 R.O 3=1937 O.L.R. 384=1937 O.W.N. 804=A.I.R. 1937 Oudh 414.**

——**S. 149**—*Appeal presented with deficient Court-fee—Pleader misled by Court documents—Time to make good deficiency—Duty of Court to grant.*

Where the copies applied to a pleader who filed an appeal showed the value of the suit at a certain amount which was less than the correct amount, and Court-fees was paid thereon, the mistake is clearly *bona fide*, and the Court should allow the deficiency to be made good and not dismiss the appeal. (*Addison, C.J. and Din Mahomed, J.*) Gahra *v.* Mt. Panah Bibi. **38 P.L.R. 262.**

——**S. 149**—*Appellate Court finding court-fee fixed by trial Court to be insufficient—Duty to grant time.*

Where in the trial Court the defendants themselves had stated that the court-fee was payable on a certain amount and the Court after enquiry had fixed that amount as the proper value of the suit, the appellate Court, when it finds this value to be insufficient, should grant the plaintiffs time to make good the deficiency. This is eminently a case to which the provisions of S. 149, C. P. Code. apply. (*Tek Chand, J.*) Abdul Rahman Khan *v.* Mohammad Amir. **40 P.L.R. 33.**

——**S. 149**—*Applicability—Application for leave to sue* in forma pauperis—*Refusal—Order for costs of defendant—Prayer for time to pay court-fee—Grant of—Payment of Court-fee alone—Sufficiency—Costs ordered to defendant not paid—Effect—Payment at subsequent stage of suit—If validates suit—Dismissal of suit under O. 33 R. 15—If justified.*

S. 149 of the C P. Code cannot empower a Court after refusing to allow a petitioner to sue *in forma pauperis*, to pay court-fee and treat his application for leave to sue *in forma pauperis* as a plaint. If such an applicant files a suit, whether with the original document contained in his petition or with a plaint subsequently drafted, he can do so only by strict compliance with the provisions of O. 33, R. 15, under which rule alone the suit comes into existence. Where a petitioner, on being refused leave to file his suit *in forma pauperis* and ordered to pay the defendant's costs asks for time for paying court-fee, and pays the Court-fee on a subsequent day to which the matter is adjourned and at a later stage of the suit the defendant who till then makes no mention of his costs, pleads non-payment of the costs and an issue is framed on the point as to whether the suit is barred by O. 33, R. 18, C. P. Code, if the plaintiff pays such costs, S. 149, C. P. Code cannot apply, and the suit cannot be held to be properly filed under O. 33, R. 15, on the date on which the court-fee has been paid. But though O. 33, R. 15, C.P. Code, is imperative, a suit in which the costs have in fact been paid must be treated as one instituted on the day on which the costs are paid, and cannot thereafter be dismissed as barred under O. 33, R. 15. (*King, J.*) Uthaman Pillai *v.* Mahomed Usuf Tharaganar. **1939 M.W.N. 178=49 L.W. 323=A.I.R. 1939 Mad. 316=(1939) 1 M.L.J. 738.**

——**S. 149**—*Applicability—Decree on payment of court-fee—Court-fee deposited after three years—Execution of decree—Starting point—Limitation Act, Art. 182.*

Where in a suit for dissolution of partnership, a defendant is given a final decree for a certain sum on his paying the requisite court-fee, the proceedings in that Court do not become final until that Court either accepts the court-fee or holds that the claim is dismissed for non-payment of the court-fee. Until this court-fee is paid there is no decree capable of execution, and when there is no decree capable of execution limitation cannot begin to run under Art. 182 of the Limitation Act. As S. 149, C. P. Code, gives the Court absolute discretion, at any stage, to allow the person by whom court-fee is payable to pay it, its acceptance of court-fee though after three years from the date of the order directing the payment of the necessary court-fee, is quite valid and time for execution of the decree begins to run only after the date when the court-fee was paid. (*Bennet, A.C.J. and Verma, J.*) BABU RAM *v.* GOPAL SAHAI. **I.L.R. (1938) All. 848=177 I.C. 875=11 R.A. 234=1938 A.L.J. 917=1938 A.L.R. 799=1938 A.W.R. (H.C.) 538=A.I.R. 1938 All. 539.**

——S. 149—*Applicability—Executing Court—Execution application filed within time—Court-fee payable in decree, paid after limitation but within time allowed by executing Court—Effect.*

There is nothing in the wording of S. 149, C.P. Code, to support the view that it does not apply to an executing Court. Where court-fee is payable in a decree but no time is fixed for its payment in the decree itself, there is no reason why the executing Court could not allow time for the payment. An application for execution of that decree filed within time is not, therefore, barred by limitation by reason of the court-fee having been paid after limitation, if it was paid within the time allowed by the executing Court. (*Bhide, J.*) LORIND CHAND *v.* LORIND CHAND-PARMA NAND. **173 I.C. 33 (1)=10 R.L. 386 (1)=39 P.L.R. 581=A.I.R. 1937 Lah. 720.**

——**S. 149 and O. 44, R. 1**—*Application for leave to appeal* in forma pauperis—*Appellate Court dismissing application and directing Court-fees to be paid by specified date and on default rejecting appeal—Jurisdiction—Revision.*

The provisions of O. 33 apply to applications for appealing *in forma pauperis* by virtue of O. 44, R. 1 and an application alone is before the Court for decision in either case. There is no plaint in the original case and no appeal in the appellate case before the Judge at the moment. Up to the stage of the decision as to whether the plaintiff should be allowed to proceed *in forma pauperis* or not, there is no plaint before the Court. So also there is no appeal before the Court until the appellate Judge has allowed or disallowed the application to appeal *in forma pauperis.* Where therefore the appellate Court after dismissing the application for permission to appeal *in forma pauperis* directs the Court-fees to be paid on or before a particular date and on default to pay the Court-fees, rejects the appeal, it cannot be said that there was an appeal before the Court and that therefore the Court acted under S. 149 in giving the appellant time to provide Court-fees. The order directing the appellant to provide Court-fees by the particular date is *ultra vires* as also, the order dismissing the appeal because Court-fees had not been paid. The Judge should have left the matter where it

was on the date on which he rejected the application to appeal *in forma pauperis.* The only order which can be made subject-matter of revision is that rejecting the application for permission to appeal *in forma pauperis* and it is open to revision. (*Mir Ahmad, A.J.C.*) MT. JAMNA DEVI *v.* BALURAM. **161 I.C. 954=8 R. Pesh. 187=A.I.R. 1936 Pesh. 69.**

——**S. 149 and O. 33, Rr. 5 and 7**—Application for leave to sue as pauper rejected—Power of Court to allow applicant to pay Court-fees—Separate and subsequent order—Legality. *See* C. P. CODE, O. 33, RR. 5 AND 7. **A.I.R. 1936 All. 584 (F.B.).**

——**S. 149 and O. 33, R. 15**—*Application to sue as pauper dismissed—Court-fee paid beyond limitation but within time granted by Court—Date of institution of suit.*

Where a person files a suit *in forma pauperis* within the period of limitation but his application to sue as pauper is dismissed and he is required to pay court-fee on a date which went beyond the limitation period and the court-fee is so paid at a time granted under S. 149, C. P. Code, the suit should be regarded as filed when the pauper application was first made. However, if it is to be regarded as filed when court-fees were paid, then the period during which the applicant was busy in prosecuting his pauper application should be excluded in counting the period of limitation and no question of limitation arises under O. 33, R. 15. (*S. K. Ghose and Petterson, JJ.*) KALI DASI DASI *v.* SANTOSH KUMAR PAL. **I.L.R. (1939) 1 Cal. 112=179 I.C. 271=11 R.C. 513=A.I.R. 1938 Cal. 730.**

——**S. 149**—*Applicatian to appeal* in forma pauperis *to High Court dismissed as barred by time—Division Bench extending time for paying court-fee on appeal—Court-fee paid—Objection that appeal is barred by time—If can be raised at the hearing.*

An application to appeal *in forma pauperis* was dismissed as barred by time by a Division Bench of the High Court which, however, extended the time for paying court-fee on the memorandum of appeal filed along with the application. The court-fee was duly paid. A preliminary objection was taken at the time of the hearing of the appeal that in the circumstances the appeal was barred by time, because at the date of the order extending time there was no appeal before the Court at all but only an unstamped piece of paper, the memorandum of appeal, and therefore no time could be extended and that anyhow the appeal remained barred by time even if the Court passed an order extending time. Overruling that objection.

Held, that the order of the Division Bench impliedly held that there was an appeal and that time should be extended and that the order not being *ex parte* was binding upon the parties. (*Dalip Singh and Skemp, JJ.*) KANWAL SHRI *v.* BABU LAL. **172 I.C. 508=10 R.L. 335=39 P.L.R. 660=A.I.R. 1937 Lah. 819.**

——**S. 149 and O. 33, R. 2**—*Application under O. 33, R. 2 to sue as pauper—Order rejecting the application also requiring the plaintiff to pay court-fee within a certain date—Suit when taken to have been instituted.*

Where the plaintiff preferred an application under O. 33, R. 2 of the C. P. Code for permission to sue *in forma pauperis* and this application was dismissed and the order of dismissal required the plaintiff to pay the full court-fee within a certain period fixed by the Court under S. 149, C. P. Code, and the court-fee was paid within the time so fixed.

Held, by virtue of S. 149 of the Code, the suit must be taken to have been instituted on the date of the application for permission to sue *in forma pauperis* since the order rejecting the pauper application and the order requiring the plaintiff to pay the full court-fee were passed simultaneously. 17 L. 831, Dist. (*Jai Lal and Abdul Rashid, JJ.*) RAM HET GIR *v.* BANWARI LAL. **171 I.C. 412=10 R.L. 193=A.I.R. 1938 Lah. 41.**

——**S. 149**—*Court-fee made up within time allowed—Effect of.*

Where within the time allowed, the proper Court-fee and printing fee are paid up, the document on which the Court-fee is so made up must be taken to date back to the date on which it was originally, presented. A.I.R. 1929 P C. 147, Foll. (*Tek Chand and Dalip Singh, JJ.*) NIHAL CHAND *v.* DISTRICT BOARD, MIANWALI. **166 I.C. 575=9 R.L. 390=A.I.R. 1936 Lah. 564.**

——**S. 149 and Sch. II, Para.** 17—*Court-fee on objections to award not paid through inadvertence—Requisite Court-fee paid at earliest opportunity—Objections, if liable to be dismissed.*

Where the Court-fee payable on a memorandum of objections to an award has not been paid through inadvertence, owing to a *bona fide* mistake of the objector's Counsel but the requisite Court-fee is paid at the earliest opportunity, the Court should, under S. 149, C. P. Code, accept the Court-fee and should not dismiss the objections as not properly stamped. (*Tek Chand, J.*) PIARE LAL *v.* GOPI RAM. **174 I.C. 21=10 R.L. 519 (2) =A.I.R. 1937 Lah. 276.**

——**S. 149**—*Delay in filing deficient Court-fee—When can be condoned.*

In the certified copies of the judgment and the decree of the lower appellate Court, the value of the suit for purposes of jurisdiction was given, as Rs. 5 and on this amount the appellant paid Court-fee while presenting the appeal. Subsequently it transpired that the real value of the suit was much more and therefore, the appellant was called upon to pay the deficient Court-fee which he made good within the time allowed but after the period prescribed by law for presentation of the appeal had passed.

Held, that this was eminently a fit case in which the delay in filing the deficient Court-fee should be condoned under S. 149, C. P. Code. (*Tek Chand, J.*) IHSAN ALI *v.* ATTA ULLAH. **172 I.C. 769=10 R.L. 367=39 P.L.R. 389=A.I.R. 1937 Lah. 688.**

——**S. 149**—*Discretion of Court — Court-fee paid after limitation—Court receiving after limitation—Effect.*

S. 149, C. P. Code, gives wide and unfettered discretion to the Court to accept Court-fees at any stage, and if the Court receives the Court-fee after the expiry of the period of limitation, the instrument is validated retrospectively as from the date of its presentation. (*Thomas, J.*) MATA BAKSH SINGH *v.* AJODHIA BAKHSH SINGH. **163 I.C. 770=9 R.O. 1=1936 O.L.R. 378=A.I.R. 1936 Oudh 340.**

——**S. 149**—*Discretion of Court—Exercise of—Appeal memo stamped with a moiety of court-fee payable—Plea of inability to pay—Extension of time—Powers.*

A Court has a discretion to extend time for payment of the requisite court-fee due on a memorandum of appeal, when the appellant had paid a substantial portion of the court-fee and pleaded poverty as a ground for extension of time. (*Pollock, J.*) SONBA KESHAO SONAR *v.* RODRIGUES. **177 I.C. 505=11 R.N. 142=1938 N. L.J. 155=A.I.R. 1938 Nag. 322.**

——**S. 149**—*Discretion of Court—Exercise of—Interference on appeal—Court allowing extension unreasonably — Remedy of aggrieved party—Failure to apply in revision—Suit allowed to proceed—Appeal from final decree in suit—Wrong exercise of discretion in extending time for payment af court-fee—If can be made a ground of attack—C. P. Code, S. 99.*

If the discretion allowed to a Court under S. 149, C. P. Code, to allow time for payment of court-fees is exercised in an outrageous fashion which prejudices the defendant, it is quite open to the injured defendant to go to the High Court for relief in revision; and the High Court, in an application for revision against the order allowing time, would, by virtue of its general powers of superintendence, interfere and check the action of the lower Court. But if the injured party takes no such step, he is not entitled in an appeal from the final decree in the suit to attack the ultimate decree or order of the trial Court on the basis of the wrongful exercise of discretion by the lower Court in allowing extension of time, Such wrong exercise of discretion, whether by the trial Courts or first appellate Courts, must be remedied, if at all, at once by the High Court on the application of the aggrieved party, and it would be too late if that party allows the suit to proceed and then seeks to interfere with the discretion in appeal. (*Courtney-Terrell, C.J., Khaja Mohammad Noor and Manohar Lall, JJ.*) BAIJNATH PRASAD SINGH *v.* UMESHWAR SINGH. **18 Pat.L.T. 665=172 I C. 138=10 R.P. 284=16 Pat. 600=1937 P.W.N. 667=A.I.R. 1937 Pat. 550 (S.B.).**

——**S. 149**—*Discretion of Court—Exercise of—Principles.*

The discretion conferred on the Court by S. 149, C. P. Code, is normally expected to be exercised in favour of the litigant except in cases of contumacy or positive *mala fides* or reasons of a similar kind. The question of *bona fides* in this connection should be construed in the sense that the word is used in the General Clauses Act and not as used in the Limitation Act. A thing should be presumed to be done *bona fide*, if it is done honestly whether it is done negligently or not for the purposes of judging whether the discretion under S. 149 should or should not be exercised in favour of the litigant. (*Dalip Singh, Monroe and Din Mohammad, JJ.*) JAGAT RAM *v.* KHARAITI RAM. **175 I.C 699=11 R L. 36=40 P.L.R. 413=A.I.R. 1938 Lah. 361 (F.B.).**

——**S. 149**—Discretion under—Exercise of—Rejection of application for leave to sue as pauper—Time for payment of court-fee. *See* C. P. CODE, O. 33, RR. 5 AND 15. **19 Pat.L.T. 8.**

——**S. 149**—*Discretion of Court—Extension of time for payment of deficient Court-fee—Inability to raise funds owing to famine conditions.*

Inability of a party to raise funds is not ordinarily a sufficient ground which would entitle the Court to exercise its discretion under S. 149, C. P. Code, and to permit payment of the deficit Court-fees. But that rule has reference only to normal conditions. But where it is shown that the party seeking the Court's discretion lives in a district where an acute famine prevails and that in consequence he was unable to procure the necessary funds, an exception should be made to the rule, and the Court in such a case will exercise its discretion in his favour under S. 149. (*D. N. Mitter and S. K. Ghose, JJ.*) Souresh Chandra Sarkar *v.* Gosta Behari Dutt. **40 C.W.N. 1294.**

——**S. 149**—*Discretion of Court—Extension of time for payment of court-fee—Power to grant—Payment of court-fee after extension of time—Effect—Plaint, when to be deemed to be filed—Merits of case—Relevancy.*

The Court has a double function; it has its judicial function to hear and determine cases; it has also the function of acting as a collector of revenue for the Government in the shape of court-fees according to the statutes provided, and in exercising that function it has a discretion granted to allow time. Under S. 149, C. P. Code, the Court has a clear discretion to allow time to a plaintiff for the payment of court-fee, and when the court-fee has been paid, the plaint upon which it was paid must be deemed as having been filed on the day on which it was actually filed. The provision for payment of court-fees has really nothing to do with the litigation as such or with the merits of the case, and is merely a provision enforcing the payment of revenue by a denial of judicial process to a person who does not pay the provided fees. (*Courtney-Terrell, C. J., Khaja Mohammad Noor and Manohar Lall, JJ.*) Baijnath Prasad Singh *v.* Umeshwar Singh. **18 Pat. L T. 665=1937 P.W.N. 667=16 Pat. 600=172 I.C. 138=10 R.P. 284=A.I.R. 1937 Pat. 550 (S.B.).**

——**S. 149 and O. 7, R. 11**—*Discretion of Court—Plaint insufficiently stamped — Extension of time—Duty of Court—Consideration.*

O. 7, R. 11, C. P. Code, necessarily implies an obligation on the part of the Court to grant an extension of time for payment of deficient court-fee in respect of plaint insufficiently stamped. It is manifestly a convenient rule for the disposal of justice. Nevertheless in applications for extension of time, the Court as regards the period of extension, must have regard to the justice of each particular case, and should not automatically grant long extensions of time, because of the duty owed by judicial authorities to protect the revenue. That, however, is not a matter which concerns the defendant; the matter is as between the Crown and the plaintiff.

Khaja Mohammad Noor, J.—Before rejecting a plaint under O. 7, R. 11, C. P. Code, the Court is bound to give some time to the plaintiff to make the deficiency; it cannot straight away reject the plaint without giving any time.

Manohar Lall, J.—A Court's duty is to interpret the plain meaning of the words deliberately used in O. 7, R. 11 (*c*), C. P. Code, and not to guess the possible intention of the Legislature. The rule lays down two conditions, both of which must be satisfied, before a plaint can be rejected; some time must be given before the plaint can be rejected. (*Courtney-Terrell, C.J., Khaja Mohammad Noor and Manohar Lall, JJ.*) Baijnath Prasad Singh *v.* Umeshwar Singh. **18 Pat.L. T. 665=1937 P.W.N. 667=16 Pat. 600=172 I.C. 138=10 R.P. 284=A.I.R 1937 Pat. 550 (S.B.).**

——**S. 149 and O. 7, R. 11**—*Discretion of Court—Plaint presented on last day of limitation with insufficient court-fee—Return for payment of proper court-fee within time fixed—Re-presentation within time fixed with request for further time—Order granting same—Payment of full court-fee and re-presentation in time—Effect of—If barred by limitation.*

Under O. 7, R. 11, C. P. Code, the Court may admit a plaint though written on paper insufficiently stamped, if the plaintiff on being required by the Court supplies the requisite stamp paper within the time allowed by the Court, the plaint is a valid plaint and must be regarded as having been filed on the date on which it was originally presented. The Court has a discretion under S. 149, C. P. Code, to grant time for payment or to extend the time granted for payment and the discretion of the trial Court in the matter should not be interfered with by the Court of appeal. A plaint was presented on the last day of limitation which was 4—10—1928, with only a one rupee stamp. On 5—10—1928, it was returned directing payment of the deficient court-fee within two weeks. On 19—10—1928, it was re-presented with a prayer for a further two weeks for payment. That was granted on 20—10—1928, and the plaint was re-presented on 3—11—1928 with the required stamp duty, and was accepted.

Held, that the plaint should be regarded as having been presented on 4—10—1928 and not on 3—11—1928, and that regarding O. 7, R. 11 with S. 149, the suit was not barred by limitation. (*Madhavan Nair and Stodart, JJ.*) Durairangam Pillai *v.* Govindarajulu Naidu. **11 R.M. 434=178 I.C. 238=1938 M.W.N. 257=48 L.W. 244=A.I.R. 1938 Mad. 560=(1938) 2 M.L.J. 135.**

——**S. 149 and O. 33, R. 7**—Dismissal of pauper application—Permission granted to pay Court-fees—Date of institution of suit. *See* C. P. Code, O, 33, Rr. 7 and 15. **43 C.W.N. 686.**

——**S. 149**—*Judge distributing plaints—Power to extend time.*

A Judge acts ministerially in distributing plaints and does not constitute a Court for the purpose of extension of time under S. 149, C. P. Code. But the mere fact that the deficiency in court-fee is made up on his requisition is not material, as even if the plaint is sent to the trial Court with deficient court-fee, that Court would be bound to ask the plaintiff under O. 7, R. 11, C. P. Code, to make up the court-fee within a period to be fixed by it, and could reject the plaint only if the deficiency is not made up within that period. (*Bhide, J.*) Jagat Ram *v.* Kharati Ram **39 P.L.R. 199=10 R.L. 228=171 I.C. 764=A.I.R. 1937 Lah. 392.**

——**S. 149**—***Memorandum of appeal filed with insufficient court-fee—Application under S. 149 rejected—Appeal if filed in time.***

Where a memorandum of appeal was filed within the time allowed by law, with insufficient Court-fee, the valuation of the appeal was subsequently reduced and an application filed by the appellant under S. 149, C. P. Code, for extension of time to pay the deficient court-fee was rejected.

Held, that the memorandum of appeal cannot be held to have been presented in time. In the absence of an order granting time under S. 149, presentation of the unstamped or insufficiently stamped memorandum of appeal will not amount to a valid presentation. (*Varadachariar and Pandrang Row, JJ.*) SITHARAMAYYA *v.* RAMAYYA. **177 I.C. 453=11 R.M. 341=47 L.W. 211=1938 M.W.N. 71=A.I.R. 1938 Mad. 316=(1938) 1 M. L.J. 514.**

——**Ss. 149 and 115**—*Objections filed against award without affixing court-fee—Court disposing of matter without taking notice of objections —Objector not given opportunity to make good court fee—Material irregularity—Revision.*

Where objections were filed against an award without affixing court-fee stamp, and the Court disposed of the matter without taking any notice of the objections and without giving the objector any opportunity whatsoever to make good the court-fee stamp.

Held, in revision, that the Court had acted with material irregularity in the exercise of its jurisdiction in ignoring the provisions of S. 28 of the Court-Fees Act and S. 149, C. P. Code, and its order was, therefore, liable to be set aside. (*Agha Haidar, J.*) ABDUL GHAFFAR ALI *v.* ROSHAN ARA BEGUM. **169 I.C. 672=10 R.L. 42=38 P.L. R. 1163.**

——**S. 149**—*Order granting time—If can be reviewed subsequently.*

If a plaintiff obtains a grant of time by an entirely false representation, as for example, by saying that he had on the previous day been robbed of his money or that the stamp-vendor's stock was exhausted, it would certainly be inequitable to allow the plaintiff to take advantage of his own fraud, in view of the principles that fraud vitiates consent and that no party should be prejudiced by an order made behind his back. An insufficiently stamped plaint was filed on the last day of limitation with an application for granting time for payment of full court-fee alleging that plaintiff was not possessed of the amount required. The Court granted an extension of time for paying the full stamp and within the time allowed the requisite court-fees were paid; but subsequently on the date of hearing, the defendant contended that time was obtained by plaintiff on false pretences and the Court reviewed its order granting time, and finding that it was obtained by plaintiff under false pretences, set it aside and dismissed the suit as barred by limitation.

Held, that the Court had power to review its order granting time under S. 149 and reject the plaint as barred by limitation. (*Pollock, J.*) REVANSIDDAPPA *v.* SHANKAR. **I.L.R. (1938) Nag. 359=171 I.C. 460=10 R.N. 113=A.I.R. 1937 Nag. 87.**

——**S. 149 and O. 33, R. 15**—*Pauper application rejected—Power of Gourt to grant time to pay Court-fee—Date of institution of suit.*

When the application for leave to sue as a pauper is rejected, the proceedings before the Court are terminated completely. The plaint can only be considered as a plaint if the application for leave is allowed. On the failure of the application for leave, the document cannot be considered any further by the Court. The plaint falls with the application to sue, and the only recourse of the applicant in such an event is to pay the court-fees and institute the suit in the ordinary way. When that is done, S, 149, C. P. Code, cannot be invoked so as to enable the Court to deem the suit to have been instituted at the time the application for leave to sue as a pauper was made, inasmuch as the two proceedings are entirely distinct and the one is commenced after the termination of the other. A petitioner in an application for leave to sue *in forma pauperis* desiring to take advantage of the provisions of S. 149 must make his application for permission to pay the court-fees on the proposed plaint or for a grant of time for such payment before his application for leave to sue *in forma pauperis* is finally rejected. A.I.R. 1929 Pat. 637 and A.I.R. 1936 Cal. 28, Diss. (*Mya Bu and Mackney, JJ.*) MA SAW YIN *v.* S. P. K. A. A. M. FIRM. **169 I.C. 890=10 R.R. 42=1937 Rang L.R. 331=A.I.R. 1937 Rang. 185.**

——**Ss. 149 and O. 33, R. 2**—Pauper petition—Subsequent application to pay Court-fees—Effect of—Discretion of Court. *See* C. P. CODE, O. 33, R. 2 AND S. 149. **1938 Rang.L.R. 629**

——**S. 149**—*Plaint rejected for non-payment of deficit court-fee—Subsequent order setting aside order of rejection and granting time for payment —Validity.*

If, without an application for review, a Court sets aside its own previous order rejecting a plaint for non-payment of deficit Court-fees and gives a further extension of time under S. 149, C. P. Code, its subsequent order is not a nullity but remains a perfectly good order until it is set aside by a superior Court or in proper proceedings. (*Henderson, J.*) DHARMANATH SARMA *v.* MADHU CHANDRA MAHANTA. **69 C.L.J. 379=A. I.R. 1939 Cal. 722.**

——**S. 149**—*Plaint with deficient Court-fee presented within limitation—Deficiency made good and accepted by Court after limitation—Court, if can be deemed to have granted time.*

A plaint which did not bear the requisite Court-fee stamp was presented on a day previous to the date on which the limitation for the suit expired, but it was accompanied by an application for an extension of time for the payment of the Court-fee. The plaintiff did not obtain an express order from the Court granting him time but made up the deficiency in the Court-fee stamp on a subsequent date.

Held, that even assuming that the Court-fee was made good after the expiry of the period of limitation, the Court must be deemed to have granted time by accepting the Court-fee, and the plaint having been presented within limitation, the suit was not barred by time. (*Jai Lal, J.*) HIRA LAL *v.* FAYAZ KHANAM. **167 I.C. 291=9 R. L. 478=38 P.L.R. 445=A.I.R.1937 Lah. 111.**

——**S. 149**—Powers of Court—Application for leave to sue as pauper—Subsequent payment of court-fee—Excuse of delay—Power of Court—Suit—When instituted—Considerations. *See* LIMITATION ACT, S. 3, EXPL. **A.I.R. 1937 Nag. 36.**

——**S. 149**—Power of Court to extend time for payment of Court-fee—Refusal of permission under O. 33, R. 5—Rejection of application under O. 33, R. 7 (3). *See* C. P. CODE, O. 33, RR. 5, 7 AND S. 149.

——S. 149—*Power of Court—Order to pay deficit Court-fees within particular period—Suit to stand dismissed in case of failure—Plaintiff applying for extension of time before expiry of period—Power to extend.*

Where the appellate Court orders the plaintiff in a suit to put in additional Court-fee within a particular time and directs that in case of failure to do so on his part the suit is to stand dismissed, and the plaintiff applies for extension of time for putting in the deficit Court-fee before expiry of the period, the appellate Court has jurisdiction under S. 149 to extend the time as the appeal is not finally disposed of, before the order of extension of time is made. (*Nasim Ali and Henderson, JJ.*) RAMESH CHANDRA TALUKDAR *v.* PRAMATHA NATH SANYAL. **162 I.C. 522=8 R.C. 610 =63 C.L.J. 591=40 C.W.N. 758=A.I.R. 1936 Cal. 245.**

——S. 149—Scope—Set-off—Written statement not stamped—Trial Court ordering payment of Court-fee, but not realising full Court-fee—High Court's power to direct payment of deficit Court-fee in second appeal. *See* COURT-FEES ACT, Ss. 12 (*ii*) AND 28. **A.I.R. 1936 Cal. 277.**

——**S. 150**—*Applicability—Transfer of business —Meaning of—Transfer of jurisdiction as regards future business—Pending cases not transferred or affected—Application for restitution arising out of such pending cases—Jurisdiction to entertain.*

S. 150, C. P. Code, only applies to cases where the business of a court is transferred to another Court on account of the abolition of that Court or the transfer of any local area from the jurisdiction of one Court to that of another. It cannot be invoked to meet a case where there has neither been a transfer of the entire business of a Court owing to its abolition, nor a transfer of any particular case from one Court to another. Where there has only been a transfer of jurisdiction as to future business subject to an express reservation as regards pending cases, the Court in which a suit was pending and which passed the decree has exclusive jurisdiction to entertain and decide applications for restitution arising out of such suit. (*Harries and Kachhpal Singh, JJ.*) SKINNER *v.* SKINNER. **I.L.R. (1937) All. 670=1937 A.W.R. 510=1937 A.L.J. 588=1937 A.L.R. 713=170 I.C. 706=10 R.A. 157=A.I.R. 1937 All. 515.**

——**S. 151.**

Abuse of process.
Addition of parties.
Amendment.
" Second application for.
Appeal.
Applicability.
Compromise decree.
Consent decree.
Ends of justice.
Execution.
Execution sale.
Inherent power.
Injunction.
Jurisdiction.

Limitation.
Order under.
Other remedy.
Powers of High Court.
Remand.
Restitution.
Restoration.
Review.
Scope.
Stay of execution.
Stay of suit.

Abuse of process.

——**S. 151**—*Abuse of process of Court—Court incorrectly fixing period of grace for payment of arrears of rent—Payment after date fixed but within proper time—Ejectment—Power of Court to redress wrong.*

Where a decree for ejectment wrongly fixed the period of grace for payment of the arrears and the tenant in ignorance of his remedy kept quiet and paid the arrears after the date but within the proper time allowable under the law, but the landlord nevertheless applied under S. 61 of the Oudh Rent Act and obtained an order of ejectment, such an order amounts to an abuse of the process of the Court and S. 151, C. P. Code, is the only section under which the tenant could get redress of the wrong done and the Court can remedy the injustice done by reason of the wrong order and cancel the decree of ejectment (*Mehta, J.M.*) HARI KISHEN DAS *v.* BADAL SINGH. **1939 A.L.J. (Supp.) 10=1938 R.D. 758 =1938 O.W.N. 931=1938 A.W.R. (B.R.) 383.**

Addition of parties.

——**Ss. 151 and 153**—*Addition of parties—Appeal filed against dead respondent—Addition of legal representatives of deceased party and amendment of record—Powers of Court.*

A Court has jurisdiction in an appeal to order the addition as parties to the appeal legal representatives of respondents who were not parties to the appeal in the sense that they were dead. Though the appeal might be one against a dead person or persons, the Court has power under Ss. 151 and 153 to add the legal representatives and amend the record in order to prevent injustice being done to either side. (*Wadia and Wassoodew, JJ.*) ALABHAI VAJSURBHAI *v.* BHURA BHAYA. **I.L.R. (1937) Bom. 602=39 Bom.L.R. 444=10 R.B. 207=171 I.C. 536=A.I.R. 1937 Bom. 401.**

——**Ss. 151, 152, 153 and Evid. Act, S. 94**—*Amendment—Application to amend mistake in mortgage deed, preliminary and final decrees as to extent of interest mortgaged—If permissible.*

Where after the passing of a final decree on a mortgage an application is made under Ss. 151, 152 and 153, C. P. Code, to amend the mortgage deed, preliminary and final decrees with reference to the extent of the interest mortgaged, namely, from 'five pies' to 'five shares' on the ground that a mistake which crept in the mortgage was repeated in the plaint and in the decrees, it cannot be granted for the mortgagees cannot be allowed to obtain by this application what they could not have obtained in the suit itself. This is a case which is governed by the rule laid down in S. 94 of the Evidence Act. (*Bennet and Verma, JJ.*) UMA SHANKER RAI *v.* RAM AGYAN THAKUR. **I.L.R. (1939) All. 399=181 I.C. 153=11 R.A.**

552=1939 A.W.R. (H.C.) 173=1939 A.L.J. 193 =A.I.R. 1939 All. 231.

Amendment.

———**S. 151**—*Amendment—Sale in execution of mortgage decree—Property wrongly described in sale certificate due to mistake in mortgage deed—Amendment of sale certificate—Jurisdiction.*

The decree-holders purchased the property in execution of their mortgage decrees. By an application, they alleged that though they had obtained a sale certificate from the Court they could not get mutation made in their favour as the sale certificate showed as if the property purchased by them was situated in one *mahal* only while as a matter of fact it was in two *mahals*. They, therefore, prayed that the sale certificate be amended so as to describe the property in detail as given in the application specifying the property of each of the two *mahals* separately. It was contended by the opponent that the description given in the sale certificate being in accordance with that given in the mortgage-deed itself, the Court had no jurisdiction to amend the sale certificate.

Held, that the Court had power under S. 151, C. P. Code, to make the amendment in question. (*Zia-ul-Hasan, J.*) SURAJ DIN *v.* RAM PRASAD SINGH. **12 Luck. 167=8 R.O. 361=1936 O.W. N. 575=162 I C. 233=1936 O.L.R. 239=A.I.R. 1937 Oudh 144.**

———**Ss. 151 and 152**—*Amendment of decree—Question of costs raised in both first and second appeals—Dismissal of appeals—Effect of—Amendment of first appellate decree relating to costs—If competent.*

Where the question of costs was raised by the applicant for an amendment of the decree in both the first and second appeals which were dismissed, the matter must be presumed to have been adjudicated upon adversely to him. In such circumstances, no application by him for amendment of the decree relating to costs is competent in the first appellate Court. (*Bhide, J.*) SADHU RAM *v.* LAKHMI DASS. **183 I.C. 144=12 R.L. 103=41 P.L.R. 136=A.I.R. 1939 Lah. 312.**

———**Ss. 151 and 152**—*Amendment of decree—Second application—Maintainability.*

It is not open to a Court to entertain a second application for amendment of a decree, when a prior application on the same question has been dismissed. (*Bhide, J.*) SADHU RAM *v.* LAKHMI DASS. **183 I.C. 144=12 R.L. 103=41 P.L.R. 136=A.I.R. 1939 Lah. 312.**

———**Ss. 151 and 152**—*Amendment of decree—Third party acquiring interest in property affected by decree—Application for amendment of decree long after—If can be allowed.*

A decree should not be amended in the exercise of the powers conferred under Ss. 151 and 152, C. P. Code, long after it was passed so as to prejudice the rights acquired by third parties in the property affected by the decree. The principles which apply to the amendment of pleadings cannot be extended to the amendment of a decree after interest of third parties has accrued. (*Lokur, J.*) LAXMAN MAHADEV *v.* MARUTI RAMBHAU. **184 I.C. 775=41 Bom.L.R. 800=A.I.R. 1939 Bom. 389.**

Appeal.

———**S. 151**—*Appeal.*

No appeal lies from an order passed under S. 151, C. P. Code. (*Tek Chand and Abdul Rashid, JJ.*) GANESH DATTA *v.* MODEL TOWN SOCIETY. **185 I.C. 125=12 R.L. 268=A.I.R. 1939 Lah. 508.**

———**S. 151**—Appeal—Amendment of decree to correct description of property—Power of Court—Refusal to amend—Appealability. *See* C. P. CODE, S. 47. **41 Bom.L.R. 1170.**

———**S. 151**—Appeal—Application for enquiry as to how much money was due from judgment-debtor—Application referring to S. 151 in the heading—Order on—Appealability. *See* C. P. CODE, S. 47. **161 I.C. 21.**

———**S. 151**—*Appeal—Application under O. 21, R. 90—Order restoring possession to judgment-debtor pending its decision—Appeal—Revision.*

An appeal was filed against an order rejecting as incompetent an application filed by the judgment-debtor under O. 21, R. 90, C. P. Code. In the meantime the sale was confirmed and the auction-purchaser took possession. The Appellate Court allowed the appeal and remanded the case to be heard on the merits. The lower Court passed an order restoring possession of the property to the judgment-debtor acting under S. 151, C. P. Code.

Held, (i) that the order was really in the nature of an interlocutory order and was not in any sense a "decree" within the meaning of S. 2 (2), C. P. Code, as the eventual rights of the parties would depend upon the result of the decision of the application under O. 21, R. 90, that no appeal lay against the order, and that, therefore, an application for revision was competent; (ii) that it could not be said that the order was made without jurisdiction. (*Henderson and Latifur Rahman, JJ.*) SURPAT SINGH *v.* RATANCHAND. **I.L.R. (1939) 2 Cal. 378=186 I.C. 600=12 R. C. 489=70 C.L.J. 160=43 C.W.N. 1028=A.I.R. 1940 Cal. 92.**

———**S. 151**—*Appeal—Objection to passing of final decree on mortgage—Claim for payment made—Dismissal for default—Refusal to restore—If appealable.*

Where an objection to the passing of a final decree on a mortgage is raised on the ground that certain payment made after the preliminary decree has not been given credit to, but the objections are dismissed owing to default in appearance, a refusal to restore such application is not appealable, for it is an order passed on an application to exercise the Court's inherent jurisdiction under S. 151, C. P. Code. (*Mulla, J.*) MUNNI SINGH *v.* COLLECTOR OF BENARES. **179 I. C. 70=11 R.A. 349=1938 A.W.R. (H.C.) 711 =1938 A.L.J. 1055=A.I.R. 1939 All. 28.**

———**S. 151**—*Appeal—Order amending final decree under S. 151—Right of appeal—Proper procedure—Appeal from amended decree—Competency.*

The nature of an order is not determined by the provision of law to which it may wrongly have been assigned. The true test is, what is the order itself. A Court cannot change its true order merely because it is given a wrong name. Where a Court amends a final decree passed by it purporting to do so under S. 151, C. P. Code, it cannot be said that no appeal lies in the matter on the ground that an order under S. 151, C. P.

Code, is not appealable. A Court cannot evade the appellate jurisdiction of the Court above it by arbitrarily placing its order under a provision of law, orders under which are not appealable. The appellate Court should not treat the amending decree as an appealable order but it should regard the decree as amended by the order and the amended decree being appealable the appellate Court should deal with the matter as an appeal from the amended decree and proceed to hear and determine the same. *(Davis, J.C. and Tyabji, J.)* KHODROMAL JERAMDAS *v.* MENGHAMAL. **I.L.R. (1939) Kar. 428=185 I.C. 67=12 R.S. 141=A.I.R. 1939 Sind 303.**

———**Ss. 151 and 144**—*Appeal—Orders for restitution after setting aside order of confirmation of sale—Principle involved.*

Simply because an order is passed under the inherent powers it does not necessarily become appealable. If however the inherent powers are used to expand a remedy in order to do justice to cover a case not within the exact words of but within the purpose of a procedural section, the Court is in effect using its inherent powers to act as if the orders were made under the section in question. In such a case, even justice demands that one side should be given a remedy and the other side should, as a matter of justice, be allowed the right to appeal that would have existed had a particular section really applied instead of its being applied by means of a fiction. Therefore an order for restitution passed after setting aside an order of confirmation of sale in execution proceedings is in fact not an order under S. 144 but an order under S. 151, and by analogy is appealable. *(Stone, C.J. and Digby, J.)* MT. CHAMPABAI *v.* DAULATRAM SHARMA. **I. L. R. (1939) Nag. 350=179 I.C. 677=11 R.N. 307=A.I.R. 1938 Nag. 326.**

———**S. 151**—*Appeal—Order in exercise of inherent jurisdiction in execution.*

No appeal lies from an order made by the Court in exercise of its inherent jurisdiction under S. 151 in execution proceedings. *(Davis, J.C. and Lobo, A.J.C.)* ESAK HAJI ABUBAKAR *v.* JIMABAI. **30 S.L.R. 170=165 I.C. 305 (2)=9 R.S. 96=A.I.R. 1936 Sind 166.**

———**Ss. 151 and 144**—*Appeal—Order not strictly coming under S. 144, passed under S. 151—If appealable—Right of appeal—Nature and extent of.*

An order under S. 151, C. P. Code, is not appealable. It is not correct to say that when an order which does not strictly come under S. 144, C. P. Code, is passed under S. 151, it is appealable. The right of appeal is a creature of the statute and unless there are express provisions of law relating to the maintainability of an appeal, it would not be correct to say that because an appeal is allowed by statute in certain cases it must be allowed by way of analogy in other similar cases. Where an application for restitution is made under S. 151, C. P. Code, and is treated as such by the Court and an order is passed, it is not appealable. *(Zia-ul-Hasan, C.J. and Srivastava, J.)* BRIJ MOHAN SINGH *v.* RAMESWAR SINGH. **183 I.C. 709=12 R.O. 58=1939 A.W.R. (C.C.) 127=1939 O.W.N. 765=1939 O.A. 636=1939 O.L.R. 544=A.I.R. 1939 Oudh 273.**

———**S. 151**—Appeal—Order of restitution under inherent powers—If appealable—If covered by S. 47. *See* C. P. CODE, S. 47. **43 L.W. 773=A.I.R. 1936 Mad. 636.**

———**S. 151**—*Appeal—Order passed under S. 151—Power of High Court to set aside.*

No appeal lies from an order passed by a Court in exercise of its inherent jurisdiction under S. 151, C. P. Code. Where the lower appellate Court has heard such an appeal, it is open to the High Court to set aside the order entertaining the appeal, and therefore an appeal lies to High Court merely on the question of jurisdiction. *(Jai Lal, J.)* MAGHI MAL *v.* GANPAT RAI. **163 I.C. 121=8 R.L. 1010=38 P.L.R. 717=A.I.R. 1936 Lah. 212.**

———**S. 151**—Appeal—Remand under S. 151. *See* REMAND, *infra.* **A.I.R. 1936 Pat. 491.**

———**S. 151**—Appeal—Restitution—Order for—Appealability—Remedy—Revision. *See* C. P. CODE, Ss. 144 AND 151. **19 Pat.L.T. 111.**

———**S. 151**—Appeal—Restitution—Order under S. 144 read with S. 151—Appealability—Revision. *See* C. P. CODE, Ss. 144 AND 151. **19 Pat. L.T. 118.**

Applicability.

———**S. 151**—*Applicability—Absence of other remedy.*

S. 151, C. P. Code, is to be invoked when no other remedy under the law is available and one party or other is entitled to relief in equity. *(Mehta, S.M. and Harper, J.M.)* RAM AUTAR *v.* QADIR. **1940 A.W.R. (B.R.) 55=1940 R. D. 159.**

———**S. 151**—*Applicability—Appeal dismissed for failure of appellant to file appellant's list or make printing deposit in time—Restoration—Application for—Inherent power of Court to entertain—If application for review under O. 47, R. 1—O. 41, R. 19—Application of Patna High Court Rules, Part II, Chap. IX, R. 23.*

An application for the restoration of an appeal dismissed for failure to file the appellant's list cannot be treated as an application for review. Under O. 47, R. 1, C. P. Code, the new matter or evidence should have been discovered by the party applying for review and not by the Court whose order is to be reviewed; and secondly, the error or mistake referred to in the rule should be one apparent on the face of the record and not one caused by the Court not being apprised at the time of the dismissal of the appeal of the circumstances which prevented the appellant from taking the necessary steps. A failure to file the appellant's list cannot be treated as being an omission of the same kind or description as an omission to produce a matter or evidence subsequently discovered or a mistake or error apparent on the face of the record. Nor would O. 41, R. 19, C. P. Code, apply to such an application for restoration of an appeal dismissed under R. 23 of Ch. IX, Part II of the rules framed by the Patna High Court for failure to file the appellant's list. The failure to file the list stands on no worse footing than the default referred to in Rr. 11, 17 and 18 of O. 41; and although there is no provision in the Code covering the case of restoration of an appeal dismissed for failure to file the list or to deposit the printing cost, the Court is not powerless to restore the appeal. If the Court has power to dismiss an appeal for such failure, it also has the power to restore the appeal in a proper case. S. 151, C. P. Code, expressly saves the inherent power of the Court, and every Court must be deemed to possess as inherent in its very constitution all such powers as are necessary to do right and undo a wrong in the course of the administration of justice. An application to set aside an order dismissing an appeal for not filing the appellant's list within the time allowed may be entertained under S. 151, C. P. Code, and neither O. 41, R. 19 nor O. 47, R. 1 would apply. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) RAM KHELAWAN SINGH *v.* MONILAL SAHU. **19 Pat. 159=12 R.P. 371=6 B.R. 184=185 I.C. 480=20 Pat.L.T. 883=1939 P.W.N. 832=A. I. R. 1939 Pat. 678 (F.B.).**

———**S. 151**—*Applicability—Inherent powers—When to be exercised.*

It is a well-recognised principle that where a party has another remedy, and will not adopt or negligently fails to pursue it, the Court will not, as a general rule, grant him relief under its inherent powers under S. 151. (*Rowland, J.*) RAMESHAWAR LAL JHUNJHUNWALA *v.* RAMCHARAN PRASAD SAHU. **178 I.C. 41=5 B.R. 49=11 R.P. 204=1938 P.W.N. 313=19 Pat.L.T. 111=A.I.R. 1938 Pat. 447.**

———**S. 151 and O. 7, R. 10**—*Applicability—Order returning plaint on ground of pecuniary jurisdiction—Appeal.*

O. 7, R. 10 is not restricted only to those cases in which the Court for want of territorial jurisdiction returns the plaint. A plaint returned on the ground of pecuniary jurisdiction is also to be considered as returned under this provision and not under S. 151. Hence the order returning the plaint on this ground for presentation to proper Court is appealable. (*Dadiba C. Mehta and Lobo, JJ.*) KHIOMAL *v.* GOPALDAS. **I. L. R. (1939) Kar. 50=175 I.C. 684=11 R.S. 5=A.I.R. 1938 Sind 124.**

———**S. 151**—*Applicability—Power of Revenue Court to invoke against weight of evidence.*

S. 151, C. P. Code, is not to be lightly invoked or intended to permit a Revenue Court to decide a case against the weight of evidence, even if it appears equitable. (*Drake Brockman, S.M. and Knox, J.M.*) SUNDAR KOERI *v.* MANGAL RAI. **1936 R.D. 457.**

———**S. 151**—Application under—Modification of scheme—Maintainability. *See* C. P. CODE, Ss. 92 AND 151. **1940 O.A. 582.**

———**S. 151**—*Arbitration—Order of reference—Power of Court to revoke.*

The Court cannot revoke its order of reference to arbitration in the exercise of its inherent power under S. 151, C. P. Code. Such a power does not exist apart from the provisions contained in Sch. II, C. P. Code. (*Niamatullah, Harries and Collister, JJ.*) MANNI LAL *v.* PAHLAD DAS. **167 I.C. 171=9 R.A. 512=1937 A.L.J. 29=1937 A. W.R. 30=1937 A.L.R. 157=A.I.R. 1937 All. 141 (F.B.).**

———**S. 151**—Award under Co-operative Societies Act—Mistakes in—Correction—Jurisdiction of Civil Court executing award to direct rectification. *See* CO-OPERATIVE SOCIETIES ACT (II OF 1912), S. 43 AND BENGAL R. 22 (6). **40 C.W.N. 89.**

Compromise decree.

———**S. 151**—Compromise decree—Power to set aside for fraud, misrepresentation or mistake—Procedure. *See* COMPROMISE—CONSENT DECREE. **41 Bom.L.R. 994.**

Consent decree.

———**S. 151**—*Consent decree—Setting aside of—Inherent jurisdiction.*

The remedy of a party who impeaches a consent decree on the ground that his consent was induced by fraud is to institute a regular suit for the purpose. S. 151, C. P. Code, is not applicable in such a case. In the first place, the section being a residuary section should not be applied at all unless there is no other remedy open to the litigants. In the second place, the matter for enquiry in such matters is something extraneous to the suit itself and the same kind of investigation is necessary as in a contested suit. Further it cannot be said that there was any fraud practised *upon the Court* which would justify it in exercising its inherent power. (*Mukherjea and Roxburgh, JJ.*) SURESH CHANDRA SEN *v.* JOGESH CHANDRA SEN. **186 I.C. 276=12 R.C. 462=69 C.L.J. 533=43 C.W.N. 969=A.I.R. 1939 Cal. 658.**

Court-fee.

———**S. 151**—*Court-fee—Excess amount—Powers of High Court to direct refund.*

In cases which are not governed by Ss. 13, 14 and 15, Court-Fees Act, the High Court has inherent powers to direct a refund under S. 151, C. P. Code, of excess Court-fee, where Court-fee has been paid in excess of the amount payable, and obvious injustice has been done. Where in a suit for enhancement of rent under S. 7, B. T. Act, the plaintiff paid Court-fees on the basis of the enhanced rent both on the plaint and the memorandum of appeal, and the proper Court-fee payable was the amount payable on the difference between the rate claimed and rate paid under Sch. I, Art. 1, the High Court interfering under its inherent powers directed refund of the excess amount paid. (*D. N. Mitter and Narasing Rao, JJ.*) KUMUD NATH DAS SAHA *v.* GOVERNMENT PLEADER. **163 I.C. 222=8 R.C. 724=39 C.W.N. 1074=A.I.R. 1936 Cal. 347.**

———**S. 151**—*Court-fees—Refund—Form of order.*

Where the Court has inherent power to order the refund of excess Court-fees, a direct order for a refund ought to be passed. If the Court does not possess jurisdiction to pass an order for refund, it is not its duty or function to issue eleemosynary recommendations for the purpose of enabling a litigant to present a memorial *ad misericordian* to the Revenue Authorities. 55 M. 641 and 57 M. 542 (544), Disappr. (*Page, C.J., Mosely and Ba U, JJ.*) CHOCKALINGAM AMBALAM *v.* MAUNG TIN. **14 Rang. 173=163 I.C. 340=9 R.R. 1=A.I.R. 1936 Rang. 208 (F.B.).**

———**S. 151**—*Court-fee—Refund—Powers of Court—Order of remand under inherent powers.*

Where a Court-fee has been paid by a litigant of a larger amount than that exigible under the Court-Fees Act, the Court has inherent jurisdiction to order that the excess Court-fee be refunded *ex debito justitiae.* But where a specific Court-fee exigible under the Court-Fees Act has duly been paid, and in the Act express provisions are inserted setting forth the circumstances in which a Court-fee can be refunded, the Court has no jurisdiction in the exercise of its inherent powers or otherwise than as therein prescribed to order that the Court-fee chargeable and paid shall be refunded to a litigant. Where, therefore, an order of remand passed by the Court does not come within S. 13 of the Court-Fees Act but is one purported to have been passed under its inherent powers, the Court has no jurisdiction either under the Court-Fees Act or in exercise of its inherent powers to refund the Court-fee paid by the appellant. (*Page, C.J., Mosely and Ba U, JJ.*) CHOCKALINGAM AMBALAM *v.* MAUNG TIN. **14 Rang. 173=163 I.C. 340=9 R.R. 1=A.I.R. 1936 Rang. 208 (F.B.).**

———S. 151—Court-fee—Refund of unspent process fee or custody fee deposited in respect of attachment of movables. *See* COURT-FEES ACT, Ss. 13, 14 AND 20. **A.I.R. 1937 Cal. 86.**

Ends of justice.

———S. 151—*Ends of justice—Agreement by parties in suit—Power of Court to give effect to—Procedure not contemplated by Code—If can be adopted—Money found due by one defendant to another in suit by plaintiff against them—Transposition of defendant as plaintiff and decree for sum found due—If can be passed—C. P. Code, O.* 1, *R.* 10.

In a suit by the plaintiff against her son, the 1st defendant and his principal, the 2nd defendant, to recover a sum of money belonging to her and used by the 1st defendant for the purpose of the 2nd defendant's business, the plaintiff applied for the appointment of a Commissioner to settle the accounts of defendants 1 and 2, expressing her willingness to take whatever was found due on accounting. Both the defendants endorsed this application with a statement showing consent, each agreeing to pay the other what might be found due on taking accounts and stating that the Court might pass a decree for the amount found due. A Commissioner was accordingly appointed and he sent in a report finding that a certain amount was due by the 1st defendant to the 2nd defendant on accounts. Plaintiff then applied under O. 1, R. 10, C. P. Code, to transpose the 2nd defendant as plaintiff for the purpose of enabling a decree to be passed in his favour, but the 2nd defendant attempted to resile from the agreement.

Held, (1) that though O. 1, R. 10, C. P. Code, did not in terms apply, the transposition should be made in the interests of justice and a decree granted to the 2nd defendant after such transposition, it being always the policy of the Court to enforce, if possible, any agreement entered into between the parties; and in special circumstances where a grave injustice would be done if the Court did not exercise its inherent powers, the Court is entitled under S. 151, C. P. Code, to do justice by giving effect to the agreement of the parties; (2) that the 1st defendant should not be allowed to resile from the agreement entered into freely by him to pay whatever might be found due by the Commissioner; and when he agreed to pay the 2nd defendant or plaintiff such sum as might be found due, he impliedly agreed to such changes being made in the nature or frame of the suit as to give effect to the finding of the Commissioner; and that (3) though the procedure adopted was not contemplated by the Code, the Court in virtue of the agreement became an arbitrator, and the parties were bound by their agreement. (*Horwill, J.*) MOOSA SAHIB *v.* SUBBAMMA. **1937 M.W.N. 382=45 L.W. 764=170 I.C. 819=10 R.M. 235=A.I.R. 1937 Mad. 563=(1937) 1 M.L.J. 672.**

———S. 151—*Ends of justice—Objection that pleader engaged by opposite party should not be allowed to appear—Objection accepted in lower Court—Interference.*

Where in a suit a party objects that a pleader engaged by the opposite party should not be allowed to appear, as he had been previously engaged by him in connexion with the same litigation, and the lower Court after hearing both the parties, accepts the objection, an application by the pleader to set aside an order does not lie either under S. 151 or S. 115, C. P. Code or under S. 85, Government of Burma Act. (*Baguley and Mosely, JJ.*) MAUNG THA TUN *v.* BRAJAHORI WADDADER. **1939 Rang. L. R. 14=177 I.C. 511 =11 R.R. 137=A.I.R. 1938 Rang. 241.**

———S. 151—*Ends of justice—Other remedy open—If bar to Court from exercising powers under S.* 151—*Duty of Court in respect of minors and widows.*

The fact that a minor has a remedy to have an adverse order set aside by a suit does not exclude the remedy which the Court possesses under S. 151 if the Court thinks that it is essential in the interests of justice that this power under S. 151 should be exercised. It is of course easy in the quiet atmosphere of the Court to say that this and that should be done, and another suit should be brought; but any one who has any experience of the difficulties of litigation in India, particularly where a widow or a minor is concerned, can realize that where two courses are open, one in which the Court can take immediate action in a suit that is before it and the other in which the Court can merely say that another suit should be filed, the Court is bound in the exercise of its duty and in answer to its own conscience to direct that course should be taken which would lessen the difficulties and remove obstructions in the way of widows and orphans. (*Davis, J.C.* and *Mehta, A.J.C.*) MOHANLAL TEJMAL *v.* SH. KHUSHALIBAI. **31 S.L.R. 32=169 I.C. 918=10 R.S. 28 =A.I.R. 1937 Sind 101.**

———Ss. 151 and 152—*Error not due to slip but due to negligence of party—Amendment of decree, if justified.*

Where the trial Court is of the opinion that the error if any was not one arising from any accidental slip or omission but rather arising from the negligence of the parties, it would not be proper for the High Court to say that there is such an error as would justify an amendment. Further where it cannot be amended under S. 152, it could neither be amended under S. 151. (*Zia-ul-Hasan and Yorke, JJ.*) SHEO NARAIN *v.* LACHHMAN PRASAD. **186 I.C. 667=12 R.O. 321=1940 O.W.N. 213=1940 O.A. 207=1940 O.L.R. 138=1940 A.W.R. (C.C.) 116=A.I.R. 1940 Oudh 298.**

Execution.

———S. 151—Execution—Injunction to stay execution sale—Grant of—Inherent powers. *See* C.P. CODE, O. 39, R. 1. **16 Pat. 738.**

———**S. 151**—*Execution proceedings—Portion of property released from attachment with consent of parties—Decree-holder executing against whole property fraudulently—Power of Court to restore property wrongfully attached.*

In execution proceedings a formal order was passed with the consent of the parties releasing certain portion of property from attachment. In further proceedings in the collectorate the Collector, on application by the decree-holder, executed the decree by leasing out the whole property without excepting the portion ordered to be exempt from attachment.

Held, that the order being a consent order was final and not appealable. Hence the portion ordered to be exempt from attachment finally and completely passed out of the ambit of execution proceedings and therefore the proceedings after the order could not be held to be those under S. 47, C.P. Code, in respect of the portion exempt from attachment. They were the results of fraud perpetrated by the decree-holder, and the Court could restore the property wrongfully attached in exercise of its inherent powers under S. 151. (*Agha Haidar, J.*) **Jalal Din *v.* Sant Ram. 169 I.C. 870=10 R.L. 51=39 P.L.R. 210=A.I.R. 1937 Lah. 29.**

———**S. 151**—*Execution—Proceedings in.*

The provisions of S. 151 should not be applied to execution proceedings. (*Fraser, J.C. and Saad-ud-Din, A.J.C.*) Piara Ram *v.* Soma Ram **A.I.R. 1936 Pesh. 115.**

———**S. 151**—*Execution—Recalling of order made* ex parte *without notice.*

A judicial order which may affect or prejudice any party cannot be finally made unless he has been afforded opportunity to be heard; and if such an order is made *ex parte,* that is to say, without notice to the opposite party, it would be made subject to the implication that it may be revoked at the instance of any party prejudiced thereby; and the Court has inherent power to give such directions as the justice of the case may require. In an execution proceeding an application was made by a stranger under O. 21, R. 58. The Court passed an order registering the application and ordering that the application be put up on the date of hearing of the execution proceedings and that the decree-holder should be informed of the application and of the date fixed for hearing. The officers of the Court failed to inform the decree-holder as required. On the date fixed for hearing an order on the application under O. 21, R. 58 was passed in the absence of the decree-holder. The decree-holder moved the Court—the successor of the Judge who passed the order—to recall the order under its inherent jurisdiction.

Held, that since the ignorance of the decree-holder was due to the default of the officers of the Subordinate Judge's Court, the Judge had power to recall the order by invoking the powers conferred on it by S. 151, C.P. Code. 17 C.W.N. 862 and A.I.R. 1921 Pat. 293 and 491, App. (*James, J.*) Moharmani Kuer *v.* Bhankumar Chand. **161 I.C. 933=8 R.P. 492=1936 P.W.N. 118=A.I.R. 1936 Pat. 176.**

———**S. 151**—Execution—Set-off—Equitable set-off—Claim arising under same decree—Power of Court. *See* C.P. Code, O. 21, R. 19. **44 L.W. 34=A.I.R. 1936 Mad. 626.**

———**S. 151**—Execution—Set-off not falling under O. 21, R. 19—Power of executing Court to entertain. *See* C.P. Code, O. 21, R. 19. **A.I.R. 1936 Cal. 409.**

———**S. 151**—*Execution—Stopping of sale—Inherent powers.*

Under S. 151, C.P. Code, the Court has full power to correct *suo motu* defects which it discovers in its proceedings. It cannot be said that a Court is bound to proceed with the sale of property when it has been brought to its notice that by reason of the absence of attachment, misdescription in the proclamation or other defect any sale held is bound to be set aside. The Court is entitled to pause and require that the party concerned should correct an obvious defect. (*Weston, I.C.S.*) Kishen Lal *v.* Man Mal. **1938 A.M.L.J. 97.**

Execution sale.

———**S. 151**—*Execution sale—Power to set aside before confirmation.*

No doubt the Court has inherent power under S. 151, C.P. Code, to set aside an execution sale before its confirmation, where there is an abuse of the process of the Court. But there is certainly no jurisdiction to set aside the sale under that section on the application of a third party on the ground that owing to a misapprehension due to the conduct of another third party he failed to be present on the day of the sale and therefore was unable to bid. It might be otherwise if that had been due to some omission or wrong procedure on the part of the Court. (*Jack, J.*) Subodh Chandra Mallick *v.* Ajodhya Hatui. **182 I.C. 649=12 R.C. 92=43 C.W.N. 250=A.I.R. 1939 Cal. 161.**

———**S. 151**—*Execution sale—Setting aside—Power of Court—Sale in execution of mortgage decree without protecting prior mortgagee's rights.*

Where the Court directed that the property should be sold in execution of a mortgage decree free from a prior mortgage but the sale-proceeds should be deposited in Court for payment to the prior mortgagee and that the decree-holder would be entitled to the surplus alone, if any, but the decree-holder who purchased the property did not implead the prior mortgagee in the course of execution proceedings and did not deposit in Court any amount for him, the decree-holder did not conduct himself in an honest manner and the sale is liable to be set aside. (*Addison and Din Mohammad, JJ.*) Jaspat Rai *v.* Kahan Chand. **181 I.C. 389=11 R.L. 821=40 P.L.R. 128=A.I.R. 1938 Lah. 232.**

Inherent powers.

———**S. 151**—*Inherent powers—Appeal—Party exonerated by trial Court not made party to appeal—Power of Court to decree claim as against him.*

Where a suit is dismissed as against a particular defendant by the trial Court, and his name does not appear in the memorandum of appeal filed by the plaintiff-appellant, the appellate Court cannot decree the suit as against that party; neither S. 151, nor Rr. 20 and 33 of O. 41, C. P. Code, can properly be applied to the case. Unless the Court of appeal extends the period of limitation for appeal under S. 5 of the Limitation Act as against him, the appeal is incompetent as against him and hence he cannot be made liable in appeal. (*Fazl Ali and Luby, JJ.*) Bisambhardeo Narayan Singh *v.* Hitnarayan Singh. **15 Pat. 219=160 I.C. 976 =16 Pat.L.T. 813=8 R.P. 399=2 B.R. 264= A.I.R. 1936 Pat. 49.**

———**S. 151**—Inherent powers—Appeal relating to part of decree only—Memorandum accompanied by copy of that part of decree only—Copy of unnecessary portions of decree—Power of Court to dispense with. *See* C. P. Code, O. 41, R. 1. **40 C.W.N. 1298.**

———**S. 151**—*Inherent powers—Conversion of suit into application.*

Where legislature provides a procedure of a summary nature by an application without expressly barring any suit in that behalf, it is always within powers of Courts, when instead of application a suit is filed, to treat the suit as an application and decide accordingly. (*Jack, J.*) Ananda Prosad Ghose *v.* Ronendra Lal. **165 I.C. 715= 9 R.C. 453=40 C.W.N. 856=A.I.R. 1936 Cal. 342.**

———**Ss. 151 and 152**—*Inherent power—Exercise of—Another remedy open—Amendment of decree—Powers of—Decree of Subordinate Court merged in appellate decree.*

A resort to inherent jurisdiction is not permissible where another remedy is open to the person preferring an application under S. 151. Thus where a remedy by way of appeal from a decree is clearly open to a person, he cannot invoke the inherent jurisdiction of the Court. But the mere fact that there is no appeal or that there is considerable delay in appealing is no bar to the District Judge entertaining an application to amend the decree of the Subordinate Court under S. 151, if in fact there is an error in the decree. The District Judge can amend the decree even under S. 152, if the decree of the Subordinate Court has merged in the appellate decree. But this cannot be asked to be done as of right. The matter is one of discretion with the Court and the discretion has to be exercised after duly considering all the circumstances. (*Bhide, J.*) Mitter Sen-Ganeshi Lal *v.* Kalyan Rai. **178 I.C. 677=11 R.L. 483 =A.I.R. 1938 Lah. 4.**

———**S. 151**—*Inherent powers—Exercise of.*

The Court is bound to exercise its inherent powers cautiously and with circumspection, and it is not at liberty to do so where the order proposed would contravene any principle of the common law or equity, or would affect a matter in respect of which provision has been made by statute either expressly or according to the true intendment thereof. (*Page, C.J., Mosely and Ba U, JJ.*) Chockalingam Ambalam *v.* Maung Tin. **14 Rang. 173=163 I.C. 340=9 R.R. 1= A.I.R. 1936 Rang. 208 (F.B.).**

———**S. 151**—*Inherent powers—Exercise of—Conditions—Ends of justice—Test of.*

S. 151, C. P. Code, should be applied with great caution and only when the ends of justice require its application. In order to decide whether the ends of justice require the application of the section to a particular case, the Court has to keep in view not only the interest of the applicant but also that of the other party who may be affected by the order sought to be made under the section. (*Harries, C.J., Fazl Ali and Agarwala, JJ.*) Ram Khelawan Singh *v.* Monilal Sahu. **19 Pat. 159=12 R.P. 371=6 B.R. 184=185 I.C. 480= 20 Pat.L.T. 883=1939 P.W.N. 832=A.I.R. 1939 Pat. 678 (F.B.).**

———**S. 151**—Inherent power—Exercise of—Limits. *See* C. P. Code, O. 21, R. 48 and Ss. 73 and 151. **1940 Rang.L.R. 421.**

———**S. 151**—*Inherent powers—Extent of—Power to give compensation to decree-holder purchaser for loss of part of property purchased as the result of another suit.*

S. 151, C. P. Code, cannot be interpreted as giving the Courts power which under the general law they do not possess. A Court has no power under the section to give compensation to a decree-holder, who after purchasing property in execution in satisfaction of his decree loses part of that property as the result of another suit. (*Wort and Varma, JJ.*) Phulchand Ram Marwari *v.* Naurangi Lal Marwari. **16 Pat. 729=10 R. P. 320=172 I.C. 225=1937 P.W.N. 836=18 Pat.L.T. 826=A.I.R. 1937 Pat. 647.**

———**S. 151**—*Inherent powers*—Interim *injunction in execution.*

The provisions of S. 151, C. P. Code, are very wide and where the interests of justice so require, it is competent to the Court to order an *interim* injunction to issue even in execution proceedings. (*Lobo, A.J.C.*) Kewalram Dewandas *v.* Gulabsing and Sons. **172 I.C. 131=10 R.S. 136=A.I.R. 1937 Sind 315.**

———**S. 151**—*Inherent power—Limits of.*

Unless a matter could be brought under S. 115, C. P. Code, S. 151 could not be used to set aside an order of a lower Court against which no appeal or revision lies. (*Pollock, J.*) Ghanashyam Prasad *v.* Vishwanath. **1940 N.L. J. 93.**

———**S. 151**—*Inherent power—Limits of—Decree absolute for dissolution—Setting aside at instance of third party.*

Where a decree for dissolution of marriage has been made absolute, it is not open to a third party to seek the aid of the Court under S. 151, C. P. Code, to set it aside on the ground that one of the parties to the divorce proceedings was a minor and has not been represented by a guardian *ad litem.* Nor is there any provision in the Divorce Act to set aside a decree absolute in the manner in which a decree *nisi* could be attacked. (*Yorke, J.*) Alexander *v.* M. S. Jalil. **15 Luck. 350=12 R.O. 274=185 I.C. 884=1940 O.A. 140=1940 O.L.R. 71=1939 O.W.N. 139 =1940 A.W.R. (C.C.) 69=A.I.R. 1940 Oudh 279.**

———**S. 151**—*Inherent powers—Minor (auction-purchaser) subsequently applying for setting aside sale on ground of his minority—Power of Court to set aside sale.*

Where a minor himself bid at an auction-sale but subsequently applied for not confirming the sale on the ground that he was a minor, and the Court after finding that he was a minor declined to set aside the sale on the ground that there was no such provision in law, and the appellate Court also dismissed the appeal.

Held, it was doubtful whether second appeal lay; confirmation of sale would give rise to complications as the sale was in favour of a minor and would ultimately have to be set aside as a void transaction. In the absence of any other provision of law for setting aside the sale, the appeal was treated as an application for revision and sale was set aside under S. 151. (*Jai Lal, J.*) Ram Parkash *v.* People's Bank of Northern India, Ltd. **10 R.L. 205=171 I.C. 478 =39 P.L.R. 364=A.I.R. 1937 Lah. 72.**

———**S. 151**—Inherent power—Orders for protection of property, the subject-matter of litigation—Jurisdiction to pass. *See* C. P. Code, O. 39 and S. 151. **1940 A.W.R. (H.C.) 74.**

———**S. 151**—Inherent powers—Particulars in petition or affidavit—Power of Court to direct. *See* C. P. Code, O. 6, Rr. 1 and 4. **40 C.W.N. 913.**

———**S. 151**—*Inherent powers—Payment of money in Court to party entitled—Money realised by execution sale of attached property—Application for payment by Crown towards arrears of income-tax due by judgment-debtor—Powers and duty of Court to order payment—Separate suit by Crown—Necessity—Attaching creditor—If secured creditor—Income-tax Act, S. 46—If a bar to application for payment—Crown debt—Priority.*

The Crown has priority over unsecured creditors in the payment of debts and the Court can, on application and without a formal attachment being issued, order payment of a Crown debt due by the debtor where there are funds in Court belonging to the debtor. Where in execution of a decree the judgment-debtor's property is sold in Court-auction and money is realised, the Court can on the application of the Government order payment out of the sale proceeds money due by the judgment-debtor on account of income-tax assessed on and due by the judgment-debtor. It is not necessary for the Crown to file a suit for the amount due, when the debt is not disputed and is indisputable. The right to payment being indisputable, justice requires that it should be paid to the Crown when formal application for payment has been made. Both right and convenience demand that the Court should exercise its inherent power. No special act of the Legislature is required to enable the Crown to apply to the Court for payment of money to which it has an undoubted right. The decree-holder who brings the property to sale is not, by reason of his attachment before sale, placed in the position of a secured creditor. Nor does S. 46 of the Income-tax Act operate as a bar to the payment by the Court on mere application. S. 46 is not exhaustive and it cannot, without express words to that effect, take away from the Crown the right of enforcing payment by any other method open to it.

Mockett, J.—The Court under such circumstances can rightly invoke its power under S. 151, C. P. Code, in making the payment to the person entitled to it. (*Leach, C.J., Varadachariar and Mockett, JJ.*) Manickam Chettiar *v.* Income-tax Officer, Madura. **I.L.R. (1938) Mad. 744=174 I.C. 423=10 R.M. 702=47 L.W. 368 =1938 M.W.N. 197=A.I.R. 1938 Mad. 360= (1938) 1 M.L.J. 351 (F.B.).**

———**S. 151**—*Inherent power—Power to go behind order of predecessor.*

Where a presiding officer of a Court has passed an order, his successor cannot and should not go behind that order and hold that order to be *ultra vires.* (*Zia-ul-Hasan and Hamilton, JJ.*) Sri Krishen *v.* Jamna Narain. **173 I.C. 980=10 R.O. 248=1938 O.L.R. 154=1938 O.A. 240= 1938 O.W.N. 348=A.I.R. 1938 Oudh 103.**

———**S. 151**—Inherent powers—Power to act *ex debito justitiae* in order that real justice may be done. *See* C. P. Code, O. 9, R. 9—"Sufficient Cause." **40 Bom.L.R. 238=A.I.R. 1938 Bom. 199 (S.B.).**

———**S. 151**—*Inherent powers—Power to set aside wrong or illegal order—If limited to cases of fraud or deception practised on Court.*

A Court has always got an inherent power to vacate or set aside an order made by it when it is brought to its notice that the order is one which is null and void and should never have been made. Its power to so rescind or vacate such an order is not limited to cases of fraud or deception practised upon the Court. (*Davis, J.C. and Lobo, J.*) Dholandas Gidumal *v.* Sadhumal Dolumal. **32 S.L.R. 215.**

———**S. 151**—*Inherent powers—Recalling of invalid orders.*

A Court has inherent jurisdiction to re-call and cancel its invalid orders. (*Iqbal Ahmad and Allsop, JJ.*) Champa Devi *v.* Asa Devi. **I.L.R. (1938) All. 71=172 I.C. 956=10 R.A. 441= 1937 R.D. 577=1938 A.L.R. 53=1937 A.W.R. 933=1937 A.L.J. 945=A.I.R. 1938 All. 8.**

———**S. 151**—*Inherent power—Re-calling of orders passed by Court—Order passed within jurisdiction and not illegal—Facts rendering order invalid or irregular not brought to notice of Court—Effect—Power to re-call order passed under mistake or by inadvertence—Bihar Tenancy Act, Ss. 26-M and 174.*

Petitioners purchased a certain holdings belonging to their judgment debtors at a sale in execution of a mortgage sale on 20th May, 1935. The sale was confirmed on 29th June, 1935. In the meantime, however, on 10th June, 1935, the new Bihar Tenancy (Amended) Act came into operation, S. 26-M of which Act provided that a sale should not be confirmed unless the auction purchasers filed a certain notice and deposited in Court a certain sum for payment to the landlord of the holding. This was not done by the purchaser, and the Court confirmed the sale without probably noticing S. 26-M of the Act. On 24th September, 1936, the respondent obtained a decree for rent and brought the same holding to sale and purchased it himself on 17th March, 1937. On 12th April, 1937, the petitioners applied under S. 174 of the Act, offering to make a deposit and on 23rd April, 1937, this was accepted by the Court and the sale set aside by the Court, though *ex parte.* The landlord respondent then moved the Court on 14th May, 1937, under S. 151, C. P. Code, to re-call the order of 23rd April, 1937, setting aside the sale under his rent decree on the ground that the petitioners had no *locus standi* to apply to set aside his sale as they had not deposited the landlord's fee at the time of their application under S. 174 of the Bihar Tenancy Act. The Court thereupon re-called the order setting aside the sale allowing the application of the landlord-respondent.

Held, in revision, (1) that the order setting the sale passed on 23rd April, 1937, was one which it had jurisdiction to pass though the Court may have taken an erroneous view of the law, or not followed the correct procedure in having proceeded *ex parte*; (2) that the order being within jurisdiction, the Court could not re-call it, and the remedy of the respondent, if aggrieved, was by way of appeal or revision and not by applying under S. 151, C. P. Code; (3) that there having been no application to set aside the sale of 1935, the Court was bound to confirm the sale under O. 21, R. 92, C. P. Code; and the order of confirmation was perfectly legal and within jurisdiction in spite of the enactment of S. 26-M of the Bihar Tenancy Amendment Act, which was not brought to the notice of the Court; (4) that the non-compliance with S. 174, *i.e.*, non-deposit of fees at the application on 12th April, 1937, did not make the order setting aside the sale without jurisdiction, when that fact was not brought to the notice of the Court; and (5) that therefore the order under S. 251, re-calling the order setting aside the sale was wrong and without jurisdiction and must be set aside. (*Manohar Lall, J.*) Ram Kishun Lal *v.* Manzurul Hoque. **180 I.C. 304=11 R.P. 483=5 B.R. 379=1938 P.W.N. 192=A.I.R. 1938 Pat. 593.**

———S. 151—Inherent power—Reference in pending suit to arbitration—Order that if award not filed by particular date trial must go on that day—Award not filed in time—Decree *ex parte*—Setting aside—Procedure—Proper remedy—Application under O. 9, R. 13—If proper. *See* C. P. Code, Sch. II, para. 8. **71 M.L.J. 648.**

———S. 151—Inherent powers—Refund of Court-fee—Plaint rejected for non-payment of proper Court-fee—Refund of Court-fee originally paid—Power of Court. *See* Court-fees—Refund. **1937 A.W.R. 389=1937 A.L.J. 481.**

———S. 151—*Inherent powers—Restitution—Duty of Court—Other remedy open—If bar to restitution under inherent powers—Property wrongly taken away in execution against another under erroneous order—Duty to take restitution on establishment of title.*

Where property has been taken away from a third party under an erroneous order of the Court, and that party has subsequently established by a suit that the property belongs to him, and not to the judgment-debtor in execution of a decree against whom the property was so taken, the Court must use its inherent powers to restitute to such innocent party his property of which he has been deprived by the erroneous order of the Court. The fact that a suit is maintainable at the instance of that party is no ground for refusing redress under S. 151 when the wrong has been done under the order of the Court. (*Khaja Mohammad Noor, J.*) Rameshwar Lal Jhunjhunwala *v.* Mst. Subdi. **180 I.C. 326=11 R.P. 498=5 B.R. 467=19 Pat.L.T. 119=A.I.R. 1938 Pat. 468.**

———S. 151—Inherent powers—Restitution—Powers of Court—Execution sale—Property subsequently held to be third person's in separate suit—Restitution to purchaser of purchase money. *See* C. P. Code, Ss. 144 and 151. **19 Pat.L.T. 111.**

———S. 151—Inherent powers—Restoration of case dismissed for default—Grounds. *See* C. P. Code, O. 9, R. 9. **40 Bom.L.R. 238.**

———S. 151—*Inherent powers—Review—Power of Subordinate Judge to review order of predecessor—O. 47 and S. 151—Construction.*

S. 151, C. P. Code, is not intended to constitute one Subordinate Judge an appellate authority over his predecessor of like jurisdiction as himself. If one Judge reviews the order of another, he cannot escape the provisions of O. 47, C. P. Code, by placing his order under S. 151. Both S. 151 and O. 47 are to be construed strictly and are not intended to be used to allow one Judge to sit in appeal on orders of his predecessor exercising an equal jurisdiction with his own. (*Davis, J.C. and Weston, J.*) Mir Haji Ghulam Shah *v.* Khanchand. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

———S. 151—*Inherent powers—Security for costs—Revision application to High Court—Security for costs—Order for—Power to make—Civil Procedure Code, O. 25, R. 1 and O. 41, R. 10.*

There is no provision in the C. P. Code or in the Provincial Insolvency Act which specifically empowers the High Court in revisional applications under S. 115, C. P. Code, or S. 75 of the Provincial Insolvency Act to pass an order calling on the applicant to furnish security for costs. But under S. 151, C. P. Code, it is competent to the High Court to make such an order as is contemplated by O. 25, R. 1, or O. 41, R. 10, C. P. Code. (*Rangnekar, J.*) Hiralal Ramsukh *v.* Monghibai. **I.L.R. (1938) Bom. 743=178 I.C. 774=11 R.B. 191=40 Bom.L.R. 1025=A.I.R. 1938 Bom. 510.**

———S. 151—*Inherent powers—When to be exercised.*

The powers of S. 151 have to be exercised sparingly. Where there is specific provision of law, or a specific procedure provided by law, which has not been followed by a party, or of which advantage has not been taken by a party, the Court would certainly hesitate before exercising its inherent jurisdiction under S. 151. (*Rangnekar, J.*) Hiralal Ramsukh *v.* Monghibai. **I.L.R. (1938) Bom. 743=178 I.C. 774=11 R.B. 191=40 Bom.L.R. 1025=A.I.R. 1938 Bom. 510.**

Injunction.

———S. 151—*Injunction—If the section can be invoked to add to the powers conferred by O. 39.*

Whatever may be said as to the power of the High Court to issue injunction for purposes other than those mentioned in O. 39, and to punish disobedience thereof in exercise of its own inherent power as a Court of record, the power of the Subordinate Courts must be found within the four corners of the Code and it seems to be too much to suggest that when the Code has expressly dealt with injunction in O. 39, S. 151 can be invoked to add to the powers conferred. (*Varadachariar, J.*) Murugesa Mudali *v.* Angamuthu Mudali. **176 I.C. 688=11 R.M. 149=46 L.W. 956=1937 M.W.N. 1229=A.I.R. 1938 Mad. 190=(1937) 2 M.L.J. 888.**

———S. 151—*Injunction—Inherent power.*

The petitioner applied under O. 41, R. 5, C. P. Code, praying to issue order preventing the order of the Judicial Commissioner from taking effect during the pendency of the appeal, O. 41, R. 5 and also O. 39, R. 2, C. P. Code, were not applicable. The only alternative was whether S. 151 could be invoked.

Held, that the applicant did not come to Court with clean hands and no equitable relief could be granted to him by way of injunction. (*Agha Haidar, J.*) Jeswant Singh *v.* Shiromani Gurdwaras Prabandhak Committee. **164 I.C. 16 =9 R.L. 106=A.I.R. 1936 Lah. 567.**

——S. 151—Insolvency Court—Inherent powers to rectify omissions. *See* Provincial Insolvency Act, Ss. 37 and 43 (1). **40 C.W.N. 1229.**

Jurisdiction.

——S. 151—*Jurisdiction—Absence of—Order of Subordinate Judge reviewing predecessor's order on ground of error of law—Revision—Interference.*

Where a Subordinate Judge usurps an appellate jurisdiction which he does not possess and reviews an order made by his predecessor on the ground of an error of law, the order reviewing the predecessor's order is one without jurisdiction and is liable to be set aside in revision by the High Court. The fact that the order is made under S. 151, C. P. Code, make no difference. (*Davis, J.C. and Weston, J.*) Mir Haji Ghulam Shah *v.* Khanchand. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

Limitation.

——S. 151—Limitation—Excusing delay in filing application for restoration of appeal dismissed for default—Powers. *See* C. P. Code, O. 41, R. 19 and S. 151. **1938 A.M.L.J. 124.**

——S. 151—*Mistake—Rectification of—Inherent power of Court.*

Where rights of third parties have not intervened, it is not only in the power, but it is the duty of the Court to relieve a party of the injury done to him by it, by reason of its mistakes and defaults or mistakes or defaults of its officers inadvertently committed. (*R.C. Mitter, J.*) Gadadhar Sarkhal *v.* Gopal Chandra Das. **63 Cal. 1079=166 I.C. 641=9 R.C. 570=40 C.W.N. 680=A.I.R. 1936 Cal. 343.**

Order under.

——S. 151—*Order under—Appealibility—Order passed on appeal—Revision.*

As there is no specific provision in the Code of Civil Procedure for an appeal against an order passed under S. 151, no appeal lies from such an order and therefore the order of an appellate Court passed on appeal from such order is passed without jurisdiction. And where such an order has been passed without jurisdiction a further appeal or a revision application can be entertained to set aside the order which has been passed without jurisdiction. (*Almond, J.C.*) Kanshi Ram *v.* Gobind Ram. **178 I.C. 776=11 R. Pesh. 58=A.I.R. 1938 Pesh. 81.**

Other remedy.

——S. 151—*Other remedy not availed of—Inherent power—Resort to—Permissibility.*

When there are specific provisions in the Code for the remedy which a party seeks, it is not open to him, after his failure to adopt those remedies, within the period allowed by law, to appeal to the inherent powers of the Court to obtain that remedy. Hence where a party has not applied under O. 21, Rr. 89, 90 or 91 it is not open to him to seek the inherent power of the Court to set aside the sale. (*Mya Bu and Mackney, JJ.*) Arumugam Chettiar *v.* Ramanathan Chettiar. **179 I.C. 162=11 R.R. 301=A.I.R. 1938 Rang. 433.**

——S. 151—*Other remedy open—Execution struck off in full satisfaction—Aggrieved party not appealing—If can later on apply under S. 151.*

Where certain orders were passed on an execution application and it was finally struck off in full satisfaction, the orders passed were under S. 47, C. P. Code and hence appealable. If the party aggrieved by those orders fails to pursue the remedy by way of appeal, that party could not invoke the inherent powers of the Court under S. 151 later on. (*Mulla, J.*) Mohammad Tahar *v.* Intizar Fatima. **180 I.C. 960=11 R.A. 542=1938 A.W.R. (H.C.) 733=1938 A. L. J. 1041=A.I.R. 1939 All. 25.**

——S. 151—*Restitution—Other remedy open—Exercise of inherent powers—If justified.*

When the law of the land has provided ample remedies—statutory and otherwise—for the redress of a wrong suffered by a party owing to the conduct of his opponent or the mistakes committed by the Court, a party is not entitled to invoke, and the Court ought not to exercise, the inherent jurisdiction of the Court. (*Rangnekar, J.*) Shivappa Dhondapp v. Ramlingappa. **168 I.C. 810=9 R.B. 401=39 Bom.L.R. 112=A.I. R. 1937 Bom. 173.**

——S. 151—*Other remedy open—Interference under inherent power.*

An order which can be set aside in appeal cannot be set aside under the inherent power of the Court. (*Nasim Ali and R. C. Mitter, JJ.*) Abdul Jabbar Palwan *v.* Azizar Rahman Mea. **172 I.C. 682=10 R.C. 406=67 C.L.J. 129=41 C.W.N. 893=A.I.R. 1937 Cal. 425.**

——S. 151—*Other remedy open—Order by execution Court—Inherent powers—Resort to—Permissibility.*

An order by the execution Court under S. 47, C. P. Code, is an appealable order. The execution Court has no jurisdiction to set aside that order except perhaps on an application for review. It cannot do so under S. 151, especially when the order is open to appeal. (*Jai Lal, J.*) Lehna Singh *v.* Mst. Jassi. **38 P.L.R. 331.**

——S. 151—*Other remedy open—Order of sale in contravention of Punjab Land Alienation Act—Inherent power of executing Court to set aside sale.*

It is well established that recourse to inherent powers is not justifiable when another remedy is provided by law, for setting aside an illegal order. The Punjab Alienation of Land Act itself provides for such a remedy in an application by the Deputy Commissioner to set aside any order passed in contravention of the Act by a civil Court. The executing Court therefore is not justified in resorting to inherent jurisdiction under S. 151, C. P. Code, to set aside the sale which has been confirmed. (*Bhide, J.*) Budh Singh *v.* Dittu. **175 I.C. 319=10 R.L. 701=39 P.L.R. 710=A.I.R. 1937 Lah. 416.**

———**S. 151**—*Other remedy open—Resort to inherent jurisdiction—Permissibility.*

The party cannot invoke the special powers under S. 151, C. P. Code, when there is a legal remedy open to him. (*Beckett, J.*) HARCHAND SINGH *v.* SALEKH CHAND. **38 P.L.R. 373.**

Powers of High Court.

———**S. 151**—*Powers of High Court under—Stay of connected suits.*

The High Court has ample jurisdiction under S. 151, C. P. Code, to stay the proceedings in connected suits. (*Roughton, F.C.*) SETH BALKRISHNA *v.* GOVERDHANLAL. **1938 N.L.J. 120.**

———**S. 151**—*Powers under—Orders in contravention of S. 7 (1) (a) of U. P. Encumbered Estates Act—If can be set aside.*

Where a delivery of possession has been made in contravention of S. 7 (1) (*a*) of the United Provinces Encumbered Estates Act, though an application for restitution may not come under S. 144, yet it can be set aside under S. 151, C. P. Code. (*Zia-ul-Hasan and Yorke, JJ.*) SHEO NATH *v.* MADAN MOHAN LAL. **177 I.C. 543=11 R.O. 50=1938 R.D. 765=1938 A.W.R. (C.C.) 119=1938 O.W.N. 911=1938 O.L.R. 422=1938 O.A. 684=A.I.R. 1938 Oudh 221.**

———**S. 151**—Refund—Court-fee. *See* S. 151, COURT-FEES.

———**S. 151**—*Refund—Lessee paying to lessor's decree-holder—Lease failing—Right of lessee to refund.*

Where the lessee pays money to decree-holders of the lessor on the basis of a lease which is subsequently set aside and through no fault of his, the lessee has a right to get a refund of the money from the person to whom he paid the money. (*Jai Lal, J.*) MAGHI MAL *v.* GANPAT RAI. **163 I.C. 121=8 R.L. 1010=38 P.L.R. 717 =A.I.R. 1936 Lah. 212.**

Remand.

———**S. 151**—*Remand—Inherent powers—Decision by trial Court on merits and on preliminary point—O. 41, R. 23.*

Where the trial Court has decided the case on the merits as well as on the preliminary point, the appellate Court cannot remand the case under O. 41, R. 23. If the case is remanded the remand is not under O. 41, R. 23, but under the inherent powers of Court under S. 151. (*Wort, J.*) GOBARDHAN MAHTON *v.* SITA RAM SINGH. **164 I.C. 1085=9 R.P. 149=1936 P.W.N. 233=A.I.R. 1936 Pat. 491.**

———**S. 151**—Remand—Power of High Court in revision to remand. *See* C. P. CODE, S. 107. **A.I.R. 1936 Nag. 140.**

———**S. 151**—Remand—Power to—Resort to inherent power, when not justified. *See* C. P. CODE, O. 41, R. 23 AND S. 151—INHERENT POWER. **1940 N.L.J. 350.**

———**S. 151**—*Remand order under S.* 151—*Appeal.*

Where the appellate Court remands the case to be begun as *de novo,* the remand is under S. 151 and not under O. 41, R. 23 and no appeal lies from such order of remand. (*Wort, J.*) GOBARDHAN MAHTON *v.* SITA RAM SINGH. **164 I.C. 1085=9 R.P. 149=1936 P.W.N. 233=A.I.R. 1936 Pat. 491.**

———**S. 151**—*Remand under inherent power—Appeal.*

The C. P. Code makes no provision for an appeal where a suit has been remanded under the inherent powers of the Court and hence no appeal can lie in such a case. (*Davies.*) HAZARI *v.* PARTABA. **1939 A. M.L.J. 110.**

Restitution.

———**S. 151**—Restitution—Case not falling under S. 144—Relief under inherent powers. *See* C. P. CODE, Ss. 144, 151 AND 47. **A.I.R. 1939 Nag. 101.**

———**S. 151**—Restitution—Court-fee in pauper suit—Payment by defendant under order of Court —Order reversed on appeal—Restitution—Award of interest—Power of Court—Discretion to refuse. *See* C. P. CODE, S. 144. **(1937) 1 M.L.J. 21.**

———**S. 151**—Restitution—Inherent powers of —Absence of reversal or variation of decree. *See* C. P. CODE, Ss. 144 AND 151. **A.I.R. 1937 Nag. 151.**

———**S. 151**—Restitution—Inherent powers—Powers of Court to award mesne profits. *See* C. P. CODE, Ss. 144 AND 151. **A.I.R. 1937 Mad. 694.**

———**S. 151**—Restitution—Inherent powers. *See* C. P. CODE, Ss. 144 AND 151. **43 L.W. 773=A.I.R. 1936 Mad. 636.**

———**Ss. 151, 144 and 47**—*Restitution—Order confirming sale set aside—Application by auction-purchaser for compensation for improvements.*

The order of the executing Court confirming a sale which is set aside on appeal does not amount to a decree and therefore an application by auction-purchaser for improvements payable in consequence of that order cannot be said to fall within the purview of S. 144 as that section contemplates restitution where a decree has been varied or reversed. Nor does the application fall under S. 47 as the question of improvements is one between the auction-purchaser and judgment-debtor and does not relate to the execution, satisfaction or discharge of the decree as such. The application can therefore fall only under S. 151. The question of improvements by auction-purchaser is a question incidental to and consequential on the setting aside of the sale. The executing Court under S. 151 has jurisdiction to go into the question of improvements. The judgment-debtor cannot be allowed to retain the benefit of the improvements made *bona fide* by the auction-purchaser without paying for them. The case therefore is a fit one for the exercise of the inherent powers of the Court under S. 151. (*Tek Chand and Abdul Rashid, JJ.*) A. R. DAWAR *v.* GANESH DATTA. **A.I.R. 1940 Lah. 59.**

———**S. 151**—*Restitution—Order holding surety liable for payment—Reversal—Application by surety for restitution—Inherent power of Court.*

A surety who is a party to an order holding him liable for payment to the decree-holder can, on reversal of that order on appeal, apply to the Court for restitution under the inherent jurisdiction of the Court, apart from S. 144, C. P. Code. (*Dalip Singh, J.*) MUKAT BEHARI LAL TEJ PAL *v.* DINA NATH. **179 I.C. 336=11 R.L. 552=40 P.L.R. 289=A.I.R. 1938 Lah. 833.**

———**S. 151**—Restitution—Powers of Court—Money paid to wrong party—Duty to make restitution. **A.I.R. 1937 Mad. 95.**

Restoration.

———**S. 151**—*Restoration—Application under O. 21, R. 90—Dismissal for defallt—Inherent power of Court.*

Although it is true that S. 141 does not apply to proceedings in execution of decrees, and therefore O. 9, Rr. 4 and 9 are inapplicable, the Court has inherent power under S. 151, C.P. Code, to restore an application in execution proceedings which has been dismissed for default, notwithstanding the fact that the applicant had an alternative remedy open. The judgment-debtor, a purdanashin lady, filed an objection petition under O. 21, R. 90 for setting aside sale. When her application was called out for hearing neither she nor her pleader was present. Consequently her application was dismissed and order confirming the sale was passed. A few minutes after the order was passed, judgment-debtor's pleader appeared and presented an application under O. 9, Rr. 4 and 9 and Ss. 141 and 151 for setting aside the order. The Court did not apply its mind to the merits of the application for restoration but dismissed it *in limine* on the technical ground that no such application lay after the sale was confirmed.

Held, that the order of the Court dismissing the application for restoration was wrong as in the peculiar circumstances of the case the order dismissing the objection petition for default should have been set aside and the objection petition heard on merits. (*Tek Chand, J.*) ACHARJI BIBI *v.* SWAMI SHESH SAHAI. **41 P.L.R. 544 =A.I.R. 1939 Lah. 223.**

———**S. 151**—*Restoration—Inherent power of Court—Execution application consigned to record for default—Fresh application barred by time.*

The Courts have no inherent jurisdiction under S. 151 to restore an application for execution consigned to record room on account of default of appearance on the part of the decree-holder, merely on the ground that a fresh application is not competent on account of 12 years having elapsed since the decree was passed. A.I.R. 1926 Mad. 980 and 5 P.L.J. 208, Foll.; A.I.R. 1921 Lah. 67 and A.I.R. 1928 Oudh 478, Not Folld. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) ABDULLAH KHAN *v.* HARI CHAND-DAULAT RAM. **165 I.C. 268=9 R. Pesh. 45=A.I.R. 1936 Pesh. 191.**

———**S. 151**—*Restoration — Order dismissing for default petition of compromise.*

Where a petition for recording a compromise presented by a party to a suit is dismissed owing to the absence of the petitioner on the date of hearing of the petition, his proper remedy is by way of an application under S. 151, C.P. Code, to have the order of dismissal set aside. It is doubtful whether an appeal lies against the order under O. 43, R. 1 (*m*), C.P. Code. (*Derbyshire, C.J. and Nasim Ali, J.*) SURAJMALL KESHAN *v.* R. A. WOOD. **43 C.W.N. 1113.**

———**S. 151 and O. 7, R. 13**—*Restoration—Powers of—Rejection of plaint under O. 7, R. 13.*

Though a plaint is rejected under O. 7, R. 13, a Judge has jurisdiction under S. 151, C.P. Code, to restore the suit. (*Allsop, J.*) ANANT PRASAD SINGH *v.* CHUNNU TEWARI. **183 I.C. 426 =12 R.A. 132=1939 A.L.J. 335=1939 A.W.R. (H.C.) 325=A.I.R. 1939 All. 452.**

———**S. 151**—*Restoration—Suit dismissed for default on date fixed for filing objections to Commissioner's report.*

A Court has inherent jurisdiction to restore a suit, which has been dismissed in default owing to a mistake of the Court itself. Where the lower Court dismissed a suit in default on the plaintiff's absence on that date, which had been fixed merely for filing objections against the report of the Commissioner appointed in pursuance of the preliminary decree.

Held, that the suit should be restored. A.I.R. 1928 Lah. 534 and 6 I.C. 208, Appl. (*Tek Chand, J.*) DHANPAT RAI *v.* BADRI DASS. **166 I.C. 102 =9 R.L. 337=A.I.R. 1936 Lah. 759.**

Review.

———**S. 151**—Review—Inherent power—Adjustment of decree in favour of minor by next friend without sanction of Court—Remedy of minor—Review—Power of Court. *See* C.P. CODE, S. 47. **A.I.R. 1936 Pat. 506.**

———**S. 151**—*Review—Order due to inadvertence—Power of Court.*

Where in an execution case the Court had allowed the auction-purchaser to withdraw the deposit made by him on furnishing a security for re-depositing it when asked to do so and a surety bond was accordingly executed, and the Court having asked the purchaser to deposit the amount made an order that if the amount was not deposited within certain period the property be resold and short-fall be recovered from him but on the next date on becoming aware of the surety bond the Court reviewed and modified its order and directed the surety to pay the amount.

Held, that the Court had an inherent power to review its previous order as the error was patent on the face of the record and the previous order was made by the Court *suo motu* through oversight. (*Bhide, J.*) MOHAMMAD RAMZAN *v.* MT. KHADIJA SULTAN BEGUM. **181 I.C. 429 =11 R.L. 834=40 P.L.R. 755=A.I.R. 1938 Lah. 472.**

——**S. 151**—*Review—Order obtained by practising fraud upon Court—Power to vacate.*

Where an order permitting withdrawal of the suit was obtained by practising fraud upon the Court by a defendant acting in collusion with a minor plaintiff's next friend and the Court subsequently vacated its order.

Held, that the Court had power under S. 151, C.P. Code, to vacate an order obtained by misleading and practising fraud upon Court and hence the order of the Court vacating its previous order was right. (*Davis, J.C. and Mehta, A.J.C.*) MOHANLAL TEJMAL *v.* SH. KHUSHALIBAI. **31 S.L.R. 32=169 I.C. 918=10 R.S. 28=A.I.R. 1937 Sind 101.**

———**S. 151**—*Review—Power of Court—Order fixing Court-fees—Court-Fees Act, S. 12.*

Although S. 12 of the Court-Fees Act lays down that the decision of the trial Court on the amount of fees chargeable on a plaint is final as between the parties to the suit subject to the provisions of the second part of that section, that does not prevent the trial Court from reviewing its order fixing Court-fees, a power which is granted to it by S. 151, C.P.Code. Where, therefore, the Court reopens and takes up the question of appropriate Court-fees for a second time, it does not amount to material irregularity. (*Middleton, J.C.*) SHIV SAHAI *v.* DEVI SAHAI. **166 I.C. 178 (1)=9 R. Pesh. 59=A.I.R. 1936 Pesh. 213.**

——**Ss. 151 and 115**—*Revision—Order refusing to amend decree—Power of High Court to interfere.*

Even if upon a strict construction of S. 115, C.P.Code, the High Court is precluded from interfering in revision with an order of a lower Court refusing to amend a decree, it is still open to it to interfere under S. 151, C.P. Code. 1935 O.W.N. 968, Rel. on. (*Nanavutty and Zia-ul-Hasan, JJ.*) UMA SHANKAR *v.* MURARI DAS. **13 Luck. 186=167 I.C. 586=9 R.O. 391=1937 O.L.R. 125=1937 O.W.N. 268=A.I.R. 1937 Oudh 246.**

Scope.

——**S. 151**—*Scope.*

It is a mistake to suppose that S. 151 confers any special jurisdiction on Civil Courts. It is merely a saving clause which saves inherent power of the Court which may exist independently of that section from being limited by the provisions of the Code. (*Sulaiman, C.J. and Bennet, J.*) GENDA MAL *v.* SUKHADARSHAN LAL. **164 I.C. 200=9 R.A 125=1936 A.L.J. 736=1936 A.W, R. 531=1936 A.L.R. 713=A.I.R. 1936 All. 555.**

——**S. 151**—Scope—Administration suit—Decree—Power of Court to pass appropriate order. *See* C.P. CODE, O. 20, R. 13. **1938 M.W.N. 1127.**

——**S. 151**—*Scope of—'Ends of justice' or 'abuse of the process of the Court'—Construction.*

Per *Blagden, J.*—S. 151 does not empower the Court to make any order which the particular individuals who at a given moment happen to compose it think just or calculated to prevent an abuse of its process. The words "ends of justice" and "abuse of the process of the Court", must, in fact, be construed with due regard to the rest of the provisions of the Code, the section being really intended to prevent the Courts being rendered impotent by any omission in the Code. The section empowers the Court to make "necessary orders", and no other orders. (*Roberts, C.J. Dunkley ond Blagden, JJ.*) U AUNG GYI *v.* GOVERNMENT OF BURMA. **1940 Rang. L.R. 512=189 I.C. 338=A.I.R. 1940 Rang. 162 (F.B.).**

——**Ss. 151 and 154**—*Scope—Power to vacate prior order made by Court—Interests of justice.*

It is perfectly competent to a Court to vacate its own prior order. The provisions of Ss. 151 and 154, C.P. Code, are wide enough to allow this being done. Where the Court feels that it is necessary in the interests of justice to vacate a previous order made by it, it can do so, and such an order vacating a prior wrong order cannot be said to be improper or without jurisdiction. (*Macklin and Sen, JJ.*) HASAN *v.* ISAP **I.L.R. (1939) Bom. 27=180 I.C. 784=11 R.B. 311=40 Bom.L.R. 1180=A.I.R. 1939 Bom. 51.**

——**S. 151**—Scope of—Powers under, when to be exercised. *See* U. P. ENCUMBERED ESTATES ACT. S. 6. **1938 R.D. 365.**

——**Ss. 151 and 152**—*Scope and applicability.*

Ss. 151 and 152, C.P. Code, cannot apply to a case where there is no accidental slip or error or omission on the part of the Court or there is no accidental slip, error or omission or slip in the plaint which intended one thing and owing to an accidental slip stated another, but the parties were labouring under a mistake at the time of the decree and the mistake was embodied in the decree. (*Dalip Singh, J.*) ABDUL SATTAR *v.* FAZAL-UL-RAHMAN. **181 I.C. 28=11 R.L. 765=40 P.L.R. 100=A.I.R. 1938 Lah. 331.**

——**S. 151**—*Scope of inherent jurisdiction—Application to set aside execution sale under S. 151—If maintainable.*

S. 151 of the C.P. Code does not confer an unlimited jurisdiction on the Courts to do what they please and further when another remedy was or is open to a party, he has no right to invoke the inherent jurisdiction of the Court. An application under S. 151 by a decree-holder purchaser to set aside the sale in execution of the materials of a house only, is incompetent where the decree-holder had submitted to the sale and had acquiesced in it and had allowed his other remedies to be barred by time. (*Bennet and Verma, JJ.*) RAHMAT BIBI *v.* CHANDU LAL. **1939 A.W.R. (H.C.) 365=1939 A.L.J. 398=A.I.R. 1939 All. 497.**

——**S. 151**—*Scope and object of—If justifies ignoring or overriding express provision of law.*

S. 151, C.P. Code, was not intended to permit the Court to ignore or override the provisions of the C.P. Code, nor was it intended to oust the provision of the law. It was intended merely to supplement the provisions of the Code and to provide a means of serving justice when the law provided none. It was intended to override the plain and express enactment of the law. . (*Davis, J.C. and Weston, J.*) MIR HAJI GHULAM SHAH *v.* KHANCHAND. **I.L.R. (1939) Kar. 330=182 I.C. 154=11 R.S. 250=A.I.R. 1939 Sind 137.**

——**S. 151**—*Stay—Stay of suit—High Court's powers.*

A mining lease was granted in respect of certain land, the lessee covenanting to start the development of the prospective coal mine as soon as possible after the commencement of the lease. The lessee having failed to do so, the lessor brought a suit against him for damages for breach of the covenant. The lessee applied for stay of the suit pending the disposal of another suit instituted by the Secretary of State against the lessor and the lessee, claiming a declaration that the lessor had no right to the minerals in the land and that the lessee had not acquired any title to them. The trial Court declined to stay the suit and the High Court's inherent powers to stay the procedings were invoked.

Held, that under the circumstances it was desirable that the lessor's suit against the lessee should be stayed on proper terms pending the suit by the Secretary of State. (*Agarwala and Rowland, JJ.*) Bengal Coal Co., Ltd. *v.* Brijdeo Narayan Singh. **163 I.C. 895=9 R.P. 49=A.I.R. 1936 Pat. 408.**

Stay of execution.

———S. 151—*Stay of execution—Case not coming under O. 45, R. 13—Inherent powers.*

It is open to the High Court to exercise its powers under S. 151 and stay the execution of the decree, although the matter may not be strictly within the terms of O. 45, R. 13. Defendant appealed against a decree passed against him and also applied for stay of execution of the decree. The application for stay was dismissed and leave to appeal to the Privy Council was also refused. In the meantime, plaintiff applied for execution of the decree and it was fixed on 7th January, 1939, for final orders. Defendant had taken steps to file an application to the Privy Council for special leave to appeal and for stay of execution. But, it was not physically possible for the defendant to file his application before 16th January, 1939. He therefore filed an application to the High Court to make an order directing stay of execution until his application for special leave was filed and orders thereon obtained.

Held, that in the circumstances of the case the High Court should stay the execution under its inherent powers. (*S. K. Ghose and B. K. Mukerjea, JJ.*) Jewan Ram Gangaram & Co. *v.* Commissioners for Port of of Calcutta. **183 I.C. 565=12 R.C. 168=A.I.R. 1939 Cal. 308.**

Stay of suit.

———S. 151—*Stay of suit.*

S. 151, C.P. Code, cannot be invoked to stay a suit which cannot be legally stayed under S. 10, C.P. Code, (*Din Mahomed, J.*) Lakshmi Insurance Co., Ltd. *v.* B.K. Kaula. **A.I.R. 1940 Lah. 85.**

———S. 151—*Stay of suit—Application for—Plea of jurisdiction involving difficult questions—If can be dealt with.*

A plea as to the jurisdiction of a Court to entertain a suit involving questions of difficulty and importance should not be dealt with by an application for stay of the suit. It may be set down as a preliminary question of law for determination when the suit comes on for trial. (*Derbyshire, C.J. and Lort Williams, J.*) Abdul Shakoor *v.* Ebrahim Shakoor. **I.L.R. (1940) 1 Cal. 497=44 C.W.N. 460.**

———S. 151—*Stay of suit—Balance of convenience.*

In order to justify a stay of a suit it is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceeding in some other place. It must be proved to the satisfaction of the Court that either the expense or the difficulties of trial of the suit in the place in which it is brought are so great for the litigant applying for stay as to result in injustice being done. (*Sen, J.*) Ali Mahomed Ebrahim Shakoor *v.* Adam Hajee Peer Mohamed Essack. **I.L.R. (1939) 2 Cal. 199=187 I.C. 356=12 R.C. 569=A.I.R. 1940 Cal. 134.**

———S. 151—*Stay of suit—Court in United Provinces—If can issue stay order to a Court in another province.*

A Court in the United Provinces is not competent under S. 151, C.P. Code, to issue a stay order to a Court in another province. (*Collister and Bajpai, JJ.*) Darbar Patiala *v.* Narain Das Gulab Singh. **I.L.R. (1938) All. 650=176 I.C. 625=11 R.A. 139=1938 A.L.R. 666=1938 R.D. 561=1938 A.L.J. 481=1938 A.W.R. (H.C.) 313=A.I.R. 1938 All. 434.**

———S. 152—*Accidental omission—Preliminary decree against legal representatives of mortgagor—Correction of error—Power of Executing Court—Omission by legal representatives to object in previous execution application—Effect of.*

Where in a suit instituted against the legal representatives of a deceased mortgagor as such, the Court passes a personal decree against them, there is an accidental omission in the decree in failing to limit their liability. The Court has power under S. 152, C.P. Code, which it should exercise, to correct the omission in the decree, The Court is not debarred from exercising its power merely because that error has been brought to its notice in the course of an application in which the decree-holder is seeking to execute the decree.

An executing Court has power to rectify such error when it is the same Court which passed the decree. The omission by the legal representatives to raise an objection to the form of the decree in a previous execution application, does not operate as *res judicata.* Nor can the doctrine of estoppel be introduced when there is no ground for suggesting that the decree-holder has thereby altered his position to his detriment. (*McNair, J.*) Ganesh Prosad Agarwalla *v.* Monoharlal. **I.L.R. (1939) 1 Cal. 305=187 I.C. 801=12 R.C. 614=43 C.W.N. 490=A.I.R. 1940 Cal. 202.**

———S. 152—"Accidental slip or omission"—Omission to award further interest—Amendment—Power of Court when decree in accordance with judgment. *See* C. P. Code, Ss. 34 (2) and 152. **50 L.W. 719=(1939) 2 M.L.J. 751.**

———S. 152—Amendment of decree after expiry of 12 years—If revives right to execute decree. *See* C.P. Code, S. 48. **(1940) 1 M.L.J. 235 (F.B.).**

———S. 152—*Amendment of decree—Application for—If can be made after decree is barred.*

Although there is no limitation for an application to amend a decree under S. 152, C.P. Code, it is obvious that such an application must be made before the decree has become unexecutable owing to the 12 years limitation provided by S. 48, C.P. Code. (*Norman, I.C. S.*) Johri Lal *v.* Aziman. **1939 A.M.L.J. 27.**

———S. 152—*Amendment of decree—Effect on rights acquired after decree and before amendment.*

If a decree is subsequently amended, the amendment does not take effect from the date of the decree so as to affect the rights of a purchaser who has acquired the property after the decree and before the making of the amendment. (*Srivastava, Ag. C.J., Nanovutty and Zia-ul-Hasan, JJ.*) Indrani *v.* Maharaj Narain. **13 Luck. 101=166 I.C. 662=9 R.O. 324=1937 O.L.**

R. 33=1937 O.W.N. 25=A.I.R. 1937 Oudh 217 (F.B.).

———**S. 152**—Amendment of decree—Effect of—Appeal from decree—Limitation—Starting point—If extended up to date of amendment. *See* Limitation Act, Art. 152. **40 C.W.N. 83.**

———**S. 152**—*Amendment of decree—Limitation—Discretion of Court.*

The question of limitation does not arise in an application for amendment of a decree under S. 152, C.P. Code, and such amendment can be made at any time. But a party has no right under the Code to have a mistake corrected, whatever the circumstances may be, and the matter is left to the discretion of the Court and this discretion has to be exercised in view of the particular facts of each case. (*Coldstream, J.*) Mt. Santi *v.* Mulkh Raj. **175 I.C. 634=10 R.L. 28=39 P.L.R. 769=A.I.R. 1937 Lah. 894.**

———**S. 152**—*Amendment of decree—Right of purchaser of decree.*

A person who purchases a decree purchases the rights in the decree and if one of these rights vesting in the vendor is a right to have the decree amended under the law, this right also passes to vendee. (*Blecher, J.*) Jai Bhagwan Das *v.* Om Parkash. **182 I.C. 830=12 R.L. 77=41 P.L.R. 99=A.I.R. 1939 Lah. 255.**

———**S. 152**—Amendment of decree—Subordinate Court's decree merged in appellate decree *See* C.P. Code, Ss. 151 and 152. **A.I.R. 1938 Lah. 4.**

———**S. 152**—*Applicability—Consent decree or order—Mistakes in—Power of Court to correct.*

S. 152, C.P. Code, applies also to a consent decree; and a Court has jurisdiction under S. 152 to correct clerical or arithmetical mistakes in a consent decree or consent order. (*Beaumont, C.J.*) Karimunnissa Begam *v.* Kaji Mir Jamaluddin. **I.L.R. (1937) Bom. 837=39 Bom. L.R. 915=172 I.C. 170=10 R.B. 252=A.I.R. 1937 Bom. 457.**

———**S. 152**—Applicability and scope—Correction of accidental slip in decree—Effect of—Review—Distinction—Order correcting mistake in decree but passed on review application—If falls under S. 152 or O. 47—Original decree—If superseded. *See* Appeal—Competency. **1938 M.W.N. 250.**

———**S. 152**—*Applicability—Decree against dead persons—Amendment and decree against legal representatives—Appeal filed against first decree and not against second—Maintainability—Amendment.*

Where a decree passed against persons who are dead is amended on an application for review and a decree is passed against the legal representatives of the deceased and an appeal is filed against the first decree, the test in deciding whether the appeal has been correctly filed is not whether the error or accidental slip to be corrected in the first decree does or does not fall under S. 152, C.P. Code, but whether for the first decree a second decree is substituted. Where it appears that the first decree has been substituted by a second one, an appeal against the first decree is not competent. The matter which is before the appellate Court for decision is an appeal not against the first decree but an appeal against the second decree. 1929 Bom. 183, Rel. on. (*Davis, J.C. and Mehta, A.J.C.*) Lachmibai *v.* Doulatram. **29 S.L.R. 445=163 I.C. 30=8 R.S. 182=A.I.R. 1936 Sind 53.**

———**S. 152**—*Applicability—Decree in suit to enforce charge—Form of—Duty of Court—O. 34, Rr. 4 and 15—Decree in wrong form—Amendment.*

Where a suit is to enforce a charge, it is incumbent on the Court to pass a decree in terms of O. 34, R. 4, by reason of O. 34, R. 15, C.P. Code. If the Court fails to pass a decree in that form and directs a decree in wrong form to be passed, S. 152, C.P. Code, applies and the judgment and the decree must be amended. (*Venkatasubba Rao, J.*) Parthasarathy Rayanimgar *v.* Seetharamarayanimgar. **1937 M.W.N. 1013.**

———**S. 152**—*Application for amendment of decree—If entertainable in absence of opposite party.*

A Court has no jurisdiction to entertain an application for amendment of a decree on the merits in the absence of the opposite party. (*Din Mahomed, J.*) Puran Mal *v.* Parameshri Das. **42 P.L.R. 263=A.I.R. 1940 Lah. 182.**

———**S. 152**—Application under, to amend the decree—A defendant taxed with full pleader's fee, while it should have been one-fourth of the legal fee. *See* Oudh Civil Rules, Chap. VII, R. 289, para. 6. **1937 O.W.N. 1110.**

———**S. 152**—*Costs—Application for amendment of decree—Maintainability.*

An application for amendment of a decree is maintainable under S. 152, where the question of award of costs is not in dispute but only the method of assessment or any item awarded is in controversy. (*Mir Ahmad, A.J.C.*) Jagdish Lall *v.* Secretary of State. **165 I.C. 904 (1)=9 R. Pesh. 52 (2)=A.I.R. 1936 Pesh. 196.**

———**Ss. 152 and 115**—*Decree substantially amended—Remedy—Ground of jurisdiction, if open.*

Where a decree is amended and the amendment is substantial in that it alters the amount declared due on a mortgage, at least so far as the additional amount is concerned, there is a new decree from which there is an appeal. It canot therefore be revised. But in the appeal it is open to the appellant to challenge the decree on the ground of jurisdiction. (*Weston, I.C.S.*) Kanak Mal *v.* Myer Nissim Co., Ltd. **1938 A.M.L.J. 88.**

———**S. 152**—*Delay in applying—If bar to amendment of decree.*

Person against whom decree for costs had been passed did not appear in Court and hence had no knowledge of the discrepancies between judgment and decree. Consequently there was great delay in making the application for amendment of the decree.

Held, that in these circumstances the equities were not so much against the applicant and therefore the application should be granted. (*Mukerjee, Ag. C.J. and Ghosh, J.*) Hemangini Devi *v.* Sarat Chandra Basu. **171 I.C. 207=10 R.C. 245=A.I.R. 1937 Cal. 96.**

———**S. 152**—*Delay—Correction of error as to costs.*

An application to correct an error made in a decree awarding costs will be refused, if the applicant is guilty of laches. (*Din Mahomed, J.*) Puran Mal *v.* Parmeshri Das. **42 P.L.R. 263 =A.I.R. 1940 Lah. 182.**

———S. 152—*Delay—Third party acquiring interest in decree—Its subsequent amendment—Permissibility.*

An application for amendment of a decree to bring it into conformity with the judgment will be rejected, if it is made long after a third party acquires an interest in the decree by taking an assignment of the decree without being aware of the defect in it. (*Nasim Ali and Rau, JJ.*) Joy Chandra Das *v.* Gobinda Chandra Dhar. **44 C.W.N. 708.**

———S. 152—*Mistake made in both judgment and decree—Power of Court to correct.*

The Court has power to correct a mistake made in both the judgment and the decree. It should not refuse to correct the error on the ground that since the mistake appears in the judgment, the error in the decree is not accidental. (*Monroe, J.*) Kishen Lal *v.* Surja. **41 P.L.R. 119.**

———S. 152—*Mistake on part of Court officers —Decree-holder, if must show absence of laches on his part—Time limit for amendment of decree.*

There is no time limit prescribed by law within which an application for amendment of a decree under S. 152, C.P. Code, has got to be made. It is true that when there are undue laches on the part of the decree-holder or the interest of third parties has intervened, the Court should be reluctant in allowing amendments of this description. But where the omission of the schedule of the mortgaged properties in the final decree for sale was due to a mistake, if any, on the part of the Court officers and the misdescription in the name of the decree-holder was also a palpable error apparent on the face of it, the decree-holder applying for amendment of the decree is under no obligation to satisfy the Court that really there were no laches on his part. (*Derbyshire, C.J. and Mukherjea, J.*) Manohar Chandra Bandopadhyay *v.* Sudhi Priya Roy. **41 C.W.N. 1330 =65 C.L.J. 455.**

———S. 152—*Omission—Suit for possession and mesne profits—Court accepting oral request to determine mesne profits in execution—No mention as to mesne profits in judgment and decree—Amendment, whether can be granted.*

In a suit for possession and mesne profits, the plaintiff made an oral statement requesting the Court to determine the amount of mesne profits in the execution department and this prayer was accepted by the Court. The suit was decreed for possession but nothing was said either in the judgment or in the decree as to mesne profits. The plaintiff applied to the Court to add in the judgment and decree words to the effect that the amount of mesne profits would be determined on a separate application in the execution department.

Held, that the application must be allowed and that S. 152, C.P. Code, was wide enough to cover the case which was undoubtedly one of accidental omission of an order as to mesne profits in the judgment. (*Srivastava, Ag. C.J. and Zia-ul-Hasan, J.*) Puttu Lal *v.* Sripal Singh. **12**

Luck. 759=165 I.C. 799=9 R.O. 263=1936 O.W.N. 1229=A.I.R. 1937 Oudh 191.

———S. 152—*Power of Court—Decree in conformity with judgment—Judgment and decree a bit ambiguous—Amendment, application for—Maintainability.*

Where the decree follows the judgment in its entirety and there is no incidental slip or omission, an application for amendment of the decree under S. 152, C.P. Code, is not maintainable. If the judgment and the decree are a bit ambiguous, it is a matter of interpretation of the decree, having regard to the pleadings of the case and the other relevant papers, but it is not a matter for which an application for amendment could be made. (*Mukherjea, J.*) Harshamukhi Dasi *v.* Yunus Molla, **175 I.C. 177=10 R.C. 762=65 C.L.J. 452 A.I.R. 1938 Cal. 187.**

———S. 152—*Power of Court—Decree not agreeing with judgment—Amendment.*

The judgment in appeal directed 'the costs in appeal would be costs in the suit' and no mention was made of the costs of the lower Court. The decree was drawn up stating that costs of the original hearing and costs of re-trial ordered by the decree and the costs of appeal should abide by the result of the re-trial.

Held, that the language of the decree was different from that of judgment and as doubts and difficulties arose thereby, the decree could be amended to be in agreement with judgment. (*Mukerjee, Ag. C.J. and Ghosh, J.*) Hemangini Devi *v.* Sarat Chandra Basu. **171 I.C. 207= 10 R.C. 245=A.I.R. 1937 Cal. 96.**

———S. 152—Revision—Order rejecting amendment—Proper remedy. *See* C.P. Code, S. 115. **1936 A.M.L.J. 117.**

———S. 152—*Scope—Alteration of decree on the strength of accounts filed—If justified.*

Where after the passing of a decree, an application for its amendment on the strength of certain accounts newly filed, is allowed, and the decree amount is reduced, the Court in so doing has not merely corrected any clerical error but has altered the decree in a substantial manner, in the light of accounts produced; at a stage when the Court had no jurisdiction to receive fresh documentary evidence. The procedure is not justified by the powers of the Court under S. 152, C.P. Code. (*Mulla, J.*) Balchand *v.* Narain Dass. **179 I.C. 810=11 R.A. 390=1938 A.W.R. (H.C.) 773=1938 A.L.J. 1080=A.I.R. 1939 All. 96.**

———S. 152—*Scope—Error in consent decree —Rectification—Power of Court—Amended decree being appealable—Maintainability of revision.*

S. 152, C. P. Code, does not empower a Court to rectify a decree merely because the decree is wrong or unfair or because the parties have not realised their rights and put them before the Court in such a way as to enable a correct decree to be passed. The powers given under that section only relate to arithmetical mistakes or errors arising from an accidental slip or omission. And the Court has no jurisdiction under S. 152 to add to a term in a consent decree without the consent of both parties to the decree. Ordinarily the High Court will not entertain a revision petition when a remedy by way of appeal is available.

But in very special circumstances if there is a clear error relating to jurisdiction it may at its discretion do so. (1901) I.L.R. 24 Mad. 646, considered. (*Wadsworth, J.*) Adinarayana Rao Naidu *v.* Kothandarammayya Naidu. **1940 M.W.N. 184=51 L.W. 252=A.I.R. 1940 Mad. 538=(1940) 1 M.L.J. 310.**

———S. 152—*Wrong assessment of costs—Amendment of decree.*

The award of costs to which the party successful may be entitled is neither an arithmetical mistake nor an accidental slip or omission under S. 152, C. P. Code. A decree cannot, therefore, be amended under that section, if the method of assessment of costs is wrong. (*Din Mahomed, J.*) Puran Mal *v.* Parmeshri Das. **42 P.L.R. 263=A.I.R. 1940 Lah. 182.**

———S. 153—*Appeal—Dead man made party by mistake—Discretion of Court to implead legal representatives.*

The fact that a dead man had been made a party by mistake does not deprive the Court of the power to implead his legal representatives and proceed with the hearing of the appeal. S. 153 allows the Court a discretion to do so in a fit case, *e.g.*, where the mistake is a *bona fide* one. (*Mir Ahmad, A.J.C.*) Mubarak Shah *v.* Acharaj Ram. **165 I.C. 201=9 R. Pesh. 44=A.I.R. 1936 Pesh. 192.**

———S. 153—*Duty of Court—Application for leave to appeal as pauper not verified—Rejection—Propriety—Duty to give opportunity to correct defect.*

The verification in an application for leave to appeal *in forma pauperis* not being in the manner prescribed by the Code, the Court rejected it.

Held, in revision, that it was the duty of the Court to allow the applicant a chance to correct the defect in the verification before rejecting the application itself. (*Pollock, J.*) Bisanlal Gujrathi *v.* Kisan Vithoba Gujrathi. **169 I.C. 894=10 R.N. 32=A.I.R. 1937 Nag. 108.**

———S. 153 and O. 1, Rr. 9 and 10—*Power of Court under—Suit in name of non-existing or non-juristic person—Amendment by substitution—Power of Court—Misdescription—Dismissal of suit on ground of plaintiff being non-juristic person—Propriety.*

The plaint in a suit described the plaintiff as "Mandir Shri Deo Radhavallabji Bulakhichandji of Saugor" through Managers or trustees B.G. and nine others. The trial Court dismissed the suit on the ground that a temple was a non-juristic person and that the Muhatimimkars could not represent a person who was non-existent. The lower appellate Court held that it was at the most a case of a misdescription of the plaintiff, the real person being the deity through its trustee and allowed an amendment by striking the word "Mandir."

Held, in second appeal, that it would be possible to allow amendment of a plaint mistakenly brought in the name of a non-existing or non-juristic person, and that in any case the order allowing amendment could be upheld on the ground of misdescription.

Held further, that in a case where it would be still open to the plaintiff to bring another suit, there being no question of limitation involved, there was no injustice to the defendant in allowing the suit to proceed. S. 153, C. P. Code, being very wide in the general power of amendment which it gave. Courts are to be reluctant to non-suit parties on purely technical grounds if a way of escape can be found. (*Gruer, J.*) Ragunath Singh *v.* Radhavallabhji. **20 N.L.J. 65=10 R.N. 132=171 I.C. 763=I.L.R. (1937) Nag. 514 =A.I.R. 1937 Nag. 173.**

———S. 153—*"Proceeding"—Meaning of—Application for challan for depositing amounts for setting aside execution sale under O. 21, R. 89—Amount deposited and receipt filed along with memo. by depositor for purpose of setting aside sale—If "proceeding"—Absence of formal prayer for setting aside sale—Separate application not filed—Application to amend memorandum for including prayer to set aside sale beyond one month—Power of Court to allow.*

The term "proceeding" in S. 153, C. P. Code, must be interpreted as any application to a Court of justice, however made, "for aid in the enforcement of rights, for reliefs, for redress of injuries, for damages or for any remedial object." An application for a challan for depositing the necessary amounts for the purpose of setting aside an execution sale, and a memorandum accompanying the receipt obtained for the deposit are "proceedings" within the meaning of S. 153, C. P. Code, though they may or may not be treated as applications to set aside the sale under O. 21, R. 89, C. P. Code, for want of a formal prayer to set aside the sale. Such a challan or memorandum may be amended so as to add a prayer therein that the sale be set aside, under S. 153, C. P. Code. The fact that the period of limitation for making an independent application for setting aside the sale has expired is no ground for refusing the amendment under S. 153. (*Venkataramana Rao, J.*) Asan Kutti *v.* Koyyaman Kutti. **171 I.C. 646=1937 M.W.N. 277=45 L.W. 633=10 R.M. 377=A.I.R. 1937 Mad. 342=(1937) 1 M.L.J. 658.**

———Sch. I—*Rules in—Force of.*

Rules framed under Orders in the C. P. Code have the force of law and should be observed. It is incorrect to say that the Rules framed in the Code are not so imperative as the main sections of the Code. (*Varma, J.*) Mukhram Marwari *v.* Bateswar Mahton. **169 I.C. 805=10 R.P. 46=3 B.R. 621=A.I.R. 1937 Pat. 307.**

———O. 1, R. 1—*Applicability to joinder of causes of action.*

Rule 1 applies not only to the joinder of plaintiffs, but also to the joinder of causes of action in one suit. Where the defendant was the agent of two sets of principals appointed at different times and by different acts, and the principals sued him for rendition of accounts and having regard to the scope of agency some common questions of fact and law were bound to arise.

Held, that the principals could join their causes of action in one suit, and hence there was no misjoinder of parties. (*R. C. Mitter, J.*) Manindra Lal Chatterjee *v.* Hari Pada Ghose. **166 I.C. 608=9 R.C. 555=64 C.L.J. 587=41 C.W.N. 27=A I.R. 1936 Cal. 650.**

———O. 1, R. 1—*Co-sharers—Suit for ejectment—Non-joinder of mortgagee of share—Effect.*

The law lays down that where there are two or more co-sharers in any right, title or interest, all things permitted to be done by the possessors of the same must be done conjointly unless they have appointed an agent. The only exception allowed is in connection with a right to a separate share of rent or the right to bring a suit separately for a share of rent. The mortgagee of a share is a co-sharer, and he must therefore join the sharers in a suit for ejectment. A suit by the other co-sharers without joining the mortgagee is therefore incompetent. (*Drake Brockman, S.M. and Knox, J.M.*) FATIMA *v.* SIRAJUDDIN. **1936 R.D. 85.**

——O. 1, R. 1—*Same transaction—Relief in respect of, claimed by defendant against co-defendant—Such defendant if can be added as plaintiff.*

Where a defendant in a suit claims relief as against a co-defendant, in respect of the same transaction as that with reference to which the suit is brought, he could be added as a co-plaintiff for, if he brought a separate suit a common question of law and fact would arise. (*Wort, Ag. C. J. and Manohar Lall, J.*) NILURIPPATRA COAL CO., LTD. *v.* NORTH BURRAKKAR COAL CO., LTD. **178 I.C. 286=5 R.R. 79=11 R.P. 238=A.I.R. 1939 Pat. 157.**

——O. 1, R. 3—Applicability—Different mortgages on same property to same person—Single suit on both, joining both mortgagors—Competency. *See* T. P. ACT, S. 67-A. **A.I.R. 1937 Nag. 99.**

——O. 1, R. 3—*Joinder of defendants—Suit for damages for breach of contract against one defendant and for damages in tort against another.*

A decree for damages for breach of contract against one defendant and a decree for damages in tort against another defendant in respect of damages arising out of the same transaction can be passed in the same action. Defendants against whom damage is claimed on these two causes of action can be joined in the same suit. O. 1, R. 3 covers such a case and there is no misjoinder of defendants. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) P. B. BOSE *v.* M. R. N. CHETTIAR FIRM. **1938 Rang.L.R. 303=175 I.C. 804=11 R.R. 1=A.I.R 1938 Rang. 185 (S.B.).**

——O. 1, R. 3—*Joinder of several defendants—Conditions—Suit for possession against several defendants—Different causes of action—Breaches of tenancy agreements—Trespasses—Misjoinder of causes of action—O. 2, R. 6—If applies.*

O. 1, R. 3, C. P. Code, is the rule that makes provision for what must be the exceptional case of combining in one suit separate causes of action against several defendants. But it provides that, before that ought to be done, the right to relief must arise in respect of or out of the same 'act or transaction or series of acts or transactions.' In order to qualify under this rule, the case must be one in which the issue—be it an issue of fact or an issue of law on both—against each of the defendants is substantially the same. Where a plaintiff sued as an owner for possession of property, different defendants or sets of defendants who were in possession on the ground of either breaches of tenancy agreements, or trespasses, it was held that the suit in reality was an attempt to combine in one suit different suits against different defendants in respect of different pieces of property and upon different causes of action. Separate lettings to each tenant and separate 'squatting' by each squatter did not constitute the same act or the same series of acts or transactions. It was further held that the case is not one covered by O. 2, R. 6 for that rule does not apply to cases of misjoinder of causes of action but to cases where several causes of action have been properly joined in one suit and the causes of action so joined cannot conveniently be tried together. (*Braund, J.*) DAW HLA GYI *v.* MAUNG PO THAUNG. **1938 Rang.L.R. 397=178 I.C. 918=11 R.R. 291=A.I.R. 1938 Rang. 420.**

——O. 1, Rr. 3 and 5—*Misjoinder of defendants and causes of action—Every defendant if to be interested in all reliefs—Suit by son against father and alienees to declare debts not binding.*

Where the sons of a Hindu father sued him and his creditors and alienees for a declaration that the father's debts are immoral debts and hence not binding on them, the suit is not bad for misjoinder of defendants and causes of action, for the several alienations made by the father constitute 'series of acts or transactions' and they are the same series of acts or transactions because, as alleged by the plaintiffs, they were all vitiated by one circumstance, namely, that they were incurred for immoral purposes. This feature put all debts in one category, and the successive borrowings formed one series of acts or transactions. O. 1, R. 3 contemplates not only joinder of defendants but also causes of action. O. 1, R. 5 is to be read with R. 3 and hence it is not necessary for every defendant to be interested in all the reliefs in suit. (*Niyogi, J.*) PURUSHOTTAM *v.* BHAGWAN SAO. **I.L.R. (1939) Nag. 229=11 R.N. 211=1938 N.L.J. 210=178 I.C. 215=A.I.R. 1938 Nag. 461.**

——O. 1, R. 3—*Necessary party—Test for determination of.*

The allegations in the plaint alone should be looked into in order to come to a finding whether a certain defendant is or is not a necessary party. (*Abdur Rahman. J.*) DEVENDRA AYYAR *v.* MUTHU CHETTIAR. **178 I C. 191=47 L.W. 760=11 R.M. 416=1938 M.W.N. 75=A.I.R. 1938 Mad. 329.**

——O. 1 R. 3—*Suit for recovery of possession of land—Defendant claiming possession as tenant of another person—Such person and his predecessor-in-title, if proper parties.*

Where in a suit for recovery of possession of land, the defendant claims to be in possession of the land as a tenant of another person, such person may be a proper party to the suit but his predecessor-in-title can never be a proper party to the suit and an order directing him to be impleaded in suit is wrong. (*Baguley, J.*) N. E. S. P. A. CHETTYAR FIRM *v.* LETCHMANAN KONAN. **163 I.C. 630=9 R.R. 38=A.I.R. 1936 Rang. 241.**

——O. 1 R. 3—*Suit on promissory note—Subsequent surety, if can be joined with executants.*

The execution of a promissory note and the subsequent guarantee of the debt on that promissory note are a series of transactions within the meaning of O. 1, R. 3, C. P. Code. Hence in a suit on a promissory note the subsequent surety can be joined with the co-executants of the promissory note. (*Mosely, J.*) C. T. A. C. T. FIRM *v.* MAUNG AYE. **171 I. C. 527=10 R. R. 161=A.I.R. 1937 Rang. 197.**

——O. 1, Rr. 3 and 9—*Suit to declare easement right over pathway—Parties—Non-joinder of necessary party—Effect.*

Where the plaintiff claims a declaration that he is entitled to a right of easement in respect of a certain pathway, every owner of the servient tenement who denies the plaintiff's right, or is concerned in the obstruction of the pathway, is a necessary party; and any decree obtained in the absence of any such person is infructuous. (*Edgley, J.*) Rakhaldas Mukherji *v.* Kalipada Bhattacharji. **168 I.C. 164=9 R.C. 768=A.I.R. 1936 Cal. 534.**

——**O. 1, R. 8**—*Applicability—Arbitration proceedings—Application to set aside award under S. 14, Arbitration Act—Leave under O. 1, R. 8—If can be granted.*

O. 1, R. 8, C. P. Code, is a rule of procedure made for the purposes of convenience and saving of trouble and expense, and there is no reason why its provisions should not be applied to an application under S. 14 of the Arbitration Act to set aside an award on the ground of misconduct of the arbitrator. The Court has power to grant leave under O. 1, R. 8, to a petitioner applying under S. 14, Arbitration Act. A petition under S, 14 is one which can be heard and tried as a suit. (*B. J. Wadia, J.*) Abdul Gani Sumar *v.* The Reception Committee of the 48th Indian National Congress. **60 Bom. 645=163 I.C. 532=9 R.B. 29=38 Bom.L.R. 380=A.I.R. 1936 Bom. 259.**

——**O. 1, R. 8**—*Applicability—Suit against several defendants as representing large body of villagers—Prayer for declaration, possession and injunction and mesne profits—Maintainability—Decree for consolidated sum for mesne profits—Sustainability—Land held by defendants under* karaiyedu *tenure.*

A representative suit would lie as much in respect of a declaration as for an injunction. But the law is quite clear that the procedure pertaining to representative suits is inapplicable to action of debt to money claims or its liabilities in contract or in tort. The defendants were sued under O. 1, R. 8, C. P. Code, as representing a large number of villagers too numerous to be impleaded, individually, for a declaration, injunction and possession and mesne profits in respect of lands held by them under the *Karaiyedu* tenures, under which the lands were temporarily cultivated in separate shares by the co-sharers and were subject to periodic redistribution. The defendants' case was that in virtue of their holding certain other lands in the village under the *Karaiyedu* system, they were entitled to similar rights in the suit land. The lower Court decreed the suit and granted a decree for a consolidated sum as representing the mesne profits.

Held, that though on the facts found the plaintiffs were entitled to have recourse to O. 1, R. 8, C. P. Code, as there was sufficient community of interest as to render the rule applicable, the lower Court was wrong in passing a decree for mesne profits, as no attempt had been made to apportion the liability and as what had been found due was the amount supposed to be payable by the entire group. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Ratnaswami Nadar *v.* Prince of Arcot's Endowments, Trichinopoly. **181 I C. 117=11 R.M. 775=1938 M.W.N. 740=48 L W. 109=A.I.R. 1938 Mad. 755=(1938) 2 M.L.J. 148.**

——**O. 1, R. 8**—*Applicability—Suit on behalf of panchayat.*

The provisions of O. 1, R. 8, C. P. Code, are applicable to a suit brought on behalf of a panchayat of a village. If in such a suit all the members of the panchayat are not upon the record, and those who are upon the record have not obtained permission under O. 1, R. 8 to represent the other members of the panchayat who are interested in the suit, the suit is liable to be dismissed. (*Davis, J.C. and Lobo, J.*) Narumal Mulchand *v.* Rais Hashim. **I.L R. (1940) Kar. 190=187 I.C. 883=12 R.S. 263=A.I.R. 1940 Sind 63.**

——**O. 1, R. 8**—*Applicability—Various plaintiffs putting forward varying legal claims in support of right—Leave to maintain representative suit—If can be granted.*

O. 1, R. 8, C. P. Code, cannot be applied unless the plaintiffs truly represent the persons whom they seek to represent. Where in a suit by certain persons claiming to be representatives of a large body of persons entitled to be in occupation of the property in suit, varying legal claims are put forward, some claiming to be owners, some to be permanent tenants, some to be tenants entitled to certain benefits under the City Tenants' Protection Act and others having no other title than that of being mere trespassers, the Court will not allow the various plaintiffs to continue the suit, because they cannot be said truly to represent the whole body of occupants, unless they reduce themselves to the level of those among the occupants who have the weakest case to put forward, *i.e.*, unless the plaintiffs describe themselves as trespassers and nothing else, the Court will not be justified in granting permission to them under O. 1, R. 8, C. P. Code. (*King, J.*) Kuppuswamy *v.* Commissioner, Corporation of Madras. **49 L.W. 165=1939 M.W.N. 440=A.I.R. 1939 Mad. 428.**

——**O. 1, R. 8**—Applicability—Village-path or lane—*Osara* on—Suit in respect of—Right of private person—Leave under O. 1, R. 8—Proof of special damage—Necessity. *See* C. P. Code, S. 91 and O. 1, R. 8 **17 Pat L.T. 842.**

——**O. 1, R. 8**—*One plaintiff withdrawing from suit—Procedure.*

Where one of the plaintiffs permitted under O. 1, R. 8, C. P. Code, to bring a suit on behalf of a proprietary body intimates to the Court that he does not wish to prosecute the suit, the proper course for the Court to follow is to decide whether it will permit the remaining plaintiff or plaintiffs to continue to prosecute the suit, or whether it will insist upon the original number, in which case it should notify to the members of the proprietary body so that they may authorise another person to conduct the case on their behalf as a co-plaintiff. 54 M. 527, Foll. (*Tek Chand, J.*) Girdhari *v.* Ram Kala. **173 I.C. 679=10 R.L. 465=39 P.L.R. 407=A.I.R. 1937 Lah. 601.**

——**O. 1, R. 8**—*Parties to suit—Who are not.*

Where persons are not among those who have been appointed by the Court to defend a suit under O. 1, R. 8 on behalf of any class and they have not applied under sub-R. (2) of R. 8 to be impleaded as defendants in their own name, they are not parties to the suit in the real sense of the term and their absence from the record is wholly immaterial. (*Tek Chand and Dalip Singh, JJ.*) Fazl Rahim Khan *v.* Hussaina. **I.L.R. (1940) Lah. 199=188 I.C. 189=12 R.L. 507=A.I.R. 1939 Lah. 572.**

——**O. 1, R. 8**—*Representative suit—Death of some of representatives—Procedure.*

Two of the defendants who died *pendente lite* were out of the twelve representatives appointed under O. 1, R. 8.

Held, that the remaining representative defendants should have applied to the Court for directions as to whether they should conduct the case on behalf of all the defendants as before or whether any other persons should be added. (*Bhide, J.*) Mehtab *v.* Ahmad Khan. **A.I.R. 1940 Lah. 272.**

——**O. 1, R. 8**—*Representative suit—Principle underlying—Scope and object of O. 1, R. 8.*

The principle of a representative suit is to prevent a defendant from being vexed and molested by other similar suits by other persons of a particular body. Personal service cannot, obviously, be made, on non-existing persons and it is only when such existing persons are numerous that there may be another form of service such as public advertisement. Hence O. 1, R. 8, C, P. Code deals with persons in existence at the time the suit is brought and is to prevent an actual existing danger, namely the bringing of suits by such persons and not merely a possible future danger which may never mature, namely, the coming into existence at some unknown period of persons who become creditors of the defendant in that suit. (*Hamilton, J.*) Suraj Bakhsh Singh *v.* Thakur Das. **187 I.C. 90=1940 O.A. 260=1940 O.W.N. 285=12 R.O. 355=1940 O. L.R. 167=1940 A.W.R. (C.C.) 148=A.I.R. 1940 Oudh 200**

——**O. 1, R. 8**—*"Same interest"—Meaning of.*

What O. 1, R. 8, C. P. Code, contemplates is that the plaintiff or plaintiffs must have a common interest with those whom he or they claim to represent. All that is necessary is that there must be a common interest and a common grievance. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Manavedan *v.* Veerayan Unni. **189 I.C. 66=1939 M.W.N. 458=A.I.R. 1939 Mad. 751.**

——**O. 1, R. 8**—*Scope.*

O. 1, R. 8 does not draw a distinction between cases (1) in which the public or a large part of the public, are interested in the subject-matter of dispute and some persons sue, or are sued, on behalf of this indeterminate body; and (2) cases in which the persons interested are named in the record and only some of them have been permitted to sue or defend the suit as a matter of convenience, because after an order under O. 1, R. 8 has been passed, the only effective parties to the suit or appeal are the nominees of the Court and not the other persons interested even though their names are allowed to remain on the record. (*Tek Chand and Dalip Singh, JJ.*) Fazal Rahim Khan *v*, Hussaina. **I.L.R (1940) Lah. 199=188 I.C. 189=12 R.L. 507=A.I.R. 1939 Lah. 572.**

——**O. 1, R. 8**—Scope and effect of—If creates new right of suit—If over-ridden by S. 91—Village pathway—Obstruction—Right of individuals to sue in respect of. *See* C. P. Code, S. 91 and O. 1, R. 8. **19 Pat. 208.**

——**O. 1, R. 8**—*Scope—Suit in their own right by some members of a community—If affected.*

O. 1, R. 8, C. P. Code is only an enabling section and it does not debar some of the members of a community from maintaining a suit in their own right; but it may not affect persons who are no parties to it. (*Thom, C.J. and Ganga Nath, J.*) Ram Kali *v.* Munna Lal. **I.L.R. (1939) All. 754=184 I.C. 620=12 R.A. 260=1939 A.W.R. (H.C.) 515=1939 R.D. 390=1939 A.L.J. 821=A.I.R. 1939 All. 586.**

——**O. 1, R. 8**—Scope—Suit under O. 21, R. 63, by decree-holder—Prayer for declaration of bogus character of sale-deed and for setting aside the same as a fraud on creditors—Leave of Court to sue on behalf of all creditors—If essential. *See* T. P. Act (as amended in 1929), S. 53. **51 L.W. 608=(1940) 1 M.L.J. 872.**

——**O. 1, R. 8**—*Scope—Village temple—Alienation of properties by* pujaries—*Decree for sale—Representative suit on behalf of villagers for declaration of invalidity of alienation and for injunction to restrain sale—Maintainability.*

A suit by certain persons on behalf of the villagers of a village for a declaration that the suit property is Devadayam inam land belonging to a temple in the village, and that certain alienations thereof by the defendants, *pujaries* are void and not binding on the temple and for a permanent injunction restraining the alienees from bringing the property to sale in execution of a mortgage decree obtained by them, can be maintained under O. 1, R. 8, C. P. Code, apart from the provisions of S. 92, C. P. Code. The existence of a more effective remedy is obviously no answer to the suit and cannot justify its dismissal. (*Patanjali Sastri, J.*) Sri Veerabhadraswami *v.* Maya Kone **50 L.W 658=1939 M.W.N. 1137=A.I. R. 1940 Mad 81=(1939) 2 M.L.J. 920.**

——**O. 1, R. 8**—*Suit against a member of unregistered body—Procedure laid down by R. 8 not followed—Binding nature of decree.*

It is well settled that where a suit is brought on behalf of or against an association or an unregistered body, no one member thereof can alone sue or be sued. The suit must be brought by or against all the members thereof. A decree passed against one of the members will not be binding upon the unregistered body unless the procedure laid down by O. 1, R. 8, C. P. Code, has been followed. If that procedure is not followed, the result of the suit has no binding effect on those who are not on the record. An objection as to the procedure under O. 1, R. 8 not having been followed is not an objection as to non-joinder, or misjoinder of parties but goes to the root of the case. The prejudice is obvious if all the members of an association are made bound by a decree although they were never either parties to the suit or properly represented by some one else. (*Radha Krishna, J.*) Thakur Prasad Saksene *v.* Sadiq Husain Mehdi Husain Firm. **15 Luck. 253=12 R.O. 215=1940 A.W.R. (C.C.) 38=1939 O.L.R. 735=185 I.C. 330=1940 O.W.N. 7=A.I. R. 1940 Oudh 129.**

——**O. 1, R. 8**—*Suit for declaration that there is no public right of way over plaintiff's land—Members of public not impleaded—Defendants alone interested in opposing plaintiff's right—Suit, if bad.*

A suit for a declaration that there is no public right of way over the lands in suit belonging to the plaintiff is not bad although members of the public have not been impleaded in the way contemplated by O. 1, R. 8, C. P. Code, when according to the plaintiff the defendants alone are interested in opposing or resisting his rights. Whatever conclusion the Court may come to in the case, the decision can be binding only as between the parties to the suit. Other members of the public not being represented will not be affected one way or the other. (*Biswas, J.*) JAMINI RANJAN *v.* PROMODE RANJAN. **44 C.W. N. 1029.**

——**O. 1, R. 8**—Suit under—Death of one of several plaintiffs—Omission to implead legal representatives—Abatement. *See* C.P. CODE, O. 22. **17 P.L.T. 926.**

——**O 1, R. 8**—*Suit under—Frame of Suit by plaintiff in representative capacity for declaration of right of fishery against defendants in representative capacity—Direct claim by plaintiff against defendant for damages for actual trespass and for injunction against further trespass — If can be joined.*

There is no reason why a relief which neither the plaintiff claims in a representative capacity himself nor seeks to enforce against the defendants in any representative capacity should not be joined with the claim against the defendants in a representative capacity in respect of a declaration of right. There is no objection to the plaintiff maintaining his representative suit for a declaration of a right of fishery along with his direct claim for an injunction against the defendants restraining them from further trespass or for damages for trespass actually committed by them. (*Harries, C.J. and Rowland, J.*) RAJA BRAJA SUNDER DEB *v.* MANI BEHERA. **189 I.C. 543=6 B.R. 836=5 C.L.T. 35=A.I.R. 1940 Pat. 247.**

——**O. 1, R. 8**—Tort—Damages—Representative suit—Maintainability. *See* TORT—DAMAGES. **49 L.W. 664.**

——**O. 1, R. 9**—Applicability to mortgage suit. *See* C.P. CODE, O. 34, R. 1. **1940 O.A. 191=1940 O.W.N. 209.**

——**O. 1, Rr. 9 and 10**—*Applicability—Addition of party—Right of plaintiff to add at late stage—Duty of Court—Considerations.*

O. 1, R. 9, C. P. Code, lays down the general principle that a suit shall not be dismissed merely because of the non-joinder of some person necessary to suit; but admittedly an exception has been made by the Courts to those cases in which the plaintiff has persisted in two or more Courts in not adding the necessary party, even when he was given an opportunity to do so. It cannot be said that there is any rule of thumb by which a Court can say whether the plaintiff shall be allowed to add a party at a late stage or not, O. 1, R. 9, is still the rule to be applied at any stage of a proceeding, and a plaintiff should only be refused that equitable relief when his conduct has been such as to disentitle him to it. Nor will the Courts lightly dismiss a plaintiff's suit unless his conduct has been such that he does not deserve the consideration of the Courts. If he has behaved in a fair and straightforward manner and the adding of a party would not unduly prejudice the defendant, his suit should not be dismissed because of some technicality such as the adding of a party even if it be at a very late stage of the litigation. (*Horwill, J.*) NARAYANAN NAIR *v.* CHEKUNNI. **1937 M.W.N. 245=45 L.W. 648=170 I.C. 242=10 R.M. 164=A.I.R. 1937 Mad. 520.**

——**O. 1, R. 9**—*Joinder of parties—Power of Court—Party in whose favour joinder is necessary, refusing to allowing addition.*

Though a Court has a power to join a party under O. 1, R. 9 it cannot join a party, which the litigant in whose interest the joinder is to be made refuses to have the necessary parties joined. (*Stone, C.J. and Bose, J.*) GIRDHAR *v.* MOTILAL CHAMPALAL FIRM. **1940 N.L.J. 151.**

——**O. 1, R. 9 and O. 34, R. 9**—*Scope—Mortgage—Suit for redemption—Omission to implead some of the proprietors interested in equity of redemption—If fatal.*

It is not correct to say that O. 1, R. 9, C. P. Code, is subordinate to O. 34, R. 1, C. P. Code. The rule laid down in O. 34, R. 1, is merely a rule of procedure enacted with the object of avoiding multiplicity of suits. The combined effect of O. 1, R. 9 and O. 34, R. 1, is that all persons whose rights and interests may be adjudicated upon and determined in a mortgage suit ought to be added as parties, but the failure to add one or more such persons cannot have the effect of defeating the suit, if the Court, in their absence, can deal with the matters in controversy so far as regards the rights and interests of the parties actually before it. Whether the Court can do so or not must depend upon whether the presence of those not added is essential to enable the Court to adjudicate on the rights and interests of those actually before it. If no decree can be passed without affecting the rights of absent parties, the suit cannot proceed in their absence and must be dismissed. Otherwise the suit can proceed and the Court can determine the matters in controversey between the parties actually present, though the other parties might properly have been added as parties to the suit. Since it is beyond controversy that any one of several co-mortgagors can redeem a mortgage, the omission to implead some of the proprietors interested in the equity of redemption as parties to a suit for redemption of the mortgage is not fatal to the suit, when the presence of those persons is not essential to enable the Court to decide the matter in controversy in suit. (*Fazl Ali, J.*) NARAIN PANDEY *v.* SURAJBHAN LAL. **1937 P.W.N. 98=169 I.C 897=3 B.R. 678=10 R.P. 91=18 Pat. L.T. 289=A.I.R. 1937 Pat. 414.**

——**O. 1, R. 9**—*Scope—Non-joinder, if can entail dismissal of suit.*

O. 1, R. 9, C. P. Code, is wide in its scope and is subject to no qualification whatever. No suit whatever is to be defeated by the non-joinder of parties, and in every suit the Court is to proceed to do justice as between the parties thereto, no matter if there has been non-joinder. It is for the Court to decide in each case, whether it is possible to do justice as between the parties despite non-joinder. The answer to the question as to whether the suit falls to be dismissed in case of non-joinder because it is barred by limitation as against the party not impleaded, must depend on the facts and circumstances of each case. (***Thom, C.J. and Ganga Nath, J.***) KUNJ BEHARI LAL *v.* JAMNA KUNWAR. **181 I.C.**

448=11 R A. 566=1939 A.L.J. 123=1939 A.W. R. (H.C.) 214=A.I.R. 1939 All. 235.

——O. 1, R. 9—*Scope—Non-joinder of necessary party in spite of objection at earliest stage—Effect—Dismissal of suit—If justified.*

O. 1, R. 9 does not do away with the necessity for bringing a necessary party on the record. If a necessary party is not on the record the proper course is to apply to have him joined. If he is not brought on the record at all, or if when he is brought on the record the suit as against him is barred by limitation, the suit will be dismissed especially where the defendant has taken the objection even at the earliest possible moment and the plaintiff has not asked for amendment of the plaint for bringing on record such party. An executant of a promissory note governed by the Bengal School of Hindu Law died leaving two widows. Plaintiff impleaded one of them as defendants in his suit on the note. Even at the earliest moment, the impleaded widow pleaded that the other widow was a necessary party but the plaintiff did not implead her.

Held, that she was a necessary party and as she was not on record, the suit should be dismissed. (*McNair, J.*) PROBODH LAL MUKERJEE *v.* NILARATAN ADHIKARY. **62 Cal. 324=162 I.C. 323=8 R.C. 597=A.I.R. 1936 Cal. 193.**

——O. 1, R. 9—*Scope—Omission to follow procedure of amendment—Suit allowed to proceed to decree—Effect—Waiver of defect.*

Once a multifarious suit is allowed to proceed to trial and results in a decree, without the procedure for amendment prescribed by O. 1, R. 9, C. P. Code, being followed, the defect of multifariousness is considered to have been waived. (*Rowland, J.*) JANKI RAI *v.* RAM RAN BIJAYA PRASAD SINGH. **187 I.C. 49=12 R.P. 560=6 B.R. 416=20 Pat.L.T. 889=A.I.R. 1940 Pat. 145.**

——O. 1, Rr. 9 and 10—*Scope—Partnership—Suit for accounts—Non-joinder of one partner—Subsequent joinder as* pro forma *defendant after limitation—Dismissal of whole suit—Propriety and legality of.*

The fact that a claim is barred against a particular person does not prevent that person from being impleaded as a *pro forma* defendant to the suit. In a suit for accounts of a partnership a member of the partnership was not originally made a party. On a plea of non-joinder being raised, he was impleaded as a *pro forma* defendant, but that was not till after the period of limitation for the suit had expired. The lower Courts dismissed the suit on the grounds that (*i*) that the suit for accounts should be dismissed if all the partners were not impleaded; (*ii*) that a party could not be impleaded at all if any claim which might have been made against him be barred by limitation.

Held, that neither of the grounds was valid or correct and that the dismissal was consequently wrong and must be set aside. (*Allsop, J.*) JAMNA KUER *v.* KUNJ BEHARI LAL. **1937 A.W.R. 527=170 I.C. 743=1937 A.L.J. 571=10 R.A. 171=1937 A.L.R. 728=A.I.R. 1937 All. 502.**

——O 1, Rr. 9 and 10—Scope—Powers and duties of Court—Suit in name of non-existing or non-juristic person — Dismissal — Propriety—Amendment to rectify misdescription—Permissibility *See* C. P. CODE, S. 153 AND O. 1 RR. 9 AND 10. **20 N.L.J. 65.**

——O. 1, R. 9—*Scope—Suit by one of two persons jointly interested—Competency — Death of other party interested pending suit—Power of Court to decree suit—Subsequent events—Duty of Court to take notice of.*

The provisions of O. 1, R. 9, C. P. Code, are clear enough and make it incumbent on the Court to deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. It may be that a Court would in certain exceptional cases refrain from passing a decree in favour of a plaintiff when it finds that all the parties interested in the subject-matter of the suit have not been impleaded. But this rule can have no possible application to a case in which on account of the death of the other party jointly interested with the plaintiff, though it occurred during the pendency of the suit, the plaintiff has become the only person, when the case is taken up for trial. entitled to the relief claimed. Courts can take notice of events happening after the institution of the suit and at times it is essential for the Court to do so in order to avoid a further unnecessary litigation and to do complete justice between the parties. (*Abdur Rahman, J.*) SORNAMMAL *v.* THANGAVELU MUDALIAR. **1940 M.W.N. 429=A.I.R. 1940 Mad. 412=(1940) 1 M.L.J. 240.**

——O. 1, R. 10—*Addition of parties—Limits to Court's powers.*

Although under O. 1, R. 10, C. P. Code, the Court has wide powers to add parties to a suit or proceeding, merely because a person claims to be interested in a suit and wants to be added as a party, the Court would not ordinarily make him a party without the concurrence of the plaintiff. (*Wadia and Wassoodew, JJ.*) VIRBHADRAPPA *v.* SHEKABAI. **I.L.R. (1939) Bom. 232=182 I.C. 539=12 R.B. 15=41 Bom.L.R. 249=A.I.R. 1939 Bom. 188.**

——O. 1, R. 10 and O. 41, R. 23—*Addition of parties—Partition action—Necessary parties not impleaded—Procedure to be followed by appellate Court.*

Where the Appellate Court is of opinion that a certain person is a necessary party and ought to have been impleaded in a partition suit the proper procedure is to remand the case to the Court of first instance with a direction that the Court should implead that person and then proceed to dispose of the case. (*Braund, J.*) NOOR MOHAMMAD *v.* ZAINUL ABDIN. **1940 A.W. R. (H.C.) 375=A.I.R. 1940 All. 399**

——O. 1, R. 10—*Addition of party in appeal—If subject to appeal or revision.*

An order made by an appellate Court adding a third person as a party is not appealable as an order under O. 1, R. 10 does not find a place in O. 43, R. 1. It is also not one which can be assailed in revision because it is clearly an interlocutory order. (*Thomas, C.J. and Yorke, J.*) BRIJ MANOHAR *v.* RAMANAND. **14 Luck. 447=179 I.C. 1004=1939 O.A. 228=1939 O.L. R. 105=11 R.O. 223=1939 O.W.N. 181=A.I.R. 1939 Oudh 102.**

——O. 1, R. 10—*Applicability — Defendant dead prior to suit—Joinder of heir—Procedure—O. 22, R. 10—Applicability.*

A suit was instituted against a person who was however subsequently found already dead. The person in whom the property of the deceased vested was made a party to the suit under O. 1, R. 10. No application was made under O. 22.

Held, that O. 22, R. 10 of the Code had no application as the person sued was already dead before the institution of suit. If the plaintiff, being ignorant of the death of defendant, joined him as a party to the suit he was in no worse position than that in which he would have been had he failed to join defendant if alive. He could at any time before the period of limitation for instituting the suit against defendant join him if he was alive and could likewise join persons who had succeeded to his estate if he was dead. A person in whom the property of deceased vested could therefore be joined as party to the suit under O. 1, R. 10. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) GORDHANDAS *v.* RIJHIBAI. **168 I.C. 860=9 R.S. 251=A.I.R. 1937 Sind 47.**

——**O. 1, R. 10 and O. 6, R. 17**—*Applicability—Plaint instituted by living person in name of and verified on behalf of, dead person—Substitution of name of living person—Permissibility—Gross neglect—Effect of.*

Where a person, who had instituted a suit in the name of a dead person and had verified the plaint on behalf of the dead person, applied under O. 1, R. 10, O. 6, R. 17 and S. 151 for leave to amend the description in the plaint, and it was found that he was guilty of gross neglect in misdescribing himself.

Held, that a living person's name could not be substituted in the place of a dead person under O. 1, R. 10. Nor would it be proper for the Court to exercise its discretionary jurisdiction in favour of the applicant to amend the plaint under O. 6, R. 17 as he was guilty of gross neglect. (*Rupchand Bilaram, A.J.C.*) NOORBHOY ALIBHOY HALAI *v.* SECRETARY OF STATE. **168 I C. 784=9 R S. 244=31 S.L.R. 406=A.I.R. 1937 Sind 92.**

——**O. 1, R. 10**—Applicability and scope—Suit for money against two defendants—Agreement between parties to take accounts, each agreeing to pay other what might be found due—Amount found due to one defendant by another—Transposition of former as plaintiff and decree for sum in his favour against other defendant—Power of Court to make—Inherent powers. *See* C. P. CODE, S. 151. **(1937) 1 M L.J. 672.**

——**O. 1, R. 10**—*Application under—Court disposing it of under O. 22, R. 10—Appeal.*

When an application is made under O. 1, R. 10 but it is dealt with by the Court also under O. 22, R. 10, an appeal lies against the order on the application. (*Venkataramana Rao, J.*) MEYYAPPA CHETTIAR *v.* SEETHACHI ACHI. **171 I C. 145=10 R.M. 280=A.I.R. 1937 Mad. 200=(1937) 2 M.L. J. 279.**

——**O. 1, R. 10**—Ex parte *decree—Application by necessary parties not impleaded as such for addition and for permission to apply to set aside* ex parte *decree—Maintainability—Duty of Court.*

Where a suit is decreed *ex parte* and persons entitled to be added as parties to the suit make an application to add them as parties and to set aside the *ex parte* decree, the Court should add them as parties and give them an opportunity to set aside the *ex parte* decree. (*Rowland, J.*) RAMESHWAR BHAGAT *v.* THAKUR JEBAN NARAYAN SINGH. **166 I.C. 794=9 R.P. 353=3 B.R. 231=18 Pat.L.T 278=1936 P.W.N. 708=A.I.R. 1937 Pat. 49.**

——**O. 1, R. 10**—*Grounds for permitting amendment—Suit on behalf of a Government Ward—Plaintiff's name wrongly given—Amendment, if can be allowed—C. P. Court of Wards Act* (1889), *Ss. 30 and 27.*

O. 1, R. 10, C. P. Code, on a plain reading only contemplates that a suit should have been filed in the name of a wrong person irrespective of whether he is a living or a dead person. Such a defect is capable of being cured, if the mistake is shown to have occurred in good faith and provided that in permitting the amendment no injustice results to the defendant. In a suit on behalf of a Government Ward under S. 30 of the C. P. Court of Wards Act, the real plaintiff is the manager and he sues on behalf of the Ward. Any mistake in the name of the Ward does not affect the substance of the suit and its correction cannot prejudice the defendant. (*Niyogi, J.*) KARIMULLAH KHAN *v.* BHANU PRATAP SINGH. **175 I.C. 911=11 R.N. 14=A.I.R. 1938 Nag. 458.**

——**O. 1, R. 10 and O. 41, R. 20**—*Joinder of parties in appeal—Provision of law applicable—Party to suit not impleaded in appeal—Addition after right of appeal is time barred.*

The proper Order and Rule applicable to the joinder of parties in appeal is O. 41, R. 20 and not O. 1, R. 10. A party against whom a suit has been dismissed and as against whom the right of appeal has become barred, is not interested in the result of the appeal and hence cannot be added in appeal under O. 41, R. 20. (*Davis, J.C. and Lobo, A.J.C.*) THADHI *v.* ABDUL HUSAIN. **31 S.L.R. 486=171 I.C. 315=10 R.S. 100=A.I.R. 1937 Sind 236.**

——**O. 1, R. 10**—*Mortgage by Hindu father—Suit on—Son—If necessary party—Application by son to be joined as party—If to be allowed.*

A member of a joint Hindu family who contends that the action of the manager was beyond his powers as manager is not properly represented by the manager, and ought to be joined as a party. A son is not a necessary party to a suit against his father on a mortgage of joint family property as he can bring a suit for declaration that the mortgage decree is not binding on his share. But when he himself applies to be made a defendant contesting the binding nature of the mortgage, he should be joined as a proper party to the suit under O. 1, R. 10, C. P. Code, to effectually and completely settle the questions involved in the suit and to avoid multiplicity of proceedings. (*Pollock, J.*) MOTIRAM *v.* LAL CHAND. **I L.R. (1937) Nag. 366=170 I.C. 192=10 R.N. 52=A.I.R. 1937 Nag. 121.**

——**O. 1, R. 10**—*Mortgage suit—Final decree—Subsequent addition of equitable mortgagee not impleaded in suit—Powers of Court.*

The Court has ample power under O. 1, R. 10, C. P. Code, even after the passing of the final decree in a mortgage suit to order that a person whose presence may be necessary to enable the Court effectually and completely to adjudicate upon the questions involved in the suit be added as a party to the proceedings. If it appears that there is an equitable mortgagee who, under O. 34, R. 1, C. P. Code, was a necessary party, and that he ought to be joined as a party, the Court can add him as a party although the final judgment has been passed in the suit. (*MacNair, J.*) ANNAPURNA ROY *v.* RAM RANJAN MULLICK. **40 C.W.N. 1173.**

——**O. 1, R. 10**—Mortgage suit—Holder of money decree against mortgagor getting receiver appointed in execution—Power of Court to implead him as party in mortgage suit. *See* C.P. CODE, O. 34, R, 1. **40 C.W.N. 974.**

——**O. 1, R. 10**—Mortgage suit—Omission to implead interested party—If fatal. *See* C. P. CODE, O. 34, R. 1. **A.I.R. 1936 Pat. 153.**

——**O. 1, R. 10**—*Necessary parties added as co-defendants instead of as co-plaintiffs—Grant of appropriate relief.*

One or more of several persons jointly interested can bring an action in respect of joint property and if their right to sue is challenged can amend by joining their co-contractors as plaintiffs if they will consent or as co-defendants if they will not. Nor indeed would it matter that a wrong person had originally sued though he had no cause of action. Once all the parties are before the Court the Court can make the appropriate order and should give judgment in favour of all the persons interested whether they be joined as plaintiffs or defendants. A person executed a mortgage in favour of a firm. Subsequently some of the partners retired assigning their interest in favour of the remaining partners by unregistered deed. The remaining partners brought a suit on the mortgage and as an objection was brought to the maintainability of the suit, the plaint was amended bringing on record the retiring partners as defendants.

Held, that it would have been more satisfactory that the retiring partners should have been made co-plaintiffs instead of co-defendants, but even otherwise as whole of the necessary parties were before the Court, appropriate relief could be granted.

Held, also, that the judgment should be given in favour of all the original partners, though some of them had been made defendants. (*Lord Porter.*) MONGHI BAI *v.* COOVERJI UMERSEY. **66 I.A. 210=I.L.R. (1939) Bom. 503=I L.R. (1939) Kar.(P.C.) 295=1940 P.W.N. 19=11 R.P.C. 295 =1939 O.W.N. 626=1939 A.W.R. (P.C.) 136= 70 C L.J. 261=41 Bom.L.R. 1127=50 L.W. 926 =1939 A.L.J. 863=182 I.C. 1=1939 O.L.R. 392 =5 B.R. 750=43 C.W.N. 869=A.I.R. 1939 P.C. 170=(1939) 2 M.L.J. 366 (P.C.).**

——**O. 1, R. 10**—*Parties improperly added—Order 'discharging' them—Propriety—Order for costs—Power of Court.*

Where parties are added as defendants at the instance of a co-defendant, and no cause of action is found against them, the proper order to pass is to strike off the names of those defendants under O. 1, R. 10 (2), C. P. Code, and not to discharge them. When such defendants are struck off under O. 1, R. 10 (2) as being improperly added, Court can impose such terms as it considers proper and can order the party to pay costs to such defendants. This power of the Court is analogous to its power of adjourning proceedings in which case the Court is empowered to make the defaulting party to pay costs to other party and there is no limitation as to the amount which can be awarded under such circumstances. (*Jai Lal, J.*) ALLAHABAD BANK, LTD., LAHORE *v.* RAJA RAM. **171 I.C. 570=39 P.L.R 342=10 R L. 215= A.I.R. 1937 Lah. 67.**

——**O. 1, R. 10**—Pro forma *defendant becoming co-plaintiff on his own application—If adopts all the statements made in plaint.*

When a *pro forma* defendant becomes on his own application a co-plaintiff, he adopts all the statements made in the plaint which support the cause of action and those statements only. He does not adopt statements made therein which are not essential to the cause of action as stated in the plaint. (*R. C. Mitter, J.*) SURAJ SINGH *v.* KALIDASI DASI. **41 C.W.N. 501.**

——**O. 1, R. 10**—Reference under Cantonments House Accommodation Act (VI of 1923), S. 15—Mortgagee not in possession of property acquired on lease—If to be added as party. *See* CANTONMENTS HOUSE ACCOMMODATION ACT, S. 15. **167 I.C. 158=9 R. Pesh. 80=A.I.R. 1937 Pesh. 17.**

——**O. 1, R. 10**—*Rent suit—Claim by intervener alleging purchase of holding to be added as party—Statutory recognition taking effect after suit—If bar to joinder.*

A Court has, under O. 1, R. 10, C. P. Code, power to add any person as party whose presence is necessary in order to enable a Court efficiently and completely to adjudicate upon and settle the questions involved in the suit. This power is given to the Court at any stage of the proceedings. Where in a rent suit the intervener, alleging purchase of the holding claims that he should be added as party to the suit, the Court must add the intervener as party even though statutory recognition as transferee has taken place after the institution of the suit. (*Rowland, J.*) RAMESHWAR BHAGAT *v.* THAKUR JEBAN NARAYAN SINGH. **166 I.C. 794=9 R.P. 353=3 B.R. 231= 18 Pat.L.T. 278=1936 P.W.N. 708=A.I.R. 1937 Pat. 49.**

——**O. 1, R. 10**—*Striking out name of necessary party—Propriety—Proper procedure.*

When O. 1, R. 10, C. P. Code, provides that the Court may strike out the name of party who has been improperly joined as plaintiff or defendant, these words have reference to the suit as framed. It was certainly never intended that the claim of a necessary party should be first tried and that his name should then be struck off the record on the ground that his claim ought to be dismissed before any decree has been passed. Such a procedure can only lead to multiplicity of proceedings. Where, therefore, several persons claiming to be owners of the equity of redemption sue for redemption of the mortgage, the Court cannot strike out the names of some of them under O. 1, R. 10, C. P. Code, on the ground that they had not been properly joined as parties to the suit. The correct procedure would be to keep the names of all the plaintiffs on the record until a preliminary decree is passed. If the Court is then of opinion that any of the claims have failed, these claims can then be dismissed as part of the preliminary decree. (*Beckett, J.*) MANOHAR LAL *v.* ROSAN LAL **179 I.C. 685=11 R.L. 608 =40 P.L.R. 805=A.I.R. 1938 Lah. 799.**

——**O. 1, R. 10 and O. 30, Rr. 3 and 8**—*Suit against firm—Person interested in firm but not served with summons—Right to intervene and defend on merits—Denial of being partner—Effect*

—*Power of Court to implead against plaintiff's wishes.*

In a suit against a firm under O. 30, C. P. Code, it is not possible for a person who has not been served with a writ but who apprehends that at some future time the plaintiff will eventually seek to hold him liable in execution proceedings on the basis of partnership, to enter appearance and defend the suit on the merits unless he admits that he is not in fact a partner. Neither O. 30, C. P. Code, nor R. 20 of the Calcutta High Court Rules (Original Side), Ch. VIII, permits of such a course. But when such person is interested in some way or other in the assets of the firm, and denies that he is a partner in the firm, he can apply to the Court under O. 1, R. 10, C. P. Code, and it will be proper for the Court to add him as a party to the suit even in opposition to the wishes of the plaintiff. (*Panckridge, J.*) DHAI *v.* BHADARBULL HARGOBINDROY. **40 C. W. N. 677.**

——**O. 1, R. 10**—*Suit by assignee of bond under void assignment—Assignor, if can be substituted as plaintiff.*

A suit instituted by an assignee of a bond under an assignment which is void under S. 136, T. P. Act, can be said to have been instituted in the name of a wrong person, and where the assignee has acted under a *bona fide* mistake, the Court can remove the name of the assignee and order substitution of the name of the assignor as plaintiff under O. 1, R. 10, C. P. Code. (*Srivastava and Nanavutty, JJ.*) SITLA BUX SINGH *v.* MAHABIR PRASAD. **12 Luck. 150=162 I.C. 229=8 R.O. 359=1936 O. W. N. 414=A.I.R. 1936 Oudh 275.**

——**O. 1, R. 10**—*Transposition of defendant as plaintiff—When to be made.*

O. 1, R. 10 is in the widest possible language and transposition of a defendant to the side of the plaintiff should be adopted in all cases where it is necessary for the complete adjudication upon the question involved in the suit and to avoid multiplicity of proceedings. A.I.R. 1932 Pat. 346, Ref. (*Wort, J.*) LAL NARAIN SINGH *v.* UGESHWARDHARI SINGH. **160 I.C. 149=8 R.P. 340=A.I.R. 1936 Pat. 107.**

——**O. 1, R 10**—*Transposition of parties—If can be permitted in second appeal.*

The Court, including the High Court in second appeal has power at any stage to permit a transposition of parties under O. 1, R. 10, C. P. Code. This power is discretionary and its use will, of course, depend upon the circumstances of each case. The purpose of the rule is to enable the Court to be in a position to determine the real questions in controversy between the parties and avoid allowing a mere technical objection successfully to defeat a just claim. A respondent may be transposed as an appellant or a defendant made a plaintiff. (*Verma and Rowland, JJ.*) RADHABALLABH PRASAD *v.* RAGHUNATH LAL. **180 I.C. 833=5 B.R. 496=11 R.P. 543=1939 P.W. N. 829=A.I.R. 1939 Pat. 397.**

——**O. 1, R. 10**—*Transposition of parties—Suit by assignee of mortgage right—Mortgagee impleaded as defendant — Assignment found invalid owing to registration being void—Application to transpose mortgagee as plaintiff in appeal and for decree on mortgage—Maintainability.*

Where in a suit brought by an assignee of a mortgage right to enforce the mortgage, impleading the mortgagee assignor also as a defendant, it is found that the assignment deed is invalid as a result of invalid registration, if an application is made in appeal to transpose the mortgagee-assignor as a plaintiff and to grant a decree on the foot of the mortgage, the Court will not grant the application at that stage, when the result is to change the character of the suit which has proceeded on the footing that the mortgagee has accepted the assignment as binding on him. If that is reopened and transposition effected at that stage, it would complicate matters and hence the transposition should not be made. (*Pandrang Row and Krishnaswamy Ayyangar, JJ.*) LAKSHMI NARASIMHACHARIAR *v.* MANGAMMAL. **49 L.W. 387 (2)=1939 M.W.N. 554=A.I.R. 1939 Mad. 467.**

——**O. 1, R. 10**—*Written statement requesting* inter alia *to add parties—If an application.*

A written statement which *inter alia* requests the Court to add certain persons as parties is an application under O. 1, R. 10, C. P. Code. (*Mya Bu and Baguley, JJ.*) MAHOMED SULTAN *v.* ABDUL RAHMAN. **171 I.C. 876=10 R.R. 194=A.I.R. 1937 Rang. 175.**

——**O. 1, R. 10 (1)**—*Applicability*—"Bona fide *mistake" — Redemption of mortgage—Suit by grandson of mortgagor impleading sons as defendants—Allegation that latter having also right to redeem refused to join in suit—Finding that plaintiff had no right to sue—Dismissal of suit—Propriety—Sons* ex parte—*Power of Court to transpose as plaintiffs or to decree in their favour.*

In a suit for redemption of a mortgage filed by the grandson of the mortgagor, it was alleged in the plaint that defendants 8 and 9, the sons of the mortgagor were also entitled to redeem but that they refused to join the plaintiff in the suit as they themselves claimed no interest in the property. The defendants 8 and 9 remained *ex parte* and did not ask for any relief or put forward any claim. The Court found that the plaintiff had no cause of action and that the only persons entitled to redeem were defendants 8 and 9 and dismissed the suit.

Held, that it could not be said that there was any *bona fide* mistake as contemplated by O. 1, R. 10, C. P. Code, and that in the absence of an application or request by the defendants 8 and 9 the Court could neither transpose them as plaintiffs nor pass a decree in their favour and the only right and proper course was to dismiss the suit. (*Horwill, J.*) ALAGIRISAMI NAIK *v.* SIKANDAR ROWTHER. **166 I.C 730=9 R.M. 393=1936 M.W.N. 1184=44 L.W. 563=A.I.R. 1936 Mad. 960=71 M L.J. 614.**

——**O. 1, R. 10 (2)**—*Addition of new party—Conditions justifying.*

The Court in making an order directing a new party to be added under O. 1, R. 10 (2), C. P. Code, must be satisfied either that the party ought to have been joined as plaintiff or defendant, or that the presence of that party is necessary to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, so that they shall not again be raised in that or any other suit between the parties to the suit or any of them and third parties. (*Kunhi Raman, J.*) **MANGACHARYULU *v.***

KRISHNAMACHARYULU. **50 L.W. 777=1939 M. W.N. 1233=A.I.R. 1940 Mad. 225=(1939) 2 M.L.J. 872.**

——**O. 1, R. 10 (2)**—*Addition of parties—Suit under S. 92, for framing of scheme—Close relation of creator of trust claiming voice in management of trust property applying to be impleaded.*

In a suit under S. 92, the plaintiff proposed a scheme for the management of a certain charitable trust. The Deputy Commissioner being in charge of the trust property was made a defendant. He did not object to the proposed scheme. A close relation of the person who created the trusts moved the lower Court to be added as a defendant in the suit on the ground that he possessed the necessary educational qualification for being appointed as one of the trustees for the trust created by his ancestor and if he was not so added, the scheme would go unchallenged and would be accepted by the Court, in which case he would have no right of appeal. It was contended by the applicant that he was not only a beneficiary but was also a person entitled to have some voice in the settlement of any scheme for the management of the trusts created by his ancestor.

Held, such a person should be added as a defendant in suit in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. (*Nanavutty and Zia-ul-Hasan, JJ.*) SURESH SINGH *v.* LEGAL REMEMBRANCER U. P. GOVERNMENT. **1937 O.W. N. 271=167 I.C. 828=9 R.O. 402=1937 O.L.R. 160=A.I.R. 1937 Oudh 229.**

——**O. 1, R. 10 (2)**—*Discretion of Court—Addition of parties—Claim to vacant site against Municipality—Plea of title in Government—Latter—If necessary party—Addition as party—If justified.*

In cases where a plea of *jus tertii* is set up, it is generally desirable to make the person whose title is set up a party to the suit to avoid multiplicity of litigation. In cases where the interests of the public or involved and the ownership of the Government is in question, it is very desirable and sometimes necessary that the Government should be made a party to the suit. In a suit for declaration of the plaintiff's title and ownership to a vacant site, the defendant Municipality pleaded that the site in question was "kuntha" and "rastha", a public pathway, that the title thereto was in the Government and that the latter should therefore be made a party. The lower Court ordered that the Government should be made a party to the suit.

Held, in revision, that since a declaration of absolute title was claimed as against the Municipality in whom the property was for the time being vested for specific purposes, without the freehold vesting in them, it was desirable that the person really interested in the property *i.e.*, Government, should be made a party to the suit; and since the lower Court had exercised its discretion correctly, the High Court would not interfere with such exercise in revision. (*Venkataramana Rao, J.*) KRISHNASWAMI NAIDU *v.* MUNICIPAL COUNCIL BELLARY. **45 L.W. 731=170 I.C. 919=10 R.M. 249=A.I.R. 1937 Mad. 641=(1937) 1 M.L.J. 597.**

——**O. 1, R. 10 (2)**—*Object and scope of—Suit for rent by* thicadar *against tenant—Application by another to be impleaded as party as being the present* thicadar *entitled to rent—If to be allowed.*

O. 1, R. 10, C. P. Code, has been enacted for the purpose of avoiding multiplicity of suits. In a suit for rent by a *thicadar* against some tenants, the defendants pleaded that the plaintiff's *thica* lease had expired long before the suit, that the petitioner was the present *thicadar* to whom they were paying rent. The petitioner, who was also actually summoned as a witness to prove that he was the present *thicadar* applied to be added as an intervener, but his application was rejected.

Held, that if it was important to decide who should pay rent, it might be equally important to decide who should receive rent, and the petitioner should therefore be added as a defendant. (*Varma, J.*) NAGENDRA PRASAD *v.* BADRI LAL. **21 Pat L.T. 329.**

——**O. 1, R. 10 (2)**—*Order awarding costs—Appeal.*

No appeal lies from an order awarding costs under O. 1, R. 10 (2), C. P. Code. (*Jai Lal, J.*) ALLAHABAD BANK LTD, LAHORE *v* RAJA RAM. **171 I C. 570=10 R. L. 215=39 P. L. R. 342=A.I.R. 1937 Lah. 67.**

——**O. 1, R. 10 (2)**—*Partition suit—Mortgagee of undivided share—Power of Court to add as party.*

Under O. 1, R. 10 (2), C. P. Code, the Court has power to add as a party in a partition suit a mortgagee of an undivided share of the property, where the extent of the mortgagor's share is in dispute. There can be no doubt that the addition of the mortgagee as a party in the suit would avoid multiplicity of proceedings. (*Rau and Akram, JJ.*) PROFULLA KUMAR *v.* DHIRENDRA LALL. **I.L.R. (1940) 2 Cal. 37=189 I.C. 90=71 C. L.J. 549=44 C.W.N. 589=A.I.R. 1940 Cal. 284.**

——**O 1, R. 10 (2)**—*Person added as plaintiff—Interest adverse to plaintiff—Striking out as plaintiff and transposing as defendant as necessary party—Expediency.*

Where the petitioner was added as the second plaintiff in a suit by the first plaintiff for recovering a certain amount from the defendants who were the owners of certain villages charged with the payment of an annuity and the petitioner alleged that the first plaintiff added him without his knowledge and that the first plaintiff's interests were adverse to that of his own,

Held, that since there was no right to relief alleged to exist in the petitioner jointly, severally or in the alternative, and as the petitioner claimed adversely also to the first plaintiff in the suit, it would be expedient to strike out his name as second plaintiff. But as he was clearly a person whose presence before the Court was necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit, he could be transposed as a defendant in the suit. *Mathews*: In re, *Oates* v. *Mooney*, (1905) 2 Ch. 460, followed. Where several disputes arise out of one subject matter, all the parties interested in such disputes should be brought before the Court and all questions in controversy between them should be completely settled in that action. (*Patanjali Sastri, J.*) VANJIAPPA GOUNDAN *v.* ANNAMALAI CHETTIAR. **188 I.C. 379=13 R.M. 11=1939 M.W.N. 948=50 L.W. 494=A.I.R. 1940 Mad. 69=(1939) 2 M.L.J. 551.**

——**O. 1, R. 10 (2) and S. 107**—*Power of Court —Addition of party as respondent in the appeal.*

The Court has ample powers under the provisions of O. 1, R. 10 (*2*) read with S. 107, C. P. Code, to implead any person in the appeal as a respondent who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to adjudicate upon all the questions involved in the appeal. effectively. (*Abdur Rahman, J.*) Devendra Ayyar *v.* Muthu Chettiar. **178 I.C. 191=11 R.M. 416=47 L.W, 760=1938 M.W.N. 75=A.I R. 1938 Mad. 329.**

——**O. 1, R. 10 (2)**—*Power of Court to act* suo motu—*Grounds for adding party.*

Under O. 1, R. 10 (2) it is not necessary that there should be an application from the parties; the rule, however, does suggest that the Court will not act on its own initiative unless the presence of the party added is necessary in order to settle effectually and completely and to adjudicate upon and settle all the questions involved in the suit. (*Darling, S.M. and Bomford, J. M.*) Hira Lal Roy Chowdhury *v.* Annapurna. **1938 A.L.J. (Supp.) 9=1938 A.W.R. B.R. 97=1938 R.D. 188.**

——**O. 1, R. 10 (2)**—*Scope—Attachment of Hindu joint family property in execution of decree—Subsequent suit by female member claiming charge—Sale of part of property to attaching decree-holder—Application by latter to be added as party to maintenance suit—If to be allowed.*

A attached all the joint family property of two minors in execution of his money decree. Subsequently a maintenance suit was brought by the grandmother of the minors claiming a charge on the same property. The guardian of minors conveyed some property to *A* to avoid the Court-sale. *A* therefore applied to be joined as a party to the maintenance suit. The application was rejected by the Court on ground that the sale to *A* was *pendente lite*. On revision,

Held, that *A* was a proper party to the suit since at the time the suit was filed the property which the grandmother sought to be made the subject of the charge in her suit was under attachment at the instance of *A* and it was obviously just and convenient to decide in her suit whether the grandmother's right could override that of *A's*. (*Stodart J.*) Ranganayaki Ammal *v.* Janaki Ammal. **1937 M.WN. 375=10 R.M. 399=171 I.C. 798=A.I.R. 1937 Mad. 338.**

——**O. 2, Rr. 1 and 3**—*Joinder of causes of action—Improper sale under S. 69, T. P. Act—Claim by mortgagor against mortgagee in respect of amount of mortgage and against purchaser on ground of fraud—If can be joined together.*

In the case of an unauthorised or improper or irregular exercise of the power of sale under S. 69, T. P. Act, the only remedy of the aggrieved mortgagor in the absence of fraud, is by way of damages against the mortgagee who has brought the property to sale. If there is fraud, there may be a cause of action for a suit to have the sale declared void or set aside. But it will be improper to club together a suit against the purchasers on the ground of fraud and a suit against the mortgagee on the question of the amount still due on the mortgage. (*Horwill, J.*) Govindaswami Naicker *v.* Pukraj Sowcar. **52 L.W. 324=1940 M.W.N. 772=(1940) 2 M.L.J. 281.**

——**O. 2, Rr. 1 and 6**—*Plaintiff joining in one suit two independent claims—Permissibility—Duty of Court to ask plaintiff to elect.*

Where the plaintiff sues in one suit for a declaration of his title as proprietor in respect of a portion in certain land and for partition of his share after the declaration of his title and also sues in the same suit the admitted raiyats of the land, calling upon them to remove a building from his holding and thus joins two claims and causes of action which are absolutely independent and unconcerned with one another, the suit should not be tried in the form in which it is instituted. The Court should ask the plaintiff to elect to proceed with one of the claims. (*Mohammad Noor and Varma, JJ.*) Nitai Lal Dutta *v.* Gobinda Bhushan Sen. **161 I.C. 695=8 R.P. 469=A.I.R 1936 Pat. 142.**

——**O. 2, R. 2**—Applicability—Contract of sale by instalments—Defaults—Separate suits in respect of each default—If barred. *See* Sale of Goods Act, S. 38 (2). **A.I.R. 1938 Rang. 364.**

——**O. 2, R. 2**—*Applicability—Lease deed with default clause—Lessee not taking advantage of—Successive suits on defaults—If barred.*

Where in a covenant there is a clause exclusively for the benefit of a party, it is to be treated not as an obligation but as an option which may be exercised according to the choice that such party may make in that behalf. Where therefore there is a default clause in a lease giving to the lessor on any default by the lessee in the payment of his monthly rent, a right to eject the lessee and to realize the rent from the lessee for the remaining unexpired period of the lease, at an increased rate of rent, if, in spite of such default clause, the lessor finds that it would be beneficial to him to keep the lease subsisting, he cannot be compelled to put an end to the agreement by reason of the default. If, therefore, in such a case, in spite of the default clause, the lessor does not sue for ejectment and for recovery of rent for the period remaining unexpired on default, but merely brings a suit for rent due from date of defalt to date of suit, he will be deemed to have exercised the option not to claim under the default clause but to keep the lease subsisting. If after such suit there is again a default and the lessor brings a suit for the recovery of rent for a further period for which cause of action had not arisen at the time of the previous suit, such cause of action is different from the cause of action in the previous suit, and therefore such subsequent suit is not barred by the provisions of O. 2, R. 2, C. P. Code. (*Dadiba C. Mehta and Lobo, A.J. Cs.*) Thadhomal *v.* Holomal. **32 S.L.R. 80=172 I.C. 712=10 R.S. 179=A.I.R. 1937 Sind 300,**

——**O. 2, R. 2**—*Applicability—Mortgage—Subsequent sale of mortgaged properties and others by mortgagor to mortgagee for amount of mortgage debt and cash consideration—Covenant that in case vendee was ejected or dispossessed vendors would pay the whole sale price with interest—Sale cancelled by Collector and vendee dispossessed—Suit by vendee for recovery of amount of cash consideration paid and decreed—Subsequent suit for amount due under mortgage—If barred—Mortgage if superseded by sale.*

A mortgage bond was executed to the plaintiff and his father by the 1st defendant, and the father of defendants 2 and 3, for Rs. 440, on which interest was payable at 6¼ seers of paddy a rupee. A year later the mortgagees took a *kobala* from the mortgagors for the sale of the mortgaged and other properties for the sum of Rs. 1,000. The consideration of Rs. 1,000 recited in the *kobala* was made up of the mortgage amount of Rs. 440, and another mortgage for Rs. 178, thus making up Rs. 618 which was due to the plaintiff from the mortgagors and a cash payment of Rs. 382. The *kobala* stipulated that in case the purchaser was ejected or dispossessed from the lands sold to him, the whole sale price of Rs. 1,000 was to be repaid to him with interest from the date of execution of the *kobala*. The sale was however, cancelled by the Collector as being inoperative against defendants 1 to 3, and the plaintiff was dispossessed from the properties sold. He realised the sum of Rs. 382 paid by him in cash under the *kobala* with interest by suit. He then brought another suit to enforce the mortgage for R. 440.

Held, that the effect of the *kobala* was to create and substitute a new contract between the parties, extinguishing their rights under the mortgages, the amounts under which formed part of the consideration for the sale, which contract was one and indivisible, and which superseded the existing contracts of mortgage. The plaintiff having chosen to sue for and obtain a money decree for Rs. 382 and interest, which was part of the claim under the *kobala*, and not having included the whole of the claim which he could make under the *kobala*, must be taken to have abandoned and relinquished the rest of the claim under it, and consequently the suit for Rs. 440 under mortgage which had been superseded by the *kobala* was barred by the provisions of O. 2, R. 2, C. P. Code. (*Guha and Bartley, JJ.*) KAMARUDDIN SHAH *v.* SHAIK DILJAN. **166 I.C. 996=9 R. C. 646=64 C.L.J. 62=A.I.R. 1937 Cal. 57.**

——**O. 2, R. 2**—Applicability—Prior suit for possession under sale deed—Mistake in description of property—Dismissal—Subsequent suit for rectification of sale deed and for possession—If barred. *See* C. P. CODE, S. 11. **1937 A.W.R. 245 =A.I.R. 1937 All. 401.**

——**O. 2, R. 2**—*Applicability—Sale deed—Covenant as to land being free from encumbrances—Undisclosed mortgage—Decree and sale—Suit on ground of dispossession by purchaser at sale—Dismissal as dispossession found to be false—Second suit on ground of plantiff having been compelled to pay claim of prior mortgagee—If barred.*

Although a sale deed contains a single covenant to the effect that the land sold is free from encumbrances, there may be two distinct causes of action giving rise to different suits, arising out of the breach of the same covenant. The dismissal of a suit by the vendee on the ground of dispossession by the purchaser at a sale in execution of a decree on an undisclosed prior mortgage—the dispossession being found to be false—is no bar under O. 2, R. 2, C. P. Code, to a second suit on a separate cause of action, namely, that the vendee, at a time anterior to the date of the alleged dispossession, was compelled to pay off the claim under the undisclosed mortgage.

(*Horwill, J.*) ARUMUGHAM CHETTIAR *v.* MARIAPPAN CHETTIAR. **1937 M.W.N. 1256=176 I.C. 809 =11 R.M. 178=A.I.R. 1938 Mad. 255=(1938) 1 M L.J. 184.**

——**O. 2, R. 2**—*Applicability—Test—"Cause of action"—Three sale deeds executed by same person in favour of same vendees on same day for different considerations—Successive suits to set aside on ground of want of consideration and undue influence—If barred.*

"Cause of action" means every fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove such fact, but every fact which is necessary to be proved to entitle the plaintiff to a decree. It is, in other words, a bundle of essential facts which it is necessary for the plaintiff to prove before he can succeed in the suit. A cause of action founded on contract, is different from the cause of action founded on another contract, although both of them are made by the same person at the same time. It does not follow because two claims arise out of one transaction that the cause of action for both would be identical. *M* owned about 5 bighas of land. On 13—1—1930 he executed three sale deeds in respect of these lands, one for Rs. 600, another for Rs. 200, and the third for Rs. 300 in favour of the defendants. In 1933, the plaintiffs claiming to be the heirs of *M*, who died on 19—1—1930, brought a suit to set aside the first two sale-deeds and for possession of the properties covered by them, alleging that they were executed without consideration and under the undue influence of the defendants. The suit was decreed. Subsequently in 1935, the plaintiffs brought another suit to set aside the third sale-deed for Rs. 300, and for confirmation or in the alternative, recovery of possession, substantially on the same allegations or want of consideration and undue influence. The defendant raised a plea that the suit was barred by O. 2, R. 2, C. P. Code, by reason of the prior suit.

Held, (1) each sale represented a distinct and separate contract, and the three sale-deeds, though executed on the same date, furnished different causes of action, having been executed for different considerations. (2) Facts necessary to establish want of consideration of each separate sale-deed must necessarily be different, and it was not at all necessary for the plaintiffs to allege and prove in the first suit that the consideration for the third sale-deed impeached in the second suit was not paid, and the cause of action in the second suit being thus quite different from that in the previous suit, O. 2, R. 2, C. P. Code, did not apply so as to bar the second suit. (*Rowland and Chatterjee, JJ.*) SHEOKUMAR SINGH *v.* BECHAN SINGH. **18 Pat. 789=12 R.P. 263= 184 I.C. 714=6 B.R. 74=1939 P.W.N. 794=A.I. R. 1940 Pat. 76.**

——**O. 2, R. 2**—*Applicability—Test—Plaintiff wrongly basing her claim as co-heir and claiming partition of half of property—Suit dismissed on technical ground—Subsequent suit for possession of entire property basing claim as absolute owner —If barred.*

Per *Braund and Spargo, JJ.*—The 'cause of action' consists of the facts upon which the plaintiff is entitled to base a 'claim' in a suit with reference to the subject-matter of the dispute. The claim he actually does make cannot be material because what the rules makes the deciding factor is the claim which he is 'entitled' to make. It is most important to appreciate that it is the claim which he is entitled to 'make' and not the claim he makes that is made the criterion under O. 2, R. 2, C. P. Code. The application of O. 2, R. 2 is not made to depend upon the success or failure of the first suit. It depends upon 'omission to sue' and that omission may occur whenever a suit is started, be it successful or not, in which the claim subsequently sought to be sued for again might have been raised in respect of the same cause of action, but was not. On the death of her grandfather the plaintiff was entitled to the estate as the sole heir. Being wrongly advised she brought a suit claiming not the whole property but the partition of half of the property basing the claim as co-heir. The suit was dismissed on technical ground. She therefore brought a subsequent suit for possession of the entire property now basing her claim as absolute owner.

Held, O. 2, R. 2, sub-R. 2, applied and she could not claim portion of the property which she omitted in the first suit. (*Dunkley, J.*, on difference between *Leach and Spargo, JJ.*) MA PWA SHIN *v.* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R. 1937 Rang. 324.**

——**O. 2, R. 2**—*Applicability—Transaction giving rise to two different claims based on different causes of action—Separate suits—Bar of—Illegal distress by mamlatdar—Suit for recovery of amount levied and interest—Subsequent suit for compensation and damages—If barred.*

Where a transaction gives rise to two different claims founded on two different causes of actions they need not be included in the same suit under O. 2, R. 2, C.P. Code, though they arise out of the same transaction. The test is whether they can be supported by different kinds of evidence. If they are, a suit in respect of one claim only, would not be a bar to a subsequent suit in respect of the other. A sum of money was illegally seized and forcibly removed from the plaintiff's possession by the defendant who was a mamlatdar, under a warrant of distraint for arrears of land revenue which was due from certain other persons. The action of the mamlatdar was illegal and *ultra vires.* Plaintiff brought a suit against the defendant to recover the sum removed from him under the illegal distress with interest. Subsequently he brought another suit for compensation or damages for illegal distraint. The defendant pleaded O. 2, R. 2, C. P. Code, in bar of this suit by reason of the fact that the second claim should and could have been included in the first suit.

Held, that the transaction gave rise to two different claims for the loss sustained; first, the claim to recover back the amount with consequential loss of interest due thereon; and, secondly, the claim for loss of reputation and business, that they were founded on different causes of action and need not have been included in the same suit, and O. 2, R. 2 was not therefore a bar to the second suit. (*Wassoodew, J.*) SHRIDHAR MAHADEO *v.* GODULAL JETHMAL. **I. L. R. 1939 Bom. 721=186 I. C. 509=12 R. B. 343=41 Bom.L.R. 1223=A.I.R. 1940 Bom. 20.**

——**O. 2, R. 2**—*Bar of fresh suit—If extinguishes right—Mortgagee omitting to include portion of mortgaged property in suit on mortgage—Right to rely on security of that portion by way of defence—Proceeding under S. 51, Provincial Insolvency Act.*

A bar of fresh suit which O. 2, R. 2, C. P. Code, creates does not extinguish the right but merely bars the remedy. Therefore, where a mortgagee omits to include in his suit on the mortgage a portion of the mortgaged property but brings the entire property to sale in execution of his decree and purchases it himself, he can rely by way of defence on the security of the portion of the property omitted in the suit in a proceeding brought under S. 51 of the Provincial Insolvency Act by the Receiver of the estate of the judgment-debtor who has been adjudicated insolvent, although he is precluded by the provisions of O. 2, R. 2, C. P. Code, from filing a fresh suit in respect of that portion. (*Bhide, J.*) PUNJAB NATIONAL BANK, LTD. *v.* OFFICIAL RECEIVER, KARNAL. **188 I.C. 833=42 P.L.R. 29=A.I.R. 1940 Lah. 166.**

——**O. 2, R. 2**—*Cause of action, different—Suit for land on ground of purchase—Subsequent suit on basis that transaction is mortgage—If barred.*

O. 2, R. 2 does not bar *per se* a subsequent suit brought on a different cause of action. It only purports to bar suits for claim omitted from former suits and arising from the transaction under which the claim was made in the former suit and splitting up of the reliefs in respect of the same cause of action. It does not require that where several causes of action arise from one transaction, the plaintiff should sue for all of them in one suit. The rule is directed to securing the exhaustion of the relief in respect of a cause of action, and not to the inclusion in one and the same action of different causes of action, even though they arise from the same transactions. Where, therefore, a suit for possession of land on the ground that the plaintiff had bought it fails, on the ground that the transaction really amounts to a mortgage by conditional sale and not to an agreement to purchase coupled with an agreement for resale, it is not a bar to a subsequent suit on the basis that the transaction was a mortgage. 41 I.A. 142 (P.C.), Rel. on. (*Mosely and Ba U, JJ.*) U PO KE *v.* U PO THEIN. **161 I.C. 820=8 R.R. 515=A.I.R. 1936 Rang. 167.**

——**O. 2, R. 2**—Cause of action—If same—Test. *See* C. P. CODE, S. 11, EXPL. IV. **A.I.R. 1937 Mad. 804.**

——**O. 2, R. 2**—*Conditions for application—Separate suits for rent of different periods—Return for presentation to proper Court—Presentation to proper Court simultaneously as different suits—Bar of O. 2, R. 2—If applies.*

Where a suit for rent presented by a landlord against tenant is returned by the Civil Court for presentation to the Revenue Court on the ground that the Civil Court has no jurisdiction to try it, and is then re-presented to the Revenue Court, S. 14 of the Limitation Act would save the suit from the bar of limitation. Where the plaintiff, who is obliged to present them to the Revenue Court, so presents them, he must be deemed to have claimed for all the years up to the date of the presentation: where another suit filed by him for rent of a period anterior or subsequent to the period of the suit is also returned for presentation to the Revenue Court and is presented to the Revenue Court along with the other suit, O. 2, R. 2, C. P. Code, will not come into operation on the ground that the plaintiff has omitted to claim the rent for the period anterior or subsequent as the case may be. O. 2, R. 2 will only apply if the plaintiff has omitted in respect of, or intentionally relinquished, any portion of his claim. The fact that the Court numbers the suit separately or that the plaintiff omits to ask the Court to treat the two as one suit and give it one number will not amount to an omission to sue or relinquishment of any portion of the claim within the meaning of O. 2, R. 2, C. P. Code, and the rule therefore cannot operate as a bar. (*Venkataramana Rao, J.*) SATYANARAYANAMURTHY *v.* MAHARAJA OF PITHAPUR. **189 I.C. 204=50 L.W. 139=A.I R. 1939 Mad. 724=(1939) 2 M L.J. 329.**

——**O. 2, R. 2**—*Default clause in mortgage—Suit for interest alone—Second suit for interest accruing subsequent to first suit—Maintainability.*

A mortgage provided for payment of the principal in five years and interest thereon every year. It further provided that if there was default in the payment of the annual interest or in the payment of the principal amount on the due date, the mortgagee would be entitled to sue for the recovery of the whole principal and interest by sale of the mortgaged property. The default having been made in the payment of the interest the mortgagee instituted a suit for recovery of the interest by sale of the mortgaged property and obtained a decree. Before the term of five years for the payment of the principal expired, the mortgagee instituted another suit for recovery of the amount of interest which fell due after the date of the previous suit by sale of the mortgaged property.

Held, that the second suit was not barred by O. 2, R. 2. The mortgagee was not bound to sue for recovery of the whole amount, principal and interest, when he filed the first suit and it was at his option to waive the default and to sue for interest alone. When the mortgagee asked in second suit for sale of the mortgaged property in default of payment of interest, he should be deemed to have based his claim on his normal right independently of the default clause to recover overdue interest by the sale of the mortgaged property. (*Jai Lal, J.*) MANGAL RAM *v.* SAT DEO. **175 I.C. 927=11 R.L. 89=39 P.L.R. 995=A.I.R. 1937 Lah. 767.**

——**O. 2, R. 2**—Dismissal of suit—Rejection of plaint after refusal of permission to withdraw—Failure to give proper valuation and to pay deficit Court-fee—Subsequent suit on the same cause of action—If barred. *See* C P. CODE, O. 7, RR. 11 AND 13. **40 C.W.N. 1390.**

——**O. 2, R. 2**—*First suit for maintenance—Second suit to have maintenance charged on property—If barred.*

A wife who brings a suit for maintenance against her husband and obtains a decree, cannot again bring a suit for getting the maintenance fixed in the former suit charged on the property of the husband, as such a suit is barred by O. 2, R. 2, C. P. Code. The relief for a charge is connected with the relief for maintenance and both the reliefs arise out of the same cause of action. The mere ground that the wife entertains any apprehensions as regards the husband's transferring his property would not afford her a new cause of action for the relief sought for by her in the second suit. (*Harries and Ganga Nath, JJ.*) JWALA PRASAD *v.* PADMAWATI. **I.L.R. (1937) All. 269=167 I.C. 123=9 R.A. 491=1936 A.W. R. 1096=1937 A.L.R. 143=A.I.R. 1937 All. 56.**

——**O. 2, R. 2**—Gift of certain property to wife in lieu of dower—Widow remarrying after husband's death—Suit for pre-emption by husband's brother dismissed—Subsequent suit for declaration of title to property on ground of remarriage of widow and for avoidance of gift—If barred. *See* C. P. CODE, S. 11 **A.I.R. 1938 Lah. 492.**

——**O. 2, R. 2**—*Instalment payment creditor given liberty to sue for entire debt on default by debtor—Suit for arrears of instalments alone—Second suit for entire balance—If barred.*

Where although a cause of action for the recovery of the whole amount of the debt exists, the creditor agrees to forbear and not to sue upon that cause of action so long as the debtor pays him a certain sum a month and until the monthly instalments are at least three months in arrears, the remedy of the creditor in the event of the failure of the debtor to pay three consecutive instalments is to sue for the whole balance of the debt. If, on the other hand, he sues only for the arrears of instalments, a subsequent suit by him for the balance of the debt is barred by O. 2, R. 2, C. P. Code. (*Dunkley, J.*) MAHOMED AFZAL *v.* MAHMED ISMAIL. **1939 Rang.L.R. 180=183 I.C. 425=12 R.R. 75=A.I.R. 1939 Rang. 251.**

——**O. 2, R. 2**—*Mesne profits—Separate suit for—Different cause of action*

The claim for mesne profits accruing subsequent to the institution of the suit for possession is a separate cause of action and not one arising out of the same cause of action on which the claim for possession is based. In a claim for possession it is the specific restitution of the property that is sought, but in an action for mesne profits the claim is for all loss suffered during the period of dispossession. The cause of action arises from day to day and is a continuing one and under the common law of England an action for mesne profits would not lie until after the plaintiff had re-entered and recovered the possession of the land. Evidence required to prove the claim for mesne profits is different from that which is required to prove the claim for possession of the property dispossessed. Therefore a separate suit for mesne profits alone would not be barred under O. 2, R. 2, C. P. Code. (*Venkataramana Rao, J.*) RAMIAH *v.* THATHIAH. **174 I. C. 181=10 R.M. 669=47 L.W. 547=1938 M.W. N. 643=A.I.R. 1937 Mad. 849=(1938) 1 M.L. J. 320.**

——**O. 2, R. 2**—*Mortgage—Suit by mortgagee for possession—Subsequent suit for mortgage money—Bar of.*

Suit for return of mortgage money on the ground of failure of security is barred under O. 2, R. 2, if the mortgagee first sues for possession and having failed there, institutes the second suit for the money. A.I.R. 1924 Oudh 147; A.I. R. 1925 Oudh 524; A.I.R. 1932 Lah. 523; A.I.R. 1921 Lah. 309 and A.I.R. 1926 Pat. 87, Foll. (*Mir Ahmad, A.J.C.*) LAIQA RAM *v.* GOKAL CHAND. **161 I.C. 698=8 R. Pesh. 180=A.I.R. 1936 Pesh. 86.**

———O. 2, R. 2—Mortgage—Suit for redemption after mortgagee's refusal to accept deposit by mortgagor—Claim to excess profits realised by mortgagee not included—Suit for such profits afterwards—Maintainability. *See* C. P. CODE, S. 11, EXPL. IV AND O. 2, R. 2. **40 C.W.N. 627.**

———**O. 2, R. 2**—*Mortgage—Suit for sale by prior mortgagee—Omission to claim benefit of S. 101, T. P. Act, as against puisne mortgagee—Subsequent suit by latter—Prior mortgagee if precluded from making claim under S. 101.*

In a suit for sale by a perior mortgagee for the balance due to him after giving credit to the amount discharged by sales of portions of mortgaged property in his favour, he did not set up as against a subsequent mortgagee who was a party defendant, a claim to the benefit of S. 101, T. P. Act. He got a decree for sale. Subsequently the puisne mortgagee filed a suit on his mortgage for sale and the prior mortgagee who was impleaded as defendant set up his claim to the benefit of S. 101.

Held, that there was no need to raise this plea in the prior suit, and hence there was no basis for the plea of *res judicata*; that O. 2, R. 2, C. P. Code, did not also bar the plea, as the same was set up by a party only as a defendant. (*Cornish and Varadachariar, JJ.*) RAMA AIYAR *v.* BAGAVATHIMUTHU PILLAI. **163 I C. 834=9 R.M. 76=43 L.W. 478=1936 M.W.N. 374=A.I.R. 1936 Mad. 473=70 M.L.J. 506.**

———**O. 2, R. 2**—*Mortgage by conditional sale—Suit for foreclosure and mesne profits—No prayer for possession—Decree—Subsequent suit for future mesne profits—If maintainable.*

Where a mortgagee who is entitled to sue both for mesne profits and possession sues only for mesne profits and does not sue for possession and obtains a decree, he cannot subsequently sue for possession. And when his right to sue for mortgagee possession becomes barred, he is disentitled to sue for mesne profits also, for a claim for mesne profits presupposes that the person seeking it has a right to possession. (*Misra, J.*) TAYYAB HASAN *v.* SAGHIR HASAN. **180 I.C. 356=11 R.A. 453=1938 A.L.J. 997=1938 A. W.R. (H.C.) 728 =A.I.R. 1939 All. 52.**

———**O. 2, R. 2**—*Omission of claim—Absence of leave—Effect.*

Where a person failed to include in his suit the whole of the claim which he was entitled to make in respect of a cause of action and also omitted to claim the relief of a declaration and restoration of possession in respect of the land sold in execution, and failed to obtain the leave of the Court to sue for such relief, a subsequent suit for those relief is barred by the provisions of O. 2, R. 2, C. P. Code. (*Mosely, J.*) A. S. CHETTYYAR FIRM *v.* P. R. S. MEERA PILLAI. **178 I C. 157=11 R. R. 209=A.I.R. 1938 Rang. 290.**

———**O. 2, R. 2**—*Omission of claim—Claim not known to plaintiff at time of suit—Non-inclusion—If bars subsequent suit.*

To constitute an omission to sue by the plaintiff under O. 2, R. 2, C. P. Code, it is necessary that the claim must be known to the plaintiff. It is only a claim or remedy known at the time of the institution of the suit, which if omitted will be barred under O. 2, R, 2. Actual knowledge of the claim, and not constructive knowledge, is necessary in order that the relief may be barred in a subsequent suit. Where a plaintiff is unaware of a claim at the time of his suit, though he may, by proper inquiry make himself aware of its existence, the noninclusion of that claim will not preclude him from subsequently suing in respect of that claim. (*Venkataramana Rao, J.*) VENKATACHANDIKAMBA *v.* VISWANADHAMMAYYA. **164 I.C. 717=9 R M. 159=44 L. W. 379=1936 M. W.N. 671=A.I.R. 1936 Mad. 699=71 M.L.J. 264.**

———**O. 2, R. 2**—*Plaintiff though entitled to claim whole property, claiming partition of half property—Suit dismissed on technical ground—Subsequent suit for possession of entire property—Decree for half-share—If can be granted.*

Per *Dunkley, J., agreeing with Leach, J.*—Plaintiff though entitled to claim whole property, claimed partition of half of the property. Her suit was dismissed on a technical ground. Subsequently plaintiff filed a suit as absolute owner for possession of the entire property.

Held, that O 2, R. 2 applied to the two suits.

Held, further, that plaintiff could not be given even a decree for a half-share of the property in the second suit. (*Dunkley, J.*, on difference between *Leach and Spargo, JJ.*) MA PWA SHIN *v.* U PO SIN. **170 I.C. 946=10 R.R. 117=A.I.R. 1937 Rang. 324.**

———**O. 2, R. 2 and S. 11**—*Prior suit for rectification of sale-deed and for possession of portion of property wrongly shown as exempted from sale—Subsequent suit for possession of property shown as sold in sale-deed—Whether barred.*

Where the prior suit by the plaintiff was for rectification of the sale-deed on the allegation that in the map attached to the sale-deed a certain portion of the property sold was wrongly shown as exempted from sale and for possession over that portion and the subsequent suit by him was for possession of a portion of the property which according to the sale deed and the plan attached to it had been sold to him on the allegation that the defendant had failed to deliver possession of the same.

Held, that although both the suits arose out of the same transaction of sale, they were not in respect of the same cause of action and that, therefore, the subsequent suit was not barred either by the provisions of S. 11, C. P. Code or under O. 2, R. 2, C. P. Code. (*Nanavutty and Zia-ul-Hasan, JJ*) ZAKIA BEGAM *v* THE LUCKNOW IMPROVEMENT TRUST. **13 Luck. 192=167 I. C. 414=9 R O. 382=1937 O.W.N. 252=1937 O.L R. 115=A.I.R. 1937 Oudh 263.**

———**O. 2, Rr. 2 and 3**—*'Same cause of action'—Interferences with the ownership of same property at different times—Obligation to claim relief in respect of all known interferences—Failure—Bar of suit.*

Where there have been repeated interference with the ownership of the same property of a person at different times, they are not different causes of action entitling the owner to bring separate suits. In such a case the real cause of action is the interference with the ownership and every known interference should be pleaded in a plaintiff's suit and relief claimed in respect of all of them. If it is not so done fresh suits in respect of each of such interferences would be barred by O. 2, R. 2, C. P. Code. (*Madeley, J.*) KISHEN NARAIN *v.* NIZAMUDDIN. **1937 O.W.N. 1146.**

———**O. 2, R. 2**—*Scope—Duty of plaintiff.*

A plaintiff is not obliged to put forward in one suit every claim which he may have against the defendant, as the causes of action in such cases may be different, but he must include the whole claim based on the particular cause of action. (*Pollock, J.*) PARASHRAM *v.* SADASHEO. **I. L. R. (1937) Nag. 94=167 I.C. 703=9 R. N. 200=A.I. R. 1936 Nag. 268.**

——**O. 2, R. 2**—Scope—If controls S. 130, T. P. Act. *See* T. P. ACT, Ss. 6 AND 130. **18 Pat. 839.**

——**O. 2, R. 2**—*Scope—If subject to Expl. V to S.* 11—*Partition suit—Failure to ask for mesne profits from date of suit until delivery—Fresh suit for recovery of mesne profits—If barred.*

O. 2, R. 2 must be read with Expl. 5 to S. 11 and the relief claimed under Expl. 5 to S. 11 is a relief arising from the same cause of action. The fact that a plaintiff may under O. 2. R. 4 join in one suit two causes of action, does not mean that he must necessarily do so, or fall under the bar imposed by O. 2, R. 2 and S. 11, Expl. 5. A plaintiff may of course anticipate in a suit for partition that certain property will fall to his share; he may anticipate that after the final decree he will not be given delivery of possession and he may in his suit for partition ask for mesne profits from the date of suit until delivery of possession. But if he does not do so another suit for recovery of mesne profits is not barred. (*Davis, J.C. and Tyabji, J.*) TIKAMDAS HOTUMAL *v.* KISHNOMAL JESSOMAL. **I.L.R. (1940) Kar. 36=185 I.C. 702 =12 R.S. 174=A.I.R. 1939 Sind 367.**

——**O. 2. R. 2**—*Scope—Prior suit for cancellation of lease—Decree—Subsequent suit for mesne profits—Maintainability.*

An earlier successful suit for cancelling a lease of immoveable property does not bar a subsequent suit for past mesne profits under O. 2, R. 2, C. P. Code, especially when the plaintiff has stated in the earlier plaint that he intends to bring a separate suit for mesne profits. A claim for mesne profits need not be included in a suit for possession. (*Pandrang Row and Abdur Rahman, JJ.*) VENUGOPAL PILLAI *v.* THIRUGNANAVALLI AMMAL. **52 L W. 533=1940 M.W.N. 901=(1940) 2 M.L. J. 427.**

——**O 2, R. 2 and O. 23, R. 1**—*Scope—Suit on mortgage—Agreement between plaintiff and sub-mortgagee to omit properties sub-mortgaged from suit and to file fresh suit in that behalf within time fixed—Court omitting properties and fixing time —No express application or order under O.* 23—*Effect—Fresh suit in time if barred.*

In a suit in the Bombay High Court for sale on a mortgage, the plaintiff and his sub-mortgagee who was impleaded as a party to the suit, agreed to omit from that suit their claim to certain lands in the suit, which were in Madras, and to bring a suit for the same within three months in Madras. An *interim* decree was passed by consent as between these two parties. The period was extended later by another fifteen days and it was ordered that if such a suit was not filed within the said fifteen days the parties should be barred from filing such a suit. There was, however, no express written application to withdraw the claim nor any express order allowing withdrawal or granting permission to file a fresh suit. A fresh suit was filed by the sub-mortgagee within the time fixed in Madras in the proper Court. It was contended that the suit was barred under O. 2, R. 2 and O. 23, R. 1.

Held, that the suit was not barred either under O. 2, R. 2 or O. 23, R, 1, C. P. Code and it must be held that the Bombay Court acted under O. 23, C. P. Code, and gave permission to the institution of a fresh suit and that the order was duly complied with. (*Madhavan Nair and Stodart, JJ.*) RAMANATHAN CHETTIAR *v.* SHRI DOWLAT SINGJEE THAKORE SAHIB. **181 I.C 827=11 R.M. 854= 1938 M.W.N. 785=48 L.W. 292=A.I.R. 1938 Mad. 865=(1938) 2 M.L.J. 534.**

——**O. 2, R. 2**—*Scope—Suit for* rabi *rent under S.* 132, *Agra Tenancy Act*—Kharif *rent due but not included in claim—Distraint proceedings for* Kharif *proving infructuous—Subsequent suit for* Kharif *rent—If barred.*

A landholder sued his tenant under S. 132 of the Agra Tenancy Act for the recovery of *rabi* rent of a certain *fasli*, but did not sue for the *Kharif* rent of that *fasli*, though that was also due; as the landholder wanted to recover the particular instalment by distraint, he did not include the *Kharif* rent in the plaint. The distraint proceedings proved infructuous, and the plaintiff then brought a suit for recovery of the *Kharif* rent of that *fasli*.

Held, that the suit was barred by O. 2, R. 2, C. P. Code. (*Darling, S. M. and Bomford, J. M.*) KISHAN LAL *v.* SHRI RAM. **1937 A.W.R. 867= 1937 R.D. 394.**

——**O. 2, R. 2**—*Separate suits by husband and wife for divorce decreed without going into merits —Court remarking that it would not prejudice parties in subsequent suit—Suit for partition of marriage property by wife—Husband, if debarred from proving wife's misconduct.*

In two separate suits for divorce one brought by husband against wife on the ground of adultery and another brought by wife against husband on the ground of cruelty the Judge without going into merits of case and without inquiring into the alleged matrimonial misconduct passed two decrees for divorce. He added that the decision would not prejudice the parties with regard to anything that they might desire to establish in a subsequent suit in connexion with the property of the marriage. Subsequently the wife brought a suit against the husband for partition and separate possession of the joint property of the marriage.

Held, that the remark of the Judge in suit for divorce that the suit was decreed without prejudice to what each party may have to prove in a subsequent case would be of no effect.

Held further, that in the suit for divorce although the husband did not insist upon proving his wife's guilt to obtain a divorce, he was not debarred from raising this point in a subsequent suit where the property of the marriage was involved. It was open to him to prove misconduct on the part of his wife which would disentitle her from obtaining any of the joint property. (*Dunkley and Wright, JJ.*) MAUNG PO SEIK *v.* MA PWA TIN. **187 I.C. 380=12 R.R. 324=A.I.R. 1940 Rang. 29.**

——**O. 2, R. 2**—*Specific performance of contract of sale—Suit for—Separate suit for possession—If barred.*

In a suit for specific performance of a contract of sale the cause of action that first arises is one for performance of that contract by execution of a registered deed of sale. It may be that possession will be handed over after a decree for specific performance has been granted, and the question of possession is a contingency that need not necessarily arise until a decree for specific performance has been passed and is then a new and distinct cause of action arising from the deed itself. (*Mosely, J.*) A. S CHETTYAR FIRM *v.* P. R. S. MEERA PILLAI. **178 I.C. 157=11 R.R. 209 =A.I.R. 1938 Rang. 290.**

——**O. 2, R. 2 and S. 11, Expl. IV**—Suit by plaintiff for possession of certain shops decreed in respect of one-fourth share—Subsequent suit by him for mesne profits from date of possession to date of suit—Defendant pleading set-off in respect of improvements in former suit but withdrawing plea in the end—Same plea, if barred in subsequent suit. *See* C. P. CODE, S. 11, EXPL. IV AND O. 2, R. 2. **168 I.C. 472=A.I.R. 1937 Oudh 394.**

——**O. 2, R. 2 and S. 11**—*Suit for decree for redemption alleging mortgage by conditional sale —Subsequent suit to declare sale deed void on ground of executant's minority—If barred.*

In an earlier suit for a decree for redemption, plaintiff alleging that the arrangement between the parties was a mortgage by conditional sale pleaded that the sale deed did not stand alone but was to be read in the light of the unregistered agreement for re-purchase. The question of the minority of the executant was also raised and pleaded but was not decided. The suit failed because the unregistered agreement was inadmissible in evidence. Subsequently plaintiff filed another suit to declare the sale-deed void by reason of the minority of the executant. The defence was that the decision in the previous suit operated as *res judicata* and the plaintiff was also barred by O. 2, R. 2, C. P. Code.

Held, that the question of minority was not finally decided in the former suit. Hence the plea of *res judicata* could not stand.

Held also, that the cause of action in the subsequent suit was entirely different from the cause of action in the earlier suit. The earlier suit proceeded entirely on the basis that the sale-deed was a valid document. In the subsequent suit the plaintiff had to prove that she was minor when she signed the deed and so the deed was void. So O. 2, R. 2 did not bar the subsequent suit. (*Leach, J.*) MA HLA ON *v.* KO U. **171 I.C. 913=10 R. R. 204=A.I.R. 1937 Rang 204.**

——**O. 2, R. 2**—*Suit for dissolution of partnership—Subsequent suit for accounts—If barred.*

A suit for accounts brought subsequent to a suit for dissolution of partnership is not barred under O. 2, R. 2, C. P. Code, as the two suits are not based on the same cause of action. (*Tek Chand, J.*) JHANDU MAL-BHAG MAL *v.* RULIA MAL. **168 I.C. 692=9 R.L. 666 (2)=39 P.L.R. 197=A.I.R. 1937 Lah. 633.**

——**O. 2, R. 2 and O. 9, R. 9**—*Suit to set aside sale under Bengal Revenue Sales Act on ground of irregularities in sale—Allegation that irregularities were due to fraudulent conduct of defendant—Suit dismissed for default—Subsequent suit for declaration that defendant has bought property fraudulently and for directing him to reconvey property—Maintainability.*

The plaintiff instituted a suit for setting aside a sale under S. 33 of the Bengal Revenue Sales Act as having been made contrary to the provisions of that Act. He alleged that the irregularities in the sale were due to the fraudulent conduct of the defendant who has purchased the property at the sale. This suit was dismissed for default and an application to have that dismissal set aside was also unsuccessful. The plaintiff subsequently brought another suit for a declaration that the defendant has fraudulently bought the property and for a decree directing him to execute a deed of re-conveyance in favour of the plaintiff.

Held, that the suit was not barred, under O. 2, R. 2 (3) or O. 9, R. 9 (1), C. P. Code, as the cause of action is not the same in the two suits. (*S. K. Ghose and Patterson, JJ.*) GOURHARI ADAK *v.* SARAT CHANDRA LAHIRI. **I.L.R. (1937) 2 Cal. 651=65 C.L.J. 513=41 C.W.N. 1179.**

——**O. 2, R. 2 and S. 11, Expl. IV**—*Title suit for possession dismissed—Subsequent suit for redemption of mortgage—If barred.*

The defendant who was a mortgagee of certain lands obtained a mortgage decree and in execution of that decree purchased the lands. The plaintiff who was not a party to the suit instituted a title suit for the recovery of possession of the lands. Upon the allegation that the mortgagor having only a non-transferable occupancy right the auction purchase under the mortgage decree conferred no title upon the defendant. The suit was, however, dismissed. The plaintiff subsequently instituted the present suit for redemption of the mortgage. It was contended by the defendant that the plaintiff having asserted a title paramount was not entitled to redeem and that the plaintiff's claim was barred under O. 2, R. 2 and S. 11, Expl. IV, C. P. Code.

Held, that the decision in the title suit did not preclude the plaintiff from claiming redemption in the present suit and that neither O. 2, R. 2 nor S. 11, Expl. IV, C. P. Code, operated as a bar to the suit. (*Akram, J.*) KALI NATH SHAHA *v.* MANINDRA NATH DAS. **I.L.R. (1940) 1 Cal. 544.**

——**O. 2, R. 2**—*Two suits filed on same day—Order in which they were filed—Presumption.*

Two suits were simultaneously filed under S. 226 of the Agra Tenancy Act against a Lambardar. In one the plaintiffs sued for the profits from the weighing dues in a Bazaar in one *patti,* in the other they sued for profits on account of other weighing dues, and *sir* plot in three *pattis* of the same *mahal.* The *patti* was the same in both suits.

Held, that where suits were filed on the same day it must be presumed until the contrary was proved that they were presented and admitted in the order in which their numbers appeared in the register and that the second suit was barred by O. 2, R. 2, C. P. Code. (*Darling, S.M. and Bomford, J.M.*) RAM CHARAN RAWAT *v.* AITMAD ALI KHAN. **1937 R D. 86.**

——**O. 2, R. 2 (3)**—*Leave of Court—What amounts to.*

Where there has been an omission to sue for all reliefs in respect of the same cause of action, the remark of the Court in its judgment that a suit in respect of the omitted relief could be brought later on, does not amount to the leave of the Court in the sense in which it is used in O. 2, R. 2 (3) C. P. Code. (*Madeley, J.*) KISHEN NARAIN *v.* NIZAMUDDIN. **1937 O.W.N. 1146.**

——**O. 2, R. 2 (3)**—*Leave under—When to be applied for—Grant of leave at late stage of suit—Legality of.*

Under O. 2, R. 2, C. P. Code, the omission to ask for a particular relief is not a defect that goes to the maintainability of the very suit in which leave should have been asked; it only entails a disability as regards subsequent proceedings. There is no reason for insisting that the application for leave to omit must precede, or at least be contemporaneous with the plaint in the first suit. It cannot be said that the Court has no power to grant leave unless the application is made before the institution of the suit or along with the presentation of the plaint. The Court, when called upon to deal with such an application has ordinarily to consider whether the grant of leave to reserve certain remedies would in the circumstances be appropriate in the sense that it will not give an unfair advantage to the plaintiff or impose an unfair burden on the defendant. A question of this kind can as well be dealt with by the Court during the pendency of the suit as before its institution. The legislature did not wish to insist upon leave being obtained before the first hearing. (*Varadachariar, J.*) VENKAYYA *v.* VENKATA RAO. **I.L.R. (1939) Mad. 317=179 I.C. 963=11 R.M. 644=1938 M.W.N. 925=48 L.W. 517=A.I.R. 1938 Mad. 979=(1938) 2 M.L.J. 642.**

———**O. 2, R. 2 (3)**—*Omission to sue for all reliefs—Absence of leave—Effect.*

If a person entitled to more than one relief in respect of the same cause of action, omits to sue for all the reliefs without the leave of Court, he loses his rights in respect of those reliefs and it cannot be restored to him by the exercise of the inherent powers of the Court. (*Madeley, J.*) KISHEN NARAIN *v.* NIZAMUDDIN. **1937 O.W.N. 1146.**

———**O. 2, R. 2 (3)**—*Splitting of claim—Right of plaintiff.*

Per *Baguley, J.*—There is no provision of law by which a plaintiff can reserve the right to split his claim arising out of the same cause of action. He may ask the Court to allow him to do so under O. 2, R. 2 (3), C. P. Code, but the Code gives no unilateral right to reserve a claim of this sort. (*Baguley and Sharpe, JJ.*) MA MA NYUN *v.* MAUNG MYA. **1937 Rang.L.R. 447=174 I.C. 794=10 R.R. 428=A.I.R. 1938 Rang. 76.**

———**O. 2, R. 3**—Applicability—Different mortgages on same property by different persons in favour of same mortgagee—Single suit by mortgagee joining both causes of action—Maintainability. *See* T. P. ACT, S. 67-A. **A.I.R. 1937 Nag. 99.**

———**O. 2, R. 3**—*Suit for redemption of mortgage with possession—Claim for rent paid by mortgagor to mortgagee's use—If can be joined.*

A mortgagor suing for redemption of a mortgage with possession can join with that claim a claim for rent paid by him to the mortgagee's use. (*Wort, J.*) SUBEDAR MIAN *v.* SHEO SHANKAR MISSIR. **6 B.R. 765=189 I.C. 109=A.I.R. 1940 Pat. 579.**

———**O. 2, R. 6**—Applicability. *See* U. P. ENCUMBERED ESTATES ACT, S. 7. **1937 A.L.J. 1139.**

———**O. 2, R. 6**—Applicability—Misjoinder of causes of action. *See* C. P. CODE, O. 1, R. 3—JOINDER OF SEVERAL DEFENDANTS. **1938 Rang. L.R. 397.**

———**O. 2, R. 6**—*Multifariousness—If always fatal to suit—Suit against mortgagors and others who had rendered the security insufficient—If proper.*

The joinder of causes of action and parties is not invariably fatal to the suit. No doubt the misjoinder of claims and parties is to be discouraged when it is calculated to defeat the ends of justice; but such joinder would be unexceptionable unless it is apparent that the defence will be embarrassed by confusing different issues and proofs in the same litigation. Where a mortgagee files a suit against the mortgagors and also against others who had damaged and thereby rendered the mortgage security insufficient, the suit cannot be said to be bad for multifariousness. (*Niyogi, J.*) HARIDAS NARAYANDAS *v.* JAGANNATH. **I.L.R. (1940) Nag. 63=184 I.C. 579=12 R.N. 115=1939 N.L.J. 338=A.I.R. 1939 Nag. 256.**

———**O. 3, Rr. 1 and 2**—*Construction and scope—Agent appointed under power-of-attorney to appear and conduct suit—Right of audience in Court—Principal appointing advocate to appear—Agent's right to notice—Right to act and charge fees to principal as solicitor or agent.*

An agent with a power-of-attorney to appear and conduct judicial proceedings has no right of audience in Court. Nor is he entitled to notice if his principal wants to appear and conduct the proceedings himself in person or appoints an advocate to appear for him. Such a power-of-attorney agent cannot carry on business as a solicitor or attorney, drafting, engrossing and filing plaint, Judge's summons, affidavits and generally issuing legal process and charge fees to the principal. (*Beasley, C.J., Venkatasubba Rao and Mockett, JJ.*) THAYARAMMAL *v.* KUPPUSWAMY NAIDU. **I.L.R. (1938) Mad. 12=172 I.C. 489=10 R.M. 469=46 L.W. 734=1937 M.W.N. 1060=A.I.R. 1937 Mad. 937=(1937) 2 M.L.J. 552 (F.B.).**

———**O. 3, Rr. 1 and 4**—*Pleader not appointed in writing—Power to file application for restoration of suit.*

A pleader who puts in an application on behalf of a litigant acts for him and cannot, therefore, do so unless he is authorized in writing by him. Consequently an application for restoration of a suit dismissed for default cannot be made by a pleader whose appointment has not been made in writing. (*Addison and Din Mahomed, JJ.*) BASHER AHMAD *v.* MARY NINCK. **I.L.R. (1938) Lah. 417=40 P.L.R. 235=179 I.C. 755=11 R.L. 625=A.I.R. 1938 Lah. 698.**

———**O. 3, R. 1**—*Recognised agent—Right to argue and plead.*

The language of O. 3, R. 1, C. P. Code, means no more than that a recognised agent can appear, make applications and take such steps as may be necessary in the course of the litigation for the purpose of the case of the principal being properly laid before the Court. It cannot justify his being allowed to argue and plead. (*Srivastava and Nanavutty, JJ.*) JIVAN LAL *v.* PROPERTY OF RAM RATAN. **12 Luck. 123=161 I.C. 538 (1)=8 R.O. 332=1936 O.W.N. 351=A.I.R. 1936 Oudh 261.**

———**O. 3, R. 1**—*Scope—Darkhast—Presentation by pleader without power from decree-holder—If legal presentation—Defect—If fatal.*

The presentation of a darkhast on behalf of the decree-holder by a pleader who holds no vakalatnama from the latter is not a legal presentation, and the defect is fatal. (*Norman.*) Shamboo Nath *v.* Mt. Udai Kanwar. **1937 A M.L.J. 47.**

——**O. 3, R. 2**—*Applicability—Proceedings under Madras Estates Land Act—Application to set aside rent sale—Presentation by person looking after factory of applicant and doing general business—If proper—"Recognised agent"—"Carrying on business."*

O. 3, R. 2, C. P. Code, is applicable to proceedings under the Madras Estates Land Act by reason of S. 192 (*c*) of the Estates Land Act. A person who is looking after a factory on behalf of his master and is doing general business for him in the off-season cannot be regarded as a recognised agent of his master for the purpose of presenting an application on behalf of that another under S. 131 of the Madras Estates Land Act to set aside a sale of a holding for arrears of rent. Such a person cannot be held to be a person "carrying on business" under O. 3, R. 2, in respect of the management of the land of his master, so as to entitle him to apply on behalf of his master under S. 131 of the Estates Land Act. An application to set aside the sale presented by such a person is not validly presented. (*Varadachariar, J.*) Ellappa Naikar *v.* Sivasubramania Maniagaran. **169 I.C. 244=9 R.M. 725=1936 M.W.N. 1175=44 L.W. 567=A.I.R. 1937 Mad. 293=71 M.L.J. 607.**

——**O. 3, R. 2 (a), Bombay Amendment**—*Construction—Recognised agent—Attorney of High Court—Competency to act under general power-of-attorney.*

The word "persons" in the first part of O. 3, R. 2 (*a*), Bombay Amendment, is comprehensive and does not exclude an attorney of the High Court. What is meant under the second part is that an attorney of the High Court can also appear under a special power of attorney. A person who is not an attorney can only act under general power of attorney. The words "requisite power of attorney" do not mean that only a special power of attorney is required, but they mean that the special power of attorney must be a proper one. An attorney of the High Court can therefore act both under a general and a special power of attorney, but a person who is not an attorney can only act under a special power. (*Wadia, J.*) Performing Right Society, Ltd. *v.* Indian Morning Post Restaurant. **I.L.R. (1939) Bom. 295=184 I.C. 673=12 R.B. 192=41 Bom.L.R. 530=A.I.R. 1939 Bom. 347.**

——**O. 3, R. 2 (b)**—*"Carrying on business"—Meaning of.*

The expression "carrying on business" in O. 3, R. 2 (*b*), must be interpreted in a restricted sense, *viz.*, as relating to commercial business, as in S. 20, C. P. Code. The appearance, application or act made or done must relate to matters connected with the trade or business only. (*Varadachariar, J.*) Ellappa Naikar *v.* Sivasubramania Maniagaran. **169 I.C. 244=9 R.M. 725=1936 M.W.N. 1175=44 L.W. 567=A.I.R. 1937 Mad. 293=71 M.L.J. 607.**

——**O. 3, R. 4**—*Duty of Court—Counsel not duly authorized through* bona fide *and reasonable mistake—Effect—Procedure—Duty to give litigant chance to set matter right—Extension of time—Limitation Act, S. 5.*

It is contrary to the spirit of justice that a litigant should fail simply because, through some perfectly *bona fide* and reasonable mistake, the Counsel appearing for a party is not duly authorized. Where it appears that he is not duly authorized, it will doubtless be the duty of the Court in question to treat the proceedings that he has set on foot as of no effect; still the Court should, so far as is possible, safeguard the litigant from his litigation coming to so unsatisfactory a conclusion, by pointing out to him the desirability of making the necessary application to set the matter on foot again, and, if an application is made, be indulgent as regards time, and should give effect to the provisions, in a suitable case, of S. 5, Limitation Act. (*Stone, C.J.*) Ramdeo Tilokchand *v.* Lalu Natha. **I.L.R. (1937) Nag. 494=169 I.C. 117=9 R.N. 305=A.I.R. 1937 Nag. 65.**

——**O. 3, R. 4**—*Functions of ministerial nature—Power of pleader to delegate.*

To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the litigation in order that his case may be properly laid before the Court. But there is nothing in O. 3, R. 4, which prohibits a pleader from delegating some of his functions, and the Code plainly contemplates that certain functions of a ministerial nature may be delegated. A ministerial act, in relation to this matter, is an act which does not require the personal skill or attention of the pleader and which can be done without consideration of facts or circumstances. To such acts the maxim *qui facit per alium facit per se* must be held to apply. When a plaint or memorandum of appeal has been drawn up and signed by a pleader duly authorized under O. 3, R. 4, there is nothing contrary to the provisions or the spirit of that rule in the mechanical act of handing over the papers to the Court, or the officer appointed, being performed by a clerk or another pleader to whom the duty of performing that act has been delegated by the duly authorized pleader. The presentation of the plaint or appeal must be taken to be that of the signatory thereto. (*Roberts, C.J. and Dunkley, J.*) Sawarmal *v.* Kunjilal. **1939 Rang.L.R. 108=180 I.C. 565=11 R.R. 418=A.I.R. 1939 Rang. 1.**

——**O. 3, R. 4**—*Power to appoint another Counsel—Party appointing general agent by power-of-attorney giving him all powers necessary for proper conduct of suit—Agent appointing pleader giving power to appoint another pleader—Such pleader appointing another pleader by vakalatnama signed by himself—Appeal filed by latter—If proper.*

A party appointed a general agent to conduct litigation on his behalf and gave him all powers necessary for conduct of case. The agent appointed a pleader by a vakalatnama duly signed and filed and give him power to appoint another pleader if necassary. The pleader in his turn appointed another pleader by a vakalatnama duly signed by himself and such pleader filed the appeal.

Held, that the appeal was properly constituted as the agent was duly authorized under the power of attorney to give a pleader a power to appoint another pleader and the pleader who filed the appeal had been duly authorized by the pleader engaged by the agent. (*Stone, C. J.*) Ramdeo Tilokchand *v.* Lalu Natha. **I.L.R. (1937) Nag. 494=169 I.C. 117=9 R.N. 305=19 N.L.J. 207=A.I.R. 1937 Nag. 65.**

——**O. 3, R. 4**—*Scope*—Mukhtar *appointed by party presenting nomination on behalf of party*—Mukhtar *accepting* mukhtarnama *and actually acting for client—Omission to write name of* mukhtar *in body of* mukhtarnama—*If fatal—Power of* mukhtar *to act on behalf of party.*

The presentation of an application or a nomination by a *mukhtar* appointed by the party under a *mukhtarnama* signed by the *mukhtar* in token of acceptance is a valid presentation, although by oversight the name of the *mukhtar* is not written in the body of the *mukhtarnama.* Where a *mukhtar* or vakil is actually intended by a party to act on his behalf and does so act, formal defects of this nature, such as the omission to write the name of the vakil or *mukhtar* in the body, are of no importance and cannot invalidate the presentation by him. (*Darling, S. M. and Bomford, J.M.*) Krishna Pratab Singh *v.* Emperor. **1937 R D. 5.**

——**O. 3, R. 4**—*Vakalat filed in suit—How long remains in force—Collector's cases—Fresh vakalat—Necessity.*

Collector's cases are regulated by rules framed under S. 70, C. P. Code. Being part of execution proceedings they are part of proceedings in suit. As a vakalatnama filed by a pleader in the suit remains in force throughout the proceedings in the suit and as a fresh vakalatnama is not necessary for his appearance in execution proceedings, so also in Collector's cases which are only part of those proceedings in the suit, a fresh vakalatnama is not necessary for the pleader's appearance. (*G. P. Burton, F. C.*) The Co-operative Society *v.* Ramchandra Bhagwatt. **1938 N.L. J. 122**

——**O. 3, R. 4**—*Vakalatnama—Construction—Appointment for "prosecution" of all proceedings—Power to file execution petition.*

In construing a vakalatnama the circumstances in which it is given must be looked to. When a pleader is appointed for the "prosecution" (pervi) of all proceedings connected with a case, and is engaged especially for the purpose of a darkhast, the pleader has power to file darkhasts or execution applications. (*Norman, I. C. S.*) Khairat Mohammed *v.* Hira Chand. **1936 A. M.L.J. 138.**

——**O, 3, R. 4**—Vakalatnama *not executed by party or any one on his behalf—Order based on verbal compromise intimated to Court by pleader of that party—If liable to be set aside.*

Where the *vakalatnama* lodged in Court by the pleader of one of the parties was not actually executed either by that party or by any one on his behalf, an order of Court based on a verbal compromise intimated to it by that pleader is liable to be set aside. (*Darling, S. M. and Bomford, J.M.*) Mahomed Taqi Khan *v.* Dhanpati. **1937 R.D. 99**

——**O. 3, R. 4**—Vakalatnama—*Signature of appellant in it proved to be forgery—Appeal, if competent.*

Where the signature which purported to be of the appellant on the *vakalatnama* is proved to be a forgery, the appeal filed by the pleader who is said to have acted on his behalf in the lower Court is incompetent. (*Edgley, J.*) Abdul Jamadar *v.* Lal Behari Sarkar. **65 C.L.J. 418.**

——**O. 3, R. 4 (1)**—*Appellant executing power-of-attorney in favour of a certain advocate—Presentation of appeal by another advocate on behalf of latter—Whether proper—"Acting" and "pleading"—Distinction between.*

A pleader who appears on behalf of another pleader engaged by a party, can appear for the latter pleader only "to plead" on behalf of the party, but he has no power "to act" on his behalf without a document in writing being executed in his favour in the manner prescribed by O. 3, R. 4, C. P. Code. The presentation of an appeal amounts to "acting" and not "pleading". If the appellant engages a certain advocate for filing the appeal and duly executes a power of attorney in his favour, he alone could present the appeal. Where the memorandum of appeal presented in Court is not signed by him but by another advocate for him, there is no proper appeal before the Court. (*Agha Haidar, J.*) K. L. Gauba *v.* The Indo Swiss Trading Company, Ltd. **17 Lah. 610=163 I.C. 141=8 R.L. 1024=38 P.L.R. 258 =A.I.R. 1936 Lah. 500.**

——**O. 3, R. 4 (1)**—*Appointment of pleader—Agent under power-of-attorney—Power to appoint.*

A person who is authorized under a power-of-attorney to appoint a pleader for the principal can validly appoint a pleader, and such a pleader can act on that appointment on behalf of the principal. (*Norman, I.C.S.*) Khairat Mohammed *v.* Hira Chand. **1936 A.M.L.J. 138.**

——**O. 3, R. 4 (1)**—Scope—Advocate of High Court—Appearance in mofussil Court to plead—Memorandum signed by himself—Sufficiency—Vakalatnama—Necessity—Bombay High Court Rules, R. 4. *See* Bombay High Court Rules (Original Side), R. 40. **42 Bom L.R. 515.**

——**O. 3, R 4 (1)**—*Scope—Pleader filing petition without* vakalat—*Subsequent filing of* vakalat *without accepting it—Acceptance of* vakalat *later—Sufficiency—Petition if in order and duly filed.*

An application for execution of a decree duly signed and verified by the decree-holder was filed in Court and acted on by the Court. The pleader had not, however, filed a *vakalatnama* along with the petition and on the omission being noticed he filed a *vakalatnama* duly stamped, but without having been accepted by him. Later the omission was made good, the pleader signing his acceptance in the back of the *vakalatnama* with the permission of the Court.

Held, that the application was in order and was duly filed on the date it was presented to the Court, and that there was nothing wrong about it. (*M. C. Ghose, J.*) Jagadish Chandra Dhabal Deb *v.* Satya Kinkar Sahana. **63 Cal. 733=40 C.W.N. 730.**

——**O. 3, R. 4 (1)**—*Scope—Pleader having no* vakalat *from client—Presentation of execution application—Effect—If has any legal effect—Limitation Act, Art. 182 (5)—"In accordance with law".*

A pleader who has not been appointed by a document in writing as required by O. 3, R. 4, is wanting in capacity or competence to act. If a pleader purports to do something which he has no power or capacity to do, it can have no legal effect. The presentation of an execution petition by a pleader who holds no *vakalat* from the decree-holder is a nullity. An execution petition presented by such a pleader though in proper form and duly signed by the decree-holder is not an application "in accordance with law" within the meaning of Art. 182 (5) of the Limitation Act, and cannot therefore operate as a step-in-aid, especially when the application was ultimately withdrawn and dismissed without any execution really taking place.

Quaere: Whether if anything has really been done upon such an application, it can be treated as mere waste paper. (*Burn and K. S. Menon, JJ.*) Nandamani Ananga Bhima Deo *v.* Madana Mohana Deo. **I.L.R. (1937) Mad. 320=165 I.C. 659=9 R.M. 280=1936 M.W.N. 957=44 L.W. 528=A.I.R. 1937 Mad. 239=71 M.L.J. 604.**

——**O. 3, R. 4** (1)—Vakalatnama *signed by party and by vakil whom he intended to act—Mention of name of another vakil in body of document—Effect of.*

Where a *vakalatnama* was signed by the party and also by the vakil who was actually intended by him to act on his behalf and who did, in fact, so act, the fact that by an error the name of another vakil remained in the body of the document is a formal defect of no importance. (*Sulaiman, C.J. and Bennet, J.*) Ram Sarup *v.* Bhagwati Prasad. **58 All. 912=164 I.C. 725=9 R.A. 187=1936 A.W.R. 516=1936 A.L.J. 586=A.I.R. 1936 All. 636.**

See also (*Abdul Rashid, J.*) Singh Ram *v.* Khubi Ram Sheo Ram. **30 P.L.R. 639=A.I.R. 1937 Lah. 719.**

——**O. 3, R. 4 (2)**—*Pleader validly representing party in lower Court—Authority to file appeal.*

O. 3, R. 4 (2), C. P. Code, provides that every appointment of a pleader shall be filed in Court and shall be deemed to be in force until all proceedings in the suit are ended so far as the client is concerned. So where a pleader validly represents a party in the trial Court, he can present a memorandum of appeal on behalf of his client and prosecute the appeal. (*Agha Haidar, J.*) Rasul Shah *v.* Diwan Chand. **165 I.C. 274=9 R.L. 234=A.I.R. 1936 Lah. 583.**

——**O. 3, R. 4 (3) and O. 9, R. 9**—*Interpretation of sub-R. (3) of R. 4 of O. 3—Application for restoration of suit dismissed for default—Fresh appointment of pleader—Necessity.*

The maxim *expressio unius est exclusio alterius* cannot be applied to the interpretation of the terms of sub-R. (3) of R. 4 of O. 3 as R. 1 authorises a pleader to make any application on behalf of the party he represents. As a suit terminates only by a decree, an application for restoration of a suit dismissed for default must be regarded as a proceeding in the suit. So a pleader is entitled to present such an application without fresh appointment. (*Niyogi, J.*) Mst. Boro Bai *v* Ramsunder. **177 I.C. 409=11 R.N. 141=1938 N.L.J. 98=A.I.R. 1938 Nag. 272.**

——**O. 4, R. 1**—*Presentation of plaint—Same Judge presiding at two places.*

Where the same Judge has to preside over two Courts in different places, the presentation of a plaint to him when presiding at one place, with reference to property within the jurisdiction of the other Court, is a valid presentation. The Judge has jurisdiction to accept such a plaint. (*Pollock, J.*) Rikhiram *v.* Mathura Prasad. **1939 N.L.J. 503.**

——**O. 4, R. 1**—Presentation of plaint—Time and place—Presentation to clerk outside Court house and outside Court buildings—Validity. *See* Bombay Civil Courts Act, S. 40. **38 Bom.L.R. 1196=A.I R. 1937 Bom. 25.**

——**O. 5, Rr. 15 and 17 (as amended in Bengal)**—*Notices under O. 21, R. 22 issued on heirs of judgment-debtor—Eldest son accepting only notice in his name—Notices in names of others affixed on door—Validity of service.*

Where notices issued under O. 21, R. 22, C. P. Code, on the heirs of a deceased judgment-debtor who were substituted in his place, were tendered to the eldest son who took the notice in his name and signed an acknowledgment but refused to take the notices in the names of his brothers, and those notices were then affixed on the main door of the house,

Held, that there was good service on the other legal representatives of the judgment-debtor under O. 5, Rr. 15 and 17, C. P. Code, as amended in Bengal in 1928. (*Mitter and Khundkar, JJ.*) Rangpur Loan Office, Ltd. *v.* Tarit Bhusan Roy. **I.L.R. (1939) 1 Cal. 530=70 C.L.J. 97=186 I.C. 174=12 R.C. 447=43 C.W.N. 539=A.I. R. 1939 Cal. 369.**

——**O. 5, R. 15**—*Service on defendant's brother living with him—If service on defendant.*

Where summons is handed over to the defendant's brother who lives with him, service on the defendant should be deemed to have been made in accordance with O. 5, R. 15, C. P. Code. (*Abdul Qayoom, C.J.*) Basu Shah *v.* Kanshi Ram. **39 P.L.R J. & K. 133.**

——**O 5, R. 17**—*Applicability—Notice after first hearing.*

The provisions of O. 5, R. 17, C. P. Code, are not strictly applicable to the service of notice after the first hearing in the case. (*Hamilton and Radhakrishna, JJ.*) Saheba Khatun *v.* Anwarul Hasan. **1939 A.W.R. (C.C.) 141=1939 O.W.N. 787=1939 O.A. 699.**

——**O. 5, R. 17**—Applicability—Service of notice under S. 112, Madras Estates Land Act—Service by affixture—When to be ordered—Due and reasonable diligence—If to be proved. *See* Madras Estates Land Act, S. 112. **(1939) 1 M. L.J. 618.**

——**O. 5, R. 17**—*Duty of process-server—Service under—When due service.*

The serving peon before he can take advantage of the provisions of O. 5, R. 17 of C. P. Code, must attend at the right place and he must attend at a time when he may reasonably expect that the defendant will be present, and if he fails to find the defendant, he must take reasonable steps to discover where the defendant may happen to be. Where in a case the process-server went to the house of the defendant on three different dates, but the summons was not served and on the fourth date as neither the defendant nor his agent nor any adult member of his family was found, the process-server posted the summons on the house.

Held, that the defendant was not duly served as due and diligent search was not made. (*Ba U, J.*) A. S. P. L. V. S. Ramaswamy Chettyar *v.* Suni

Mohamed Rowther. **173 I.C. 794=10 R.R. 375 =A.I.R. 1937 Rang. 475.**

——**O. 5, R. 17**—*Notice—Service—Endorsement of refusal—Copy of notice neither offered to person to be served nor affixed to his residence—Sufficiency of service.*

Where on the reverse of a notice it is noted that the person to be served with that notice refused to affix his thumb impression thereto in token of his having been informed of the contents of the notice, but where no copy of the notice was either offered to that person or affixed to his abode, the service cannot be said to comply with the provisions of O. 5, R. 17, C. P. Code. (*Darling, S. M. and Mehta, J. M.*) Mam •Raj *v.* Mangal Sen. **1938 R.D. 929=1939 A.W.R. (B.R.) 54.**

——**O. 5, R. 17**—*Scope—Proper service under—Proof—Peon sending summons through maid servant—Father not examined—Effect of—Proper service—If can be inferred.*

Where the report of the peon entrusted with the service of summons on a defendant is to the effect that he sent the summons to the defendant through a maid servant, and the latter is not examined to prove that the defendant refused to accept the summons, there is no ground for holding that there has been a proper service under O. 5, R. 17, C. P. Code, which can be accepted as a substitute for personal service. (*Varma, J.*) Snehalata Devi *v.* Janardhan Prasad Singh. **21 Pat.L.T. 340=A I.R. 1940 Pat. 563.**

——**O. 5, R. 17**—*Summons—Service by affixture when justified—Reasonable diligence to find out party—Party though not present, expected to return—Affixture—Summons if duly served.*

The procedure of affixing a copy of the summons to the outer door of a defendant's house, can come into operation only when certain conditions have been fulfilled, one of them being the inability of the serving officer to find out the defendant after using all due and reasonable diligence. Where the process-server was told that the defendant had gone out on business and would be back in the evening and he thereupon affixed the summons to the door of the house, it cannot be said that the summons has been duly served, for it could not be said that reasonable diligence had been used to find out the defendant. (*Mulla, J.*) Salig Ram *v.* Jumna Sahai. **180 I.C. 514=11 R.A. 474=1938 A.W.R. (H.C.) 750=1938 A.L.J. 1166=A.I.R. 1939 All. 180.**

——**O. 5, R. 19**—*Scope—Compliance with—Duty of Court—Affidavit of process-server and verification—If can be acted upon—Express declaration of due service—Necessity for.*

Rule 19 of O. 5. C. P. Code, casts a duty on the Court, when a summons is returned under R. 17, to either declare that the summons has been duly served or to order such service as it thinks fit. It is not enough for the Court to merely act mechanically on the affidavit of the service officer. The rule requires that the Court ought to be satisfied on the affidavit of the serving officer and on the verification in the return that it can safely declare the summons properly served. When there is no such declaration, the mere fact that the Court declares the defendant *ex parte*, does not lead to the conclusion that the Court has impliedly made such a declaration of due service. There must be a strict compliance with R. 19. (*Venkataramana*

Rao, J.) V. Gopala Chettiar *v.* Mariasusai Pillai. **1937 M.W.N. 184 (2).**

——**O. 5, R. 19**—Scope—Duty of Court—Summons not personally served—Omission to declare service sufficient—Effect. *See* C. P. Code, S. 11. **71 M.L.J. 317.**

——**O. 5, R. 19**—*Scope—Express declaration of sufficiency of service of summons—Absence of—Effect of—If ground for holding that summons has not been duly served—Implied declaration—Inference from circumstances.*

It is of course desirable that all Courts should observe the mandatory provision in O. 5, R. 19, C. P. Code, and "either declare that the summons has been duly served or order such further service as it thinks fit." But it cannot be said that the absence of such an express declaration will involve as a necessary consequence a finding that a summons has not been duly served. There may be circumstances which would justify an inference that there has been an implied, though not express, declaration of sufficiency of service. (*Burn and Stodart, JJ.*) Venkata Rayanim Varu *v.* Chinna Bapanna. **1939 M.W.N. 1197=50 L.W. 938=A.I.R. 1940 Mad. 213=(1939) 2 M.L.J. 934.**

——**O. 5, R. 19**—*Scope—Non-compliance—Effect.*

The provision of O. 5, R. 19, will apply to all cases in which return of summons is made under O. 5, R. 17 whether due to absence or refusal of person to be served. Even in the case of a refusal, unless there is a declaration by the Court that the service under O. 5, R. 17, is sufficient as required by the provisions of O. 5, R. 19, any order passed by the Court in the absence of judgment-debtor will not constitute as *res judicata.* (*Pandrang Row and Menon, JJ.*) Ramanadhan Chettiar *v.* Veerappa Chettiar. **173 I.C. 468=10 R.M. 591=A.I.R. 1937 Mad. 84.**

——**O. 5, R. 20**—*Substituted service—Propriety—House found to be locked—Avoiding of service—If can be inferred.*

From the mere fact that when the notice of execution was taken to the house of the judgment-debtor for the first time, the house was found to be locked, it is very unsafe to infer that he was avoiding service; and it is not proper to order substituted service in such case. (*Harper, S M. and Sathe, J.M.*) Khalil Uddin *v.* Abdul Ali. **1940 R.D. 332=1940 A.W R. (B R.) 141 =1940 O.A. 864.**

——**O. 5, R. 20**—*Substituted service—When could be ordered—Conditional order to serving officer—Legality.*

Where in an order for fresh summons a Court remarked that if the defendant evaded service or could not be found after due care and diligence substituted service would be effected, it was held that such a conditional order was illegal, as it was for the Court and not for the serving officer to determine whether there was evasion of service. O. 5, R. 20 allows substituted service only when the Court is satisfied that defendant is evading service. (*Weston, I.C.S*) Govind Ram *v.* Niranjan Lal. **1938 A.M.L.J. 43.**

——**O. 5, R. 20**—*Substituted service—When not sound service.*

Substituted service may or may not be sound service. It is not sound service if the person on whom the notice was sought to be served can prove that in actual fact he was not evading service and knew nothing whatever about the hearing in question. (*Davies, I.C.S.*) Munshi Ram *v.* Raj Kumar. 1938 **A.M.L.J. 124.**

———**O. 5, R. 20 (2)**—"Effectual"—Meaning of. *See* Limitation Act, Art. 164. **1939 Rang.L.R. 606.**

———**O. 5, R. 20 (2)**—*Scope and effect of—Substituted service—Adequacy of service—If can be questioned.*

Under O. 5, R. 20 (2), C. P. Code, service substituted by the order of the Court is as effectual as if it had been made on the defendant personally, but, it does not follow that substituted service is necessarily due service, the adequacy of which can never be questioned by the party concerned. (*Smith, J.*) Gajadhar *v.* Uma Dutta. **171 I.C. 617=10 R.O. 139=1937 O.L.R. 572=1937 O.W.N. 1141=A.I.R. 1938 Oudh 11.**

———**O. 5, R. 21**—*Service by post on defendant living in British India—Legality.*

There is no provision of law by which summons may be issued by post on a defendant residing within British India. (*D. R. Norman.*) Rani Veshni *v.* Ganesh Mal Sardar Mal. **1937 A.M.L.J. 70.**

———**O. 6, Rr. 1 and 4**—*Scope—Particulars of allegation in petition or affidavit—Power of Court to direct.*

The Court, under its inherent jurisdiction, is entitled to interfere and direct particulars if it considers that a litigant is substantially embarrassed owing to lack of precision in a petition or affidavit; and a party disregarding his opponent's request for particulars will be doing so at his own risk. Any relevant statement which could have been incorporated in the petition or furnished by way of particulars will not, on failure to furnish particulars, be allowed to be imported in an affidavit in reply at the hearing of the petition. (*Panckridge, J.*) Sitaram Poddar *v.* Hariram Poddar. **165 I.C. 24=9 R.C. 370 (1)=40 C.W.N. 913.**

———**O. 6, R. 4**—*Pleadings—Deed impeached as 'fraudulent' and 'bogus'—Necessity to keep the two distinct.*

To call a deed both 'fraudulent' and 'bogus' is not a clear piece of pleading. Though fraud may be present in both cases, a deed may be fraudulent without being bogus and hence it is better to keep the two distinct. (*Gruer and Niyogi, JJ.*) Godbole *v.* Mst. Nanibai. **I.L.R. (1940) Nag. 293=181 I.C. 297=11 R.N. 452=1938 N.L.J. 279=A.I.R. 1938 Nag. 546.**

———**O. 6, R. 5**—*Filing of replication—Discretion of Court to reject.*

O. 6, R. 5, C. P. Code, only permits a better statement of the claim being put in when it is ordered by the Court. If the Court considers that no replication is called for, it has the discretion to reject it. (*Bhide, J.*) Bihari Lal *v.* Chandu Lal. **41 P.L.R. 650=A.I.R. 1939 Lah. 386.**

———**O. 6, Rr. 5 and 7**—*Further statement of claim based on different cause of action—Permissibility.*

O. 6, R. 5, C. P. Code, permits merely a further and better statement of the nature of the claim or further and better particulars of any matter stated in any pleading, and not the submission of new material altogether based on an entirely different cause of action. This would be really

repugnant to R. 7 of the same order which unequivocally prohibits the raising of any new ground of claim or the alleging of any fact inconsistent with previous pleadings. (*Addison and Din Mohammad, JJ.*) Mehnga Dass *v.* Maya Singh. **175 I.C. 382=10 R.L. 706=40 P.L.R. 881=A I.R. 1937 Lah. 795.**

———**O. 6, R. 5**—*Opportunity under not availed of—Subsequent formal amendment of plaint—Further pleadings—Case for.*

In a certain suit the defendant was given an opportunity to make a detailed statement under O. 6, R. 5, C. P. Code, on condition of his paying some amount as adjournment costs. The defendant refused this conditional offer. Subsequently the plaintiff applied for an amendment of the plaint and it was allowed. The amendment was of a formal nature, the parties being well aware of their position throughout. On such amendment, the defendant submitted his detailed statement previously refused by him but the Court refused to accept it as being belated.

Held, that the amendment of the plaint being of a formal nature, did not reopen the case so as to give the defendant a fresh opportunity irrespective of what had happened before. No case for further pleadings arose on such amendment and the Court in refusing to accept defendant's statement rightly disallowed him to take advantage of the technical plea. (*Gruer, J.*) Ganba Paiku Kunbi *v.* Ganpatsao. **I.L.R. (1937) Nag. 498=176 I.C. 155=11 R.N. 35=A.I.R. 1937 Nag. 376.**

———**O. 6, R. 5**—*Particulars—Power to order and to dismiss suit, if not furnished—Order of dismissal—Interference by appellate Court—Attitude of Courts with reference to failure to give particulars.*

Where a plaintiff is ordered to give particulars one of the terms of the order may be that the action shall be dismissed unless the particulars are delivered within a certain time. Where a trial Judge makes an order of dismissal and makes it fairly giving every kind of chance, an appellate Court, if indeed it has any power at all to interfere with such a discretion so judicially exercised, should be exceedingly slow to do so. Broadly speaking, it is not desirable that cases should be lost in this way. It is not desirable that Judges should be stringent where it comes to dealing with litigants who may have gone wrong because of ignorance or wrong advice. It is not advisable on the other hand to allow litigants to take up a contumacious attitude, holding their facts back until they have an opportunity of fishing about in their opponent's evidence. (*Stone, C.J. and Bose, J.*) Gajadhar *v.* Gokuldas. **1940 N.L.J. 307=A.I.R. 1940 Nag. 261.**

———**O. 6, R. 5**—*Scope—Further and better particular not asked for—Effect—Objection on the score of vagueness—Maintainability in appeal.*

It is not open to a defendant to make a grievance of any vagueness in the plaintiff's pleadings at an appellate stage because if they so desired, it would be open to them to apply for further and better particulars under O. 6, R. 5, C. P. Code. (*Edgley, J.*) K. C. De *v.* Hira Bewa. **I.L.R. (1937) 1 Cal. 491=167 I.C. 461=9 R.C. 695=41 C.W.N. 88=A.I.R. 1937 Cal. 51.**

———**O. 6, R. 6**—*Contract—Breach—Suit by seller for damages against buyer for failure to take* *delivery—Averment as to readiness and willingness—Necessity.*

Where in suit by the seller against the buyer for failure to take delivery of goods, it was pleaded that there was no averment in the plaint as to readiness and willingness.

Held, that the actual allegations coupled with the fact of the pleadings being moffussil pleadings and that some latitute should be allowed, are enough, to show that the claim cannot fail for failure to comply with technical rules of pleading. (*Stone, C.J. and Niyogi, J.*) Arjunsa *v.* Mohanlal. **I.L.R. (1938) Nag. 308=172 I.C. 812=10 R.N. 246=A.I.R. 1937 Nag. 345.**

———**O. 6, R. 7**—Applicability to minors. *See* C. P. Code, O. 8, R. 9 and O. 6, R. 7. **A.I.R. 1937 Pat. 625.**

———**O. 6, R. 10**—*Plea of insanity—Pleadings—Contents—Duty of final Court of fact.*

Though it may be that a party seeking to avoid the effect of a deed by pleading insanity at the time of execution of the deed is not bound to plead circumstances from which he was bound to establish insanity and though it is permissible for him to lead evidence in proof of general insanity from which an inference of unfit mental condition at the time of the deed could be drawn and the burden lay on the opposite party to prove the contrary, that does not absolve the Court from the liability to scrutinise the pleadings of the parties when pleas have been made and if these pleas appear to be destructive of the case of usual insanity it will not be proper for the final appellate Court of fact to infer usual insanity from the statement of some witnesses ignoring the pleading. (*Puranik, J.*) Mst. Hazra Bi *v.* Mst. Fatmabi. **177 I.C. 80=11 R.N. 103=A.I.R. 1938 Nag. 204.**

———**O. 6, R. 14**—*Co-plaintiff though named in plaint not signing plaint—Effect.*

There is no rule that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint. The defect is not such as to justify the rejection of the plaint, but the co-plaintiff should be allowed to sign it. 17 Cal. 580 (P. C.), Rel. on. (*Mir Ahmad, A.J.C.*) Gangaram *v.* Secretary of State. **167 I.C. 158 =9 R. Pesh. 80=A.I.R. 1937 Pesh. 17.**

———**O. 6, Rr. 14 and 15**—Scope—If excluded by O. 29, R. 1. *See* C. P. Code, O. 29, R. 1. **41 Bom.L.R. 530.**

———**O. 6, R. 14**—*Signing of pleadings—Rule, if merely one of procedure—Authorization—Signing, if necessary.*

R. 14 of O. 6, C. P. Code, which requires a pleading to be signed by the parties is merely a matter of procedure. So, where it is found that a suit was duly authorized by a person, the question whether his signature was made by him or by somebody else on his behalf becomes immaterial. (*Grille and Niyogi, JJ.*) Sarju Prasad *v.* Badri Prasad. **I.L.R. (1939) Nag 515=188 I.C. 405=12 R.N. 338=1939 N.L.J. 333=A.I.R. 1939 Nag. 242.**

———**O. 6, Rr. 14 and 15**—Suit by limited company—Plaint signed and verified by Secretary—Sufficiency—Affidavit testifying to Secretary's fitness to verify—Necessity. *See* C. P. Code, **O. 29, R. 1. 40 C.W.N. 930.**

———**O. 6, R. 15**—Applicability to petitions to High Court in criminal revision. *See* Patna High Court Rules, Ch. III, R. 3. **19 Pat. 263.**

———**O. 6, R. 17 and United Provinces Encumbered Estates Act, S. 9**—*Addition of claim—If permissible—Amendment of written statement after period fixed by S. 9 of United Provinces Encumbered Estates Act—Additional claims—If can be allowed.*

O. 6, R. 17, C. P. Code, would not enable a party to alter the nature of his suit by the substitution or the addition of a claim founded on a different cause of action. Where a creditor seeks to amend his written statement of the period permitted by S. 9 of the United Provinces Encumbered Estates Act for the filing of a written statment, by the addition of certain claims on previously not mentioned mortgages, he cannot be permitted to amend his written statement as it makes a material change in the claim made in the written statement. (*Zia-ul-Hasan, C.J. and Bennet, J.*) Nazir Hasan Khan *v.* Ganga Din. **14 Luck. 701=183 I.C. 436=1939 O.W.N. 755=1939 A. W.R. (C.C.) 123=1939 R.D. 467=1939 O.L.R. 523=12 R.O. 34=A.I.R. 1939 Oudh 245.**

———**O. 6, R. 17**—*Amendment — Considerations.*

The provisions of the Civil Procedure Code allow a wide discretion to the Courts in the matter of amendment of pleadings. The main considerations to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidence of the multiplicity of litigation. (*Srivastava, Ag.C.J. and Zia-ul-Hasan, J.*) Mohd. Ata Husain Khan *v.* Nawab Bagar Mirza. **13 Luck. 584=171 I.C. 33=10 R.O. 66=1937 O.L. R. 514=1937 O.W.N. 1131=A.I.R. 1937 Oudh 484.**

———**O. 6, R. 17**—*Amendment—Considerations—Inconsistent case, involving fresh trial.*

O. 6, R. 17, C. P. Code, restricts amendments to matters necessary for determining the real question in controversy between the parties. Where the amendment sought would introduce a new and inconsistent case involving fresh trial with fresh pleadings and fresh evidence, it ought not to be allowed. (*Stone, C.J. and Bose, J.*) Badridas *v.* Raja Pratapgir. **188 I.C. 23=12 R.N. 304=1939 N.L.J. 525=A.I.R. 1940 Nag. 8.**

———**O. 6, R. 17**—*Amendment—Discretion of Court—Amendment adding another ground of exemption from limitation.*

The amendment of pleadings is no doubt in the discretion of the Court. But that discretion must be exercised on judicial principles. Where a party seeking amendment does not propose to substitute one cause of action for another or to change the subject-matter of the suit but simply wants to add another ground of exemption from limitition, the amendment should be allowed. (*Nasim Ali and Edgley, JJ.*) Jogendra *v.* Debendra. **173 I.C. 707=10 R.C. 564=41 C.W.N. 1084 =A.I.R. 1937 Cal. 485.**

———**O. 6, R. 17**—*Amendment—Power of Court to order—Party allowed time to pay deficit Court-fees.*

The Court has undoubtedly power to allow abandonment of part of a claim on the part of the plaintiff, or to order an amendment of the pleadings under O. 6, R. 17, C. P. Code, at any time after institution of the suit. The Court does not lose this power by reason of the fact that the party has been allowed a certain time for payment of the deficit Court-fees. (*S. K. Ghose and D. C. Patterson, JJ.*) Mst. Saiyadunnessa Khatun *v.* The Gaibanda Loan Co., Ltd. **172 I.C. 897=10 R.C. 471=65 C.L.J. 199=A.I.R. 1937 Cal. 562.**

——**O. 6, R. 17**—*Amendment—If in the complete discretion of Court—When obligatory—Pronote forming part of the cause of action found inadmissible—Amendment to permit falling back upon the original debt—If can be allowed.*

Though, O. 6, R. 17, C. P. Code, begins with the words 'the Court may', the latter portion indicates that if the amendment is permissible under the law otherwise the Judge has no discretion but to allow it, if it is necessary for determining the real question in controversy between the parties. Where a suit was for monies due on a mortgage as evidenced by a pronote and a deposit of title deeds, but the pronote was found to be inadmissible in evidence, the plaintiff could be permitted to amend his plaint, so as to base his cause of action on the original debt for which the defective pronote was given. There could be no prejudice to the other party such as could not be compensated by costs, and the suit, would still remain after the amendment, a suit to recover money on a mortgage created by deposit of title deeds. (*Baguley and Mosely, JJ.*) Niemeyer *v.* E. M. Mamooji. **1938 Rang.L.R. 521=180 I.C. 519=11 R.R. 411=A.I.R. 1938 Rang. 461.**

——**O. 6, R. 17**—*Amendment in appeal—Amendment not changing character of suit and not unfair—If can be made in appeal.*

An amendment which is not of such a character as to be objectionable either as changing the subject-matter of the suit or as being otherwise unfair is within the competence of the Court under O. 6, R. 17 and can be made even in appeal. (*Sir George Rankin.*) Ramdhan Puri *v.* Lachmi Narain. **16 Pat. 149=166 I C. 649=9 R.P.C. 167=45 L.W. 191=1937 O.W.N. 155=18 Pat.L.T. 54=1937 A.W.R. 184=41 C W.N. 418=1937 M.W.N. 251=1937 P.W N. 87=3 B.R. 318=65 C L.J. 47=39 Bom.L.R. 363=1937 O.L.R. 68=1937 A.L.J. 556=1937 A.L.R. 119=A.I.R. 1937 P.C. 42 (P.C.).**

——**O. 6, R. 17**—*Amendment in appeal — Propriety.*

An amendment of the plaint may be allowed even at the appellate stage. It is for the Court to consider whether the amendment should be allowed under the circumstances of the case; and if it comes to the conclusion that the amendment sought does not alter the substance or nature of the suit, but merely its form, the Court cannot be said to act erroneously if it allows the amendment even in appeal (*Wort, J.*) Mathura Sao *v.* Ram Lal Jugal Kishore. **176 I.C. 870=4 B. R. 781=11 R.P. 125=1938 P.W.N. 398=A.I.R. 1938 Pat. 400.**

——**O. 6, R. 17**—*Amendment in appeal on ground of mistake in typing—Permissibility.*

Where the plaintiff-appellant prays in appeal for amendment of the plaint on the ground of mistake having been made in the typing of the draft plaint, but no sufficient explanation is offered why the alleged mistake was not discovered by the plaintiff till after the disposal of the case by the lower Court, it is not a case in which the High Court would in appeal exercise its discretion in allowing the amendment. (*Mahommad Noor and Varma, JJ.*) Apurba Krishna Mitra *v.* Ram Bahadur. **161 I.C. 862=8 R.P. 489=1936 P.W.N. 155=A.I.R. 1936 Pat. 191.**

——**O. 6, R. 17**—*Amendment in second appeal —Permissibility—Principles.*

There is nothing to preclude the Court from allowing an amendment necessary for the purpose of determining the real question in controversy between parties even in second appeal but except under exceptional circumstances it should not be allowed. In exercising discretion whether such an amendment should be allowed or not, the first principle to be observed is that an amendment is not permissible when it would prejudice the right of the opposite party existing on the date of such amendment. It is not a question whether the defendant would be taken by surprise by such an amendment or not, but whether by allowing such amendment, prejudice and injustice would be caused to him. The second principle to be observed is whether the conduct of the party seeking the amendment has been *bona fide* and he has come to Court with clean hands and whether by the exercise of due diligence the relief for amendment could have been sought earlier. (*Venkataramana Rao, J.*) Ramaswami Chetti *v.* Anaiya Padayachi. **165 I.C. 737=9 R.M. 293=1936 M.W.N. 411=A.I.R. 1936 Mad. 545.**

——**O. 6, R. 17**—Amendment in second appeal —Permissibility—Suit for bare declaration—Plea of non-maintainability raised in trial Court —Application for amendment in second appeal—Competency. *See* Specific Relief Act, S. 42. **1938 M.W.N. 274=A.I.R. 1938 Mad. 331.**

——**O. 6, R. 17**—*Amendment in second appeal —Power of Court to allow.*

The Court should not at the stage of second appeal allow the plaintiff to change the whole nature of the suit, particularly when even at this late stage the materials for deciding this new case are not before the Court. (*Harries, C.J. and Dhavle, J.*) Dhanu Lal *v.* Kuldip Narayan Singh. **186 I.C. 852=12 R.P. 539=6 B.R. 403 =A.I.R. 1940 Pat. 88.**

——**O. 6, R. 17**—*Amendment of plaint—Considerations—Legal relationship and nature of suit—Alteration of—If permissible.*

An amendment of the plaint should not be allowed when plaintiff seeks to amend in order to sue on an entirely different legal relationship between himself and the defendant from that relied upon in the original plaint, and when the entire nature of the suit is sought to be changed. (*Weston.*) Nihal Chand *v.* Amar Chand. **1937 A.M.L.J. 104.**

——**O. 6, R. 17**—*Amendment of plaint—Introduction of fresh details—Permissibility.*

It is not by a mere change in the wording of the plaint or the introduction of fresh details that the nature of a suit is altered. The alteration which affects the case is one where the original suit is wholly displaced by the proposed amendment or where a totally different or inconsistent case is introduced. But where this is not the case, leave to amend cannot be refused merely on the ground that the words which did not find place in the original plaint had been introduced in the subsequent plaint, even though the effect of those words is not to introduce a new or an inconsistent case. (*Addison and Din Mohammad, JJ.*) MEGH RAJ *v.* FIRM, RAGHBAR DAS. **178 I.C. 1005=11 R.L. 514=A.I.R. 1938 Lah. 712.**

———**O 6, R. 17**—*Amendment of plaint—Limitation—No new cause of action introduced.*

Where an amended plaint did nothing more than furnish particulars and did not introduce any new cause of action, no question of limitation could arise in such a case. (*Bose, J.*) RAMNATH HAJARIMAL *v.* MOHANLAL RADHAKISAN. **181 I. C. 106=11 R.N. 424=1939 N.L.J. 21=A.I.R. 1939 Nag. 23.**

———**O. 6, R. 17**—*Amendment of plaint—Misdescription of opposite party.*

A firm brought a suit against another firm working in the Patiala State. The description of the opposite party was given as "firm *S* situate at Patiala State through *C*, manager and proprietor of the said firm." An objection being brought that O. 30, R. 1 benefited firms in British India only and not the firms working in the Indian States, the plaintiff applied that the plaint should be allowed to be amended by substituting the name of *C*, the sole proprietor and manager of the firm in place of firm *S*.

Held, that in view of the fact that the name of *C* was already on the record and that the only defect in the plaint was that the opposite party had been wrongly described, the amendment ought to be allowed. (*Addison, Ag.C.J. and Din Mohammad, J.*) KISHEN SINGH *v.* SALIG RAM. **181 I. C. 713=11 R.L. 880=A.I.R. 1938 Lah. 718.**

———**O. 6, R. 17**—*Amendment of plaint—Permissibility—Plaint reading certain document in particular way—Amendment by reading the document in another way.*

When a claim is made on a document the fact that at one stage when a plaint was presented it was read in a particular way and at another time, when it is sought to be amended, it is sought to be read in another way, will certainly not justify the view that a new and inconsistent claim is sought to be introduced. These are really alternative ways of reading the document and it will be for the Court ultimately to decide what its correct construction is, and in such a case amendment of the plaint should be allowed. (*Varadachariar, J.*) SUBRAMANIAN NAMBOODRIPAD *v* VASUDEVAN NAMBOODRIPAD. **160 I.C. 989=8 R.M. 739 (1)=A.I.R. 1936 Mad. 151.**

———**O. 6, R. 17**—Amendment of plaint—Revision. *See* C. P. CODE, S. 115—'CASE DECIDED.' **1937 A.M.L.J. 104.**

———**O. 6, R. 17**—*Amendment of plaint—When not permissible.*

Although the Court has wide powers to allow amendment under O. 6, R. 17, it is well established that an amendment which changes the whole aspect of the suit and introduces a different cause of action cannot be allowed. Where a plaintiff sues for a declaration that the properties in dispute are trust properties, but subsequently seeks an amendment that she has a life interest in the property or at any rate a charge for maintenance, the claim sought to be introduced by way of amendment is wholly inconsistent with the original plaint. (*Bhide, J.*) NAZIR AHMAD *v.* TAJ MAHAL BEGUM. **186 I.C. 828=12 R.L. 425 =A.I.R. 1940 Lah. 63.**

———**O. 6, R. 17**—*Amendment of plaint—When to be disallowed—New case—Late stage.*

It is wrong for a Court considering amendment to regard the new cause of action as in time if it was in time when the original suit was brought. Where a suit was originally brought on an acknowledgment and after the case was all over except for the arguments the plaintiff seeks to amend his plaint so as to found his claim on an earlier agreement, the prayer for amendment should be refused as being not only out of time, but made at a very late stage. It is an amendment that introduces a new case, a new cause of action, a new contract, a contract made at a different time having a different period of limitation and having different legal consequences and so ought not to be allowed. (*Stone, C.J. and Bose, J.*) LACHHMANSINGH *v.* MAHENDRALAL. **I.L.R. (1939) Nag. 194=176 I.C. 728=11 R.N. 72=1938 N.L.J. 198=A.I.R. 1938 Nag. 388.**

———**O. 6, R. 17** — Amendment — Seeking to substitute one legal entity for another—If to be permitted after limitation. *See* LIMITATION ACT, S. 22. **I.L.R. (1939) Kar. 275=A.I.R. 1939 Sind 172.**

———**O. 6, R. 17**—*Amendment without notice to other side—Propriety.*

Where a plaint was returned for amendment and was amended without notice to the other side, and the amendments were all important, the order was set aside and case remanded for trial on the original plaint. (*Davies.*) GOPAL *v.* KANI RAM. **1939 A.M.L.J. 112 (1).**

———**O. 6, R. 17**—*Appeal—Decree against two defendants—Appeal by one only—Appeal in form against whole decree—Court-fee paid only as regards part—Application to amend valuation and to pay additional court-fee—Duty of Court.*

Where an appeal by one defendant only from a decree against two is objected to on the ground that the valuation of the appeal is restricted to that part only which relates to the appellant, if the appellant offers to amend the valuation and pay the difference of Court-fee, the same must be accepted by the Court especially when the appeal in form is against the whole decree. (*Courtney-Terrell, C.J. and James, J.*) SARAT CHANDRA PATNAIK *v.* BAIDYANATH. **181 I.C. 840=11 R.P. 646=5 B.R. 682=1938 P.W.N. 523=A.I.R. 1939 Pat. 162.**

———**O. 6, R. 17**—Applicability — Insolvency petition by creditor—Amendment by inclusion of fresh acts of insolvency not pleaded or relied on originally—Power of Court to allow. *See* PROVINCIAL INSOLVENCY ACT, S. 9 (1) (*e*). **(1937) 2 M.L.J. 737.**

———**O. 6, R 17**—*Applicability—Party deliberately omitting to join necessary party to application and concealing existence—Subsequent application to amend—If can be allowed.*

Where an applicant under S 4 of the U. P. Encumbered Estates Act does not join in his application all the necessary parties as required by law, and asserts that there are no other parties to be added, wilfully concealing the existence of some persons who ought to be impleaded, he cannot be permitted to amend his application by adding the omitted parties, when the omission is brought to light by a creditor. The benefit of O. 6, R. 17 cannot be given to such a party. (*Darling, S. M. and Bomford, J. M.*) Har Prasad *v.* Parmeshwari Das. **1938 R.D. 137=1938 A.W.R. 44 (B.R.).**

———**O. 6, R. 17**—*Cause of action—Amendment introducing new cause of action—Suit for ejectment and for damages for use and occupation—Amendment to include prayer in the alternative for possession on title—Permissibility.*

A vendee of property sued for ejecting the tenant on the property and for damages for use and occupation, alleging that the defendant was his vendor's tenant and had refused to attorn to him, asserting his own title. After the death of the original defendant, his legal representatives came on the record and pleaded that they were in possession in their own rights. Plaintiff applied for leave to amend the plaint to sue in the alternative for possession on the basis of his title.

Held, the amendment could not be allowed as it sought to introduce a different cause of action and as moreover its refusal would not prejudicially affect the plaintiff in a future suit based on title even if he failed in the present suit. (*Weston.*) Chand Mal *v.* Mohammad Hussain. **1935 A.M.L J. 100.**

———**O. 6, R. 17**—*Cause of action—Changing of—Suit for recovery of land based on unprovable usufructuary mortgage—Amendment to base suit on title—Permissibility.*

Where a person brings a suit for recovery of possession of land but it is found that in fact his claim is for redemption of an unprovable usufructuary mortgage, such person cannot be allowed an amendment of the pleadings by basing his suit on his title, the causes of action for the two suits being different. (*Baguley, J.*) U Naing *v.* Ko Sein. **176 I.C. 631=11 R.R. 64=A.I.R. 1938 Rang. 125.**

———**O. 6, R. 17**—*Cause of action—Suit on promissory note—Amendment to base claim on original cause of action—Permissibility.*

A suit was filed on a promissory note bearing a certain date. In the plaint several previous promissory notes were mentioned with respective dates of their execution. The plaintiff, in order to avoid the provisions of the Indian Paper Currency Act, 1923, applied for leave to amend his plaint basing his claim on an original promissory note and treating subsequent notes including the suit note as acknowledgments of the original debt. As one of these notes was time-barred being executed more than three years after the preceding note, the plaintiff applied for further leave treating the time-barred note as one containing promise to pay a time-barred debt and basing his cause of action on that note. These amendments were allowed by Court.

Held, that the fresh promise to pay the time-barred debt was the original cause of action in respect of the suit on the promissory note and the Court in granting the amendments, only allowed the plaintiff to fall back upon the original cause of action. (*Venkatasubba Rao, J.*) Chellam Sakka Raja *v.* Muthuswamy Moopar. **165 I.C. 503=9 R.M. 264=44 L.W. 267=1936 M.W.N. 486=A.I.R. 1936 Mad. 632=71 M.L.J. 166.**

———**O. 6, R. 17**—*Conditional order—Amendment allowed subject to applicant's paying costs before particular date—Non-applicant's appeal against order before date—Subsequent acceptance of costs by him—Right to have appeal heard.*

Where an application is sought to be amended and the amendment is allowed conditional upon the applicants paying costs before a particular date but before that date the non-applicant prefers an appeal against the order of amendment, the appeal is valid though the non-applicant accepts the costs when tendered on the due date. A.I.R. 1934 Nag. 163, Dist. (*Grille, J.C.*) Sadashiv Rao *v.* Balmukund. **A.I.R. 1936 Nag. 20.**

———**O. 6, R. 17**—Delay—Omission to state in plaint ground of exemption from limitation—Subsequent amendment in second appeal—Permissibility. *See* C. P. Code, O. 7, R. 6. **20 N.L.J. 42.**

———**O. 6, R. 17**—*Discretion—Amendment, at late stage to avoid payment of Court-fee—If can be allowed.*

No party has an absolute right to abandon any portion of his claim at any stage. It is always in the discretion of the Court whether to allow an amendment of the plaint or memorandum of appeal or refuse it. Where a party has obtained an adjudication of his claim from the trial Court or has argued his case in respect of it in the Court of appeal, he cannot thereafter be permitted to amend his plaint or memorandum of appeal by abandoning a part of his claim with a view to save himself from the payment of Court-fee. (*Srivastava and Zia-ul-Hasan, JJ.*) Ibn-ul-Hasan *v.* Usman Ahmad. **178 I.C. 635=11 R.O. 119=1938 O.L.R. 499=1938 O.W.N. 1138=1938 A.W.R. (C.C.) 131=1938 O.A. 917.**

———**O. 6, R. 17**—*Discretion—Power of Court—Amendment after claim barred by limitation—If can be allowed.*

The right of allowing an amendment, although a matter of discretion, should not be exercised where the party affected thereby has acquired a valuable right and not unless in very special circumstances. Where in a mortgage suit the mortgagor makes no claim to money decree, allows time to go by and makes no application for leave to amend till his claim is barred by limitation, but subsequently applies for leave to amend, although there is still a discretion in the Court to allow amendment, the discretion will as a general rule be more wisely exercised by refusing it. (*Wort and Rowland, JJ.*) Ramkaran Thakur *v.* Baldeo Thakur. **17 Pat. 168=173 I C. 292=4 B.R. 256=10 R.P. 398=A.I.R. 1938 Pat. 44.**

———**O. 6, R. 17**—*Discretion of Court—Leave to amend—When to be granted—Considerations for Court.*

O. 6, R. 17, C. P. Code, leaves it to the discretion of the Court to grant an amendment. Leave to amend would generally be granted to enable the Court to determine the real question in issue between the parties, provided that the amendment will occasion no injury to the opposite party except such as can be compensated for by costs or other terms to be imposed by the Court. If the defendant is in no way prejudiced and is not deprived of any legitimate plea that he can raise, including the plea of limitation, and if no new cause of action is introduced by the amendment, leave to amend should be granted. (*Madhavan Nair, J.*) Kondamma *v.* Venkatarayudu. **183 I.C. 882=12 R.M. 378=1938 M.W.N. 875=48**

L.W. 498=A.I.R. 1939 Mad. 34=(1938) 2 M.L.J. 846.

——**O. 6, R. 17**—*Discretion of Court—Suit for accounts—Conversion into one on account—Permissibility.*

A suit was instituted for an account and amendment of the plaint was sought by the plaintiff to convert the suit into one on account. The plaint required amendment in many particulars and the plaintiff would have been in no better position as far as limitation was concerned by the amendment. The suit was purposely brought in the form of a suit for an account.

Held, that amendment was a discretionary relief and taking into consideration the facts of the case amendment could not be allowed. (*Rupchand Bilaram and Mehta, A. J. Cs.*) MULOMAL KHEMCHAND *v.* TARACHAND DASSUMAL. **161 I.C. 505=8 R.S. 147=A.I.R. 1936 Sind 9.**

——**O. 6, R. 17**—Discretion of Court—Suit to avoid patni sale—Plaint not framed in accordance with Patni Sale Law—Objections by defendant in written statement—Application for amendment at the close of suit—Competency—Rejection by Court—Interfernece in appeal. *See* BENGAL PATNI REGULATION, S. 14. **40 C.W.N. 1233.**

——**O. 6, R. 17**—*Discretion of Court to allow amendment—Principles governing.*

The general principles on which the discretion vested in the Courts under O. 6, R. 17, C. P. Code, is to be exercised, are: (1) The Court does not allow a party by amendment as a rule to raise against his opponent a new case. It allows him in certain circumstances and upon certain conditions to implement or to perfect some case which he has already pleaded but in which for some reason or other there is a defect. What it does not allow him to do as a rule is to raise a fresh case. (2) Whenever it is necessary for the purpose of doing justice, it will strive to allow amendments in all cases where the opposite party can be compensated in costs. (3) The Court will not as a rule permit a party by amendment to take away from his opponent some legal right that that opponent has acquired. By far the most frequent illustration of that principle arises in connexion with limitation. It may be that, before the time comes at which a plaintiff asks to amend his plaint, the defendant has acquired a complete legal answer to the amended claim under the statute of limitation. The general principle is that, unless in very exceptional circumstances, the Court will not allow a defendant to be dispossessed of that legal statutory defence by the expedient of the plaintiff making an amendment and then antedating that amendment to the date of the delivery of the original plaint. A plaintiff sued on equitable mortgage for debt due on a promissory note at a time when the limitation had almost run out. As the stamps on the promissory note were defective, the promissory note could not be admitted. The plaintiff applied for amendment of the plaint by alleging some anterior or collateral obligation to the promissory note itself. The result of the refusal would have been merely to deprive him of a personal right against the defendant, leaving the plaintiff's remedy against the defendant's property intact.

Held, that there were no special circumstances to deprive the defendant of the legal defence of limitation and that the amendment should not be allowed. (*Braund, J.*) MARY NIEMEYER *v.* EBRAHIM MOOSAJI. **178 I.C. 144=11 R.R. 203=A.I.R. 1937 Rang. 413.**

——**O. 6, R. 17**—*Discretion of trial Court—Interference.*

The trial Court has complete discretion whether to allow or refuse a prayer for an amendment of pleadings and where the discretion has not been exercised injudiciously or arbitrarily, the High Court will not interfere. (*Addison and Din Mahomed, JJ.*) JAINI BROTHERS & CO. *v.* SHANKAR LAL. **178 I.C. 176=11 R.L. 414=A.I.R. 1938 Lah. 270.**

——**O. 6, R. 17**—*Late stage—Belated application—If sufficient to justify refusal of amendment.*

Where in a suit for his share in a partnership which the plaintiff alleged was dissolved prior to date of suit but which was denied by the defendants, and the plaintiff applied to amend the plaint after considerable delay, so as to enable him to obtain an alternative relief for partition of the assets in case there was no dissolution of the partnership.

Held, that in the matter of rectifying defects in pleadings which do not affect any substantial rights, it is not consonant with justice to deny a remedy which otherwise would be lost by reason of carelessness or delay.

Held, further, that in the circumstances of the case the lower Court ought to have allowed the amendment of the plaint. (*Pandrang Row and Venkataramana Rao, JJ.*) SAMBASIVA IYER *v.* NATESA IYER. **176 I.C. 821=11 R.M. 167 (2)=1938 M.W.N. 22=A.I.R. 1938 Mad. 388=(1938) 1 M.L.J. 106.**

——**O. 6, R. 17**—*Limitation—Powers of Court—Claim barred on date of application to amend—Amendment—If can be allowed.*

Where on the date of the application for leave to amend the plaint, the claim in the suit was barred by limitation, the Court has power to make amendments in the plaint under the special circumstances of the case. (*Venkatasubba Rao, J.*) CHELLAM SAKKA RAJA *v.* MUTHUSAMY MOOPAR. **165 I.C. 503=9 R.M. 264=44 L.W. 267=1936 M.W.N. 486=A.I.R. 1936 Mad. 632=71 M.L.J. 166.**

——**O. 6, R. 17**—*Limitation—Promissory note—Settlement of accounts—Suit on—Amendment to include claim on original consideration—If can be allowed—Promissory note barred.*

Where all the facts of the original loan and all its terms are set out in the plaint, but the plaint is based on a promissory note which is either insufficiently stamped or barred by limitation, the plaintiff is entitled to succeed alternatively on the original loan, although there is no such prayer in the plaint. Where in a suit on a promissory note executed in settlement of accounts between the parties the defendant pleads discharge and limitation, but the discharge is found against, and the claim is found to be in time on account of certain payments made by the defendant, though the promissory note itself may be barred, the defendant cannot in any way be prejudiced by allowing an amendment of the plaint so as to include a prayer for a decree in the original cause of action, irrespective of the promissory note. Such an amendment ought to be allowed and the plaintiff given a decree on that basis. (*Beasley, C.J., King and Gentle, JJ.*) OFFICIAL ASSIGNEE OF MADRAS *v.* KUPPUSWAMI NAIDU. **165 I C. 301=9 R.M. 229=1936 M.W.N. 912=44 L.W. 258=A. I.R. 1936 Mad. 785=71 M.L.J. 250 (F.B.).**

——**O. 6, R. 17**—*Limitation—Promissory note—Suit on—Amendment basing cause of action on original consideration—Whether can be allowed after limitation.*

The plaintiff instituted a suit on a promissory note just before the expiry of the period of limitation. It was then discovered that two of the stamps on the promissory note had not been properly cancelled and that, therefore, it could not be acted upon. The plaintiff thereupon applied to be allowed to amend the plaint so as to base the cause of action on the original consideration for the promissory note, and this amendment was allowed. At the date of the amendment the claim was barred by limitation.

Held, that the amendment was properly allowed, for in the original plaint an alternative claim based upon the original consideration could have been made and then no question of limitation could have arisen, and that it would be monstrous that the plaintiff should lose his money merely because of a technical error in the execution of the promissory note. (*Dunkley, J.*) KRISHNA PRASAD SINGH *v.* MA AYE. **14 Rang. 383=165 I. C. 810=9 R.R. 223=A.I.R. 1936 Rang. 508.**

——**O. 6, R. 17**—*Limitation—Suit filed in firm name—Cause of action arising after its dissolution by death of partner—Substitution of individual names of partners and of legal representative of deceased partner—If may be allowed after limitation.*

A suit was filed in the name of a partnership firm in respect of a cause of action which accrued after the partnership was dissolved by the death of one of the partners. An application for the amendment of the plaint by substitution of the individual names of the partners and of the legal representative of the deceased partner, was filed after the period of limitation.

Held, that the amendment should be allowed only in regard to persons who were entitled to institute the suit in their individual names, but not in regard to the legal representative of the deceased partner. (*Panckridge, J.*) BISSESWARLAL BUDHMULL *v.* SUKHDEODAS BAIJU. **44 C. W.N. 806.**

——**O. 6, R. 17**—*Nature of suit changed—Amendment of plaint in second appeal—Permissibility.*

Where the amendment of the plaint asked for is not an amendment merely in the form of relief which could be granted without further investigation, but is one which entirely changes the character of the suit and introduces matters which have not been tried in the Courts below and on which it is not possible to give a satisfactory finding on the record as it stands, it should not be allowed in second appeal. (*Tek Chand and Bhide, JJ.*) FAZAL BIBI *v.* ABDUL RAHIM. **42 P. L.R. 479.**

——**O. 6, R. 17**—*New case.*

Where a plaintiff brought a suit for redemption and failed to establish the mortgage set up by him in the plaint and asked for permission to amend the plaint so as to convert the suit into a suit for redemption of an earlier mortgage, and if he instituted a fresh suit, it would be within limitation.

Held, it would be proper for him to institute a fresh suit. (*Srivastava, C.J.*) GAURI SHANKAR *v.* LALA. **13 Luck. 669=10 R.O. 123=171 I.C. 437=1937 O.L.R. 557=1937 O.W.N. 1121=A. I.R. 1938 Oudh 16.**

——**O. 6, R. 17**—*New case—Surprise to defendant—Duty of Court.*

Courts must be careful not to allow a *volte de face* which would completely change the complexion of the pleadings and confront the defendant with a surprise attack, for which he cannot be expected to be prepared. Where a plaintiff in a suit under S. 86 of the Agra Tenancy Act sues as an occupancy tenant, the defendant being treated as sub-tenant but later gets himself styled *sir* holder, cannot thereafter seek to amend his pleadings and ask for the ejectment of the defendants as heirs of a statutory tenant. (*Mehta, J.M.*) PAUHARI SARAN *v.* SUNDAR AHIR. **1939 A.W.R. (B.R.) 78=1939 R.D. 274=1939 A.L.J. (Supp.) 66.**

——**O. 6, R. 17**—*Plea not raised at the beginning—No ground for omission—Later amendment, if can be allowed.*

Where there has been no valid ground or excuse for the omission to raise certain pleas at the very beginning of the proceedings, amendment to permit those pleas being raised at a late stage, should be refused. (*Stone, C.J., and Bose, J.*) BADRIDAS *v.* PRATAPGIR **188 I.C. 23=12 R.N. 304=1939 N.L.J. 525=A.I.R. 1940 Nag. 8.**

——**O. 6, R. 17**—*Powers of Court—Limits to.*

No doubt the powers of the Court to permit amendments under O. 6, R. 17 are very wide and should be freely exercised, but the exercise of this jurisdiction must not be resorted to where prejudice is likely to result to the other side which cannot be compensated in costs. (*Davis, J.C. and Lobo, J.*) GOPAL DAS MOTHARAN *v.* LOKAMAL CHELLARAM. **I.L.R. (1939) Kar. 602=182 I.C. 718=12 R.S. 25=A.I.R. 1939 Sind 173.**

——**O. 6, R. 17**—*Power of Court—Plaint for possession based on title — Power to compel amendment so as to allege possession and dispossession.*

Where the plaintiff bases his claim for possession on his title and defendant alleges adverse possession, the Court must determine the rights of the plaintiff on the plaint as it is framed and not on one which in the opinion of the Court would be proper. It is not open to the Court to compel the plaintiff to amend the plaint so as to allege possession and dispossession. (*Abdul Rashid, J.*) MEHTAB SINGH *v.* DAYAL SINGH. **183 I.C. 140=12 R.L. 99=41 P.L.R. 715=A.I.R. 1939 Lah. 172.**

——**O. 6, R. 17**—Power of Court—Plaint in name of dead man—Application to amend by insertion of living man's name—If can be allowed—Gross neglect—Effect of. *See* C. P. CODE, O. 1, R. 10 AND O. 6, R. 17. **A.I R. 1937 Sind 92.**

——**O. 6, R. 17**—*Powers of Court—Substitution of cause of action.*

No power has been given to Courts to enable one distinct cause of action to be substituted for another nor can the subject-matter of a suit be changed by an amendment. (*Din Mohammad, J.*) Khushi Ram *v.* Munshi Lal. **189 I.C. 418=42 P.L.R. 194=A.I.R. 1940 Lah. 225.**

——**O. 6, R. 17**—*Powers of Court—Suit against two defendants alleging them to be partners in business—Amendment of plaint on basis that defendant 1 carrying on business as guardian of defendant 2—If can be allowed.*

In the interests of justice even where a question of limitation might arise a Court can allow amendment; where a suit was instituted against two defendants alleging that they were partners in a business and all the necessary facts and circumstances under which the suit debt was incurred were clearly set out in the plaint and the amendment as sought and allowed by the lower Court was in accordance with the true facts that defendant 1 carried on the trade as guardian of defendant 2 in pursuance of a direction in the will of the father.

Held, that the amendment was properly allowed. (*Venkataramana Rao, J.*) Perumal Ayyar *v.* Ramasubramanian Chettiar. **182 I.C. 340=12 R.M. 60=A.I.R. 1938 Mad. 265.**

——**O. 6, R. 17**—*Power of Court—Suit for declaration of Maharki watan—Subsequent amendment for reliefs of possession and injunction—Permissibility.*

Where a person brought a suit for declaration of his Maharki watan but subsequently he was allowed by Court to amend the plaint by adding reliefs of possession and injunction,

Held, that as suit for possession on refusal of amendment would have been in time and as possession of field was consequential relief on title, allowing of amendment was not contrary to law. (*Gruer, J.*) Motiram Danaji *v.* Shenu. **I.L.R. (1937) Nag. 151=9 R.N. 252=168 I.C. 351=A.I.R. 1937 Nag. 84.**

——**O 6, R. 17**—*Power of Court—Suit for specific performance—Amendment to add prayer for compensation or damages in Letters Patent appeal—Sustainability.*

A Court cannot at a late stage convert a suit for specific performance into a suit for compensation or damages, and a Court should not in Letters Patent appeal grant an amendment by adding a prayer for compensation or damages in a suit for specific performance unless such relief is asked for at an early stage. (*Harries, C.J. and Fazl Ali, J*) Kubad Mia *v.* Guhi. **19 Pat. 90=187 I.C. 198=12 R P 566=6 B.R. 435=1939 P. W.N. 880=A.I R. 1940 Pat. 92.**

——**O. 6, R. 17 and S. 115**—*Power to allow amendment—Object of—Amendment, changing nature of suit—Interference in revision.*

The power to allow an amendment of pleadings has been conferred on Courts in the interests of justice, with a view to correcting mistakes and bringing out the real matters in issue between the parties. But this power should not be exercised in favour of one party so as to cause prejudice to the other party—where an amendment is very drastic and changes the nature of the suit itself, a Court, if it allows such an amendment, exercises its jurisdiction with material irregularity, if not illegality and its order is liable to be set aside in revision. (*Zia-ul-Hasan and Yorke, JJ.*) Lachmin *v.* Bhairon Baksh Singh. **188 I.C. 893=13 R.O. 14=1940 A.W.R. (C.C.) 248=1940 O.L.R. 393=1940 O.W.N. 500=1940 O. A. 465=A.I.R. 1940 Oudh 367.**

——**O. 6, R. 17**—*Scope—Amendment introducing new and distinct cause of action—If can be allowed.*

Amendments which introduce an entirely distinct cause of action should not generally be allowed. Amendments introducing a new cause of action are sometimes allowed, *e.g.*, in a suit on a promissory note, if the instrument turns out to be inadmissible in evidence, the plaintiff may be allowed to amend his plaint so as to fall back on the original loan. But in such cases there is an intimate connection between the two causes of action. Where there is no such connection between the cause of action alleged in the plaint and the new cause of action sought to be substituted or introduced, the amendment should not be allowed. (*D.R. Norman.*) Shyam Lal *v.* Kanhaiya Lal. **1937 A.M.L.J. 16.**

——**O. 6, R. 17**—*Scope—If exhaustive—Application for leave to sue* in forma pauperis—*Property omitted from schedule—Amendment to include —Power of Court to allow.*

O. 6, R. 17, C. P. Code, is not exhaustive of the powers of the Court in the matter of amendment; a Court has therefore jurisdiction to allow an amendment of an application for leave to sue *in forma pauperis*, by including an item of property which was originally omitted from the application or annexure thereto. Such an amendment cannot be held to be illegal or without jurisdiction on the ground that O. 6, C. P. Code, applies only to pleadings and not to applications to sue *in forma pauperis*. (*Dhavle and Varma, JJ.*) Bihari Sahu *v.* Sudama Kuer. **175 I.C. 505=10 R.P. 632=1938 P.W.N. 163=4 B.R. 598=19 Pat.L.T. 101=A.I.R. 1938 Pat. 209.**

——**O. 6, R. 17**—Scope—If to be read with O. 7, R. 11. *See* C. P. Code. O. 7, R. 11. **41 Bom. L.R. 787.**

——**O. 6, R. 17**—Scope—Suit for declaration of right in certain moneys held by deceased in provident fund and for injunction—Amendment to include prayer for administration—Permissibility. *See* C. P. Code, S. 42. **A.I.R. 1939 Sind 107.**

——**O. 6, R. 17**—Scope—Suit for declaration of title and possession—Amendment to strike out prayer for possession to avoid payment of additional Court-fee—Permissibility. *See* Court-Fees Act, S. 7(iv) (*c*). **1939 P.W.N. 61.**

——**O. 6, R. 17**—*Scope—Suit for partition—Amendment to make it administration suit—Permissibility.*

A suit for administration of an estate is a different kind of suit from a suit for partition of a piece of land. Different considerations arise in the two cases. It is not possible that a suit for partition should be tried as a suit for administration by amending the plaint. (*Spargo, J.*) Ma Waing Ma Gyi *v.* Ma Bu Gyi. **174 I.C. 39=10 R.R. 384=A.I.R. 1937 Rang. 525.**

——**O. 6, R. 17**—Scope—Suit on promissory note—Note found to be forged—Amendment in second appeal—If to be allowed. *See* Negotiable Instruments Act, S. 87. **16 Pat. 527=18 Pat. L.T. 640.**

——O. 6, R. 17—*Scope—Suit under O. 21, R. 103, C. P. Code, for declaration and possession—Amendment of plaint by deleting claim for possession to avoid payment of additional court-fee—Application for leave to re-amend plaint in second appeal by including claim for possession—Sustainability.*

Plaintiff brought a suit under O. 21, R. 103, C. P. Code, claiming a declaration and possession. The trial Court having demanded additional court-fee, the plaintiff amended the plaint by deleting the claim for possession. The suit was decreed and the decree was confirmed in appeal. In second appeal by the defendant, the plaintiff applied for permission to again amend his plaint by adding the claim for possession though for the purposes of the second appeal it was not necessary.

Held, that the plaintiff having been put to his election and having abandoned the claim for possession was now seeking to reverse the decision with regard to that matter and that, therefore, leave to amend should not be given at this late stage. (*Wort, A.C.J. and Varma, J.*) RAMCHANDRA GANGA BUX *v.* SUNDER LAL SINGH. **176 I.C. 862=4 B.R. 771=11 R.P. 120=19 P.L.T. 916=1938 P.W.N. 455=A.I.R. 1938 Pat. 558.**

——O. 6, R. 17—*Second appeal—Amendment of plaint—Suit for sale on mortgage—Finding that mortgage is opposed to statute and unenforceable—Amendment to include prayer for possession on the basis of acquisition of title as owner by prescription—Permissibility.*

A plaint cannot be amended in second appeal in such a way as to alter the character of the suit to a degree which is not permissible. Where a plaintiff who had a usufructuary mortgage over certain raiyati land and had been dispossessed brings a suit for sale on his mortgage, but, on the Courts holding that the mortgage being in contravention of the statute cannot be enforced, prays for permission to amend his plaint in second appeal so as to enable him to claim possession as a person who has by prescription acquired an absolute title as owner, the amendment cannot be allowed. (*Agarwala and Rowland, JJ.*) MAKSUDAN LAL SAHU *v.* NIRANJAN NATH DAS. **19 Pat. 507=187 I.C. 266=12 R.P. 575=21 Pat.L.T. 219=6 B.R. 446 =A.I.R. 1940 Pat. 494.**

——O. 6, R. 17—*Striking out parties—Absence of notice under S. 80, C. P. Code—Amendment to discharge—Secretary of State.*

Where the notice under S. 80 of the C. P. Code was not given, permission to amend the pleadings by discharging the Secretary of State from the record and allow the suit to proceed against the orders could not be given in a case where it would not be possible to proceed without a material change in the nature of suit, the cause of action and the relief sought. (*Rowland, J.*) BALDEO PRASAD *v.* SUKHI SINGH. **174 I.C. 358=10 R.P. 500=4 B.R. 435=1937 P.W.N. 694=18 Pat.L.T. 921=A.I.R. 1938 Pat. 127.**

——O 6, R 17—*Suit on bond—Co-obligee suing for his share of money impleading the other as defendant—Amendment of plaint to include whole amount due—Permissibility.*

Where under wrong advice, one of the co-obligees sues to recover his half-share of the money due on a bond impleading the legal representative of the other as a defendant, and on

objection taken to the maintainability of the suit in view of the provisions of S. 45 of the Contract Act, applies to amend the plaint so as to claim the whole amount due on the bond, and if the suit is dismissed a fresh suit would be barred by limitation, it is proper for the ends of justice that the plaintiff should be given permission to amend the plaint. The proposed amendment would not make any charge in the cause of action. All that it is intended to do is to include the whole claim arising out of the cause of action based on the bond in suit. (*Srivastava, Ag. C.J. and Smith, J.*) RAGHUNATH PRASAD *v.* MST. PRANA. **13 Luck. 157=166 I.C. 992=9 R.O. 360=1937 O.L.R. 81 =1937 O.W.N. 163=A.I.R. 1937 Oudh 290.**

——O. 6, R. 17—*Suit on contract of sale of land—Contract found to be void—Refund of purchase money—Amendment of plaint—Permissibility.*

A suit was brought on a contract of sale of land which was subject to the conditions of the Punjab Colonization of Government Lands Act. The sale was discovered to be void owing to invalid sanction. The purchaser had not claimed an alternative relief in the plaint for the recovery of the purchase money which he had paid under the contract.

Held, that the purchaser should be permitted to amend his plaint in order to obtain the refund of the purchase money and should not be referred to a separate suit. (*Dalip Singh and Skemp, JJ.*) HAKAM ALI *v.* HASHU. **181 I.C. 624=11 R.L. 867=A.I.R. 1938 Lah. 244.**

——O. 6, R. 17—*Technical defect—Amendment of plaint in second appeal—Permissibility.*

Where a subsequent mortgagee instituted a suit for possession by redemption of the prior mortgage after that mortgage had ceased to exist having been previously redeemed by the mortgagor, the defect in the frame of the suit is a technical one, and the second mortgagee can be allowed even in second appeal to amend the plaint so as to convert the suit into a mere suit for possession as mortgagee. (*Bhide, J.*) HARDIAL *v.* GURDITTA. **188 I.C. 608=13 R.L. 26=42 P.L.R. 139=A.I.R. 1940 Lah. 201.**

——O. 6, R. 18—*Failure to amend plaint after order—Effect of.*

Under O. 6, C. P. Code, failure to amend merely involves loss of right to amend and therefore not to the determination of the suit as expressed in the original plaint. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) FEROZ SHAH *v.* KALU RAM. **164 I.C. 181=9 R.Pesh. 15=A.I.R. 1936 Pesh. 155.**

——O. 7—*Applicability to appeals.*

Provisions of O. 7 by reason of S. 141 of the Code, apply *mutatis mutandis* to memoranda of appeals as well as to plaints. (*Davis, J.C. and Weston, J.*) MOOLOMAL *v.* LAL SINGH. **I.L.R. (1939) Kar. 527=183 I.C. 757=12 R.S. 80=A.I.R. 1939 Sind 221.**

——O. 7, R. 1—*Particulars in plaint—Suit for breach of conditions in contract—Particulars as to the conditions and manner in which they had been violated—Necessity to give.*

A defendant is entitled to know exactly what case he has to meet and he must have an opportunity to investigate the details of the claim, with a view to prepare the materials for his defence Where the breach of certain conditions of a agreement forms the subject matter of the plaintiff's complaint, the defendant is entitled to know the conditions and the exact manner in which they have been violated. (*Bose, J.*) JAMSHED *v.* KUNJILAL. **181 I.C. 177=11 R.N. 444=1938 N. L.J. 392=A.I.R. 1938 Nag. 530.**

——**O. 7, R. 6**—*Exemption from limitation—Plaint should show.*

As a general principle, a plaintiff must show in his plaint how his suit is in time; for, the question whether the suit is in time must, if denied, be one of the issues in the case, and if the plaintiff does not explain how his suit is in time, it is impossible for the defendant to meet his case. (*Horwill, J.*) MADAPPAYA *v.* MAHABALA RAO. **176 I.C. 939 =11 R.M. 198=A.I.R. 1937 Mad. 826.**

——**O. 7, R. 6**—*Exemption from limitation not pleaded in plaint—If available.*

It is obligatory as a matter of pleading to show the grounds upon which exemption from limitation is claimed. Consequently unless the plaint is amended, it will not be open to a party to rely on an exemption not pleaded in the plaint. (*Venkataramana Rao, J.*) RAMASWAMI CHETTI *v.* ANAIYA PADAYACHI. **165 I.C. 737=9 R.M. 293 =1936 M.W.N. 411=A.I.R. 1936 Mad. 545.**

——**O. 7, R. 6**—*Period of limitation expiring during Court holidays—Plaint presented on re-opening—Plaint not specifically mentioning exemption under S. 4, Limitation Act—Effect.*

Where a plaint is presented on the re-opening date after Court holidays and the period of limitation has expired during the holidays, the fact that the ground of exemption under S. 4, Limitation Act was not specifically mentioned in the plaint will not entail the dismissal of the suit inasmuch as the Court is bound to take judicial notice of the holidays. (*Middleton, J.C.*) GHULAM HUSSAIN *v.* GHULAM SARWAR. **168 I.C. 384=9 R. Pesh. 125=39 P.L.R. 528=A.I.R. 1937 Pesh. 41.**

——**O. 7, R. 6**—*Scope—Exemption from limitation — Ground of — Omission to specifically allege—Effect—Subsequent amendment of plaint in second appeal—Permissibility.*

Where in a suit against a mortgagor's surety for loss caused by a defect in the mortgagor's title to the mortgaged property, the suit appears to be barred by limitation as having been filed more than six years after the date of the mortgage, if the plaintiff claims exemption from limitation on the ground that he had knowledge of the defect in title only on a date subsequent to the date of the mortgage, it is incumbent on him to specifically state in his plaint the exact date on which he came to know about the mortgagor's title being defective and to prove the same. If he fails to make such an averment in the plaint, he cannot be permitted in second appeal to amend his plaint by specifically mentioning the date on which he acquired knowledge of the defect in the mortgagor's title, especially when it is found as a fact that he knew of the defect even on the date of the mortgage. (*Niyogi, J.*) BHIKARILAL *v.* SITARAM. **20 N.L.J. 42.**

——**O. 7, R. 7**—*Applicability—Relief different from that in plaint—Addition of new parties—New relief in appeal—Permissibility.*

The relief in the plaint related to an unascertained sum of money which was to be ascertained on taking account from the defendants and the plaintiff claimed a decree against them for the amount found due from them to him.

Later on, some more defendants were added but the plaintiffs claimed no relief against them. The suit being dismissed for some technical defect, the plaintiff appealed. In the appeal he gave up his claim for rendition of accounts and for money decree, but claimed declaration that he was entitled to a specific portion of the amount held in deposit by the original defendants and he also claimed a relief against the defendants that were later on added,

Held, that the declaratory relief claimed in appeal was wholly outside the claim as set forth in the plaint and moreover it was against the added defendants against whom no claim was made in the suit after adding them. O. 7, R. 7, could not therefore apply to such a case and it was therefore proper to refuse the claim set up in appeal. (*Srivastava, Ag. C. J. and Zia-ul-Hasan, J.*) MOHD. ATA HUSAIN KHAN *v.* NAWAB BAGAR MIRZA. **13 Luck. 584=171 I.C. 33=1937 O.L.R. 514=10 R.O. 66=1937 O.W.N. 1131= A.I.R. 1937 Oudh 484.**

——**O. 7, R. 7**—*Scope—Suit for dissolution of marriage or in the alternative for declaration of nullity—Claim found not maintainable—Relief of judicial separation not prayed for in plaint—If can be granted by way of general or other relief.*

Where a suit for divorce or dissolution of marriage on the ground of the other party's unsoundness of mind or in the alternative for a declaration of nullity of the marriage is found to be not maintainable, it is not open to the plaintiff to claim the relief of judicial separation, when that relief has not been prayed for in the plaint. Such a relief claiming judicial separation is not a general relief falling under such further and other relief within the meaning of O. 7, R. 7, C. P. Code. No such relief can be granted without an amendment of the plaint. (*Wadia, J.*) PHIROZE *v.* SHIRINBAI. **173 I.C. 395=10 R.B. 329= 39 Bom.L.R. 1146=A.I.R 1938 Bom. 65.**

——**O. 7, R. 10**—Applicability—If confined to cases of return of plaint for want of territorial jurisdiction. *See* C. P. CODE, S. 151 AND O. 7, R. 10. **A.I.R. 1938 Sind 124.**

——**O. 7, R 10**—Power of Court—Return of plaint under—Grant of time for presentation to proper Court—Legality of—Effect on limitation. *See* LIMITATION ACT, S. 14. **18 Pat.L.T. 250.**

——**O. 7, R. 10**—*Return of plaint—Allegations as to jurisdiction found after trial to be incorrect —Return if permissible.*

The question of jurisdiction at the initial stages is decided by the allegations in the plaint. The allegations in the plaint, may make the suit cognizable by a Court. But if those allegations are found after trial to be incorrect or false, then the suit should have to be dismissed—A plaint could not be returned at that stage. (*Mohammad Ismail, J.*) DURGA PRASAD SETH *v.* OM PRAKASH. **174 I.C. 605=1938 A.L.R. 296=10 R.A. 594= 1938 R.D. 49=1937 A.W.R. 1090=A.I.R. 1938 All. 39.**

——**O. 7, R. 10**—*Return of plaint—When to be made and when not to be made.*

If on the face of the plaint the Court finds that it has no jurisdiction to try the case, it will return the plaint at any stage of the case; if the Court fails to detect want of jurisdiction in it to begin with, but where the plaint *prima facie* is triable by the Court and in spite of the challenge of the other side the plaintiff sticks to his own allegations in the plaint, the Court proceeds to try the case on merits and not to decide any preliminary question of jurisdiction. If then the Court comes to the conclusion that plaintiff's contention is false and the suit as laid cannot be maintained, the Court ought to dismiss the suit and no question of returning the plaint under O. 7, R. 10 arises in such a case. If the Court returns the plaint in such case, instead of dismissing the suit, it will be failing to exercise a jurisdiction vested in it by law. (*Puranik, J.*) Mangia Hagria *v.* Sakia. **1940 N.L.J. 380.**

—— **O. 7, R. 10**—*Return or rejection of plaint—Power of Court—Suit triable by some other Court—If a ground.*

A Court cannot return or reject a plaint under O. 7, R. 10, C. P. Code, merely because the suit is triable by some other Court. It can do so only if the suit is not triable by itself. (*Norman, I.C.S.*) Heera Lal *v.* Kalu. **1936 A.M.L.J. 67.**

——**O. 7, R. 10**—*Scope—Order returning plaint for presentation to proper Court—Power of Court to fix time for such presentation—Limitation—If can be extended.*

A Court returning a plaint for presentation to the proper Court cannot fix a time for such presentation, so as to extend the period of limitation for the suit. Such an order allowing a period for presentation is clearly illegal; and if the presentation is made beyond the period of limitation for the suit, the suit will be barred, although it is presented within the time fixed. (*Norman, I.C.S.*) Heera Lal *v.* Kalu. **1936 A.M.L.J. 67.**

——**O. 7, R. 10**—*Suit filed in Court having no jurisdiction—Order of dismissal—Propriety.*

If a suit is filed in a Court having no jurisdiction, the proper order is to return the plaint to the plaintiff for presentation to the proper Court and not to dismiss the suit. (*Tek Chand, J.*) Firm Ram Ditta Mal Sant Lal *v.* Firm Seth Jot Ram Kidar Nath. **188 I.C. 299=12 R.L. 518=42 P.L.R. 203=A.I.R. 1940 Lah. 171.**

——**O. 7, R. 10**—*Time for return of plaint—Order returning plaint at stage of arguments—Propriety.*

A Court can return a plaint for presentation to the proper Court even at the stage of arguments, when the question of jurisdiction is raised, especially when the suit has not proceeded very far. (*Collister and Bajpai, JJ.*) Brij Behari Lal *v.* Gopi Nath. **173 I.C. 913=10 R.A. 524=1938 R.D. 102=1938 A.L.R. 200=1937 A.W.R. 1171=1937 A.L.J. 1224=A.I.R. 1938 All. 76.**

——**O. 7, R. 10 (1)**—*Suit as framed cognizable by Court—Jurisdiction found to be barred on findings arrived at by Court—Dismissal of suit—Propriety.*

Where the suit as framed by the plaintiff is cognizable by the Civil Court and it is only on the finding arrived at by the Court that it is found that the jurisdiction of the Court is barred in respect of the major portion of the relief claimed, the Court would be right in dismissing the suit, and it is not necessary for it to return the plaint for presentation to the proper Court. (*Zia-ul-Hasan, J.*) Sitla Bin *v.* Mohan. **13 Luck. 18=165 I.C. 908=9 R.O. 271=1936 O.W.N. 1228=A.I.R. 1937 Oudh 183.**

——**O. 7, R. 11**—*Applicability—Absence of jurisdiction as regards one of the defendants—*

Rejection of plaint as against him—Appeal—Revision.

A suit was instituted against four persons on the basis of a pro-note executed by them. The Court ordered that the suit could not proceed against one of them as the pro-note was signed by that person at a place which was beyond jurisdiction of that Court,

Held, that the order was tantamount to rejection of the plaint so far as that person was concerned and was therefore appealable,

Held, further, that even if an appeal was not competent, a revision would be competent as the proceedings terminated so far as that person was concerned and therefore there was a case decided within the meaning of S. 115, C. P. Code. (*Bhide, J.*) Punjab Co-operative Bank, Ltd. *v.* Lala Ishar Das. **175 I.C. 153=10 R.L. 695=40 P.L.R. 134=A.I.R. 1937 Lah. 800.**

——**O. 7, Rr. 11 and 13**—*Applicability—Suit for declaration—Decree—Appeal—Remand for amendment—Amendment allowed—Direction for valuation of property and for payment of deficit Court-fee — Non-compliance — Application for withdrawal of suit with liberty—Rejection—Subsequent dismissal of suit for default—Propriety—Fresh suit—If barred—O. 2, R. 2; O. 9, R. 9, and O. 23, R. 1 (3)*—Res judicata.

A suit for a declaration of title having been decreed by the trial Court, the defendant preferred an appeal. The appellate Court, holding that the suit as framed was not maintainable for want of a prayer for possession, allowed the appeal and remanded the suit for fresh trial after amendment of the plaint. The amendment was allowed by the trial Court on remand and the plaintiff was directed to give the proper value of the property within a week and to put in the deficit Court-fee. The plaintiff did not do this, but applied instead to withdraw the suit with liberty to bring a fresh suit on the same cause of action. That was refused. The plaintiff having taken no further steps the suit was dismissed for default with costs to the defendants including costs of the appellate Court. Plaintiff thereafter brought a fresh suit on the same cause of action. It was pleaded that it was barred.

Held, that the order dismissing the suit for default must be regarded as a rejection of the plaint under O. 7, R. 11, C. P. Code, though the Court acted improperly in making an order of dismissal of the suit; O. 7, R. 13 gave the plaintiff the right to institute a fresh suit on the same cause of action and therefore the suit was not barred under O. 2, R. 2; O. 9, R. 9 or O. 23, R. 1 (3). There was also no scope for the application of the doctrine of *res judicata*, even with regard to the findings of the appellate Court in the prior litigation. (*R.C. Mitter, J.*) Kiranchandra Pramanik *v.* Purna Chandra Pramanik. **40 C.W.N. 1390.**

——**O. 7, R. 11**—*Application under—Scope of enquiry.*

In deciding an application under O. 7, R. 11, C. P. Code, the Court is not entitled to go outside the pleading. (*McNair, J.*) Mayadas Bhagat *v* Commercial Union Assurance Co., Ltd. **169 I.C. 788=10 R.C. 49=I.L.R. (1937) 1 Cal. 541=41 C.W.N. 193.**

——**O. 7, R. 11**—*Duty of Court—Appeal—Deficiency in court-fee—Proper procedure—Dismis-*

sal without proper order directing appellant to pay deficient court-fee.

If an appeal presented in time is insufficiently stamped or is otherwise defective, it can only be dismissed after the Court has fixed a day by which the deficiency must be made up or the defect remedied, under penalty of the appeal being dismissed. It is essential that a formal order should issue from the Court informing the appellant of the date fixed for payment of the deficiency in stamps or for remedying the defect. If he fails to comply with that order, the appeal is dismissed for such failure to comply with the order of the Court. There is no question of limitation in such a case. The best course for the Court is to wait till the expiry of the period fixed, and then issue a formal order of rejection or dismissal in case of failure of the appellant to comply with the order directing him to pay the deficient court-fee or to remedy the defect. (*Darling, S.M. and Bomford, J.M.*) Chandika *v.* Nazir Hasankhan. **1938 R.D. 179=1938 A. W.R. (B.R.) 112.**

——**O. 7, R. 11, and S. 107** (2)—*Insufficiently stamped memorandum of appeal—Procedure to be followed—Granting of time to make good deficiency—Necessity.*

According to O. 7, R. 11, C. P. Code, where a plaintiff has properly valued the relief, he must be given an opportunity to make good the deficiency in the court-fee before his plaint is rejected, and the same rule applies to a memorandum of appeal by reason of the effect of S. 107 (2), C. P. Code. (*Wort and Agarwala, JJ.*) Sarjug Prasad Sahu *v.* Surendrapat Tewari. **178 I.C. 976=5 B.R. 160=11 R.P. 318=1939 P. W.N. 166=20 Pat.L.T. 79=A.I.R. 1939 Pat. 137.**

——**O. 7, R. 11**—Power of Court under—Plaint insufficiently stamped—Return for payment of proper court-fee within fixed time—Request for further time granted—Payment within such time—Sufficiency—Suit when deemed to be instituted—Date of original presentation or date of payment of full court-fee. *See* C. P. Code, S. 149 and O. 7, R. 11. **1938 M.W.N. 257.**

——**O. 7, R. 11 and S. 149**—Relative scope of. *See* C. P. Code, S. 149 and O. 7, R. 11. **1940 O A. 699.**

——**O. 7, R. 11**—Scope—If controls Court-Fees Act, S. 7 (*iv*) (*c*) and (*d*). *See* Court-Fees Act (as amended in Bombay), S. 7 (*iv*) (*c*) and (*d*). **A.I.R. 1937 Sind 241.**

——**O. 7, R. 11**—Scope—If controls S. 7 (*iv*) (*f*), Court-Fees Act—Suit for accounts of partnership—Final decree—Appeal—Valuation — Right of appellant—Power of Court to revise valuation and levy additional Court-fee. *See* Court-Fees Act, S. 7 (*iv*) (*f*). **31 S L.R. 37.**

——**O. 7, R. 11**—*Scope—Mandatory character of—If absolute—Power of Court to amend plaint in case of non-compliance—O. 6, R. 17—If to be read along with O. 7, R. 11.*

O. 7, R. 11, C. P. Code, no doubt uses the words "shall reject" which are mandatory words. But *prima facie* the rule is mandatory only *rebus sic stantibus*, that is to say, when the Court has to deal simply with the position referred to in the rule, and would not preclude an amendment of the plaint which under O. 6, R. 17, C. P. Code, may be made at any stage of the proceedings. The two rules, O. 6, R. 17 and O. 7, R. 11, should be read together. (*Broomfield and Macklin, JJ.*) Mahant Narsidasji *v.* Bai Jamna. **185 I.C. 44=41 Bom.L.R. 787=A.I.R. 1939 Bom. 354.**

——**O. 7, R. 11**—*Scope—Rejection of plaint after remand by appellate Court —Power of Court.*

A plaint can be rejected at any stage of the suit even after its registration. The fact that the suit is registered, heard by the trial Court, and by the appellate Court and remanded is of no moment; a plaint not correctly valued or stamped can be rejected under O. 7, R. 11, at any stage of the suit; and the provisions of O. 7, R. 11 are mandatory. (*R.C. Mitter, J.*) Kiran Chandra Pramanik *v.* Purna Chandra Pramanik. **40 C.W.N. 1390.**

——**O. 7, R. 11** (a)—*Rejection of plaint in part —Legality—Revision.*

Where in a suit for money including interest, the Court framed issues and appended a note to one of them to the effect that the plaint did not show cause of action regarding the claim for interest and rejected the plaint to that extent,

Held, there is no provision in the C. P. Code for rejection of the plaint in part and note recorded by the trial Court did not therefore amount to rejection of plaint as contemplated by C. P. Code. The note therefore did not give a right of appeal. If no appeal lay, a revision would be the only remedy open to aggrieved party.

Held, further, that in recording the note the Court must be held to have acted in the exercise of its jurisdiction illegally and with material irregularity, that the note decided the claim so far as interest was concerned and this note therefore came within the meaning of words 'case decided' as contemplated by S. 115 of the Code. The order in the note therefore could be attacked in revision. (*Jai Lal and Abdul Rashid, JJ.*) Magsud Ahmad *v.* Mathra Datt & Co. **167 I. C. 376=9 R.L. 487=39 P.L.R. 299=A.I.R 1936 Lah. 1021.**

——**O. 7, R. 11** (b)—Scope—If controls S. 7 (*iv*), Court-Fees Act. *See* Court-Fees Act, S. 7 (*iv*). **A.I.R. 1936 Sind 25.**

——**O. 7, R. 11** (c)—*Applicability—Appeal insufficiently stamped—Procedure—Duty of Court —Summary rejection—Propriety.*

Where memorandum of appeal is insufficiently stamped, the Court should call upon the appellant to make good the deficiency within a stated period, as provided by O. 7, R. 11 (*c*), C. P. Code, which is applicable to appeals by reason of S. 107, C. P. Code. An order summarily rejecting the memorandum of appeal without giving the appellant an opportunity either to explain or make good the deficiency is erroneous in law and unsustainable. (*Harries, C.J. and Rowland, J.*) Ramgati Singh *v.* Shitab Singh. **180 I.C. 791=11 R.P. 539=20 Pat.L.T. 426=5 B.R. 488=A.I.R. 1939 Pat. 432.**

——**O. 7, R. 11** (c)—Applicability—Pauper suit—Dismissal—Appeal by plaintiff paying full Court-fee—Order by appellate Court for payment of Court-fee on plaint— Competency—Non-compliance—"Rejection" of appeal—If warranted. *See* C. P. Code, S. 2 (2). **1937 A.W.R. 113= A.I.R. 1937 All. 280.**

——**O. 7, R. 11** (c)—*Applicability to appeals.*

The weight of authority is decidedly against the applicability of the provisions of O. 7, R. 11

(*c*) to appeals. 27 M.L.J. 677; 61 Cal. 663; 1 Lah. 234; 3 Pat.L.J. 74; 50 All. 980, Ref. to. (*Varadachariar and Pandrang Row, JJ.*) SITHARAMAYYA *v.* RAMAYYA. **177 I.C. 453=11 R.M. 341=1938 M.W.N. 71=47 L.W. 211=A.I.R. 1938 Mad. 316=(1938) 1 M.L.J. 514.**

———O. 7, R. 11 (c)—Construction—Rejection of plaint—Conditions to be satisfied before—Duty of Court to grant time to pay deficiency in Court-fee. *See* C. P. CODE, S. 149 AND O. 7, R. 11. **18 Pat. L.T. 665=A.I.R. 1937 Pat. 550 (S.B.).**

———O. 7, R. 11 (c)—*Dismissal under—When justified—Appeal insufficiently stamped and presented in time—Duty of Court—Dismissal without order requiring payment of deficiency within fixed period—Legality.*

Before a suit or an appeal can be rejected for insufficiency in court-fee under O. 7, R. 11 (*c*), C. P. Code, the law requires that there shall be a definite order of the Court, fixing a day for payment of the deficiency and non-compliance with such order. The dismissal of the suit or appeal for non-payment of the necessary court-fee before the expiry of the period of limitation is not warranted. If the suit or appeal is filed in time, it is open to the Court to give time to the party for paying the necessary court-fee even in instalments. The fact that the counsel for the plaintiff or appellant promises to pay the deficiency within a period does not take the place of the order of the Court which is prescribed by law. Dismissal under R. 11 (*c*) of O. 7, C. P. Code, should be regarded in the light of a punishment for contempt of Court for failure to comply with the orders of the Court for payment of the difficiency in stamp. (*Darling, S.M. and Bomford, J.M.*) JANARDAN CHAUBE *v.* KANTIKA TEWARI. **1938 R.D. 235=1938 A.W.R. (B.R.) 89.**

———O. 7, R. 11 (c)—Expiry of time fixed under—Extension—Powers of Court. *See* C. P. CODE, S. 148. **40 C.W.N. 747=A.I.R. 1936 Cal. 321.**

———O. 7, R. 11 (c)—*Insufficiency of stamp—Duty of Court—Making up of deficiency—Effect—Application for making good deficiency—Necessity.*

Under O. 7, R. 11, C. P. Code, when a plaint is presented insufficiently stamped the Court is bound to give plaintiff time to make good the deficiency; and under S. 149, C. P. Code, the deficient stamp when paid within the period allowed, must be taken to have been paid at the time of the original presentation of the plaint. No application is required to be made under O 7, R. 11. (*Weston.*) MAHADEO *v.* RAM PRATAB. **1938 A.M. L.J. 60.**

———O. 7, R. 11 (c)—*Plaint insufficiently stamped—Plaintiff not acting* bona fide—*Plaint, if can be rejected.*

Under the provisions of O. 7, R. 11, C. P. Code, when a plaint is insufficiently stamped, the Court is bound to ask the plaintiff to make up the court-fee within a period to be fixed by it and the plaint could only be rejected if the deficieny in the court-fee is not made up within the period. It is immaterial that the action of the plaintiff in instituting a plaint on a deficient court-fee is not *bona fide*, and the worst that the Court can do is to ask the plaintiff to make up the court-fee on the very day on which the plaint is presented. (*Bhide, J.*) JAGAT RAM *v.* KHARATI RAM. **171 I.C. 764=10 R.L. 228=39 P.L.R. 199=A.I.R. 1937 Lah. 392.**

———O. 7, R. 11 (c)—*Rejection of plaint—Duty of Court—Insufficiently stamped memorandum of appeal—Granting of time to make up deficit—Considerations.*

Before rejecting a plaint under O. 7, R. 11 (*c*), it is the duty of the Court to require the plaintiff to make good the deficiency in stamp within a time to be fixed. Where a memorandum of appeal is insufficiently stamped, either because there is a doubt as to the court-fee payable or that it could not be ascertained before the receipt of the records, and an honest attempt had been made by the appellant to comply with the requirements of law, the memorandum of appeal may be received and time granted to make up the deficiency that may be found to be due. (*Dhavle and Agarwala, JJ.*) RAM SAWARI KUER *v.* DULHIN MOTIRAJ KUER. **17 Pat. 687=178 I.C. 150=5 B. R. 59=11 R.P. 220=19 Pat.L.T. 885=1939 P. W.N. 162=A.I.R. 1939 Pat. 83.**

———O. 7, R. 11 (c)—*Scope and effect of—Plaint insufficiently stamped—Duty of Court—Rejection of plaint—Order of—When to be made.*

Where a plaint is insufficiently stamped, the Court is bound under O. 7, R. 11, C. P. Code, to give the plaintiff time to make up the deficit; only when he fails to comply with the order, the Court can reject the plaint. That the plaint is presented on the last day of limitation makes no difference at all. Whether the payment of insufficient court-fee has been by design or due to inadvertence, the Court is bound by the mandatory terms of it to give effect to the provision of law. (*Venkatasubba Rao, J.*) VENKANNA *v.* ATCHUTARAMANNA. **182 I.C. 953=12 R.M. 195=1938 M.W.N. 259=47 L.W. 492=A.I.R. 1938 Mad. 542=(1938) 1 M.L.J. 610.**

———O. 7, R. 11 (c) and S. 148—*Suit registered in the ordinary way—Extension of time twice—Application for further extension pending consideration—Plaintiff filing an application to continue the suit of a pauper—If maintainable—Power to grant time under S.* 148.

A suit was registered as an ordinary suit and court-fee was paid on the valuation of the part by the plaintiff on the plaint. On objection being taken by the defendant the Court assessed the value of the suit at a higher figure and directed the plaintiff to pay in the deficit court-fee within one month. This time was extended twice. On the last day fixed for payment, the plaintiff applied for further time. On the day when the application was put up for orders, the plaintiff applied for permission to continue the suit as a pauper. The Court rejected both the applications and also the plaint.

Held, that even where the suit had already been registered as an ordinary suit, the application to continue it *in forma pauperis* could be entertained. In view of S 148 of the Code the time granted by the Court can be enlarged from time to time and the Court is also empowered to extend any time fixed by it even after the expiry of the period originally fixed. As the application for further time was pending consideration at the time when the application to continue the suit *in forma pauperis* was made and as the Court could, if it so wished, grant further time, O. 7, R. 11 (*c*) cannot be said to have operated *ipso facto*.

The mandatory provision of O. 7, R. 11 is intended for cases when no other complications intervene and the Court has a sufficient inherent power to depart from the normal procedure to suit the exigencies of the situation. An application to continue the suit as pauper can be entertained within one of the periods allowed for payment of deficit court-fee or even beyond it but before the plaint is rejected or before circumstances have arisen under which it is bound to be rejected. (*Mukherji and S.K. Ghose, JJ.*) HAFIZ MAHOMED FATEH NASIB *v.* SARADINDU MUKHERJEE. **66 C.L.J. 78=162 I.C. 689 =8 R.C. 643=40 C.W.N. 747=A.I.R. 1936 Cal. 221.**

———**O. 7, R. 11 (d)**—Applicability—Non-compliance with requirements of S. 80, C. P. Code. *See* C. P. CODE, S. 80. **18 Pat.L.T. 921.**

———**O. 7, R. 13**—Rejection under—Restoration—Power under S. 151. *See* C. P. CODE, S. 151 AND O. 7, R. 13—RESTORATION. **1939 A.W.R. (H.C.) 325.**

———**O. 7, Rr. 14 and 18**—*Failure to produce Khatta with plaint—Effect—O. 23, R. 1.*

In a suit on a loan the failure of the plaintiff to produce the Khatta along with his plaint may entail the penalty prescribed under R. 18 of O. 7 but, it is not a 'formal defect' in the suit in respect of which, the Court should order a withdrawal of the suit with liberty to file fresh suit. (*E. Weston.*) MISRI LAL *v.* PATASI. **1937 A.M. L.J. 75.**

———**O. 7, R. 14 (2) and O. 11, Rr. 15 and 18 (2)**—*List of documents relevant as evidence—If pleadings—Right of inspection of such documents—Procedure to be followed.*

Though a defendant can insist on inspection of documents forming part of the pleadings, before he files his written statement, he cannot except in special cases insist upon inspection with reference to documents referred to in O. 7, R. 14 (2). They do not form part of the pleadings and defendant has not to plead to them any more than he has to plead to any other evidence in support of the plaintiff's case. It is therefore entirely unnecessary as a general rule to see these documents before he files his own statement. It may in certain circumstances be necessary, but then the procedure laid down in O. 11, R. 18 (2) must be observed. But whether the appplication is made under O. 11, R. 15 or O. 11, R. 18 (2), he must act promptly and delay in itself may be a ground for refusing to grant time for filing written statement until after inspection has been made. (*Bose, J.*) THE NAGPUR GLASS WORKS CO., LTD. *v.* SHRU ONAMA GLASS WORKS CO., LTD. **I.L.R. (1940) Nag. 331.**

———**O. 7, R. 14 (2)**—List filed under—Right to inspect—Limits. *See* C. P. CODE, O. 11, RR. 15 AND 16. **A.I.R. 1938 Nag. 239.**

———**O. 7, Rr. 14 (2) and 18**—*Production of documents not included in list—Adverse inference.*

In a suit on a promissory note for cash consideration, the defendant denied the receipt of consideration and therefore the plaintiff, in answer, produced before recording of evidence bonds not included in the list of documents filed with the plaint.

Held, that in these circumstances no inference could be drawn against the plaintiff from the non-production of the bonds with the plaint or the omission from the list of the documents on which the plaintiff intended to rely, which list had also been filed with the plaint. (*Tek Chand, J.*) SANDHURA SINGH *v.* KEHR SINGH. **169 I.C. 228 =9 R.L. 725=39 P.L.R. 396=A.I.R. 1936 Lah. 1016.**

———**O. 7, R. 18 (1) and (2)**—*Document not produced under R. 14—Whether can be used to contradict defendant in cross-examination—Evidence Act, S. 145.*

The penalty to the non-production of a document under O. 7, R. 14, C. P. Code, is contained in R. 18 (1), and sub-R. (2) is an exception to sub-R. (1). When the defendant is giving evidence, it is open to the plaintiff to tender in cross-examination a previous statement in writing by the defendant to contradict him under S. 145 of the Evidence Act, even though the document comes under O. 7, R. 14 (2), C. P. Code, and ought to have been presented with the plaint. (*Bennet, J.*) LAKHPAT PATHAK *v.* GHIRAN PATHAK. **167 I.C. 46=9 R.A. 477=1937 A.L.R. 126=1936 A.L.J. 1195=1936 A.W.R. 983=A.I. R. 1937 All. 55.**

———**O. 7, R. 18**—*Scope—Powers of Court under—Document not forming basis or foundation of suit—If can be produced.*

The only ground contemplated by R. 18 of O. 7, C. P. Code, for allowing a document which has not been produced in accordance with R. 14 to be produced at a later stage is that it may be used as evidence. The rule does not allow a plaintiff to put forward as creating rights a document on which he has not in terms sued. (*Cornish, J.*) NARAYANAMURTI *v.* SURYANARAYANA. **168 I.C. 98=1936 M.W.N. 1210=9 R.M. 527=44 L.W. 840=A.I.R. 1937 Mad. 122.**

———**O. 8, R. 2**—Question of limitation—Raising of—When duty of Court and of defendant. *See* LIMITATION ACT, S. 3 AND C. P. CODE, O. 8, R. 2. **1940 Rang.L.R. 273.**

———**O. 8, R. 2**—*Scope—Plea that suit not maintainable as not having been brought as a representative suit—Omission to raise in written statement—If can be raised in appeal.*

A plea by the defendant that a suit is not maintainable on the ground that it should be brought by the plaintiff in a representative capacity, must be pleaded in the written statement under O. 8, R. 2, C. P. Code. When it is not so pleaded, it ought not to be allowed to be raised in appeal. (*Beaumont, C. J.*) GULJARKHAN *v.* HUSENKHAN. **172 I.C. 165=10 R.B. 253 (1)= 39 Bom.L.R. 917=A.I.R. 1937 Bom. 476.**

———**O. 8, Rr. 3 and 5**—*Plaint allegations as to terms of lease—Absence of specific denial—Lease inadmissible in evidence—Effect.*

Where a lessor of a house sued the lessee for damages for breach of the lease agreement which was reduced to writing, but which though compulsorily registrable was not registered and his allegations in the plaint as to the terms of the lease were not specifically denied as required by C. P. Code, O. 8, Rr. 3 and 5, the effect is that the suit could be decreed as on an admission. (*Yorke, J.*) MRS. J. H. MATHEWS *v.* MIRZA ISMAIL BEG. **1938 O.A. 785=1938 O.W.N. 1080.**

———**O. 8, R. 5**—*Applicability and scope—Defendant failing to plead—Effect—If bound by all allegations in plaint.*

A defendant who does not put in any defence is bound by all the allegations in the plaint; under O. 8, R. 5, C. P. Code, every allegation of fact in a plaint must be taken as admitted unless denied or stated to be not admitted in the pleading of the defendant. The rule is not confined to a case where a pleading has been put in by the defendant, it equally applies to a case in which the defendant puts in no pleading. (*Beaumont, C. J. and Rangnekar, J.*) SHRIRAM SURAJMAL *v.* SHRIRAM. **60 Bom. 788=164 I.C. 189 (1)=9 R.B. 64=38 Bom.L.R. 577=A.I.R. 1936 Bom. 285.**

——**O. 8, R. 5**—*Denial by necessary implication—Inconsistent statements.*

There is not a denial by necessary implication of the statements in the plaint when the language which can be looked to to find that denial is a statement which is in itself so inconsistent as not to be capable of admitting or denying anything. (*Roberts, C.J. and Dunkley, J.*) S. K. MITRA, HIGHER GRADE PLEADER, *In re.* **A.I.R. 1940 Rang. 190.**

——**O. 8, R. 5**—*Non-admissions—When admissions.*

The principle that non-admissions in certain cases are equivalent to admissions does not apply to a case where the averments in the plaint to which the principle is sought to be applied are vague and inconclusive. (*Davis, J.C. and Mehta, A.J.C.*) HAJI SHAKOOR *v.* VOLKART BROS. **9 R. S. 233=30 S.L.R. 345=168 I.C. 330=A.I.R. 1937 Sind 11.**

——**O. 8, R. 6**—*Accounts of same person in different names—Set-off—If can be claimed.*

If the accounts are of one and the same person, the mere fact of the accounts being separate or in different names would not attract the provisions of O. 8, R. 6, C. P. Code, and a set-off can be claimed. (*Dalip Singh, J.*) FIRM RALLA RAM DAULAT RAM *v.* JASWANT RAI. **189 I.C. 464=42 P.L.R. 201=A.I.R. 1940 Lah. 290.**

——**O. 8, R. 6**—*Applicability—Legal and equitable set-off—Suit for ejectment and rent—Claim to value of improvements effected by defendant—Allegation of right to remain in possession until payment of costs of improvements—Nature of set-off—Court-fee—If payable.*

For a legal set-off under O. 8, R. 6, C. P. Code, the money claimed by the defendant must be legally recoverable from the plaintiff, in other words it must be money for which the defendant could sue the plaintiff. But where the defendant sets up a right to remain in possession of plaintiff's property until the costs of improvements effected by him are paid, and claims such amount in an action for ejectment and rent the claim is not a legal set-off, but only an equitable set-off which does not fall under O. 8, R. 6, and for which no Court-fee is payable. (*Norman.*) SOLEMON D'ROZARIO *v.* JAMES ROZARIO. **1936 A. M.L.J. 60.**

——**O. 8, R. 6**—*Applicability—Suit on mortgage—Claim by mortgagor defendant to abatement of mortgage consideration—Set-off or counter-claim—Permissibility—Remedy of mortgagor.*

A claim by the mortgagor, in the mortgagee's suit on the mortgage, to have some sort of abatement of the consideration of the mortgage—the mortgagee not seeking to set aside the contract of mortgage—is in the nature of an unliquidated claim, and set off of such a claim is not permissible under O. 8, R. 6, C. P. Code. The mortgagor's right, if any, must be the subject-matter of a separate litigation, and no counter-claim can be brought. (*Wort, A.C.J. and Manohar Lall, J.*) BIBI SHAIMA *v.* BANK OF BIHAR, LTD. **178 I.C. 383=11 R.P. 258=1938 P.W.N. 603=19 Pat.L. T. 585=A.I.R 1938 Pat. 484.**

——**O. 8, R. 6**—Applicability to insolvency or liquidation proceedings. *See* PROVINCIAL INSOLVENCY ACT, S. 46. **1939 M.W.N. 1231.**

——**O. 8, R. 6**—*Claim for set-off—Conditions to be fulfilled.*

According to O. 8, R. 6, C. P. Code, before a set-off can be claimed, it must be presented in a written statement which shall have the same effect as a plaint, and it must be shown that it is an 'ascertained' sum of money legally recoverable by the defendant from the plaintiff, and that both parties fill the same character as they fill in the plaintiff's suit. A claim for commission over reduction of losses, stated approximately, was held to be not an 'ascertained sum' of money. (*Gruer, J.*) GIRDHRILAL *v.* SURAJMAL. **1940 N. L.J. 176=A.I.R. 1940 Nag. 177.**

——**O. 8, R. 6**—*Equitable set-off—Claim arising out of same contract—Court-fee, if necessary.*

In a suit when the defendant claims an equitable set-off by claiming damages arising out of the same contract on which the plaintiff bases his claim, no separate court-fee is necessary. (*Bhide and Din Mohammad, JJ.*) BASHESHAR NATH KHANNA & SONS *v.* GRINDLAY & CO., LTD. **171 I.C. 649=39 P.L.R. 345=10 R.L. 220=A.I.R. 1937 Lah. 73.**

——**O. 8, R. 6**—*Equitable set-off—Court-fee.*

When there are different demands arising out of the same transaction or so connected in their nature and circumstances that they can be looked upon as part of one transaction, there arises an equitable set-off on which no Court-fees are payable. (*Norman.*) APAJI *v.* NOOR MOHAMAD. **1936 A.M.L.J. 10.**

——**O. 8, R. 6**—*Equitable set-off—Discretion of Court.*

Equitable set-off cannot be claimed as of right and the Court has a discretion to refuse to allow it. If a protracted enquiry is necessary for determination of the sum due, it may be a ground for refusing it. (*Gruer, J.*) GIRDHARILAL *v.* SURAJMAL. **1940 N.L.J. 176=A.I.R. 1940 Nag. 177.**

——**O. 8, R. 6**—Equitable set-off—Time barred debt—Right to set-off—Suit for partition of joint estate—Debt due to one co-sharer barred by limitation—Right to set-off against shares of inheritance of others. *See* HINDU LAW—DAYABHAGA—PARTITION. **62 C.L.J. 430=40 C.W.N. 75.**

——**O. 8, R. 6**—*Plea of set-off—Claim, if should be within limitation.*

In order that a set-off might be pleaded, it would have to be within the period of limitation at the time the action of the plaintiff is brought. (*Wort, Ag. C. J.*) BUDHU *v.* SITAL SINGH. **5 B.R. 202=11 R.P. 331=179 I.C. 172=A.I.R. 1939 Pat. 142.**

——**O. 8, R. 6**—*Right of set-off—Parties not filling same character.*

In a suit for recovery of money against the defendants as the reversioners of one *A*, the defendants are not entitled to claim set-off for the amount of a decree to which they had become entitled not merely as the reversioners of *A* but also as heirs of a third person who has nothing to do with the plaintiff's suit, as they do not fill the same character in the two suits. (*Henderson, J.*) SURENDRA NATH *v.* KRISHNA CHANDRA. **44 C.W.N. 924.**

——**O. 8, R. 6**—*Scope—If exhaustive—Equitable set-off—Conditions of—Ascertained sum—If can be subject of equitable set-off.*

It is not the law that a claim to set-off a definite sum of money can only be put forward under R. 6 of O. 8, C. P. Code. Nor is it the case that an equitable set-off can only be urged when the claim is to an unascertained amount. The claim by way of equitable set-off can be urged when the claim of the defendant is to an ascertained amount also. But a claim for equitable set-off will not, however, arise simply because there are cross-demands; there must be some connection between them which will make it inequitable to drive the defendant to a separate suit. The two claims must arise out of the same transaction, and there must be knowledge on both sides of an existing debt due to one party and a credit by the other party, founded on and trusting to such debt as a means of discharging it. (*R. C. Mitter, J.*) HARI ANANDA SHAHA *v.* MUHAMMAD ESAHAK MIA. **40 C.W.N. 751.**

——**O. 8, R. 6**—*Scope—Landlord taking advances and buying goods from tenant—Understanding to set-off dues against rent—Rent suit by landlord—Tenant not claiming set-off, but filing cross-suit—Cross suit, if barred—C. P. Code, S. 11.*

Plaintiff, a shopkeeper and a tenant of the defendant, from time to time advanced moneys and sold goods to the defendants, on the understanding that the amounts due to him from the defendant in respect of these transactions should be set-off against the rent payable to the defendant as they fell due. In spite of this arrangement, defendant sued the plaintiff for arrears of rent. The plaintiff while he mentioned these advances in his written statement in that suit, did not claim a set-off under O. 8, R. 1, C. P. Code, but instituted a cross suit against the defendant for the amounts due to him. Both the suits went side by side and both were decreed. Defendant appealed against the decree in the plaintiff's suit on the ground that the plaintiff not having claimed a set-off in his (defendant's) suit, as he might and ought to have done, was precluded from claiming the amounts in a separate suit.

Held, that though the plaintiff could have claimed a set-off under O. 8, R. 6, C. P. Code, in the defendant's suit, his filing a cross-suit was not illegal since the two claims were not essentially of the same nature and he was not obliged, on pain of losing his advances, to claim a set-off in the rent suit. (*James, J.*) BAIDYANATH DUTTA *v.* KANHAI LAL MARWARI. **179 I.C. 828=5 B.R. 296=11 R.P. 412=A.I.R. 1939 Pat. 264**

——**O. 8, R. 6**—*Scope—Set-off falling under—Claim barred by limitation—If can be made subject of equitable set-off.*

An equitable set-off can be pleaded only in respect of an unascertained sum, and there is no ground for extending the meaning of equitable set-off to a claim for ascertained sums. Even assuming that a defendant may claim an ascertained sum by way of equitable set-off, such a set-off should not be allowed where the claim is barred by limitation. (*Pollock, J.*) HARGOVIND *v.* SHRI KRISHNADAS **I.L.R. (1937) Nag. 481=170 I.C. 1004=10 R.N. 92=A.I.R. 1936 Nag. 290.**

——**O. 8, R. 6**—*Set-off—Ascertained sum—Claim in respect of boarding and lodging.*

A claim for a sum in respect of the boarding and lodging of another, when no fixed amount either monthly or for any period, had been agreed upon between the parties, cannot be called one, in respect of an 'ascertained sum' and so cannot be claimed to be set-off. (*Davies.*) CHAMELI *v.* CHHITER MAL. **1939 A.M.L.J. 159.**

——**O. 8, R. 6**—*Set-off—Barred by time—Maintainability—Conditions of.*

Where the set-off claimed is not legally recoverable being time-barred and the parties do not fill the same characters in respect of the set-off as they do in respect of the suit, set-off cannot be granted. 32 Cal. 576, Ref.; 5 Cal. 333 and A.I. R. 1934 All. 427, Foll. (*Middleton, J. C. and Almond, A.J.C.*) ALLIANCE BANK OF SIMLA, LTD. *v.* FEROZE SHAH. **160 I.C. 908=8 R. Pesh. 135=A.I.R. 1936 Pesh. 57.**

——**O. 8, R. 6**—*Set-off—Barred claim—If can be pleaded.*

Set-off is a creature of statute and is governed by O. 8, R. 6, C. P. Code, although the latter part of the rule indicates that there may be a set-off other than that provided by the rule. Under this rule, a claim barred by the law of limitation cannot be pleaded by the defendant by way of set-off. The fact that the transactions which were the subject-matter of the claim and of the set-off were with regard to the same estate is immaterial. (*Wort, J.*) UMA PRASAD SINGH *v.* SHIVA KANT PRASAD SINGH. **5 B.R. 705=181 I.C. 1006=11 R.P. 651=A.I.R. 1939 Pat. 567.**

——**O. 8, R. 6**—*Set-off—Nature of—Counter-claim — Distinction — "Legally recoverable"—Meaning of.*

A set-off is either legal or equitable. O. 8, R. 6 is restricted to legal set-off. Equitable set-off is allowed if the demands arise out of the same transaction or are so connected that they can be looked upon as part of the same transaction and when the amount is unascertained. O. 20, R. 19 (3) recognises equitable set-off. A set-off may be purely defensive, that is, it may amount to an adjustment or satisfaction of the plaintiff's claim or it may be a counter-claim under which the defendant claims a decree for the surplus amount due to him. In a defensive set-off, the set-off claimed must be recoverable at the date of the plaintiff's suit. In a counter-claim the sum claimed by the defendant should be legally recoverable at the date when he makes the claim, *i.e.*, at the date when he files the written statement. The words "legally recoverable" in O. 8, R. 6, mean legally recoverable at the date of the institution of the suit in one case and mean legally recoverable at the date when the counter-claim is made in the other case. Although in O. 8, R. 6 and O. 20, R. 19, there is no clear distinction between a mere set-off, *i.e.*, a defensive set-off and a counter-claim, a distinction has been made in Indian Courts in accordance with the law of England, as it is based on a sound principle.

(*Nasim Ali and Henderson, JJ.*) JITENDRA NATH ROY *v.* JNANADA KANTA DAS GUPTA. **167 I.C. 265**=9 R.C. 672=A.I.R. 1936 **Cal. 277.**

——**O.** 8, R. 6 **and Court-Fees Act, Sch. I, Art.** 1—*Set-off—Payment of court-fee—Necessity—Amount,*

It is clear from Art. I. of Sch. 1 of the Court-Fees Act that fees must be paid on a set-off, and it must be paid on the full amount of the set-off and not only on the amount claimed in excess of that claimed by the plaintiff court-fees should be paid also on an equitable set-off. (*Gruer, J.*) GIRDHARILAL *v.* SURAJMAL. **1940 N.L.J. 176= A.I.R. 1940 Nag. 177.**

——**O.** 8, R. 6—*Set-off and counter-claim—Suit for money due in partnership business—Defendant pleading discharge and payment of loan to plaintiff and claiming same—If set-off or counter-claim.*

In a suit for recovery of amount due to the plaintiff in a partnership business between him and the defendant, the defendant pleaded that the amount already due to the plaintiff was paid off by him and that on the date of such payment he advanced a further loan to the plaintiff and that it was due from the plaintiff instead.

Held, that the claim was a counter-claim and not a set-off as the allegation of loan was put forward not as a ground of defence but as a ground of attack and the claim having been made more than three years from the date of such loan, was barred by time. (*Pollock, J.*) SUNDERMAL *v.* GANESH NARAYAN. **171 I.C. 502=10 R.N. 120= A.I.R. 1937 Nag. 210.**

——**O.** 8, R. 6 (2)—Decree for costs—Execution—Costs taxed and paid into Court—Application by solicitor for lien—Claim of set-off by opposite party for costs due under another decree—Maintainability. *See* SOLICITOR — LIEN FOR COSTS. **40 C.W N. 458.**

——**O.** 8, **R.** 9 **and O.** 6, **R.** 7—*Applicability to minors.*

Except for the special provisions in O. 32, Rr. 12-14 which govern the relations between a minor and his next friend, the C. P. Code does not make any difference between minors and others so far as general rules of pleadings are concerned. The provisions of O. 8, R. 9 and O. 6, R. 7 apply to minors also and do not cease to apply to a minor merely because during the pendency of the suit he comes of age. Hence, where a guardian *ad litem* representing the minor defendant files a written statement and the minor attains majority during the pendency of the suit, he cannot claim to file a fresh written statement so as to supersede that filed by his guardian *ad litem.* (*Rowland, J.*) RAMKHELAWAN SINGH *v.* GANGA PRASAD. **172 I.C. 513=10 R.P. 337=1937 P.W.N. 720=A.I.R. 1937 Pat. 625.**

——**O.** 9—Applicability — Application under S. 84, Madras Hindu Religious Endowments Act —Dismissal for default—Restoration—Application for—Maintainability. *See* MADRAS HINDU RELIGIOUS ENDOWMENTS ACT, S. 84. **45 L.W. 695.**

——**O.** 9 **and O.** 17—*Applicability—Application under O.* 34, *R.* 5—*Order directing notice to opposite party—Failure to pay costs of notice—Dismissal—If justified.*

An application under O. 34, R. 5, C. P. Code, is not an execution proceeding, and is governed by the provisions of O. 9 and O. 17, C. P. Code. When an applicant under O. 34, R. 5 fails to comply with the order of the Court directing notices to issue by omitting to pay the costs of the notices, the provisions of Rr. 2 and 4 of O. 9 become applicable and the Court acts rightly in dismissing the application. (*Davis, J.C.*) PREMOMAL *v.* KHUDA BAKHSH. **31 S.L.R. 180= 172 I.C. 520=10 R.S. 163=A.I.R. 1937 Sind 273.**

——**O.** 9, **R.** 2—*Plaintiff failing to get minor defendant properly served—Dismissal of suit against other defendants duly served—If justified.*

The fact that the plaintiff through his negligence had failed to get a minor defendant properly served and to get a guardian appointed for him, does not justify the dismissal of the suit under O. 9, R. 2, C. P. Code, as against the other defendants who had been duly served. (*Srivastava, C.J.*) GANESH KUER *v.* SHEORAJ SINGH. **170 I.C. 982=10 R.O. 64=1937 O.L.R. 504=1937 O.W.N. 977=A.I.R. 1937 Oudh 502.**

——**O.** 9, **Rr.** 2 **and** 4—*Power of Court—Date not fixed for appearance of defendant—Order requiring plaintiff to file process fees and copies of plaint—Non-compliance—Dismissal of suit—Legality.*

A Court has no power to require a plaintiff to file process fees or copies of the plaint before fixing a date for the appearance of the defendant. Such an order is illegal and failure to comply with it does not entail dismissal of the suit. A dismissal of the suit for failure to comply with such an order is without jurisdiction. (*James, J.*) SRIPATI SARAN PRASAD SINGH *v.* INDARJIT MAHTON. **179 I.C. 563=5 B.R. 264 =11 R.P. 397 (1)=19 Pat.L.T. 854=A.I.R. 1939 Pat. 160.**

——**O.** 9, **Rr.** 3 **and** 4—*Applicability—Plaintiff's pleader stating that his client would not proceed with case—Court recording that plaintiff's pleader had no instructions and defendant was absent and dismissing suit—Application for restoration—If maintainable.*

Where the plaintiff's pleader appeared before the Court and made a statement to the effect that his client's agent had informed him that he would not proceed with the case, but the Court expressly recorded that the plaintiff's pleader had no instructions and no steps were taken by the plaintiff and that the defendant was absent and dismissed the suit for default, the order passed is clearly one under O. 9, R. 3, C. P. Code, and an application for restoration is, therefore, maintainable under O. 9, R. 4, C. P. Code. (*S. K. Ghose and Edgley, JJ.*) JAHARLAL *v.* JYOTI PROSAD. **177 I.C. 401=11 R.C. 242=42 C.W.N. 806=A.I.R. 1938 Cal. 547.**

——**O.** 9, **R.** 3—*Dismissal of suit—Discretion of Court.*

The provisions of O. 9, R. 3, C. P. Code, are not obligatory, but merely give the Court a discretion to make an order in suitable circumstances that the suit be dismissed. (*Fasl Ali, J.*) RAMCHANDRA-FARAYA LAL *v.* BHAIA DHARMAN SAHI. **162 I.C. 557 (1)=1936 P.W.N. 359=8 R. P. 546 (1)=A.I.R. 1936 Pat. 437.**

——**O.** 9, **Rr.** 3 **and** 8—*Dismissal—When justified—Date fixed for filing list of witnesses—Failure to appear on that date—Effect—'Hearing'—Meaning.*

The utmost result of the failure of a party to give a list of witnesses within the time fixed would be that the Court might decline to hear the evidence of any witnesses whom he might subsequently call; failure to file a list of witnesses by the date fixed could under no circumstances result in the dismissal of a suit. O. 9, Rr. 3 and 8 refer to the dismissal of a suit on the failure of parties to appear when the suit is called on for hearing, and clearly a date fixed solely as the last day on which a list of witnesses may be filed is not a date fixed for hearing. The word 'hearing' in these rules although does not mean solely the recording of evidence, it means what it says, that is, "when the suit is called for hearing before the Court" and does not include the disposal of a routine matter which is within the powers of an officer of the Court and need not come before the Court at all. (*Roberts, C.J. and Dunkley, J.*) MAUNG AHMIN *v.* MAUNG SAUNG. **178 I.C. 789=11 R.R. 281=A.I.R. 1938 Rang. 360.**

——**O. 9, R. 3**—*Proceedings for final decree pending—Dismissal of suit for default — Propriety.*

Where a preliminary decree for partition has been passed and the Court takes proceedings for passing the final decree, the suit should not be dismissed for default. The suit should be adjourned *sine die* and made revivable on payment of costs. (*Mir Ahmad, J.*) VIDYAWATI *v.* GOVINDI BAI. **176 I.C. 32=11 R. Pesh. 3=A.I.R. 1938 Pesh. 27.**

——**O. 9, Rr. 3 and 4**—*Transfer of suit to another Court without notice to plaintiff—Suit dismissed for default—Restoration.*

Where in the course of adjustment of business a case was transferred to the file of another Court but no notice of the transfer was given to the plaintiff, and when the case came up for hearing none of the parties was present and the suit was dismissed under O. 9, R. 3, C. P. Code, the Court should, on the application of the plaintiff, restore the case. (*Agha Haidar, J.*) JINDA RAM RAMKISHAN *v.* FAQIRA. **165 I.C. 563 =9 R.L. 258=38 P.L.R. 1118.**

——**O. 9, R. 4**—*Construction—Remedies under—If mutually exclusive—Dismissal of application to restore suit—If bar to fresh suit.*

R. 4 of O. 9, C. P. Code, does not create but declares the right of bringing a fresh suit while at the same time permitting the plaintiff in the alternative to proceed with his original suit. The alternative provisions of the rule are not mutually exclusive; and a plaintiff whose application for restoration of the dismissed suit has been rejected is not thereby precluded from bringing a fresh suit, subject to the law of limitation. (*James and Rowland, JJ.*) BALKESIA *v.* BHAGWAN GIR. **15 Pat. 716=17 Pat.L.T. 644=166 I.C. 451=9 R.P. 297=3 B.R. 167=A.I.R. 1937 Pat. 9.**

——**O. 9, R. 4**—*Restoration of suit—Duty of Court.*

In the matter of restoration of suits dismissed for default, Courts should be anxious to see that litigants obtain justice without being hampered by rules of procedure, unless such are imperative or there is contumacious obstruction or deliberate delay with a view deliberately to lengthen proceedings. The dismissal of suits without considering whether payment of costs will not meet the situation so far as the opposite side, if any, is concerned, must be deprecated. (*Dalip Singh, J.*) MAHOMED RAMZAN *v.* MAHOMED AKBAR. **186 I.C. 306=12 R.L. 384=41 P.L.R. 571=A.I.R. 1939 Lah. 592.**

——**O. 9, R. 4**—*Suit by shebait in name of idol dismissed for default—Application for restoration by another shebait—Maintainability.*

Where a suit brought by a shebait in the name of an idol is dismissed for default under O. 9, R. 3, C. P. Code, an application for restoration under O. 9, R. 4, C. P. Code, is maintainable by another shebait who is the shebait at the time of the application. The real plaintiff in the suit must be held to be the idol and not the shebait who was suing in his name. (*S. K. Ghose and Edgley, JJ.*) JAHARLAL *v.* JYOTI PROSAD. **177 I.C. 401=11 R.C. 242=42 C.W.N. 806=A.I.R. 1938 Cal. 547.**

——**O. 9, R. 5**—*Order for issue of fresh notice to* pro forma *defendant—Plaintiff not complying with order—Dismissal of suit even as against contesting defendant—Propriety.*

The action of an Assistant Collector in dismissing a suit for profits under S. 227 of Agra Tenancy Act against both defendants merely because the plaintiff failed to comply with the Court's order for the issue of a fresh notice for the appearance of the *pro forma* defendant is high-handed in character. Under Cl. (1) of R. 5 of O. 9, C. P. Code, the Court is at liberty to "make an order that the suit be dismissed as against such defendant", namely, the *pro forma* defendant. The Assistant Collector is not justified in dismissing the suit against the contesting defendant who is duly represented from the very beginning, and his order is, therefore, liable to be set aside in revision. (*Darling, S.M. and Bomford, J.M.*) BANWARI LAL *v.* MADAN GOPAL. **1937 R.D. 384.**

——**O. 9, R. 5**—*Order staying suit—Legality—Report on summons that defendant is absconding.*

An order staying proceedings under O. 9, R. 5, C. P. Code, is illegal, where the report on the summons which was attempted to be served is that the defendant is absconding. (*Jai Lal, J.*) SULTAN SINGH *v.* RAM SARUP. **38 P.L.R. 197.**

——**O. 9, R. 6 and O. 17, R. 2**—*Applicability—Date fixed for hearing of suit after framing of issues—Defendant absent—Application by pleader for adjournment—Refusal of—Pleader withdrawing—Decree—If* ex parte*—"Appearance."*

O. 17, R. 2 applies only to a case where a suit comes on for hearing on a date to which it is adjourned and any party fails to appear. It does not apply to a case where the suit comes up for disposal on the date which is the date for the first hearing. A distinction has to be made between a first hearing and an adjourned hearing. The Court, after framing the issues in a suit, fixed 24-9-1934 for hearing; the date was later changed to 5-9-1934. On that date the defendant, through his lawyer, applied for an adjournment on the ground that he was not well. The Court dismissed the application whereupon the lawyer withdrew from the case reporting that he had no further instructions to proceed. The Court proceeded with the case without the defendant and passed a decree against him expressly stating that it was *ex parte*. But when the defendant applied to have the *ex parte* decree set aside, it rejected the application without going into the merits on the ground that the case fell under the explanation added by the Allahabad High Court to O. 17, R. 2, C. P. Code, holding that the defendant had appeared.

Held, that O. 17, R. 2 did not apply as the defendant was absent and had not appeared, and the decree was therefore an *ex parte* decree under O. 9, R. 6, C. P. Code, and it was therefore open to the defendant to apply, to have it set aside. (*Sulaiman, C.J. and Bennet, J.*) Tilak Singh *v.* Pradyumna Singh. **1937 A.L.J. 239=1937 A.W.R. 151=168 I.C. 943=9 R.A. 683=1937 A.L.R. 427=A.I.R. 1937 All. 347.**

———**O. 9, R. 6**—Ex parte *decree—Duty of plaintiff and of Court.*

In the case of *ex parte* decrees, it is the duty of the plaintiff to adduce *prima facie* evidence in support of his case, and before an *ex parte* decree is passed it is the duty of the Court to record a finding in favour of the plaintiff in the light of evidence adduced by the plaintiff in support of his case. (*Srivastava, C.J. and Smith, J.*) Baba Din *v.* Suraj Baksh Singh. **169 I.C 226=10 R.O. 2=1937 O.L.R. 360=1937 O.W.N. 620.**

———**O. 9, R. 6**—Ex parte *suit—Proof of plaintiff's case—Necessity.*

Ex parte suit is as much a judicial proceeding as a contested suit. Plaintiff has to prove his case by evidence and it is for the Judge to hear and decide on it. This cannot be left to the Reader of the Court. (*D. R. Norman.*) Sukh Ram *v.* Lalta Pershad Perbhu Dayal. **1939 A.M.L.J. 72.**

———**O. 9, Rr. 6 and 7**—*Scope—If to be enforced as penal provisions—Defendant declared* ex parte *—Right to appear afterwards and file written statement and take part in trial—Suit not past the stage of framing of issues—Powers of Court.*

The object of Rr. 6 and 7 of O. 9, C.P. Code, will be frustrated if defendants could be allowed to absent themselves with impunity at the earlier stages of a litigation. But where, by reason of causes for which none of the parties is responsible, the case has not made much progress, there is no reason why these rules should be applied as penal provisions depriving parties of the opportunity of putting forward their defence. It will not, in any sense, be reopening what has happened in the past if a defendant who has been declared *ex parte* should be permitted to file a written statement, when the case is only at a stage when the other defendants has filed their written statements and certain issues framed but no evidence has yet been recorded, even if the filing of the proposed written statement might raise other issues. In such a case a defendant who has been declared *ex parte* is entitled to file a written statement and proceed with the trial by cross-examining the plaintiff's witnesses and also by leading evidence on his own behalf. In the absence of a statutory restriction in the Code corresponding to O. 6, R. 2 of the High Court Original Side Rules, mofussil Courts cannot impose any restriction on a defendant set *ex parte* continuing the suit at the stage at which it stands when he appears so long as he does not thereby reopen anything that has been done already. (*Varadachariar, J.*) Perumal Naicken *v.* Kondama Naicken. **185 I.C. 247=12 R.M. 525=1939 M.W.N. 110=49 L.W. 372=A.I.R. 1939 Mad. 385=(1939) 1 M.L.J. 64.**

———**O. 9, R. 7**—Ex parte *order—Setting aside—Direction for costs.*

Where in the case of an *ex parte* order, the applicant to set it aside states that he did not receive the summons.

Held, that, if the applicant knew of the suit, the *ex parte* order should not be set aside and if the applicant did not know, she ought not to be made to pay costs. (*D. R. Norman.*) Rani Veshni *v.* Ganesh Mal Sardar Mal. **1937 A.M.L.J. 70.**

———**O. 9, R. 7**—*"Good cause"—Non-service of summons—If amounts to.*

"Good cause" in R. 7 of O. 9, C. P. Code, includes non-service of summons. (*Norman.*) Birdi Chand Seth *v.* Norat Mal. **1936 A.M.L.J. 18.**

———**O. 9, R. 8**—Applicability — Dismissal for default in deposit and appearance on day fixed. *See* C. P. Code, O. 9, R. 1 (1). **1938 R.D. 614.**

———**O. 9, R. 8**—*Applicability—Plaintiff's counsel asking for adjournment—Adjournment being refused, reporting no further instructions.*

Where the plaintiff's Counsel confines himself to asking for an adjournment and, when it is refused, retires from the case and states that he has no further instructions, R. 8 of O. 9 applies and the plaintiff will not be held to have appeared. However, exact language used by the Counsel to that effect is not of great importance and one must look at all the circumstances to see in any particular case whether Counsel retired from the case so as not to prejudice his client by appearing or whether he, for reasons which commended themselves to him, abandoned his claim in the suit. (*Panckridge, J.*) Baijnath Bothra *v.* Kedarnath. **I.L.R. (1938) 1 Cal. 213=174 I.C. 657=10 R.C. 703=A.I.R. 1938 Cal. 74.**

———**O. 9, Rr. 8 and 9**—*Date fixed for payment of costs of adjournment by defendant to plaintiff—Suit dismissed for non-appearance of plaintiff—Application for restoration by his counsel on same day—Plaintiff, if entitled to restoration.*

A certain date was fixed for payment of costs of adjournment by the defendant to the plaintiff. On that date, no other proceedings had to take place except the fixing of a date for recording the evidence. Neither the plaintiff nor his Counsel appeared in Court on that day and the suit was dismissed in default. On the same day an application was made by the plaintiff's Counsel for the restoration of the suit. It was alleged that the plaintiff could not appear as he was ill and that the Counsel was present in Court waiting for the case to be called and did not hear when the case was called.

Held, that the circumstances of the case were such that the plaintiff was entitled to the restoration of his suit. (*Jai Lal, J.*) Bir Bat *v.* Jiwan Singh. **168 I.C. 350=9 R.L. 625=38 P.L.R. 484 =A.I.R. 1937 Lah. 118.**

———**O. 9, R. 8**—*Dismissal for default—Propriety—Suit transferred to another Court—Notice of hearing served on pleader.*

A suit during administrative changes was transferred from one Court in one town to another Court in a different town. The transferee Court issued notice to the pleaders of the parties intimating to them new date fixed for hearing in the transferee Court. The pleader for the plaintiff in that suit informed that he was engaged to appear in one particular Court only. The Court did not inform the transfer to the party. On the date of hearing neither the plaintiff nor his pleader appeared and consequently the suit was dismissed for default. On revision against the order of dismissal,

Held, that the pleader ought to have conveyed information to his client that the date had been changed and that the case would be heard at a different Court, when he was not prepared to appear. But it did not justify the action of the Court in refraining from serving notice upon the party and conveying to him the date which had been fixed for hearing as well as the name of the Court before which he was to appear. A.I.R. 1934 Lah. 91, Rel. on. (*Agha Haidar, J.*) Tilak Singh *v.* Mohammad Rashid. **164 I.C. 142=9 R.L. 89=A.I.R. 1936 Lah. 560.**

——O. 9, R. 8—*Dismissal of suit for default on date fixed for submission of Commissioner's report—Legality—Hearing of the suit—Meaning of.*

An order dismissing the suit of the plaintiff for default on a date fixed for the submission of the report of the Commissioner as to the market value of the property in suit for purposes of court-fees, is without jurisdiction, as such date is not the date of the hearing within the meaning of O. 9, R. 8, C. P. Code. By the hearing of the suit is meant the hearing at which the judge would be either taking evidence or hearing arguments or would have to consider questions relating to the determination of the suit which would enable him finally to come to an adjudication upon it. (*Agha Haidar, J.*) Manohar Dass *v.* Baradri Shikarpurian. **161 I.C. 790=8 R.L. 807=38 P.L.R. 88=A.I.R. 1936 Lah. 280.**

——O. 9, R. 8 and O. 17, R. 2—*Exercise of powers under—Respective stages.*

Courts should not lightly dispose of litigation without going into the merits. It is also equally plain that Courts are bound in certain circumstances to dismiss cases for default. One case is that indicated in O. 9, R. 8. It is true that when a case reaches the stage where the issue stage has in part been passed, the Court is not compelled to exercise its powers under O. 9, R. 8 but is given power to make another order under O. 17, R. 2, and in any doubtful case the Court should so act. (*Stone, C.J. and Bose, J.*) Maneklal Bhimraj *v.* Phulabai. **I.L.R. (1939) Nag. 574=184 I.C. 102=12 R.N. 93=1939 N.L.J. 351=A.I.R. 1939 Nag. 213.**

——O. 9, Rr. 8 and 9—*Plaintiff's counsel applying for adjournment during plaintiff's absence—Court refusing adjournment and dismissing suit for default—Plaintiff's remedy.*

Where in the absence of the plaintiff, his Counsel puts in an application for adjournment and that application is refused, the Court should, in view of the Explanation to O. 17, R. 2, proceed as though the plaintiff is present, and decide the suit on the merits. Where, however, this is not done and the Court dismisses the suit for default, it must be deemed to decide the matter upon its merits and not act merely under O. 9, R. 8. The proper remedy of the plaintiff, in such circumstances, is to file an appeal, and not to make an application under O. 9, R. 9. (*Allsop, J.*) Jafri Begam *v.* Asghar Ali Khan. **164 I.C. 1059=9 R.A. 222=1936 A.L.J. 635=1936 A.W.R. 499=A.I.R. 1936 All. 659.**

——O. 9, R. 8—*Pleader telling Court that he has no instruction—If tantamounts to default of appearance by party.*

When the pleaders appear and intimate to the Court that they have no instructions from their client, it is tantamount to default of appearance by the party. 22 A. 66 (F.B.), Foll. (*Agha Haidar, J.*) Gulam Haidar *v.* Diwan Iqbal Nath. **167 I.C. 520 (1)=9 R.L. 504=A.I.R. 1936 Lah. 1000.**

——O. 9, R. 9—Applicability—Amendment of plaint and direction to pay deficit Court-fee after proper valuation—Rejection of application to withdraw suit with liberty—Failure to take steps—Dismissal of suit—Subsequent suit—If barred. *See* C. P. Code, O. 7, Rr. 11 and 13. **40 C.W.N. 1390.**

——O. 9, R. 9—*Applicability—Objections under S. 47 dismissed for default—Another application containing some objections—Maintainability.*

The combined effect of Ss. 2 (2) and 47 of C. P. Code, is that an application under S. 47 stands on the footing of a suit and the determination of such an application is tantamount to a decree. The provisions of O. 9, R. 9, C. P. Code, are applicable to objections made under S. 47, C. P. Code, and where such objections filed by the judgment-debtors were dismissed for default, another application under S. 47 containing the same objections is not maintainable. (*Srivastava, Ag.C.J. and Smith, J.*) Ram Harakh *v.* Banwari Lal. **13 Luck. 309=168 I.C. 314=9 R.O. 461=1937 O.L.R. 251=1937 O.W.N. 503=A.I.R. 1937 Oudh 337.**

——O. 9, R. 9—*Applicability—Pauper application—Duty of Court to decide on merits.*

O. 9, R. 9, C. P. Code, does apply to a pauper petition by reason of S. 141, C. P. Code, if the Court has jurisdiction to decide a petition under O. 9, R. 9 and S. 141, C. P. Code, it has a duty to decide such a petition on its merits, and cannot decline to exercise its jurisdiction merely because there is an alternative remedy. (*Wadsworth, J.*) Krishna Rao *v.* Janaki Ammal. **1939 M.W.N. 408=49 L.W. 543=A.I.R. 1939 Mad. 681=(1939) 1 M.L.J. 728.**

——O. 9, R. 9—*Applicability—Probate proceedings—Application for probate dismissed for default—Order dismissing application for its restoration—Appeal.*

The proceedings referred to in S. 141, C. P. Code, include original matters in the nature of suits, such as proceedings in probates, guardianships and so forth. The provisions of O. 9, R. 9 are therefore applicable to probate proceedings and an application for grant of probate can be dismissed in default and restored and an order dismissing such application under O. 9, R. 9 is appealable under O. 43, R. 1 (*c*) and certainly under S. 299 of Succession Act. [164 I.C. 334=9 R.L. 156=38 P.L.R. 263=A.I.R. 1936 Lah. 712, Affirmed.] (*Addison and Abdul Rashid, JJ.*) Rup Lal *v.* Manohar Lal. **167 I.C. 526=9 R.L. 500=38 P.L.R. 973=A.I.R. 1936 Lah. 863.**

——O. 9, R. 9—*Applicability—Proceedings under Provincial Insolvency Act.*

The provisions of O. 9, R. 9, C. P. Code, must be held to be applicable to insolvency proceedings under the Provincial Insolvency Act, in view of the provisions of S. 5 of the latter Act. (*Rowland and Chatterjee, JJ.*) Ram Dayal Babu Lal *v.* Lakhu Sao. **1939 P.W.N. 699=20 Pat.L.T. 768=12 R.P. 427=185 I.C. 857=6 B.R. 270=A.I.R 1940 Pat. 58.**

——**O. 9, R.** 9—Applicability—Suit adjourned for production of plaintiff's witnesses—Plaintiff's pleader absent on adjourned date—Application for adjournment by another advocate refused—Plaintiff not giving evidence—Dismissal of suit—If one for default or on merits. *See* C. P. Code, O. 17, Rr. 2 and 3. **50 L.W. 430.**

——**O. 9, R. 9 and O. 47, R. 1**—*Applicability—Suit dismissed for default—Remedy for restoration—Review application—Competency.*

Where a suit is dismissed for default, the remedy of the plaintiff is by way of application under O. 9, R. 9, C. P. Code, and not an application for review. (*Darling, S.M. and Bomford, J.M.*) Balwanti *v.* Badal. **1938 R.D. 184=1938 A.W.R. (B.R.) 115.**

——**O. 9, R. 9 and S. 141**—*Application for restoration of previous application dismissed for default—Maintainability.*

An application lies under O 9, R. 9, read with S. 141, C. P. Code, for the restoration of a previous application under that order and rule which has been dismissed for default. A.I.R. 1923 Oudh 146, Foll. (*Nanavutty and Smith, JJ.*) Rameshar Dutt Singh *v.* Hari Har. **13 Luck. 246=168 I.C. 47=1937 O.L.R. 186=9 R.O. 441=1937 O.W.N. 372=A.I.R. 1937 Oudh 344.**

——**O.** 9, **R.** 9—*Application under—Essentials to be proved.*

In an application for restoration under O. 9, R. 9 the plaintiff must show some fact which was either not known to the Court when it dismissed the suit, or at least at that stage lacked satisfactory proof. (*Panckridge, J.*) Baijnath Bothra *v.* Kedarnath. **I.L.R. (1938) 1 Cal. 213=174 I.C. 657=10 R.C. 703=A.I.R. 1938 Cal. 74.**

——**O.** 9, **R.** 9—Application under—Pleader on record, if can make—Fresh appointment, necessity. *See* C. P. Code, O. 3, R. 4 (3) and O. 9, R. 9. **1938 N.L.J. 98.**

——**O. 9, R. 9 and O. 43, R. 1 (c)**—*Application for restoration of suit—Order of dismissal for non-prosecution—Appeal.*

Where on dismissal of a suit for default of appearance, the plaintiff applied for restoration of the suit, and his application for restoration was dismissed for non-prosecution, the order of dismissal of the application is one under O. 9, R. 9, and an appeal therefore lies against that order to the District Judge under O. 43, R. 1 (*c*). There is no warrant for confining the operation of R 9 of O. 9 to an application dismissed on the merits. (*Harries and Bajpai, JJ.*) Uma Datt Upadhaya *v.* Zakia Bibi. **161 I.C. 840=8 R.A. 788=1936 A.L.J. 305=1936 A.W.R. 454=1936 A.L.R. 332=A.I.R. 1936 All. 737.**

——**O. 9, R. 9 and S. 148**—*Conditional order—Legality—Extension of time—Power of Court.*

Where a Court passes an order for restoration of a suit dismissed for default on condition of payment of costs to the opposite party within a time fixed by the order and directs that in case of default the application for restoration is to stand as dismissed, the order is legal and valid. The effect of the order on the expiry of the time fixed for the payment of the costs is that the application stands as dismissed, and the Court no longer remains seized of the application but becomes *functus officio*, and has, therefore, no power to extend the time for payment of costs. (*Allsop and Ganga Nath, JJ.*) Gaya Din *v.* Lalta Prasad. **163 I.C. 554=9 R.A. 35=1936 A.W.R. 414=1936 A.L.J. 566=A.I.R. 1936 All. 477.**

——**O. 9, R. 9**—*Dismissal in default—Restoration—Adequate ground.*

Where a plaintiff appears with only one day's delay and files an affidavit explaining his absence and this explanation is not contested by the other party at the subsequent hearing, it should be accepted as adequate ground for restoration. (*Harper, S.M. and Sathe, J.M.*) Chandra Bhaga *v.* Ishaq Husain. **1940 A.W.R. (B.R.) 132 (2) =1940 O.A. 783.**

——**O. 9, R. 9**—*Dismissal for default—Restoration—Duty of advocates.*

Advocates who are engaged in cases which are fixed for hearing at a given time and place cannot be allowed to treat the Court before which the hearing is to take place with contumely or indifference, and then apply casually for reinstatement of a suit dismissed in their absence merely because they hoped or believed that they might attend the hearing. They must take reasonable precautions, and the provisions of O. 9, R. 9 become meaningless if it can afterwards be urged that although none were taken and there was no sufficient cause for their non-attendance the suit can still be restored to the file because the litigant would suffer if it were not. (*Roberts, C.J., Dunkley and Blagden, JJ.*) U Aung Gyi *v.* Government of Burma. **1940 Rang.L.R. 512=189 I.C. 338=A.I.R. 1940 Rang. 162 (F.B.).**

——**O. 9, R. 9 and S. 151**—*Dismissal for default—Sufficient cause not shown—Inherent power to restore.*

Apart from the powers under O. 9, R. 9 the Court cannot exercise the inherent jurisdiction under S. 151, C. P. Code, in a case to which O. 9, R. 9 does not apply. Hence, where sufficient cause is not shown for non-appearance there can be no grounds for the application *ex debito justitiae* of any inherent power outside the rule. (*Roberts, C.J., Dunkley and Blagden, JJ.*) U Aung Gyi *v.* Government of Burma. **1940 Rang. L.R. 512=189 I.C. 338=A.I.R. 1940 Rang. 162 (F.B.).**

——**O. 9, R. 9**—*Procedure—Application for restoration not accompanied by affidavit—Summary rejection of—Propriety—Duty of Court—Absence of affidavit—If fatal.*

An application under O. 9, R. 9, C. P. Code, for the restoration of a case dismissed for default, made on the same date as that of the dismissal and within a very short time of the dismissal ought not to be summarily rejected by the Court on the ground that it is not accompanied by an affidavit. Neither O. 9, R. 9 nor any rule having the force of law prescribes or requires an affidavit. Applications under the rule are not to be disposed of summarily and it is the duty of the Court to give the applicant an opportunity to remove any doubts in the mind of the Court. The hasty rejection of applications for restoration merely increases the work of the Court in the long run instead of clearing the file of the Court. (*Darling,* *S.M. and Bomford, J.M.*) Bhagwati Prasad Agarwal *v.* Lal Mohammad. **1937 R.D. 7.**

——O. 9, R. 9—*Restoration of suit—Non-appearance on account of missing of train—Duty of Court.*

Where a suit has been dismissed in default under O. 9, R. 8 on account of the failure of the representative of plaintiff firm to appear on the date of hearing and the representative alleges that he was unable to appear on the due date by reason of his missing the last train available by a few minutes, the question to be considered by the Court, is whether the representative honestly intended to be in Court, and did his best to get there in time. Once the Court is satisfied that the man did try to get there, and that he would have been there but for the fact of having missed his train by a few minutes, it is the duty of the Court to set aside the order of dismissal after directing him to pay costs to the other party. 1923 Mad. 63, Foll. (*Baguley and Mosely, JJ.*) K.S.R.M. Chettiar Firm *v.* Prem Singh. **162 I.C. 842=8 R.R. 593=A.I.R. 1936 Rang. 204.**

——O. 9, R. 9—*Restoration of suit—Question to be considered.*

In deciding whether a suit dismissed for default should be restored under O. 9, R. 9, what has really to be considered is whether the party was really trying to appear on the date fixed for the case and if he honestly intended to be represented though in his own stupid way, not being guilty of anything in the way of misconduct or gross negligence, then he should not be deprived of his chance of being heard. A.I.R. 1923 Mad. 63, Foll. (*Baguley and Parker, JJ.*) Raman Chettiyar *v.* K. A. P. Arunachalam Chettiyar. **164 I.C. 236 (2)=9 R.R. 71=A.I.R. 1936 Rang. 335.**

——O. 9, R. 9—*Scope of—Application under O. 21, R. 13—Dismissal on failure to satisfy condition imposed—Subsequent application to restore prior application — Competency — Dismissal—Appeal against order of dismissal—Competency—C. P. Code, O. 43, R. 1.*

A suit was decreed *ex parte*. The defendant applied under O. 9, R. 13, C. P. Code, to set aside the *ex parte* decree. A conditional order was passed setting aside the *ex parte* decree if the defendant deposited a sum of money within a fixed time. The petition was later dismissed on the ground that the condition was not fulfilled. There was no appeal from this order, but an application was filed under S. 151 and O. 9, R. 9, C. P. Code, to restore the earlier petition which had been dismissed for non-compliance with the condition. The Court considered the application on the merits and dismissed if holding that the defendant did not show sufficient cause for re-opening the earlier petition. On appeal from this order, the appellate Court held that the defendant had substantially complied with the condition and therefore his petition should have been granted and allowed the appeal. The plaintiff did not raise any objection to the maintainability of the appeal.

Held, in revision by the plaintiff, that the application under O. 9, R. 13, C. P. Code, not having been dismissed for default, no petition would lie to re-open the previous order dismissing that application; (2) that the appeal against the order dismissing the second application was not maintainable under O. 43, R. 1, C. P. Code; (3) that the mere fact that the plaintiff did not object to the maintainability of the appeal did not make the order in appeal valid, and there could be no waiver with regard to jurisdiction, although the failure to raise the plea in the Court below would be a circumstance to be taken into account in considering whether the High Court should interfere in revision; and (4) that since no substantial injustice was done to the plaintiff, the High Court was not called upon to interfere with the order restoring the suit. (*Horwill, J.*) Venkatachariar *v.* Mahomed Faizuddeen. **1940 M.W.N. 833=52 L.W. 375=(1940) 2 M.L.J. 374.**

——O. 9, R. 9—*"Sufficient cause"—Case dismissed for non-appearance—Restoration—Considerations—Discretion—Discretion exercised on wrong basis—Interference on appeal—Inherent powers of Court under S.* 151.

Per *Beaumont, C.J. and Rangnekar, J.*—In cases of discretion it is very undesirable to act on precedents, as every Judge has to deal with the cases which come up before him on the particular facts of each case. If a person whose case has been dismissed for non-appearance summarily, appears on the same day, and produces some not unreasonable excuse for his absence, *prima facie* the Court ought to exercise its discretion in his favour. Of course the applicant has no absolute right to ask the Court to waive its rules in his favour, but it is a good working rule that if he applies at once, and thereby shows that his failure to appear was not due to a desire to cause delay, but was *bona fide*, he ought generally to be given the right to have his case restored on payment of costs thrown away. It is, after all, a very serious matter to dismiss a man's suit or summons or whatever it may be without hearing it, and that course ought not to be adopted unless the Court is really satisfied that justice so requires. There is nearly always some degree of negligence or carelessness on the part of an applicant whose case has been dismissed for non-appearance, but that by itself would not disentitle him to have his case restored to the file. Where the negligence is exceedingly slight, the case ought to be restored, if he is not guilty of either misconduct or gross negligence. If the Court exercises its discretion on a wrong basis, the appellate Court will interfere and make the necessary orders.

Blackwell, J.—Whether the matter is to be dealt with as falling under O. 9, R. 9 or under S. 151, C. P. Code, and the inherent jurisdiction of the Court, it is in every case a matter for the discretion of Court. If the Court dealing with the matter cannot be said to have acted either capriciously or in disregard of any legal principle in exercise of its discretion, the appellate Court ought not to interfere, though it may come to a different conclusion if it were to deal with the same matter.

Rangnekar, J.—O. 9, R. 9, C. P. Code, does not take away the inherent power of the Court to restore a suit or summons, if there is just and reasonable cause for restoring it, even if no sufficient cause is shown within the meaning of the rule for the non-appearance of the plaintiff. The Code is not exhaustive and it is for that purpose that the Legislature by S. 151, has indicated that the Court has an inherent power to act *ex debito justitiae* in order that real and substantial justice may be done. Rules of procedure are meant to secure the ends of justice and not override them. (*Beaumont, C.J., Blackwell and Rangnekar, JJ.*) P. D. SHAMDASANI *v.* CENTRAL BANK OF INDIA, LTD. **I.L.R. (1938) Bom. 829=174 I.C. 534=10 R.B. 458=40 Bom.L.R. 238=A.I.R. 1938 Bom. 199 (S.B.)**

———**O. 9, R 9**—*Sufficient cause—Minority of plaintiff—Dismissal, if to be set aside on that sole ground.*

The fact of minority of a plaintiff is not by itself a sufficient cause for setting aside any order of dismissal that may be passed owing to the absence of the next friend, irrespective of the reasons for such absence. There is nothing in the C. P. Code to warrant a distinction in the procedure to be followed where the suit is filed on behalf of a minor. The question of what is sufficient cause within the meaning of O. 9, R. 9, C. P. Code, has to be decided with reference to various circumstances and the fact of the minority of the plaintiff is only one of such circumstances to be taken note of. (*Hamilton and Radhakrishna, JJ.*) SAHEBA KHATUN *v.* ANWAR-UL HASAN. **1939 A.W.R. (C.C.) 141=1939 O.A. 699=1939 O.W.N. 787.**

———**O. 9, R. 9**—*Sufficient cause shown—Reopening, if mandatory.*

Under O. 9, R. 9 when sufficient cause is shown reopening is mandatory, but when sufficient cause is not shown it is discretionary with Judge. (*Baguley and Parker, JJ.*) RAMAN CHETTIYAR *v.* ARUNACHALAM CHETTIYAR. **164 I.C. 236 (2)=9 R.R. 71=A.I.R. 1936 Rang. 335.**

———**O. 9, R. 9 (1)**—*Dismissal of suit for default—Plaintiff, if precluded from setting up his claim as defence to suit.*

In a suit on a first mortgage, the third mortgagee who was impleaded as one of the defendants claimed priority over the second mortgagor under S. 78 of the T. P. Act. A suit previously filed by the third mortgagee to obtain a declaration of his priority was dismissed for default.

Held, that the third mortgage was not prevented from raising the contention as to priority in this suit and that O 9, R. 9 (1), C. P. Code, had no application because its provisions only precluded a plaintiff from bringing a fresh suit on the same cause of action. (*Panckridge, J.*) SUKUMARI BISHNU *v.* RAGHUNATH HAZRA. **42 C.W.N. 853.**

———**O. 9, Rr. 9 (1) and 8**—*Fresh suit—Bar of—Default in deposit and appearance on day fixed—Dismissal—Fresh suit with addition of new defendant—Maintainability.*

Where in a suit for ejectment the plaintiff was granted time to add a new defendant on condition that a sum was deposited on a certain date as damages, and where on his default in so depositing and failing to appear on the day fixed the suit was dismissed, any fresh ejectment suit by such a plaintiff with the addition of a new defendant, is clearly barred by O. 9, R. 9 (1), C. P. Code, as the order of dismissal is clearly one under O. 9, R 8. (*Mehta, J. M.*) RAM RAO KRISHNA JATAR *v.* DUDH NATH. **1938 R.D. 614=1938 A.W.R. (B. R.) 322.**

———**O. 9, R. 9 (1)**—Suit to set aside sale under Bengal Revenue Sales Act on ground of irregularities in sale—Allegation that irregularities were due to fraudulent conduct of defendant—Suit dismissed for default—Subsequent suit for declaration that defendant has bought property fraudulently and for directing him to re-convey property—Maintainability. *See* C. P. CODE, O. 2, R. 2 AND O. 9, R. 9. **41 C.W.N. 1179.**

———**O. 9, R. 9 (2)**—*Notice under—Necessity for—Dismissal of—Suit under O. 9, R. 8.*

When a case is dismissed for the absence of the plaintiff under O. 9, R. 8 and he applies for restoration of the case, under R. 9, notice must be given to the opposite party. The provisions of O. 2, R. 9 (1) are mandatory and the grave irregularity in not issuing a notice to the opposite party before the suit is restored is one that cannot be condoned. (*Darling, S. M. and Bomford, J. M.*) MAHOMED ABBAS *v.* BAQUR HUSAIN. **1937 R.D. 521.**

———**O. 9, R. 13**—*Applicability—Case adjourned for evidence—Absence of defendant—Decree on consideration of evidence—Restoration.*

Where a case is adjourned after the framing of issues on which date parties were to produce their evidence, and on that date the plaintiff appears but the defendant fails to appear, and the Court passes a decree on a consideration of the evidence, the case is governed by O. 17, R. 2 and hence it could be restored under O. 9, R 13—(*Harper, S. M. and Sathe, J.M.*) SHAFIULLAH *v.* BHAGWATI MISRA. **1940 A.W.R. (B.R.) 95.**

———**O. 9, R. 13**—Applicability—Court purporting to act under O. 17, R. 3 on the date fixed for final hearing. *See* O. 17, R. 3 AND O. 9, R. 13. APPLICABILITY OF O. 17, R. 3. **1940 A.L.J. 200.**

———**O. 9, R. 13**—*Applicability—Execution proceedings.*

O. 9, R. 13 has no application to execution proceedings, but only to decrees in suits or in proceedings in administration or guardianship akin to suits. 17 All. 166 (P.C.), Rel. on. (*Baguley and Mosely, JJ.*) U PO MYA *v.* FATHER RIOUFREYT. **1939 Rang.L.R. 134=181 I.C. 841=11 R.R. 498=A.I.R. 1939 Rang. 115.**

———**O. 9, R. 13**—*Applicability—"*Ex parte *decree"—Defendant directed to file written statement but not filing—Effect—Defendant and pleader not prevented from addressing Court at hearing—Decree—If* ex parte—*Application to set aside—Maintainability.*

Where a defendant is directed to file a written statement by a certain date but fails to do so, and his application for further time is rejected, the Court should direct the case to be heard in default of written statement. An order fixing the case for hearing *ex parte* is not justified. A defendant is not bound to put in a written statement; if he does not file it, he is taken to admit the allegations in the plaint. He is, however, entitled to appear at the hearing and submit any argument open to him on the plaint, for instance that the plaint discloses no cause of action, or that the claim is time barred. If at the hearing the defendant and his pleader are present and are not prevented in any way from addressing the Court, and a decree is passed after hearing the evidence on behalf of the plaintiff, there is no *ex parte* decree which can be set aside on an application under O. 9, R. 13, C. P. Code. (*Beaumont, C. J. and Wassoodew, J.*) VINAYAK SHREEDHAR *v.* CHINTAMAN VAMAN. **178 I.C. 816 (2)=11 R.B. 195=40 Bom.L.R. 972=A.I.R. 1938 Bom. 470.**

——**O. 9, R. 13**—*Applicability*—Ex parte *final decree for foreclosure—Power to set aside.*

Where a final decree for foreclosure is passed in the absence of the defendant, it is an *ex parte* decree and as such the provisions of O. 9, R. 13 apply to it. A Court has jurisdiction to set it aside if the conditions necessary are proved. (*Thomas, C. J. and Zia-ul-Hasan, J.*) Pratab Narain *v.* Bhagwati Singh. **14 Luck. 435=11 R.O. 212=179 I.C. 928=1939 O.L.R. 96=1939 O.A. 204=1939 O.W.N. 155=A.I.R. 1939 Oudh 111.**

——**O. 9, R. 13**—*Applicability to insolvency proceedings*—Ex parte *order of adjudication on debtor's application—Creditor's right to apply to set aside* ex parte *order.*

O. 9, R. 13, C. P. Code, is applicable to proceedings under the Provincial Insolvency Act; and the Insolvency Court has therefore power to entertain an application by a creditor to set aside an *ex parte* order of adjudication made on the debtor's application. (*Fazl Ali and Meredith, JJ.*) Ram-pratap Marwari *v.* Lachman Mistri. **6 B.R. 567=187 I.C. 794=12 R.P. 649.**

——**O. 9, R. 13**—*Application for setting aside* ex parte *decree—Opposite party contending that application is barred by limitation—Court, if can invoke justice, equity and good conscience.*

Justice, equity and good conscience cannot be invoked to overrule the law of limitation. Where on an application for setting aside an *ex parte* decree under O. 9, R. 13 on the ground that the applicant had not been properly served with summons, the opposite party contends that the application is barred by limitation, and the Court without touching on the question of limitation, passes an order setting aside the *ex parte* decree on the ground that it considers it justifiable in the interest of justice, equity and good conscience that the applicant should be given a chance to contest the suit, the order cannot be sustained. A. I.R. 1935 Rang 466, Rel. on. (*Baguley, J.*) Jagadamma Pandit *v.* Naresh Pandey. **164 I.C. 286 =9 R R. 73=A.I.R. 1936 Rang 305.**

——**O. 9, R. 13**—*Application by way of motion —Limitation.*

An *ex parte* decree was passed on 5th April, 1939. The defendant applied by way of motion to have the decree set aside and presented the application in the Court on 5th May, 1939. The application was endorsed by the Assistant Registrar of the Court having been made on 5th May, 1939, *i.e.*, the date of presentation, but notice of motion was served on 9th May, 1939.

Held, that the application was made within 30 days of the decree and was therefore in time. (*Sen, J.*) Rajagopalan *v.* Unique Assurance Co. **A.I.R. 1940 Cal. 373.**

——**O. 9, R. 13**—*Application under—Also appeal against* ex parte *decree—Dismissal of appeal—Effect on* ex parte *decree—C. P. Code, O. 41, R. 11.*

When an appellate Court judicially considers the grounds impeaching the correctness of the decree under appeal and dismisses the appeal by an order which so far as that Court is concerned is conclusive, that dismissal of the appeal supersedes the subordinate Court's decree. A person applied to the original Court to set aside an *ex parte* decree under O. 9, R. 13, C. P. Code, and at the same time filed an appeal against the *ex parte*

decree. The appeal was dismissed under O. 41, R. 11, C. P. Code, and later on the original Court also dismissed the applications under O. 9, R. 13 on the ground that the *ex parte* decree had merged in the appellate Court decree and ceased to exist.

Held, that the *ex parte* decree ceased to exist as soon as the appeal was dismissed and hence the lower Court was right in holding that it had no jurisdiction to deal with the application to set aside the *ex parte* decree.

Held, further, that the appropriate course which a party ought to take in such a case is to request the appellate Court to keep the appeal pending until the disposal of the application under O. 9, R. 13, C. P. Code or to apply to the appellate Court immediately after the dismissal of his appeal to withdraw the application to itself under S. 24 (1) (*b*), C. P. Code. The Court may after so withdrawing it re-transfer the same under sub-S. (1) (*b*) (iii) to the Court from which it was withdrawn if it does not itself wish to try or dispose of it under sub-S. (1) (*b*). (*Niyogi and Pollock, JJ.*) Kikabhai *v* Mt. Safia Bi. **172 I.C. 608=10 R.N. 228=A.I.R. 1937 Nag. 381.**

——**O. 9, R. 13**—Application under—Right of—Necessary parties not impleaded in suit—Application by them after *ex parte* decree for addition as parties and for setting aside decree—Competency. *See* C. P. Code, O 1, R. 10. **A.I.R. 1937 Pat. 49.**

——**O. 9, R. 13**—*Application to set aside* ex parte *decree—Applicant found to have evaded service—Application, if liable to be rejected.*

Where it is clear from the record that everything that was possible for the trial Court to secure the service of the defendant applicant was done but the applicant persisted in evading service and deliberately refrained from attending the Court, his application to set aside the *ex parte* decree is liable to be rejected. (*Abdul Qayoom, C.J.*) Desraj *v.* Maniram. **39 P.L.R. J. & K. 113.**

——**O. 9, R. 13**—*Costs—Neither plaintiff nor defendant to blame.*

In proceedings to set aside an *ex parte* decree, it was found that neither the plaintiff nor the defendant was to blame. The *ex parte* decree was passed on account of the negligence of the clerk of the defendant's counsel who also was not to blame.

Held, that the defendant who had employed the offending agency, *i.e.*, the clerk, should pay the costs. (*Bose, J.*) J. E. Billimoria & Sons *v.* Gopinath. **179 I.C. 471=11 R.N. 295=A.I.R. 1938 Nag 370.**

——**O. 9, R. 13**—*Costs—Setting aside an improper* ex parte *order.*

Where there is no service and an improper *ex parte* order is passed, an applicant seeking to set it aside should not be required to pay costs. (*Weston.*) Govind Ram *v.* Niranjan Lal. **1938 A.M.L.J. 43.**

——**O. 9, R. 13**—*"Due service"—Meaning of—Major defendant—Service on guardian—Sufficiency.*

The service of summons against a major defendant upon a person who is described to be his guardian cannot be said to be a proper service on the defendant though the supposed guardian may be his brother. (*Mahomed Noor and Madan, JJ.*) Kedar Nath Singh *v.* Kesri Mull. **166 I.C. 635**

=9 R.P. 327=1936 P.W.N. 696=3 B.R. 202=18 Pat.L.T. 72=A.I.R. 1937 Pat. 17.

——**O. 9, R. 13** (Oudh)—*Due service—Power of appellate Court to go into question of.*

Due service is not the same thing as personal service. It has to be decided with reference to the provisions of the C. P. Code bearing on the point. It is not beyond the jurisdiction of an appellate Court to go into the merits of the question whether an order of substituted service was correct or not. (*Radha Krishna, J.*) ASHIQUE HUSAIN *v.* LACHHMI NARAIN. **15 Luck. 150=12 R.O. 175=184 I.C. 884=1939 O.L.R. 685=1939 O.W.N. 950=1939 O.A. 766=1939 A.W.R. (C.C.) 242=A.I.R. 1940 Oudh 81.**

——**O. 9, R. 13**—*Due service—Suit against members of joint Hindu family—Service of summons on manager—If service on all members.*

A service of summons on the karta is not a service on other members of the family who are impleaded in the suit as they may have their own defence to make. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. **166 I.C. 635=9 R.P. 327=3 B.R. 202=18 Pat.L.T. 72 =A.I.R. 1937 Pat. 17.**

——**O. 9, R. 13**—*Duty of Court—Reasons for setting aside* ex parte *decree—If to be stated.*

Where a Court decides to set aside an *ex parte* decree under O. 9, R. 13, although it is not obligatory on the Court to state reasons, it is most desirable that it should state why it thinks the *ex parte* decree should be set aside. (*Stodart, J.*) VENKATARAMA IYER *v.* RAMASWAMI IYER. **163 I.C. 732=9 R.M. 55=A.I.R. 1936 Mad. 524.**

——**O. 9, R. 13**—Ex parte *decree—Application to set aside within time—Affidavit not questioned —Rejection for not having been put in earlier—Legality.*

Where an application to set aside an *ex parte* decree is made within the time allowed by law and accompanied by an affidavit the accuracy of statements in which is not questioned, it cannot be rejected on the ground that it should have been put in earlier. (*Marsh, S.M. and Mehta, J.M.*) RADHEY SHAM *v.* SATISH CHANDER. **1939 R.D. 525=1939 A.W.R. (B.R.) 225.**

——**O. 9, R. 13**—Ex parte *decree—Meaning of —Test to decide whether decree* ex parte *or not—Recital in decree as to presence of party—If conclusive.*

The question whether a particular decree is or is not *ex parte* is a mixed question of law and fact. The Court must examine the records of the case and examine the circumstances under which the decree was passed, and if it is found that a particular defendant was not present at the time of the hearing of suit, the decree must be taken to be *ex parte* against him, in spite of the fact that decree as drawn up mentions his presence. The recital in the records is not conclusive. Thus where the guardian *ad litem* of the defendant was absent during the trial of the suit and the decree drawn up mentioned his presence.

Held, that non-appearance of the guardian during trial made the decree *ex parte* and the application to set it aside was maintainable. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. **166 I.C. 635=9 R.P. 327=3 B.R. 202=1936 P.W.N. 696=18 Pat.L.T. 72=A.I.R. 1937 Pat. 17.**

——**O. 9, R. 13**—Ex parte *decree—Payment of punitive costs as condition precedent to restoration order for—Propriety—Procedure to be followed.*

Where an application for restoration of a suit after setting aside an *ex parte* decree, is made on the next day the Court ought not to make the payment of punitive costs by way of damages to the other party, a condition precedent to the restoration of the suit. The Court should first satisfy itself that under O.9,R.13, there was a *prima facie* case and then fix a reasonable payment as costs. (*Darling, S.M. and Mehta, J.M.*) PARTAP *v.* SHEO KEDAR SINGH. **1938 R.D. 939=1939 A.W.R. (B.R.) 84 (2).**

——**O. 9, R. 13**—Ex parte *decree—Setting aside —Power of trial Court after passing of appellate decree.*

In a suit against several defendants a decree was passed on contest against some and *ex parte* against others. The contesting defendants appealed against the decree, making parties to the appeal all persons who were parties to the suit. The value of the appeal was the same as that of the suit. The decree of the trial Court was one indivisible against all defendants and proceeded upon a ground common to them all. The grounds of appeal were such that if the appellate Court would have reversed the decree of the trial Court against the appellants, it would have been reversed against the other non-appealing defendants. The appellate Court affirmed the decree of the trial Court against all the defendants except one. Pending appeal the defendants against whom an *ex parte* decree was passed had applied to set aside the *ex parte* decree. After the appellate decree, they sought to continue their application.

Held, that under the circumstances the appeal involved the whole subject-matter of the suit as well as the decree of the trial Court. The decree of the trial Court therefore merged in the decree of the appellate Court and it then ceased to exist. The trial Court therefore could not, after such appellate decree, entertain the application to set aside the *ex parte* decree, filed by the defendants. (*Nasim Ali and Edgley, JJ.*) MONO MOHAN KUNDU *v.* NRIPENDRA NATH. **172 I.C. 729=10 R.C. 414=41 C.W.N. 1278=A.I.R. 1937 Cal. 548.**

——**O. 9, R. 13**—*Limitation—Application to set aside* ex parte *decree, beyond time.*

Where an application to set aside an *ex parte* rent decree is made beyond the time fixed, it has to be dismissed as time barred. (*Marsh, S. M. and Mehta, J.M.*) TIKA RAM *v.* SOBARAM. **1939 R.D. 215=1939 A.W.R. (B.R.) 121.**

——**O. 9, R. 13**—*Order under—Finality of—Suit on mortgage—Case taken up for hearing after some adjournments—Senior vakil for defendant absent being engaged elsewhere—Junior unwilling to proceed with case—Plaintiff's evidence taken in chief and suit decreed—Application to set aside* ex parte *decree—Rejection on ground of want of sufficient cause—Appeal from decree—Propriety of refusal of adjournment if can be agitated.*

A suit on a mortgage deed, after some adjournments, came on for hearing on a particular day and was called on at first between 11 and 12 noon. The contesting defendants, a Mahomedan lady and her minor son had engaged two vakils, a senior and a junior. The junior vakil represented to the Court that the senior vakil had gone to another Court because he had been led to think that the sessions case in the Court before which the suit came on would take some time. That case did not, for some reason, take as long as it was expected. The case was again called later and the Court waited for about half an hour, but would not adjourn the suit any further than 1 P.M. The lady who was acting for herself and her minor son was present in Court at the time. The junior vakil was not prepared to take the responsibility of cross-examining the plaintiff's witnesses or of leading evidence on behalf of his clients in the absence of the senior who had not yet returned. The result was that the Judge recorded the examination in chief of the witnesses tendered on behalf of the plaintiff and delivered judgment immediately for the plaintiff. The next day an application was filed under O. 9, R. 13, C. P. Code, to set aside the *ex parte* decree and was allowed on terms. But in revision the High Court set aside the order setting aside the *ex parte* decree on the ground that there was no sufficient cause for non-appearance. A regular appeal against the decree having been preferred,

Held, that though some finality should, on general principles, attach to the order passed in proceedings under O. 9, R.13, C. P. Code, yet such finality was limited to matters within the scope of O. 9, R. 13, and the Court, in appeal, was not precluded from considering the merits of the question whether in the circumstances of the case the Court should not have granted an adjournment. The application under O. 9, R. 13, was wrongly put in, and the appellants were not therefore precluded from agitating that point in the appeal. Further the point in the appeal was not whether there was sufficient cause for non-appearance, but whether in the interests of justice, having regard to the facts, it would not have been better for the Court to have adjourned the case.

Mockett, J.—The position of the Judge sitting in appeal against the decree passed *ex parte* to canvass the correctness of refusal to adjourn is very similar to that of Judge sitting in revision considering an application under O. 9, R. 13. (*Varadachariar and Mockett, JJ.*) PEER AMMAL *v.* NALLUSWAMI PILLAI. **176 I.C. 995=11 R.M. 217=1937 M.W.N. 946=A.I.R. 1937 Mad. 922=(1937) 2 M.L.J. 666.**

——O. 9, R. 13—*Power of Court under—Order for deposit of costs or security for decree amount pending trial of application—Legality.*

A Court has no power, pending trial of an application under O. 9, R. 13, C. P. Code, to order the applicant to deposit the costs of the suit or furnish security for the decree amount or to dismiss the application for failure to furnish the security ordered. (*Burn and Lakshmana Rao, JJ.*) NARAYANAN CHETTIAR *v.* CHIDAMBARAM CHETTIAR. **51 L.W. 574=1940 M.W.N. 483=A.I.R. 1940 Mad. 585=(1940) 1 M.L.J. 710.**

——O. 9, R. 13—*"Prevented by any sufficient cause from appearing"—Meaning of.*

The words "prevented by any sufficient cause from appearing" in O. 9, R. 13, C. P. Code, mean causes other than lack of knowledge of the proceedings. (*Mya Bu and Mosely, JJ.*) K.K.N. K. A. R. CHETTYAR FIRM *v.* AGA ME SHEERAZEE. **185 I.C. 663=12 R.R. 211=1939 Rang.L.R. 606=A.I.R. 1939 Rang. 436.**

——O. 9, R. 13 and O. 17, R. 2 Expl. (Allahabad)—*Refusal of adjournment*—Ex parte *decree—Remedy.*

Where on the day fixed, the defendant appeared and asked for time to enable him to file the written statement, but the Court refused it and passed an *ex parte* decree, the defendant is entitled only to appeal against the *ex parte* decree, and not to apply under O. 9, R. 13 to set it aside. The reason is, that in view of the Expl. (Allahabad) to R. 2 of O. 17, the defendant could not be said to have not appeared, or failed to appear. (*Bennet and Verma, JJ.*) JHANDOO MAL AND SONS *v.* KHALSA SINGH SAHI. **I.L.R. (1940) All 192=1940 A.L.J. 269=1940 A.W.R. (H.C.) 161=A.I.R. 1940 All. 305.**

——O. 9, R. 13—*Revision—Refusal to set aside* ex parte *decree—Interference.*

It is true that whether there was sufficient cause for non-appearance is a question of fact and the High Court cannot interfere in such matter in revision in the absence of perversity or something of the like nature. But where the Judge has concentracted his attention on the negligence of counsel instead of on the conduct of the party, interference is called for. (*Bose, J.*) J. E. BILLIMORIA & SONS *v.* GOPINATH. **179 I.C. 471=11 R.N. 295=A.I.R. 1938 Nag. 370.**

——O. 9, R. 13—*Right to apply*—Ex parte *decree against one of the defendants—Appeal by other defendants — Dismissal — Defendant not party to appeal, if can apply.*

Where a decree is passed against several defendants, is *ex parte* as against one, and an appeal is preferred against the decree by the other defendants without impleading the *ex parte* defendant, which was dismissed, and whereafter the *ex parte* defendant applied to the Court which passed the decree to set it aside.

Held, that there was no legal bar to the Court's setting aside the *ex parte* decree. (*Smith, J.*) GAJADHAR *v.* UMA DUTTA. **171 I.C. 617=10 R.O. 139=1937 O.L.R. 572=1937 O.W.N. 1141=A.I.R. 1938 Oudh 11.**

——O. 9, R. 13—Scope—Application by Official Receiver—Dismissal—Separate suit by creditors to declare decree not binding—Maintainability. *See* PROVINCIAL INSOLVENCY ACT, S. 56 (4) (*c*). **1936 M.W.N. 79=A.I.R. 1936 Mad. 161=70 M.L.J. 90.**

——O. 9, R. 13—*Scope—If exhaustive—Suit to set aside—Maintainability.*

Before the falsity of the claim on which an *ex parte* decree is based can be gone into in a fresh suit filed for the purpose of getting it vacated, it must be shown that the decree was obtained from the Court either by collusion of both parties, or by fraud committed by the plaintiff which prevented the defendant from appearing in the first suit. But where the defendant has been duly served with the summons and has failed to appear for no fault of the plaintiff, it is not open to him to file a fresh suit and challenge the decree on the ground of the falsity of the claim on which it is based. His remedy if any in such a case is to apply in the same proceedings to have the decree set aside within the time allowed by law. If he satisfies the Court that he had sufficient reasons for not attending the Court when the decree was passed he may obtain relief ; but not otherwise. (*Rupchand Bilaram, A.J.C.*) ROCHIRAM LOKMANDAS

v. Dayaram. **30 S.L R. 405=166 I.C. 906=9 R. S. 157=A.I.R. 1937 Sind 18.**

——**O. 9, R. 13**—*Scope—Power of Court to set aside* ex parte *decree apart from rule—Duty of applicant under.*

A Court has no power apart from the provisions of O. 9, R. 13, C. P. Code, to set aside an *ex parte* decree passed by itself, and an applicant seeking to avail himself of the rule must comply with the conditions laid down in the rule, *i.e.*, he must satisfy the Court either that the summons was not duly served or that he was prevented by any sufficient cause from appearing in Court when the suit was called on for hearing. (*Collister and Bajpai, JJ.*) A. H. Ghaznavi v. Gurcharan Singh. **172 I.C. 72=10 R.A. 369=1937 All.L.R. 932=1937 A.L.J. 831=1937 A.W.R. 726=A.I.R. 1937 All. 691.**

——**O. 9, R. 13 and O. 23, R. 1**—*Scope—Suit—against several defendants—One remaining* ex parte—*Plaintiff withdrawing against others and getting* ex parte *decree against one only—Subsequent setting aside of* ex parte *decree—Right of plaintiff to proceed against others—Procedure.*

The plaintiff who purchased certain lands from the 1st defendant was unable to obtain possession of the lands which the 3rd defendant claimed as his by virtue of long possession. The plaintiff therefore brought a suit against the 1st defendant (vendor), the 2nd defendant (a tenant) and the 3rd defendant who claimed to have been in enjoyment for possession and in the alternative for refund of sale price. The 1st defendant was declared *ex parte*, and the 1st plaintiff was content to have a decree against him for the purchase-money and damages and withdrew the suit against defendants 2 and 3. Later on, however, the 1st defendant got the *ex parte* decree set aside on a technical ground. The plaintiff now prayed for permission to proceed against defendants 2 and 3 also.

Held, that though it would be equitable and just to allow the plaintiff to proceed against defendants 2 and 3, the Court had no power to do so either under O. 9, R. 13 or O. 23, C. P. Code. There was no decree against defendants 2 and 3 which could be set aside under O. 9, R. 13 and O. 23 did not provide for withdrawing a withdrawal of a suit; the only thing which could be done for the plaintiff was to grant permission under O. 23, R. 1, C. P. Code, to file a fresh suit against defendants 2 and 3. (*Horwill, J.*) Rajagopala Rao v. Bhanoji Rao. **1940 M.W.N 488=51 L.W. 631=A.I.R. 1940 Mad. 765=(1940) 1 M.L.J. 811.**

——**O. 9, R. 13**—*Setting aside of* ex parte *decree—Jurisdiction of Court.*

Unless the defendant had sufficient cause for not appearing when the case was called on for hearing, the Court has no jurisdiction to set aside an *ex parte* decree under O. 9, R. 13, C. P. Code. (*M. C. Ghose, J.*) Radhika Mohan Karmakar v. Surendra Nath Acharjee. **179 I.C. 203=11 R.C. 489=67 C.L.J. 519=A.I.R. 1938 Cal. 797.**

——**O. 9, R. 13**—Substituted service—If due service. *See* Limitation Act, Art. 164. **1939 Rang.L.R. 606.**

——**O. 9, R. 13**—*"Sufficient cause"—Application for time to compromise by both parties—Rejection and* ex parte *decree—Application to set aside—Defendants not ready owing to illness of one of them in charge of case—Dismissal—Propriety—* Ex parte *decree—If to be set aside.*

The plaintiffs and defendants in a mortgage suit applied for a month's time for effecting a compromise of the suit. The Court summarily rejected the application, and the plaintiffs being ready but the defendants not being ready, the Court passed an *ex parte* decree. The defendants then applied to have the *ex parte* decree set aside, and were ready on the adjourned date, but the plaintiffs were not ready. The matter was again adjourned, but on the adjourned date, the defendant who was in charge of the case was ill and unable to attend Court, and a medical certificate to that effect was produced in Court. The Court, however, summarily rejected the request for time and dismissed the application. The defendants having appealed, *held*, that there was reasonable ground for the defendants asking for restoration of the suit, in view of the fact that a petition for time to compromise had been filed on behalf of both the parties and had been refused; and that the application under O. 9, R. 13 should be allowed and the *ex parte* decree set aside. (*Khaja Mohammad Noor and Madan, JJ.*) Nathuni Singh v. Khub Lal Singh. **167 I C. 496=9 R.P. 405=3 B.R. 300=17 Pat.L.T. 793=A.I.R. 1937 Pat. 85.**

——**O. 9, R. 13**—*Sufficient cause—Attorney's illness and death.*

A defendant had no knowledge about the date fixed for hearing of the suit and was not informed about the progress of the suit by his attorney owing to the attorney's grave illness and subsequent death. The suit was decreed *ex parte* against him.

Held, that the defendant had shown sufficient cause for not appearing on the date the suit was taken up for hearing. (*Sen, J.*) Rajagopalan v. Unique Assurance Co. **A.I.R. 1940 Cal. 373.**

——**O. 9, R. 13**—*Sufficient cause—Counsel waiting in bar room—Instructions to clerk to call him when case was called—Clerk remaining absent when case was called.*

It setting aside an *ex parte* decree attention must in the first instance be concentrated on the conduct of the party and not merely on that of the counsel. If a party cannot be present himself when his case is called on for hearing, he must of course make adequate provision for his proper representation by some agency. If he employs counsel for this purpose he must ensure that, the person he employs undertakes to be present when the case is called, or that there is somebody else there to represent him. If he wants to have the *ex parte* proceedings set aside, he must show sufficient cause and that means he must show that counsel undertook to represent him at all necessary hearings for the fees agreed upon or paid, and also that there was no qualifying clause in the agreement. He need not show an express undertaking by counsel to be present either personally or through some other authorized person at all hearings; that is necessarily implied in the contract, but he must bring the responsibility definitely home to counsel if he wants to succeed and on that ground. A party engaged a counsel to appear for him when the case would be called. On previous hearings the counsel had appeared regularly and on the day of hearing in question he undertook no other work in any other Court but was ready to appear as soon as the case was called up. The accommodation in the Court being inadequate he remained waiting in the bar room and left his clerk in the Court with instructions to call him as soon as the case was called up. The clerk had been with the counsel for several years and no previous instance of his negligence had been suggested. When the case was called up, the clerk remained absent and a decree *ex parte* was passed.

Held, that neither the party nor his counsel were to be blamed for the negligence of the clerk and there was sufficient cause for non-appearance and hence the *ex parte* decree should be set aside. (*Bose, J.*) I. E. BILLIMORIA & SONS *v.* GOPINATH. **179 I.C. 471=11 R.N. 295=A.I.R. 1938 Nag. 370.**

——**O. 9, R. 13**—*Sufficient cause—Duty of Court.*

Once the Court is satisfied that the man did try to get there and that he would have got there in time but for the intervention of an inevitable accident for which he was in no way responsible, it is the duty of the Court to set aside the judgment passed *ex parte* mulcting in proper cases the delinquent man in costs. It should never be the intention of the Court that a man should be deprived of a hearing unless there has been something equivalent to misconduct or gross negligence on his part or something which cannot be put right so far as the other side is concerned, by making the man to blame, pay for it. A break down of the lorry on the way was considered sufficient cause for setting aside the *ex parte* decree. (*Mir Ahmad, J.*) SAIHGAL BROTHERS *v.* JAI RAM JUGATRI LAL. **176 I.C. 223=11 R.Pesh. 2=A.I.R. 1938 Pesh. 39.**

——**O. 9, R. 13**—*Sufficient cause*—Ex parte *decree against minor—Absence of guardian* ad litem—*If ground for setting aside decree.*

The mere absence of a guardian *ad litem* of a minor defendant is not by itself a sufficient cause for allowing an application under O. 9, R. 13, C. P. Code, when there is nothing to show that the guardian has betrayed the interests of the minor. (*Burn and Lakshmana Rao, JJ.*) RAMANATHAN *v.* MAYYAPPA CHETTIAR. **166 I.C. 70 (2)=9 R. M. 334 (2)=1936 M.W.N. 1261=44 L.W. 702=A.I.R. 1936 Mad. 961=(1937) 1 M.L.J. 36.**

——**O. 9, R. 13**—*Sufficient cause—Mistake of Counsel—Defendant not informed of date of hearing by counsel—Latter thinking that posting was merely formal and not for trial.*

Where the counsel for the defendant does not inform him of the posting of the suit to a particular date, thinking that that posting was merely formal and not for trial, it can fairly be said that the defendant was prevented by sufficient cause from appearing, within the meaning of O. 9, R. 13. (*Burn and Abdur Rahman, JJ.*) VENKATACHALAM *v.* MALLIKARJUNA ROW. **1937 M.W.N. 976.**

——**O. 9, R. 13**—*"Sufficient cause"—Question as to—Finding on—Interference in revision.*

The question whether a party was prevented by "sufficient cause" within the meaning of O. 9, R. 13, C. P. Code, from appearing when the suit was called on for hearing is essentially one of fact; and the High Court cannot interfere in its revisional jurisdiction in a case where the Courts below have come to the conclusion that the party was himself to blame for not appearing before the Court. (*Collister and Bajpai, JJ.*) A. H. GHAZNAVI *v.* GURCHARAN SINGH. **172 I.C. 72=10 R.A. 369=1937 All.L.R. 932=1937 A.L.J. 831=1937 A.W.R. 726=A.I.R. 1937 All. 691.**

——**O. 9, R. 13**—Sufficient cause—Suit transferred to another Court after service of summons on defendant—*Ex parte* decree—Absence of notice of hearing in transferee Court—If ground for setting aside *ex parte* decree. *See* C. P. CODE, S. 115 AND O. 9, R. 13. **A.I.R. 1936 Pat. 490.**

——**O. 9, R. 13, Proviso**—*Applicability*—Ex parte *decree against Hindu manager and brother—If can be set aside as against one only—Considerations.*

The proviso to R. 13 of O. 9, C. P. Code, shews sufficiently that in cases where a decree is passed against the karta and members of a joint Hindu family, the point for consideration is not the identity of the defences of the defendants, but the nature of the decree passed. On the facts it was held that the *ex parte* decree should be set aside as against all. (*Weston.*) SURAJ MAL *v.* MOOL CHAND. **1938 A.M.L.J. 59.**

——**O. 9, R. 13, Proviso(Peshawar)**—*Applicability*—Ex parte *decree passed after sending summons by registered post.*

There is no legal justification for proceeding *ex parte* against the defendant on the ground that the summons was sent to him by post irrespective of the fact whether he received it or not. And O. 9, R. 13 as amended by the Judicial Commissioner's Court, Peshawar, does not apply to an *ex parte* decree so passed. For, that rule applies only when there is irregularity in the service of summons. In this case there is no service of summons. (*Mir Ahmad, A.J.C.*) MOHAMMAD ISMAIL MAULA BAKHSH *v.* GOPAL SINGH MANMOHAN SINGH. **165 I.C. 947=9 R. Pesh. 58=A.I.R. 1936 Pesh. 199.**

——**O. 9, R. 13, Proviso**—*Mortgage decree—Setting aside in part—Permissibility.*

A mortgage debt being indivisible, a mortgage decree passed *ex parte* cannot be set aside in part, because complications will arise at the time of execution and anomalous results may follow. (*Mahomed Noor and Madan, JJ.*) KEDAR NATH SINGH *v.* KESRI MULL. **166 I.C. 635=9 R.P. 327=3 B.R. 202=1936 P.W.N. 696=18 Pat.L.T. 72=A.I.R. 1937 Pat. 17.**

——**O. 9, R. 13, Proviso**—*Suit against firm through* G—Ex parte *decree against firm and* G—*Application to set it aside by* G—*Decree, if can be set aside against firm only.*

A suit was instituted against a firm through one *G* in which *G* was also made a defendant. On *G's* failure to appear on the date of hearing, an *ex parte* decree was passed both against the firm and *G. G* applied for setting aside the *ex parte* decree on the ground that he had not been properly served. The District Judge allowed *G's* application and set aside the decree but added that the decree had been set aside only against the firm.

Held, that the order of the District Judge was illegal and the decree ought to be set aside both against the firm and *G.* (*Din Mohammad, J.*) CHANDU LAL *v.* SARASWATI SUGAR SYNDICATE. **180 I.C. 911=11 R.L. 728=A.I.R. 1938 Lah. 823.**

——**O. 9, R. 14**—*"Opposite party"—Mortgage suit*—Ex parte *decree for sale—Application to set aside—Subsequent purchaser of part of mortgaged property—Whether entitled to notice.*

An *ex parte* decree for sale on a mortgage was set aside without notice to one *M*, a subsequent purchaser of a part of the mortgaged property who was impleaded as a necessary party in the mortgage suit. After the *ex parte* decree was passed, the property was put to sale and *M* purchased a part of it. He had also obtained an order that the sale of the property originally purchased by him should be postponed to the sale of the other property. The other property fetched a sufficient price to discharge the liability and consequently *M's* property was not put to sale It was argued on behalf of *M* that he had obtained a definite advantage under the *ex parte* decree and that it should not have been set aside behind his back.

Held, that it did not appear from the decree itself that *M* had acquired any advantage under the decree and the fact that he might have obtained some subsequent advantage by sale of the property or by purchasing the property sold possibly at a favourable price was no reason for regarding him as a person benefited by the decree itself and he could not, therefore, properly be decribed as an opposite party who was entitled to be served with a notice of the application to set aside the *ex parte* decree under O. 9, R. 14. (*Allsop and Ganga Nath, JJ.*) MANDAN SINGH *v.* SUNDAR KUAR. **163 I.C. 226=8 R.A. 949=1936 A.W.R. 522=1936 A.L.R. 538=1936 A.L.J. 544 =A.I.R. 1936 All. 410.**

——**O. 10, R. 2**—Scope—Court directing defendant to file written statement within specified time—Party failing to do so—Right of pleader to make oral statement. *See* C. P. CODE, S. 10 (2). **A.I.R. 1937 Nag 268.**

——**O. 11, R. 1**—*Order declining to re-issue interrogatories—Revision.*

Under S. 44, Punjab Courts Act, High Court has no jurisdiction to entertain an application for revision from an interlocutory order declining to re-issue interrogatories but as the High Court's powers under S. 107, Government of India Act, are not merely administrative but also judicial, it can interfere to prevent injustice where the lower Court in an interlocutory order wrongly declines to re-issue interrogatories. (*Tek Chand, J.*) JOWAHIR SINGH SUNDAR SINGH *v.* FLAMING SHAW & Co. **169 I.C. 687=10 R.L. 38=39 P.L. R. 250=A.I.R. 1937 Lah. 28.**

[Under S. 224, Government of India Act 1935, the powers of revision under S. 107 are taken away].

——**O. 11, R. 12**—*Order for discovery of documents—Rights of adversary.*

It is true that in a suitable case a defendant may object to the production of a document on the ground that it relates solely to his title, but if, on the other hand, that document may have some bearing in support of the plaintiff's title, such objection cannot be validly raised. If an order for discovery is made under O. 11, R. 12 all the documents relating to the case should be embodied in the affidavit of documents by the person against whom the order for discovery is made. If however the defendant considers that he is entitled to protection in respect of the production of any particular documents which may be entered in the affidavit under O. 11, R. 13 of the Code, he will be at liberty to raise such objection at the proper stage of the proceedings if and when he is

ordered to produce such documents under O. 11, R. 14 or to give inspection of them under O. 11, R. 18. (*Edgley, J.*) GOBINDA MOHUN *v.* MAGNERAM BANGUR AND CO. **I.L.R. (1940) 1 Cal. 504= A.I.R. 1940 Cal. 331.**

——**O. 11, R. 12**—*Right to obtain discovery of documents—Extent of.*

R. 12 of O. 11 is considerably wider than O. 13, R. 1 of the Code. The right to obtain discovery of an adversary's documents is a very wide one and is not limited merely to those documents which may be held to be admissible in evidence when the suit is ultimately tried. (*Edgley, J.*) GOBINDA MOHUN *v.* MAGNERAM BANGUR AND CO. **I.L.R. (1940) 1 Cal. 504=A.I.R. 1940 Cal. 331.**

——**O. 11, R. 12 and S. 30**—*Decision of case depending upon documentary evidence—Duty of Court.*

Where it is obvious not only to the parties concerned but also to the presiding Judge that the decision of the matter would depend to a very large extent upon documentary evidence, the case is essentially a case in which recourse should be taken to the provisions of O. 11, and in the absence of any application to this effect by either of the parties, the Judge should himself record the requisite orders for this purpose under S. 30. (*Edgley, J.*) GOBINDA MOHUN *v.* MAGNERAM BANGUR AND CO. **I.L.R. (1940) 1 Cal. 504=A.I.R. 1940 Cal. 331.**

——**O 11, R. 14**—*Applicability—Order to produce documents—Power of Court to make—Suit on promissory note—Defendant not putting in any defence—Order calling on plaintiff to produce accounts—If justified.*

Under O. 11, R. 14, C. P. Code, the Court may order the production of any documents in the possession of any party relating to any matter in question in such suit, but until it is known what the plea is and what the points at issue are, it is impossible for the Court to say that the plaintiff's accounts are relevant. In a suit on a promissory note to which the defendant has as yet not raised any defence there is no justification for the Court to make an order directing the plaintiff to produce his accounts. (*Pollock, J.*) LAXMANRAO TRIMBAKRAO *v.* GAYADIN SHAH PRASAD. **I.L.R. (1937) Nag. 266=170 I.C. 48=10 R.N. 57=A.I. R. 1937 Nag. 136.**

——**O. 11, R. 14**—*Suit against Secretary of State for India in Council represented by Collector—Petition directing Collector to produce* paimash *registers in his custody—Maintainability.*

The plaintiff in a suit filed against the Secretary of State for India in Council applied under O. 11, R. 14 of the C. P. Code, directing the defendant to produce *paimash* registers, etc., in the custody of the Collector.

Held, that the Collector cannot be required by the terms of O. 11, R. 14 to produce the registers in original on the ground that he was an agent of the Secretary of State for India in Council, as every document in his possession cannot be deemed to be in his possession in his capacity as agent of the Secretary of State for India in Council. (*Pandrang Row, J.*) SECRETARY OF STATE *v.* KRISHNASWAMI AYYAR. **179 I C. 988=11 R.M. 643=48 L.W. 646=1938 M.W.N. 1103=A.I.R. 1939 Mad. 52=(1938) 2 M.L.J. 815.**

——**O. 11, R. 14**—*Suit by husband for restitution of conjugal rights relying upon correspondence between parties—Production of correspondence—Duty of plaintiff.*

Where the plaintiff in his plaint relies upon certain documents, *prima facie* the defendant is entitled to have inspection before he files her defence. It is not open to the plaintiff to withhold it from inspection by the other side at the proper time and then to spring a surprise on him or her as the case may be at a subsequent stage of the proceedings. A husband instituted a suit against his wife for restitution of conjugal rights relying upon certain correspondence between the parties. The wife insisted on its production in Court before she offered her defence. The husband refused to claim absolute privilege not to produce the correspondence altogether in Court, but claimed the privilege of not producing the correspondence for some time, but promised to do so thereafter.

Held, that it was not open to him to do so and that the wife was entitled to inspect the document before she filed her defence. (*Rupchand Bilaram, A.J C.*) Dayaram Ambritrai *v* Mohini Ramchand. **169 I.C. 588=9 R.S. 6=A.I.R. 1937 Sind 97.**

——**O. 11, Rr. 15 and 18**—*Application under—When to be made—Right of inspection—Limits.*

Whether a party proceeds under O. 11, R. 15 or under O. 11, R. 18 (2) he must act promptly, and delay in itself may be a good ground for refusing to grant time for the filing of the written statement until after the inspection has been made. Where the documents of which inspection is sought have not been referred to in the pleadings or affidavits of the plaintiff and appear only in the list filed under O. 7, R. 14 (2) the defendant, unless he proceeds under O. 11, R. 18 (2), cannot insist that he has a right to inspect these documents before he can be called upon to file his written statement. (*Vivian Bose, J.*) Nagpur Glass Works Co, Ltd. *v.* Onama Glass Works Co. **175 I.C. 40=10 R.N. 431=A.I.R. 1938 Nag. 239.**

——**O. 11, R. 18**—*Order providing for inspection "forthwith"—Meaning of—Order not drawn up—Effect.*

An order providing for inspection "forthwith" contemplates that it would be given without unreasonable delay. The order takes effect although it is not drawn up. (*Lort Williams, J.*) Gulraj Shroff *v.* Kaniram Sureka. **I.L.R. (1938) 2 Cal. 14=178 I.C. 734=11 R.C. 402=42 C.W N. 457=A.I.R. 1938 Cal. 353.**

——**O. 11, R 21**—Applicability—Insolvency proceedings—Petition by creditor—Non-production of account books—Power to dismiss petition. *See* Provincial Insolvency Act, S. 25. **A.I.R. 1936 Nag. 130.**

——**O. 11, R. 21**—*Conditional order of dismissal of suit—Propriety.*

The terms of O. 11, R. 21, C. P. Code, seem to contemplate that ordinarily there will be two orders; first an order for discovery, and second, on default, an order of dismissal of the suit for want of prosecution. But where there has been a previous order for discovery, it is proper and also according to the practice both in England and India, to make a subsequent conditional order, for example, an order for discovery within a

prescribed time, and upon default that the suit be dismissed or stand dismissed. There is no difference in effect between the terms "stand dismissed" and "be dismissed." The order becomes on default a final order dismissing the suit. (*Lort Williams, J.*) Gulraj Shroff *v.* Kaniram Sureka. **I.L.R. (1938) 2 Cal. 14=178 I.C. 734=11 R.C. 402=42 C.W.N. 457=A.I.R. 1938 Cal. 353.**

——**O. 13, Rr. 1 and 2**—*Filing of documents—Stage—Special hearing or* wajeh-sabut—*Legality.*

The practice of giving a hearing known as *wajeh-sabut, i e.*, a hearing specially fixed for presentation of documents that may be required, is nowhere warranted by any of the provisions of the C. P. Code, Rr. 1 and 2 of O. 13, C. P. Code, clearly prescribe the procedure to be followed in the filing of the documents. (*Davies, I.C.S.*) Manning *v.* Dhiraj Lal. **1938 A.M.L.J. 120.**

——**O. 13, R. 2**—*Discretion of Court—Documents put in at late stage—If may be accepted—Discretion of trial Court—Interference in appeal.*

Though O. 13, R. 2, C. P. Code, requires the parties to put in their documentary evidence at the first hearing of the suit, the Court has still a discretion under the rule to accept documents at a later stage; and when the trial Court has exercised its discretion by allowing documents to be put in, the appellate Court should not lightly interfere with it especially when the document is put in support of an amendment which the Court considered justifiable. (*Agarwala, J.*) Kameshwar Singh *v.* Modh Narain Chowdhuri. **21 Pat.L.T. 440.**

——**O. 13, R. 2**—*Document to prove fraud produced at late stage—Admissibility.*

A trial Court cannot base its decision on an allegation of fraud never set up by the defendants in their written statement, nor in issue, and based on documents put for the first time in cross-examination of the plaintiff's witnesses and can be disregarded by the appellate Court if so admitted by the trial Court without reasons. (*Baguley and Mosely, JJ.*) Kharwar *v.* Motiwala. **1939 Rang.L.R. 18=181 I.C. 792=11 R.R. 489=A.I. R. 1939 Rang. 98.**

——**O 13, R. 2**—*Evidence admitted by trial Court—Power of appellate Court to refuse its admission.*

An appellate Court cannot refuse to admit evidence admitted by the trial Court on the ground that the evidence was produced late and was not admissible under O. 13, R. 2, C. P. Code. (*Jack, J.*) Sm. Suniti Bala Das Gupta *v.* Maharaja Bahadur Sir Pradyot Kumar Tagore. **67 C.L. J. 133.**

——**O. 13, R. 3**—Scope—If subject to S. 36, Stamp Act—Document admitted in evidence—Power of Court to afterwards reject. *See* Stamp Act, S. 36. **45 L.W. 515=A.I.R. 1937 Mad. 431.**

——**O. 13, R. 4**—*Document initialled by Judge—Duty to make clear whether it is admitted or marked for identification.*

Where a document is produced in Court and is initialled by the Judge, he should make it quite clear whether he is admitting it in evidence or only marking it for identification. (*Norman.*) Phool Chand *v.* Likimichand. **1936 A.M.L.J. 22.**

——**O. 13, R. 4**—*Non-compliance with—Effect of—Document, if inadmissible.*

The fact that the provisions of O. 13, R. 4 have not been strictly complied with in regard to endorsement on an exhibit does not make it inadmissible in evidence. (*Wort and Rowland, JJ.*) Mukhi Ram *v.* Kamta Prasad Balam Das. **161 I.C. 164=8 R.P. 437=A.I.R. 1937 Pat. 222.**

———O. 13, R. 7 and Oudh Civil Rules, Rr. 38 and 39—*Recording as "admitted" and return of rejected documents—Procedure.*

The language of O. 13, R. 7, C. P. Code, and of Rr. 38 and 39 of the Oudh Civil Rules, shows that the document must be either placed on the record or returned to the person producing it. There is no alternative. It is highly desirable and even necessary for the ends of justice, that a disputed document should be placed on the record and should not be returned to the person producing it. Therefore, as soon as formal or *prima facie* evidence of its genuineness has been given, it should be endorsed as "admitted in evidence" and placed on the record. Subsequently the Judge might find, upon a consideration of the whole evidence, that the document was a forgery, or that its genuineness was not proved to his satisfaction. In that event the Judge should, in order to avoid any possible misunderstanding add a further endorsement "genuineness not established" or words to that effect, but he should not endorse it as "rejected" which implies that the document should not form part of the record and should be returned to the person producing it. (*King, C.J. and Zia-ul-Hasan, J.*)• Keolapati *v.* Harnam Singh. **12 Luck. 568=162 I.C. 527 =8 R.O. 387=1936 O W.N. 619=1936 O.L.R. 271=A.I.R. 1936 Oudh 298.**

———O. 14, R. 1—*Failure to frame issue—If can be condoned.*

The word "shall" in Cls. (3) and (5) of O. 14, R. 1 does not leave any discretion to the Court and makes it mandatory that every proposition affirmed by one party and denied by the other, whether of fact or of law, should be made the subject-matter of an issue. Even if substantial justice is done, the failure to frame an issue should not be overlooked, because an act which is obligatory under the statute must be done and the omission to do it cannot be condoned by the fact that substantial justice has been done. (*Mir Ahmad, J.*) Dhanpat Rai *v.* Hari Chan Gobind Ram. **184 I.C. 433=12 R. Pesh 26=A.I.R. 1939 Pesh. 44.**

———O. 14, R. 1—*Issue—Framing of—Absence of written statement—Effect.*

Under O. 14, R. 1, issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Such affirmation or denial must be contained in the pleadings as defined in O. 6, R. 1. Where there is no written statement the only issues would be those arising out of the plaint which allegations are put in issue when not admitted. (*Stone, C.J. and Niyogi, J.*) Vithal Madho *v.* Narayan Ramchandra. **165 I.C. 29=9 R.N. 68=A.I.R. 1936 Nag. 177.**

———O. 14. R. 2—*Decision of question of jurisdiction—Finality—If can be reopened by Court at later stage—Right of succeeding Judge to reconsider decision of predecessor in office—Proper procedure.*

Where a question of jurisdiction to entertain the suit has been decided by the trial Court as a preliminary issue, that decision is final so far as that Court is concerned and cannot be called in question in that Court at a later stage. It is not open to a Judge succeeding the Judge who has decided the question to reopen that question at a later stage and decide it afresh. The proper stage to challenge that decision is when the decree in the suit is under appeal. (*Harries and Rachhpal Singh, JJ.*) Kalyan Das *v.* Kashi Pershad. **I L.R. (1938) All. 198=1938 A.L.R. 225=174 I.C. 55=10 R.A. 532=1937 A.W.R. 1188=1937 A.L.J. 1272=A.I.R. 1938 All. 113.**

———O. 14, R. 2—*Object of—Discretion of Court—Principles.*

In deciding the question as to whether the Court should grant or refuse a prayer to try a preliminary issue on a point of law, some harmony is to be observed between the general principle that it is undesirable to try cases piecemeal and the specific and wholesome provision of O. 14, R. 2, C. P. Code, which is for the purpose of preventing the injustice of a party being able to force his opponent to go at great length into evidence when the simple decision on a point of law might render the investigation of the facts unnecessary. (*Courtney-Terrell, C.J.*) Janki Das *v.* Kalu Ram. **162 I.C. 486=8 R.P. 538=1936 P.W.N. 209=17 Pat.L.T. 253=A.I.R. 1936 Pat. 250.**

———O. 14, R 2—*Scope—If mandatory.*

O. 14, R. 2 is mandatory; the only thing left open to the Court is to form and express an opinion of whether the case can be disposed of on the issue of law, but the opinion even if expressed must be expressed upon some reasonable materials. (*Courtney-Terrell, C.J.*) Janki Das *v.* Kalu Ram. **162 I.C. 486=8 R.P. 538=1936 P.W.N. 209=17 Pat.L.T. 253=A.I.R. 1936 Pat. 250.**

———O. 14, R. 5—*Amendment or framing of additional issues—Powers of Court—Restrictions—Issue not arising on the pleadings, if can be framed.*

Under O. 14, R. 5, C. P. Code, the Court has power to amend the issues or to frame additional issues on such terms as it thinks fit, but this power is controlled by R. 3 of the same order which provides that the issues are to be framed from the allegations by the parties or their counsel and the contents of documents. Hence it is not open to a Court to frame an issue on a point that does not arise out of such material. (*Pollock, J.*) Nandlal *v.* Deorao. **185 I.C. 881=12 R.N. 178 =1939 N.L J. 591=A.I.R. 1940 Nag. 94.**

———O. 16, R. 1—*Application made late—Power of Court to refuse summons.*

The word 'may' in O. 16, R. 1, C.P. Code, means "it shall be lawful" unless an application, on the face of it, is frivolous and vexatious, the Court has no discretion except to summon the witnesses. If an application is made too late and the service on the witness cannot be effected in time, it is no doubt within the discretion of the Court to adjourn the date of the hearing or not, but that is no reason whatsoever why a party should not be given an opportunity, if he is prepared to take the chance of having the presence of the witness secured by serving a notice upon him. (*Agha Haidar, J.*) Mehr Chand *v.* Dayal Chand. **17 Lah. 775=167 I.C. 169=9 R.L. 461=39 P.L.R. 60 (2).**

———**O. 16, R. 1**—*Payment of process fees—Procedure—Failure to pay on due date—Result.*

Process-fees can be paid to the officer of the Court who is designated under the orders of the Court to receive them, and can be paid at any time, subject to the time-limit fixed by the Court, and it is plainly unnecessary for the party paying such fees to appear in Court to pay them, and in fact, it would be highly inconvenient if parties did so. The only result of the failure of a party to pay the fees by the date fixed by the Court would at the most be that summonses would not be issued to his witnesses, and he would run the risk of not having his evidence recorded if he could not persuade the witnesses to attend Court without the issue of summons. But a case cannot be dismissed for failure of a party to appear in Court on a date before which process-fee was to be paid. (*Roberts, C.J. and Dunkley, J.*) Maung Ahmin *v.* Maung Saung. **178 I.C. 789=11 R. R. 281=A.I.R. 1938 Rang. 360.**

———**O. 16, R. 10**—*Proceedings under—Nature and object of—Party moving Court to attach property of witness—Property attached really belonging to another—Suit by latter for damages for wrongful attachment—Maintainability—Absence of malice—Liability to damages for trespass.*

The main purpose of proceedings taken under O. 16, R. 10, C. P. Code, is to indicate the authority of the Court, though incidentally a party who secures the presence of a witness may also benefit, if, as a result of the proceedings, the witness should ultimately appear. A person who asks the Court to attach certain property as the property of a witness under O. 16, R. 10, C. P. Code, cannot be placed on the same footing as a decree-holder who moves the Court to attach certain properties as the properties of his judgment-debtor, because the proceedings to enforce the attendance of a witness are the act of the Court. The same legal consequences cannot therefore follow if the property attached happens to be not of the witness but of another. A party therefore who moves the Court under O. 16, R. 10 and gets attached wrongly and carelessly properties of some other person as properties of the witness, cannot be held liable for damages for trespass in a suit by the owner of the properties, especially when the party is not shown to have acted maliciously. (*Varadachariar and Pandrang Row, JJ.*) Srinivasayya *v.* Lakshmayya. **173 I.C. 548=10 R.M. 606=46 L.W. 266=1937 M.W.N. 918=A. I.R. 1937 Mad. 811=(1938) 1 M.L.J. 73.**

———**O. 16, R. 17**—*Applicability—Witness orally directed to attend Court on future date—Absence of definite order in writing directing him to attend—Witness not appearing on date—Proceedings under O. 16, R. 17—If justified.*

Unless it can be clearly held that a witness was expressly directed to re-attend the Court on a particular date, and that he understood that he was so required by the Court, and that he in spite of it failed to re-attend as required, he cannot be liable to be dealt with under O. 16, R. 17, C. P. Code. In the absence of any definite order of the Court borne out by the record pointing to the existence of any such direction requiring him to attend, a mere impression on the part of the Judge that the witness had so been ordered to attend, does not justify the Court in proceeding

under O. 16, R. 17, for his failure to attend. (*Mohammad Noor and Dhavle, JJ.*) Avadh Behari Saran *v.* S. K. P. Sinha. **180 I.C. 102=5 B.R. 337=11 R.P. 451=A.I R. 1939 Pat. 285.**

———**O. 16, R. 19**—Scope—If controls O. 26, R. 1. *See* C. P. Code, O. 26, R. 8. **63 Cal. 914.**

———**O. 17**—Applicability—Application under O. 34, R. 5. *See* C. P. Code, O. 9 and O. 17. **31 S.L.R. 180.**

———**O. 17, R. 1**—Discretion of Court—Adjournment of suit at instance of third party—Propriety—Practice. *See* Practice—Adjournment. **17 Pat.L.T. 329 (S.B.).**

———**O. 17, R. 1**—*Illness of counsel—Refusal of adjournment—Prejudice.*

Where the counsel of a plaintiff was admittedly ill on the date fixed for the hearing of a case, and it was difficult for a new counsel to get ready on short notice, it was held that a refusal to adjourn such a case was not proper and the case was remanded for trial. (*Davies.*) Bhurey Singh *v.* B. B. and C. I. Ry. **1939 A.M.L.J. 118.**

———**O. 17, R. 1**—*Power of Court under—Costs of adjournment—Costs of the day or whole costs incurred up-to-date—Proper order.*

O. 17, R. 1, C. P. Code, gives the Court power to make an order as to costs only in respect of the costs occasioned by the adjournment and not the costs of the suit generally. The rule does not entitle the Court to demand payment of the entire costs of the suit incurred up to the date on which the adjournment is asked for. What can be allowed is only the costs of the day including a reasonable fee to the legal practitioner engaged by the opposite party, which in a Subordinate Judge's Court is Rs. 20. (*Pandrang Row, J.*) S. A. Ramanathan Chettiar *v.* S. N. Alagappa Chettiar. **177 I.C. 431=11 R.M. 319=47 L.W. 780=1938 M.W.N. 502=A.I.R. 1938 Mad. 711 =(1938) 1 M.L.J. 793.**

———**O. 17, Rr. 1 and 3**—*Powers of Court under—Scope and extent.*

The word 'may make such orders as it thinks fit' occurring in sub-R. (2) of R. 1 of O. 17, C. P. Code, are sufficiently wide to cover a condition to be imposed as a penalty if the costs of an adjournment are not paid. An order of dismissal can be made under R. 1 and R. 1 cannot be restricted by R. 3 of the same order. (*Gruer, J.*) Jani *v.* Soni. **186 I.C. 473=12 R.N. 201=1940 N.L.J. 104=A.I.R. 1940 Nag. 158.**

———**O. 17, R. 1 (2)**—*Adjournment—Costs—Pleader asked to admit genuineness of document—Right to adjournment to consult client.*

When a pleader is asked to admit the genuineness of certain documents there and then, he is entitled to consult his client; and the Court, simply because the pleader wants a short adjournment to receive proper instructions, should not burden him with costs. (*Agha Haidar, J.*) Sampuran Singh *v.* Devi Dayal. **167 I.C. 65=9 R. L. 448=38 P.L.R. 896=A.I.R. 1936 Lah. 705.**

———**O. 17, Rr. 2 and 3**—*Applicability—Case adjourned for evidence—Parties and vakils absent—Vakil applying for adjournment and stating no instructions—If appearance.*

The proper way of construing rule 3 of O. 17, C. P. Code, would be that where no default occurring under rule 2, default occurs, under rule 3, the Court should proceed under the latter rule and dispose of the case on the merits; but if the default consists in non-appearance, rule 2 which specifically deals with such a case must, in terms apply. Where a suit is adjourned to a date for production of evidence by the defendant, and the latter and his vakil are absent on that date, but another vakil applies for an adjournment on behalf of the vakil on record, and that being refused, reports that he has no further instructions, the decree passed by the Court must be deemed to be an *ex parte* decree and not a decree on the merits. When the vakil who appears states that he has no instructions beyond applying for an adjournment, it is a contradiction in terms to hold that he does in fact appear, though he says he does not appear. (*Venkatasubba Rao and Cornish, JJ.*) ELLAMMAL *v.* KARUPPAN CHETTI. **162 I.C. 759=8 R.M. 1047=1936 M.W.N. 589=43 L.W. 738=A.I.R. 1936 Mad. 625=70 M.L.J. 688.**

——**O. 17, R. 2**—Applicability—Date of first hearing of suit—Defendant absent—Pleader's application for adjournment refused—Pleader withdrawing from case—Decree—If *ex parte* or on merits—Application to set aside—Maintainability. *See* C. P. CODE, O. 9, R. 6 AND O. 17, R. 2. **1937 A.W.R. 151=A.I.R. 1937 All. 347.**

——**O. 17, R. 2**—*Applicability — Defendant absent and declared* ex parte—*Judgment reserved —Application to set aside* ex parte *decree believing that* ex parte *decree has been made—Subsequent delivery of judgment—Dismissal of application as incompetent—Propriety.*

On an adjourned date, the defendant being absent, the Judge declared him *ex parte* and reserved judgment. Immediately the defendant appeared and made an application for setting aside the *ex parte* decree, wrongly believing that such decree was passed. After some days the Judge delivered judgment. The Judge treated the application of the defendant as an application for setting aside the decree and made an order "as the suit was not decided *ex parte*, no petition lies for restoration."

Held, that the application of the defendant could be treated as one for setting aside the *ex parte* decree. The Court having held the defendant *ex parte*, the provisions of O. 17, R. 2, C. P. Code, became applicable and hence the Judge was wrong in saying that no petition lay for setting aside the *ex parte* decree. (*Venkatasubba Rao, J.*) LINGA REDDI *v.* GURU SINGH. **172 I.C. 256=10 R.M. 442=1937 M.W.N. 422=A.I.R. 1937 Mad. 674.**

——**O. 17, Rr. 2 and 3**—*Applicability—Plaintiff filing documents and Commissioner's report—Failure to produce witnesses on adjourned date—Duty of Court.*

Where the plaintiff had taken various steps in order to bring the suit to a hearing, had filed documents, cited witnesses and paid a large sum as costs of the local investigation and further the Commissioner's report was already on the record and time had been granted to him to produce his witnesses, the Court should not dispose of the suit under R. 2 of O. 17, C. P. Code, but might proceed to decide the suit under R. 3 of O. 17 on the plaintiff failing to produce his witnesses on the date of hearing. (*S. K. Ghose and Nasim Ali, JJ.*) KAZIMADDI SARDAR *v.* MAKRAMALI MOLLA. **67 C.L.J. 516=A.I.R. 1938 Cal. 789.**

——**O. 17, Rr. 2 and 3**—*Applicability—Suit adjourned for plaintiff's witnesses—Plaintiff's advocate absent on adjourned date—Application for adjournment by another advocate refused—Plaintiff not giving evidence—Dismissal of suit—If one under R. 2 or R. 3—Restoration under O. 9, R. 9—Competency.*

A plaintiff was granted time for production of witnesses and the suit was adjourned. On the adjourned date, the plaintiff's advocate was absent as he was away from the station. Another practitioner applied for an adjournment, which being refused, he took no further part in the proceedings, as he was not instructed to conduct the suit. The plaintiff also not giving evidence, the suit was dismissed. The suit was subsequently restored on an application under O. 9, R. 9, C. P. Code.

Held, that the case fell under O. 9, R. 9 as the mere physical presence of the plaintiff could not take it out of O. 9, R. 9, as it was not an appearance under O. 17, R. 3, so as to preclude an application for restoration. The disposal must be held to fall under O. 17, R. 2, C. P. Code. (*Somayya, J.*) VENKATESWARA RAO *v.* SUBRAMANYAM. **186 I.C. 455=12 R.M. 640=50 L.W. 430=1939 M.W.N. 951=A.I.R. 1939 Mad. 974=(1939) 2 M.L.J. 611.**

——**O. 17, R. 2 and O. 9, Rr. 8 and 9**—*Applicability—Two suits adjourned and parties asked to file list of witnesses before certain date—On date of hearing one suit dismissed "for default" and other dismissed "for want of prosecution" as list of witnesses not filed by plaintiff.*

Two suits were adjourned to a certain date for hearing and the parties were asked to file the list of witnesses within a week of the order. On the date of hearing, however, one of the two suits was dismissed "for default" and the other was dismissed for "want of prosecution" as the plaintiff did not file the list of witnesses as required by the Court. On applications being filed for setting aside the orders of dismissal and for restoration of the respective suits,

Held, that the order of dismissal in each case was an order under O. 17, R. 2, C. P. Code, read with O. 9, R. 8 and not under O. 9, R. 8 simply. An application for setting aside the dismissal in each case and for restoration of the suits could be made under O. 9, R. 9. The dismissal of the other suit "for want of prosecution" did not alter the applicability of O. 17, R. 2, read with O. 9 R. 8. (*Mya Bu and Spargo, JJ.*) MA HLA NYUN *v.* MA AYE MYINT. **173 I.C. 48=10 R.R. 303=A.I.R. 1937 Rang. 437.**

——**O. 17, R. 2**—*Order under—Appeal.*

If an order is made under O. 17, R. 2 read with O. 9, R. 8 then it is as though it were an order, under O. 9, R. 8, and is not appealable at all. (*Stone, C. J. and Bose, J.*) MANEKLAL BHIMRAJ *v.* PHULABAI. **I.L.R. (1939) Nag. 574=184 I.C. 102=12 R.N. 93=1939 N.L.J. 351=A.I.R. 1939 Nag. 213.**

——**O. 17, Rr. 2 and 3**—*Right course for Court to proceed under R. 2—Judgment mentioning R. 3—Presumption.*

Where the right course for a Judge in the circumstances of a case was to decide the case under O. 17, R. 2, C. P. Code, but the judgment mentioned O. 17, R. 3, it must be presumed that the Judge intended to act under R. 2 and that the entry of R. 3, was an accidental slip for R. 2. The fact that the Judge also mentioned O. 9, R. 6, in his order bears out the same conclusion. (*Srivastava, C. J. and Smith, J.*) BABA DIN *v.* SURAJ BAKSH SINGH. **169 I.C. 226=10 R.O. 2=1937 O.L R. 360=1937 O.W.N. 620.**

——**O. 17, R. 2 Expl. (Allahabad.)**—Failed to appear—Meaning. *See* C. P. CODE, O. 9, R. 13 & O. 17, R. 2. **1940 A.W.R. (H.C.) 161.**

——**O. 17, R. 2, Expl. (Allahabad)**—*Filing of list of witnesses—If amounts to appearance.*

The mere filing of the list of witnesses before the case has been called on for hearing does not amount to an appearance within the meaning of the explanation to O. 17, R. 2. The failure to appear takes place only when the suit is called on for hearing even though it be an adjourned hearing. If at the time the case is called on for hearing the party is present or is represented in Court by an agent or pleader then he has not failed to appear, but if at that time he is neither present nor represented by an agent or pleader, he has failed to appear. The mere fact that at an earlier stage, something almost mechanical as the filing of a list of witnesses, is done by a pleader on his behalf before the case is called on for hearing, cannot amount either to appearance or being represented in Court by an agent or pleader at the time when the case is called on for hearing. A decree passed against a defendant in a suit, under such circumstances in the absence of the defendant and his pleader, is therefore *ex parte* although passed under O. 17, R. 3 and he is entitled as of right to show cause for his non-appearance under O. 9, R. 13. The Court holding that it has no jurisdiction to consider the matter errs in the exercise of its jurisdiction. (*Sulaiman, C. J. and Collister, J.*) BHAJAN SINGH *v* PREM NARAIN. **164 I C. 541=9 R.A. 166=1936 A.L.J. 1274=1936 A.W.R. 835=A.I.R. 1936 All. 619.**

——**O. 17, R. 2, Expl. (Allahabad)**—Plaintiff's counsel applying for adjournment during plaintiff's absence—Court refusing adjournment and dismissing suit for default—Plaintiff's remedy. *See* C. P. CODE, O. 9, RR. 8 AND 9. **1936 A.L.J. 635=1936 A.W.R. 499.**

——**O. 17, R. 3**—*Applicability—Hearing adjourned in ordinary course.*

O. 17, R. 3, C. P. Code, applies only where the hearing is adjourned not in the ordinary course, but at the specified request of a party for one of the acts specified in the rule. Where, therefore, the hearing is adjourned in the ordinary course to a certain date for the defendants to file a list of witnesses who are to be summoned for a date which is to be fixed later, the Court cannot pass on that date an *ex parte* decree under O. 17, R. 3 on failure of the defendants to appear and file the list of witnesses. (*Tek Chand, J.*) GANESHAM LAL *v.* KESAR SINGH. **40 P.L.R. 1014.**

——**O. 17, R. 3 and O. 9, R. 13**—*Applicability of O. 17, R. 3—Absence of defendant on date fixed for final hearing—Decree after examination of plaintiff's witnesses—If could be set aside under O. 9, R. 13.*

Where after several adjournments a case was posted to a particular date for final hearing and on that date was once again adjourned to a later date owing to the transfer of the Judge concerned and on such later date the plaintiff alone appeared and neither the defendant nor his counsel appeared and the Court thereupon proceeded to examine such of the witnesses as were produced by the plaintiff and passed a decree purporting to act under O. 17, R. 3, C. P. Code, it was held that in as much as the Court had not granted time to the defendants for any of the purposes mentioned in R. 3 of O. 17, it could not be said that the defendants had failed to take any step for which time had been allowed and that hence O. 17, R. 3 never came into play. It was further held that the mere fact that the Court remarked that it was acting under O. 17, R. 3 could not make O. 17, R. 3 applicable and the decree could be set aside by an application under O. 9, R. 13. (*Bennet and Verma, JJ.*) RAJA SINGH *v.* MANNA SINGH. **188 I.C. 414=13 R.A. 19=1940 A.L.J. 200=1940 A. W.R. (H.C.) 196=A.I.R. 1940 All. 217.**

——**O. 17, R. 3**—*Applicability—Suit for partnership accounts — Preliminary decree—Trial Court ordering plaintiff to deposit Commissioner's fees—Deposit not made — Dismissal of suit—Appeal—Appellate Court admitting appeal on condition of plaintiff making required deposit—Propriety of.*

In a suit for taking partnership accounts a preliminary decree was passed and a commissioner was appointed for settling partnership accounts. The trial Court ordered the plaintiff to deposit a certain sum towards the commissioner's fees. The plaintiff did not make the deposit and obtained adjournment. On the adjourned date, the plaintiff was warned that if the deposit was not made within a week the suit was liable to be dismissed for want of prosecution. No deposit having been made within the time allowed, the Court dismissed the suit. On appeal against this order the appellate Court admitted the appeal on condition that the plaintiff deposited the required sum.

Held, (1) that the order of the appellate Court in so far as it interfered with the discretion exercised by the trial Court was unjustifiable; (2) that the order of the trial Court dismissing the suit fell under O. 17, R. 3. Hence in dismissing the suit because of the failure of the plaintiff to deposit the sum and without reference to the materials on the record the trial Court acted against the provisions of O. 17, R. 3; (3) that the preliminary decree having been passed, the Court had no jurisdiction thereafter to dismiss the suit; (4) that the suit should be restored to file on the deposit being made, and proceeded with. (*Mehta and Lobo, JJ.*) MENGHOMAL *v.* VARUMAL. **176 I.C. 503=11 R.S. 20=A. I.R. 1938 Sind 142.**

——**O. 17, R. 3 (Allahabad amendment)**—*Applicability—Time granted at the instance of both parties—Failure to appear—Court, if can decide suit on merits.*

Where at the instance of both parties time was extended for the final hearing and on the adjourned date the plaintiff's advocate states that he has no instruction, the Court has ample power under the amended R. 3 of O. 17, C. P. Code, to proceed to decide the suit on the merits, whether the party who has failed to do that for which time had been granted to him, is present or not. Nor does the fact that time was granted to both parties make the rule inapplicable. (*Bennet and Verma, JJ.*) NARAIN DAS *v.* MADAN MOHAN. **183 I.C. 703=12 R.A. 161 (2)=1939 A L J. 371 =1939 A.W.R. (H.C.) 318=A.I.R. 1939 All. 524.**

——**O. 17, R. 3**—Order of dismissal under—Remedy—Appeal or review. *See* C. P. CODE, O. 47, R. 1. **1938 R.D. 184=1938 A.W.R. (B. R.) 115.**

——**O. 17, R. 3**—*Plaintiff's Counsel meaning for adjournment on date fixed for final disposal—Court refusing adjournment and passing decree on merits—Application for restoration—If competent.*

Where the Counsel for the plaintiff moved for an adjournment on a date fixed for the final disposal of the suit and stated that he had no instructions except to move for adjournment, but the Court passed the order that the case must proceed under O. 17, R. 3 with the result that it heard no evidence on behalf of the plaintiff, as none was produced, but heard witnesses tendered on behalf of the opposite party and passed a decree disposing of the suit on the merits.

Held, that the case came under R. 3, of O.17. C, P. Code, and that being so no application lay for restoration and, therefore, there can be no revision, or first appeal from the order refusing restoration under O. 9, R. 13. (*Sulaiman, C. J. and Bennet, J.*) LACHMI NARAIN *v.* SHANKAR LAL. **164 I.C. 927=9 R A. 207=1936 A.W.R. 791=1936 A.L.J. 902=A.I.R. 1936 All. 670.**

——**O. 17, R. 3**—*Scope—Decision of suit under—Restoration under O. 9, R. 13 if possible.*

R. 3 of O. 17, C. P. Code means that the Court has discretion either to decide the case that day or not, but if it does decide the suit, it will be a decision on the merits and appearance on behalf of the defendant would be assumed, whether he was in fact present or not and the decree passed cannot be regarded as *ex parte* decree so as to entitle the defendant to apply for restoration under O. 9, R. 13, C. P. Code. (*Collister, J.*) SHEO PUJAN KALWAR *v.* BISHNATH KALWAR. **186 I.C 102=12 R.A. 377=1939 A.L.J. 627=1939 A.W.R. (H.C.) 590=A.I.R. 1939 All. 642.**

——**O. 18, R. 1**—*Right to begin—Issue of facts—Burden on defendant—Defendant's right.*

If on the issue or issues of facts, the burden of proof is on the defendant, he has the right to begin. (*Panckridge, J.*) M. D'CRUZ *v.* SECRETARY OF STATE FOR INDIA IN COUNCIL. **40 C.W.N. 865.**

——**O. 18, R. 13**—*Recording of evidence of witness—If mandatory.*

It is not enough that the Judge should refer to the evidence in his judgment. It is mandatory that he should make a separate memorandum of the evidence given by each witness and shall sign it. (*Mir Ahmad, J.*) DASSA RAM *v.* ZAFFARYAB ALI. **177 I.C. 157=11 R. Pesh. 18 (1)=A.I.R. 1938 Pesh. 46.**

——**O. 18, R. 18**—*Local inspection—Decision based solely on without allowing parties to legal evidence on points arising from inspection—Validity.*

It is improper and objectionable for a judge to base his judgment solely on the impressions formed by him at the time of his local inspection and to come to a conclusion quite contrary to the evidence in the case. Where the judge does not make any notes of inspection and has not placed on record what he found on inspection, his decision, arrived at without putting the points observed by him at the inspection to the parties and eliciting their answers, cannot be upheld by the appellate Court. (*Somayya, J.*) PADMASANI BAI *v.* SABAPATHY MUDALIAR. **1939 M.W.N. 723=50 L.W. 148=(1939) 2 M.L.J 284.**

——**O. 18, R. 18**—*Local inspection—Object of—Procedure—Judge making inquiries of people present at inspection and basing decision thereon—Propriety of—Finding of fact—Finality in second appeal.*

It is a quite unobjectionable procedure for a Judge to make a local inspection; in fact O. 18, R. 18, C. P. Code, expressly provides for it. But it is not a justifiable procedure for a Judge at such local inspection to welcome the presence of crowds of anonymous villagers and indulge in formal inquiries amongst the people in those crowds for the purpose of obtaining guidance in deciding the rights of the parties. If a judge does so and treats the result of these enquiries as evidence in the case, there is an end of all judicial procedure. A judgment must be based on evidence which is admissible in law. There is no objection to a Judge viewing the locality in dispute in order to enable him to visualise the same and to appreciate the evidence before him. But there is no warrant for the procedure whereby the Judge converts himself into an unofficial investigator and inquires of all and sundry regarding their views on the rights of the parties with the object of founding a judgment on what he has heard. No finding of fact based on such materials and achieved by such procedure can be supported or be held to be binding in second appeal. (*Wadsworth J.*) ACHUTHARAMAYYA *v.* SOORAPPAYYA. **180 I.C. 543=11 R.M. 719=1938 M.W.N. 1066=48 L.W. 595=A.I.R. 1939 Mad. 61=(1938) 2 M.L.J. 894.**

——**O. 18. R 18**—*Observation of Judge made as result of local inspection—Value of.*

Observations by a Judge in the course of his local inspection cannot be substituted for the evidence of witnesses examined on the subject. It is obvious that in the case of a Judge's observations, the parties never get a chance of either cross-examining him on the various points raised or setting right his views if they are found to be erroneous. (*Varma, J.*) HARI PRASAD SAHU *v.* ROPNA KHARIA. **175 I.C. 698=4 B.R. 625=11 R.P. 9=A.I.R 1938 Pat. 288.**

——**O. 18, R. 18**—*Scope—Local inspection—Object of—Duty of Court.*

The function of a Judge in exercising his right of local inspection granted by the statute, *i.e.*, under the C. P. Code, is for the purpose of understanding the evidence and for no other purpose. By "understanding the evidence" is not meant "contradicting a witness". A witness may make a statement which from the local inspection may appear to be untrue, but a Judge is not entitled to say that it is untrue from what he himself observes. (*Wort, J.*) ABDUL BAQI *v.* FAKHRUL ISLAM. **3 B R 677=170 I.C. 187=10 R.P. 89=1937 P. W.N. 261=A.I.R. 1937 Pat. 333.**

——**O. 19**—*Affidavits—Use of—Duty of Court to summon witnesses for cross-examination.*

Affidavits should not properly be acted upon unless both parties agree to have them treated as evidence. Where one of the parties requests the Court to summon the witnesses for cross-examining them on their affidavits, the Court should summon them and not merely act on the affidavits. (*Burn, J.*) NARAYANA *v.* LAKSHMAYYA. **185 I. C. 421=12 R.M. 543=1939 M.W.N. 735 (1)=**

50 L.W. 654=A.I.R. 1939 Mad. 927=(1939) 2 M.L.J. 399.

———**O. 20**—Scope of—Extension of principle underlying—Rules to be observed. *See* TORT—DAMAGES. **1938 A.L.J. 571.**

———**O. 20, R. 1**—*Judgment delivered without notice to parties—Counsel for party informed subsequently — Limitation for appeal —Starting point.*

Where a Court delivers a judgment without having previously fixed a date for pronouncing the judgment, and the defendant being absent on that date, the judgment is informed to his counsel on some later day, this later day must be regarded as the date for pronouncing judgment and period of limitation for appeal must be deemed to run from that date and not from the date on which the judgment is actually pronounced. A.I.R. 1925 All. 293, Rel. on. (*Abdul Rashid, J.*) MOHAMMAD ZAMAN *v.* HANS RAJ SHAH. **182 I.C. 108=11 R.L. 906=A.I.R. 1938 Lah. 707.**

———**O. 20, R. 2**—*Judgment written by ex-Judge —If can be pronounced by his successor-in-office.*

A judgment written by an ex-judge after he has ceased to be a Judge is valid as a judgment, which may be pronounced by his successor-in-office under O. 20, R. 2. (*Page, C.J., Mya Bu and Baguley, JJ.*) HARGULAL *v.* ABDUL GANY. **14 Rang. 136=161 I.C. 967=8 R.R. 523=A.I.R. 1936 Rang. 147 (F.B.).**

———**O. 20, R. 2**—*Judgment written by ex-Judge —Discretion of his successor.*

Under O. 20, R. 2, it is not necessarily incumbent upon the successor of the Judge, who wrote the judgment after he had ceased to be a Judge of the Court in which the trial was held to pronounce the judgment that had been written by his predecessor. He has a discretion in the matter, and if he is in doubt as to the correctness of the judgment that has been written by his predecessor he ought either to act in accordance with the provisions of O. 18, R. 15, or to hear the case *de novo*. (*Page, C.J., Mya Bu and Baguley, JJ.*) HARGULAL *v.* ABDUL GANY. **14 Rang. 136=161 I.C. 967=8 R.R. 523=A.I.R 1936 Rang. 147 (F.B.).**

———**O. 20, R. 3**—*Judgment setting aside* ex parte *small cause decree, delivered and signed—Finding that claim in that suit not proved to be true—Subsequent order restoring that suit to file for trial on merits—If without jurisdiction.*

Where in a suit to set eside an *ex parte* decree passed in a Small Causes Court suit, the Court delivers and signs in open Court a judgment setting aside that decree recording a finding to the effect that the defendant has failed to prove that his claim in the previous suit was a true one, it has no jurisdiction to pass a subsequent order directing the Small Causes Court suit to be restored to file and to be tried on the merits again. (*Ghose, J.*) DHARANIDHAR *v.* NITYA GOPAL. **43 C.W.N. 1148=A.I.R. 1939 Cal. 732.**

———**O. 20, R. 3**—Scope of. *See* C. P. CODE, SS. 148 AND 149 AND O. 20, RR. 3 AND 6. **1938 A. L.J. 673.**

———**O. 20, R. 4 (1)**—*Construction—Reasons for conclusion or discussion of evidence—If necessary.*

O. 20, R. 4 (1), C. P. Code, does not require that either the reasons for arriving at a conclusion or discussion of the evidence should be given by the Small Cause Court. The points for determination in order to arrive at the result and the resulting decision thereon alone need be stated. If all that is set out is the ultimate result without an indication of the points for determination, there is no compliance with the rule. A statement of issues only does not necessarily indicate the points to be determined although in some cases it may well do so. Each case must be judged by itself. (*Mockett, J.*) AYYAPPA, *In re.* **166 I.C. 550=9 R.M. 380=A.I.R. 1936 Mad. 913.**

———**O. 20, R. 4 (1)**—*Judgment in small cause suit—Contents of.*

Where the judgment in a small cause suit shows that the Judge has applied his mind to the points for determination and he has also recorded his decisions thereon, there is sufficient compliance with the law. (*Stodart, J.*) MUTHUSWAMY PILLAI *v.* VEERASWAMY PILLAI. **163 I.C. 251=8 R.M. 1119=1936 M.W.N. 572=43 L.W. 514=A.I.R. 1936 Mad. 486=70 M.L.J. 433.**

———**O. 20, R. 4 (1)**—*Judgment of a Court of Small Causes—Contents—Duty of Judge.*

Under O. 20, R. 4 (1), C. P. Code, the judgment of a Court of Small Causes must contain the point for determination and the decision thereon. Though a Judge of the Small Cause Court need not write lengthy judgments and can reduce his remarks to a minimum, yet this minimum must be intelligible so as to enable the High Court in revision to satisfy itself that the decision is according to law. The Judge is expected to apply his mind to the decision of a Small Cause Court case as carefully as he would apply his mind to the decision of a regular suit. (*Thomas, C.J.*) PUTTOO LAL *v.* EWAZ ALI. **14 Luck. 211=177 I. C. 59=11 R.O. 16 (1)=1938 O.A. 611=1938 O. L.R. 366=1938 O.W.N. 805=A.I.R. 1938 Oudh 225.**

———**O. 20, R. 4 (1)**—*Small Cause Court—Judgment—Contents of.*

Although a Judge of a Small Cause Court may reduce his remarks to a minimum and they need not contain any more than the points for determination and decision thereon, this minimum must be intelligible, enabling the High Court in revision to satisfy itself that the decree or order was according to law, without the necessity of perusing the whole record. When, therefore, there is a suit for breach of contract, it is not always sufficient to state as a point for determination, "did defendants commit breach of contract", because what the Court of Small Causes may have had to decide is whether disputed facts as a result of which it is said the breach of contract arises and is proved are themselves proved. (*Mehta, A.J.C.*) BHOJOMAL SHAMDAS *v.* ASWANI & Co. **171 I.C. 648=10 R.S. 115=A.I.R. 1937 Sind 243.**

———**O. 20, R. 4 (1)**—*Small cause suit—Judgment—Contents of—Duty of Court to record evidence or summary of evidence relied on in judgment—Judgment not supported by evidence as recorded—Facts and circumstances relied on not recorded—Effect—Interference in revision.*

A Small Cause Court is of course not bound to record the evidence *in extenso*, but it is incumbent upon that Court to record such statements of the witnesses, or to make a summary of those statements, in the deposition, as recorded, on which the Court relies in its judgment. Where the judgment in a small cause suit is not supported by the evidence as recorded, and the evidence has not been recorded in such a way as to enable the High Court to form any opinion as to the respective cases of the parties before the Court, and on what material circumstances the Court has relied upon in support of the judgment, the judgment is liable to be set aside in revision under S. 25 of the Provincial Small Cause Courts Act. It is not enough for the Judge trying a small cause suit to say that he finds for or against a party from the facts and circumstances; he must take care to note those facts and circumstances when recording the evidence of the witnesses who come and depose before him. (*R.C. Mitter, J.*) Shaik Ilimaddin *v.* Shaik Abidulla. **169 I.C. 512=64 C.L.J. 456=10 R.C. 11=41 C.W.N. 412 =A.I.R. 1937 Cal. 308.**

——**O. 20, R. 4 (2)**—Judgment—Contents. *See* C. P. Code, O. 41, R. 31 and O. 20, R. 4 (2). **A.I.R. 1938 Pat. 69.**

——**O. 20, R. 6**—Scope and effect of. *See* C.P. Code (1908), Ss. 148 and 149 and O. 20, Rr. 3 and 6. **1938 A.L.J. 673.**

——**O. 20, R. 6 (2)**—*Order as to costs—Several parties—Proper order.*

When there are several parties in a suit, the judgment and decree should make it clear which parties are to receive costs and how many sets are allowed. (*Norman, I.C.S.*) Abdul Rahman *v.* Didar Bux. **1936 A.M.L.J. 117.**

——**O. 20, R. 10 and O. 21, R. 31 and S. 75**—*Suit for specific movable properties—Form of decree—Commission to ascertain their value—Power of Court to issue.*

In a suit for recovery of specific movable properties, the decree ought to be a decree for the delivery of the movables enforceable under O. 21, R. 31, C. P. Code, but in accordance with O. 20, R. 10 of that Code the decree has to state the amount of money to be paid by the defendant as an alternative if delivery cannot be had. S. 75, C. P. Code, does not authorise the Court to issue a commission to ascertain the value of the movables. (*Mitter and Roxburgh, JJ.*) Sris Chandra Nandy *v.* Supravat Chandra. **I.L.R. (1940) 1 Cal. 372=71 C.L.J. 215=44 C.W.N. 304=A.I.R. 1940 Cal. 337.**

——**O. 20, R. 11**—*Power of Court under—If affected by U. P. Agriculturists' Relief Act.*

Under the Agriculturists' Relief Act it is imperative on the Court to pass an instalment decree in certain circumstances. The Act, however, does not derogate from the provisions of O. 20, R. 11, C. P. Code, under which the Court is entitled to pass an instalment decree. (*Allsop, J.*) Girwar Singh *v.* Har Prasad. **173 I.C. 897=10 R.A. 518=1938 R.D. 65=1938 A.L.R. 189=1937 A.W.R. 1074=1937 A.L.J. 1247=A.I.R. 1938 All. 52.**

——**O. 20, R. 11 (1) and (2)**—*Scope—Jurisdiction of Court—Money suit—Decree for instalments—Subsequent decree by consent of parties for instalments coupled with hypothecation of immovable property—If without jurisdiction—Objection that contract of security is without consideration and unenforceable and that decree is without jurisdiction—Competency.*

The fact that a Court passes an instalment decree under O. 20, R. 11 (1), C. P. Code, does not make it *functus officio* or and its jurisdiction to pass a further and a different kind of instalment decree coupled with a hypothecation of immovable property. O. 21, R. 11 (2) is wide enough to include and to apply to the fixing of instalments and the taking of security after the passing any decree for the payment of money, whether the form of the original decree was for instalments or for a lump sum, when the new direction is made by consent of both parties. The judgment-debtor cannot in execution contend that such a decree is without jurisdiction or that the contract of security was without consideration and therefore unenforceable. The Executing Court is precluded from going behind the decree. (*Rowland and Chatterji, JJ.*) Lalita Prasad Chaudhury *v.* Syed Muhammad Mansoor. **18 Pat. 719=20 Pat.L.T. 924.**

——**O. 20, R. 11 (2) and S. 42**—*Application under O. 20, R. 11 (2)—To which Court to be made.*

An application under O. 20, R. 11 (2), C. P. Code, must be made to the Court which passed the decree and S. 42 does not confer concurrent powers on the Court executing the decree. (*D. R. Norman.*) Champa Lal *v.* Kedar Mal. **1939 A.M.L.J. 104.**

——**O. 20, R. 11 (2)**—*Compromise between parties that decretal amount should be paid by instalments—Court accepting compromise and dismissing execution case—Terms of compromise—If can be enforced in execution.*

Where after the decree parties agreed that the decretal amount should be paid by instalments and that if the judgment-debtor failed to pay three consecutive instalments in time, the decree-holder would have the right to realise the entire money by execution, and the Court accepted the compromise and dismissed the execution case in terms of the compromise,

Held, that the Court must be deemed to have directed that the payment of the amount decreed should be made by instalments under O. 20, R. 11 (2), C. P. Code, and that, therefore, the decree-holder was not bound to enforce the terms of the compromise by a separate suit but could do so by execution.

Held, further, that if by the compromise there was an adjustment of the decretal amount within the meaning of O. 21, R. 2 of the Code, there was no inherent want of jurisdiction in the executing Court over the subject-matter and the parties by agreement had the right to arrange their own procedure and to give jurisdiction to the Court to adopt that procedure, and that, therefore, it would not be illegal to allow the decree-holder, on default of payment of three consecutive instalments, to realise the decretal amount by execution, which was the procedure agreed upon between the parties at the time of the compromise. (*Nasim Ali and R. C. Mitter, JJ.*) Monmohan Sanyal *v.* Khalishkali Co-operative Bank. **170 I.C. 767=10 R.C. 205=41 C.W.N. 480=A.I.R. 1937 Cal. 236.**

——**O. 20, R. 11 (2)**—*Executing Court passing order under—Validity—Acquiescence, if can cure illegality.*

If the executing Court passes an order under O. 20, R. 11 (2), C. P. Code, altering the terms of the decree to be executed, it usurps the jurisdiction of the trying Court. The acquiescence of the judgment-debtor will not avail the decree-holder and he cannot execute the altered or amended decree. (*D. R. Norman.*) Champa Lal *v.* Kedar Mal. **1939 A.M.L.J. 104.**

———**O. 20, R. 11 (2)**—*Order on time-barred application—If binding on parties.*

Even though the petition on which an order for payment of the decretal amount by instalments is made, is not made within six months of the decree, the order is not a nullity. The proper remedy of the person who objects to the order is to take appropriate steps for getting that order set aside and so long as that order is not set aside, it is binding on him. (*Nasim Ali and R. C. Mitter, JJ.*) Monmohan Sanyal *v.* Khalishkali Co-operative Bank. **41 C.W.N. 480=170 I.C. 767=10 R.C. 205=A.I.R. 1937 Cal. 236.**

———**O. 20, R. 11 (2)**—*Order under—Application time barred—Legality—Limitation—Matter of procedure.*

An order passed under O. 21, R. 11 (2) postponing the date of payment of the decretal amount on terms, on an application filed after six months of the date of the decree, is not an order passed without jurisdiction. Limitation is a matter of procedure and an order passed on a time-barred application is not one without jurisdiction. (*Weston.*) Sohan Raj *v.* Kesha. **1938 A.M.L.J. 86.**

———**O. 20, R. 12**—Court-fee—Application for ascertainment of future mesne profits claimed in suit and left open by decree—Rejection—Appeal—Valuation—Court-fee. *See* Court-Fees Act (as amended in Madras), Sch. II, Art. 11. **49 L.W. 652.**

———**O. 20, R. 12**—*Decree for mesne profits from date of suit until delivery of possession of property—Direction for its ascertainment in execution—Legality—Duty of executing Court.*

If a Court passing a decree for delivery of possession of immovable property directs that an enquiry should be made in *execution* as to the amount of mesne profits from the institution of the suit till delivery of possession to the plaintiff, the executing Court has no jurisdiction to question the propriety of the direction. It should enquire into the amount of mesne profits and forward its report to the Court which passed the decree and it would then be the duty of the Court to pass a final decree in conformity with the provisions of O. 20, R. 12 (2), C.P. Code.

Per *Derbyshire, C.J., Mukherjea, J.* (*contra*).—There is nothing improper or wrong in law in the suit Court directing that such an inquiry shall be made by the executing Court, and there is much to be said in favour of it from the point of view of convenience. (*Derbyshire, C. J. and Mukherjea, J.*) Commissioners for the Port of Calcutta *v.* Prohladrai. **67 C.L.J. 473=42 C.W.N. 748.**

———**O. 20, R. 12**—*Mesne profits—Calculation of—Deduction of collection charges.*

Even where the dispossession is wanton and malicious in calculating the amount of mesne profits the collection charges are to be deducted from the gross realization. Where there is no evidence as to the actual amount spent for collection, the customary rate in India is 10 per cent. (*R. C. Mitter and Biswas, JJ.*) Rajendra Narayan Ray *v.* Bhairabendra Narayan Ray. **179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.**

———**O. 20, R. 12**—*Mesne profits—Interest—Mode of calculation.*

When profits are earned or might have been earned by the wrongdoer yearly, interest on those profits must be calculated yearly and year by year. (*R. C. Mitter and Biswas, JJ.*) Rajendra Narayan Ray *v.* Bhairabendra Narayan Ray. **179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.**

———**O. 20, R. 12**—*Mesne profits—Interest—Rate.*

Mesne profits include interest, but it is settled law that the Court may in its discretion either refuse to give interest or give interest at such a rate as it thinks fit. There is no reason for making any distinction between different periods for calculation of interest. In absence of special circumstances six per cent. is the usual rate. (*R. C. Mitter and Biswas, JJ.*) Rajendra Narayan Ray *v.* Bhairabendra Narayan Ray. **179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.**

———**O. 20, R. 12**—*Mesne profits before and after suit—Power of Court to pass decree beyond jurisdiction.*

In a ruit for recovery of possession of immovable property and mesne profits, it is the value of the property plus the mesne profits for the period up to the date of the suit that would determine the jurisdiction of the Court. The mesne profits accruing *pendente lite* would not enter as an element in determining the value of the suit at the time when the suit is filed. It would, therefore, be quite competent to the Court to award in the shape of *pendente lite* mesne profits a sum of money which might exceed its pecuniary jurisdiction. But as regards mesne profits accruing prior to the date of the suit, the Court can award mesne profits only to the extent of such an amount, which together with the value of the land would come up to an amount which is within its pecuniary jurisdiction. (*M. C. Ghose and Mukherjea, JJ.*) Hemanga Bhooshan Ray Chaudhuri *v.* Bheem Gharami. **I.L.R. (1937) 2 Cal. 176=172 I.C. 591=10 R.C. 402=A.I.R. 1937 Cal. 761.**

———**O. 20, R. 12**—*Partition suit—Preliminary decree passed on compromise—No provision for mesne profits—Power of Court to direct enquiry into mesne profits.*

It cannot be denied that a decree can be varied by consent of parties. Although the preliminary decree passed on a compromise in a partition suit makes no provision for payment or ascertainment of any mesne profits, the Court would be justified in appointing a commissioner to determine the amount of mesne profits, when the applications and the proceedings of the Court clearly show that the intention of both the parties was that mesne profits should be paid to each other. (*Zia-ul-Hasan and Hamilton, JJ.*) Sri Krishen *v.* Jamna Narain. **173 I.C. 980=10 R.O. 248=1938 O.L.R. 154=1938 O.A. 240=1938 O.W.N. 348=A.I.R. 1938 Oudh 103.**

———**O. 20, R. 12**—*Preliminary decrees granting mesne profits before suit—Exact date from which they were to be assessed not specified—Right of* *plaintiff to mesne profits from 3 years anterior to suit.*

Where preliminary decrees gave the plaintiff mesne profits before suit but did not specify the exact date from which mesne profits were to be assessed, the decrees entitle the plaintiff to mesne profits before suit for such period as the law entitles him to, that is to say, from three years anterior to the suit if profits had been received or might have been received by the defendant within that period. (*R.C. Mitter and Biswas, JJ.*) RAJENDRA NARAYAN RAY *v.* BHAIRABENDRA NARAYAN RAY. **179 I.C. 298=11 R.C. 522=68 C.L.J. 152=A.I.R. 1938 Cal. 563.**

———O. 20, R. 12—*Proper procedure under—Ascertainment of mesne profits.*

The correct procedure under O. 20, R. 12, C. P. Code,is for the Court to direct an inquiry as to the mesne profits, and then pass a final decree for the amount found due on inquiry. The Court which is directed to make the inquiry in execution ought merely to determine the amount and not pass an order for its recovery. It is for the trial Court to pass a final decree for recovery of the amount due. (*Beaumont, C.J.*) BALARAM CHARYA *v.* CHIDAMBARAGAUDA. **176 I.C. 254=11 R.B. 33=40 Bom.L.R. 416=A.I.R. 1938 Bom. 320.**

———O. 20, R. 12—Scope—Award of mesne profits within inquiry being directed—Award at time of decree itself—If in contravention of rule—Executability of such decree without fresh final decree. *See* COURT-FEES ACT (AS AMENDED IN MADRAS), S. 11. **1938 M.W.N. 286.**

———O. 20, R. 12—*Suit for damages and arrears of rent—Plaintiff not pressing claim for damages—Court, if bound to pass preliminary decree.*

Where in a suit for damages and arrears of rent, the plaintiff makes it clear that he would not press his claim for damages and confines his relief to the recovery of the fixed rents which had been agreed upon between the parties, the amount becomes definitely ascertained, and the Court is, therefore, not bound to pass a preliminary decree in the first instance. (*Sulaiman, C.J. and Bennet, J.*) BHAGCHI *v.* MORGAN. **166 I.C. 897=9 R.A. 461=1936 A.W.R. 1212=1937 A.L.R. 104=A.I.R. 1937 All. 36.**

———O. 20, Rr. 12 and 18—*Suit for partition and possession—Preliminary decree silent regarding mesne profits—Award of mesne profits by final decree—Permissibility.*

The C. P. Code has not expressly laid down any procedure in regard to a composite action for partition and possession and in such a case the Court may pass a final decree for mesne profits even if it was not preceded by a preliminary decree relating to them. The mere fact that the preliminary decree for partition was silent as to the claim for mesne profits does not preclude the parties from applying or the Court from awarding mesne profits by its final decree; and this is specially so where the party liable has in the course of the suit undertaken to pay mesne profits to the successful party. (*Venkatasubba Rao and Vekataramana Rao, JJ.*) SWAMINATHA ODAYAR *v.* GOPALASWAMI ODAYAR. **183 I.C. 545=12 R.M. 318=1938 M.W.N. 1214=A I.R. 1939 Mad. 81=(1938) 2 M.L.J. 704.**

———O. 20, R. 12 (c)—*Construction—Future mesne profits—Liability for—Extent of—Absence of direction in decree—Effect of.*

The provision of O. 20, R. 12 (*c*), C. P. Code, suggest, that when a person obtains a decree for possession of immovable property, the defendant would be answerable to the plaintiff for mesne profits either until he delivers up possession or relinquishes possession with notice to the decree-holder through Court. It is immaterial that the decree itself contains no direction as to future mesne profits. (*Varadachariar, J.*) MUTHAYYA KONE *v.* RAKAPPAN AMBALAM. **160 I.C. 729=8 R.M. 724=1936 M.W.N. 175 (1)=43 L.W. 221=A.I.R. 1936 Mad. 137=70 M.L.J. 87.**

———O. 20, R. 12 (c) (Mad.)—Mesne profits—Application for ascertainment—Necessity—Limitation. *See* LIMITATION ACT, ART. 181. **71 M.L.J. 388.**

———O. 20, R. 12 (3) (Madras Amendment)—*Construction and scope—Procedure—Direction by appellate Court to Court of first instance to hold inquiry as to mesne profits—Proper course to be followed—Application by decree-holder for inquiry—If obligatory—Limitation—Limitation Act, Art.* 181.

The word application in sub-R. (3) to R. 12 of O. 20, C. P. Code, added by the Madras High Court, should be read as meaning a motion entirely free from the mischief of Art. 181 of the Limitation Act; and the words "and in every case the Court of first instance shall, on the application of the decree-holder, inquire and pass a final decree" must necessarily be subject to this limitation, 'irrespective of any other limitation.' On an appellate Court directing a Court of first instance under O. 20, R. 12 (3), C. P. Code, to make an inquiry into mesne profits the proper course for the Court of first instance to adopt on receipt of the record from the appellate Court is to fix a date for the appearance of the parties. If the decree-holder does not appear, the Court of first instance has no right to pass a final decree depriving him of the mesne profits awarded by the appellate decree, but should adjourn the matter *sine die*. It is not obligatory on the decree-holder to file an application asking for an inquiry into mesne profits and for the passing of a final decree, within three years of the final decree as required by Art. 181 of the Limitation Act. There is no question of limitation in such a case. (***Leach, C. J., Krishnaswami Aiyangar and Somayya, JJ.***) RAMASUBRAMANYA PATTAR *v.* KARIMBIL PATI. **I.L.R. (1940) Mad. 372=1940 M.W.N. 118=186 I.C. 474=12 R.M. 641=50 L.W. 933=A.I.R. 1940 Mad. 124=(1940) 1 M.L.J. 54 (F.B.).**

———O. 20, R. 13—Administration suit—Assets insufficient to pay debts in full—Rateable distribution—Creditor not coming in and proving claim—Suit by for rateable re-distribution and for refund from creditors who have received dividends—Maintainability. *See* ADMINISTRATION—SUIT BY CREDITOR. **38 Bom.L.R. 864.**

———O. 20, R. 13—*Administration suit—Decree in—Consequences of—Power of Court to pass order staying or restraining execution by creditor of his decree—C. P. Code, S.* 151 *and O.* 39, *Rr. 1 and 2—Application of.*

Though an administration suit is filed only by one creditor, the decree passed in the suit is in favour of all the creditors of the deceased debtor. No one should be allowed to have an advantage over another with respect to the enforcement of his claim against the estate of the deceased. The Court passing the administration decree has jurisdiction to pass appropriate orders to prevent the execution of his decree by any particular creditor, so that the Court may administer the entire estate for the benefit of all the creditors—all of whom after the preliminary decree should be considered as having become parties to the suit. It can pass orders staying execution by a creditor of his decree, or an order, in the nature of injunction restraining him from executing his decree. Such orders are consequential orders and have to be passed to give full effect to the decree in the suit. It is unnecessary to invoke S. 151 or O. 39, Rr. 1 and 2, C. P. Code, for the purpose of passing such orders. An applicant for such order need only invoke the decree in the suit in their aid. (*Madhavan Nair, J.*) NICHOLSON TOWN BANK, LTD., TANJORE *v.* VARADARAJULU NAIDU. **182 I.C. 254=12 R.M. 29=48 L.W 849=1938 M.W.N. 1127=A.I.R. 1939 Mad 204.**

——**O. 20, R. 13**—*Scope—Administration decree—Distribution of dividends to creditors rateably—Creditor not coming in and receiving payment—Right of—Remedy—Procedure.*

The right of an unsatisfied or unpaid creditor, who has not come in under an administration decree to obtain payment in respect of his debt, unless he is precluded from exercising it by reason of negligence, default or laches or any other circumstance which would make it inequitable for the Court to make a decree in his favour is not by way of action but by way of a petition under the administration action itself; such a petition can, however, succeed only if the fund is in Court or subject to the control of the Court, and further the claim can only be made against satisfied legatees and can never succeed against the creditors who have already been paid in respect of their debts. (*Rangnekar, J.*) KISONDAS PREMCHAND *v.* JIVATLAL PRATAPSHI & CO. **167 I.C. 529=9 R.B. 313=38 Bom.L.R. 864=A.I.R. 1936 Bom. 423.**

——**O. 20, R. 13**—*Suit for administration—Final decree—Contents—Order after preliminary decree determining dispute but refusing to frame final decree—If appealable.*

The Code of Civil Procedure nowhere lays down what are to be the contents of a final decree in an administration suit. The contents must depend upon the nature of dispute in each case. Where after passing of a preliminary decree in an administration suit the Court passed an order which determined all the matters in dispute between the parties but refused to frame a final decree, such order must be construed as a final decree to that extent, and is appealable. (*Jai Lal and Dalip Singh, JJ.*) MT. SHAHZADI BI *v.* MT. RAHMAT BI. **168 I.C. 105=9 R.L. 594=A.I.R. 1936 Lah. 879.**

——**O. 20, R. 13**—*Suit for rents and profits of property held in trust which is alleged to have failed—Nature of decree.*

It is only where it is necessary that the estate should be administered by the Court that the Court may make payment of the liabilities of the estate and all persons who would be entitled to be paid may come in under the preliminary decree and make their claims against the estate. Where it is not alleged that there are any debts due to the estate nor is the Court asked to administer the estate but the suit is one for rents and profits of certain property held by the defendant under trust which is alleged to have failed and all that the Court is asked to do is to decide, if the wakf is found to be invalid, whether plaintiff is entitled to what he claims, such a suit is not an administration suit; and the Court if it finds that the wakf is invalid should only grant the plaintiff's claim and pass a preliminary decree accordingly and for rents. (*Mya Bu and Mosely, JJ.*) DAW EIN *v.* DAWN CHAN THA. **1940 Rang L.R. 136=186 I.C. 210=12 R.R. 251=A.I.R. 1939 Rang. 365.**

——**O. 20, R. 14**—*Scope—Pre-emption decree—Direction to deposit certain amount within certain time—Costs awarded to pre-emptor and vendee—Right of pre-emptor to deduct costs out of purchase price—Deposit after deducting entire costs awarded to pre-emptor—Validity—Costs of vendee not taken into account—Effect.*

It is well established that a pre-emptor can deduct the costs awarded to him from the sum which he is directed to deposit in Court, although the Civil Procedure Code does not expressly permit a pre-emptor to deduct the amount of costs awarded to him from the sum which he is directed to deposit in Court. The rule permitting such deduction of costs awarded to the pre-emptor from the purchase price in a rule of equity. Where there are cross-decrees as to costs, *i.e.*, where both the pre-emptor and the vendee are awarded costs, the pre-emptor should in equity, only deduct from the purchase price deposited by him the actual amount of costs which he could recover, that is, the balance due to him after deducting the costs payable by him to the vendee under the decree. It would be unjust to permit the pre-emptor to deduct from the decree amount to be deposited the whole amount of costs awarded to him and to leave the vendee to recover the costs awarded to him from the pre-emptor subsequently. If the pre-emptor in such a case deducts the whole amount of costs awarded to him from the purchase price and not merely the balance after deducting the costs awarded to the vendee, the deposit is not valid deposit. (*Harries, J.*) BHAGWATI DEVI *v.* CHANDRIKA PRASAD. **172 I.C. 765=10 R.A. 426=1938 A.L.R. 37=1937 A L.J. 1114=1937 A.W.R. 782 =A.I.R. 1937 All 756.**

——**O. 20, R. 14**—Scope of—Significance of its provisions. *See* PRE-EMPTION—RIGHT, NATURE OF. **1939 N.L.J. 13.**

——**O. 20, R. 14**—Time fixed in decree under—Power of appellate Court to extend. *See* PRE-EMPTION—DECREE FOR. **I.L.R. (1940) Nag. 157.**

——**O. 20, R. 15**—*Scope—Taking of accounts by Commissioner—Agreement between partners as to payment of interest on capital of partners—If can be proved.*

The proof of an agreement between the partners of firm, which forms an exception to the general rule of law that no interest is to be allowed on the capital account of each partner after dissolution, is not a matter concerning the mode of taking accounts. Even if such an agreement is pleaded in the plaint, it has to be proved before the Court and not before the Commissioner who takes accounts in accordance with the preliminary decree of the Court. A Commissioner taking accounts has no power to decide questions relating to the terms of the partnership, its duration or the shares of the partners. He is bound by the terms of the decretal order of reference. (*Wadia, J.*) MOTILAL *v.* SARUP CHAND. **167 I.C. 208=9 R B. 284=38 Bom.L.R. 1058=A.I.R. 1937 Bom. 81.**

——**O. 20, Rr. 15 and 17**—*Procedure—Partnership—Dissolution—Accounts—Preliminary decree—Subsequent order of Court awarding damages to partner and giving directions as to taking of accounts—Nature of—If supplemental preliminary decree or interlocutory order.*

Obiter.—Under O. 20, R. 15, the Court is by its preliminary decree to direct such accounts to be taken as it thinks fit, while R. 17 of O. 20 enables the Court by any subsequent order to give any special directions with regard to the mode in which the account is to be taken. An order by the Court made after the preliminary decree, awarding certain amounts to a partner as damages or compensation for breach of covenant by another partner and giving directions to the Commissioners as to the taking of accounts cannot be said to be a supplementary preliminary decree, but is only in the nature of an interlocutory order which can be passed under O. 20, R. 17, C. P. Code. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lall, JJ.*) BANWARI LAL *v.* SHAIKH SHUKRULLAH. **19 Pat. 1=188 I.C. 337=6 B.R. 653=12 R.P. 697=A.I.R. 1940 Pat. 204.**

——**O. 20, Rr. 15 and 17**—*Scope—Powers of Court—Partnership — Dissolution — Accounts—Preliminary decree—Subsequent application for damages for breach of covenant by partner subsequent to suit—Power of Court to deal with and to award damages—Inclusion in final account.*

A suit by one partner against another for damages for breach of a covenant of the partnership deed, brought before the dissolution, is liable to be defeated on the ground that a suit between partners should be a suit for general accounts in which the defaulting partner could be debited with any loss that might have been caused by his act. On the other hand a claim for damages for breach of covenant by a partner does not disappear when accounts are taken (upon a dissolution or otherwise), though where the claim is advanced in the suit for (dissolution or) general accounts, it may be included in the decree under "just allowances". If the breach is subsequent to the institution of the suit for dissolution, and the claim is advanced while accounts are being taken under the preliminary decree, the aggrieved party get his damages or compensation, where the preliminary decree is in sufficiently wide terms, by an application in the proceedings leading to the final decree. Where the preliminary decree passed in the suit is not an ordinary one in an ordinary partnership action with accounts in common form, but the Court has proceeded to pass it as if it had to settle all claims between the parties, and the decree is intended to settle all such claims between the parties, it cannot be said that the Court has no jurisdiction to award damages subsequent to the suit on application made to it in that behalf and to order the amount to be shown in the final account. (*Dhavle, J., on difference of opinion between Mahomed Noor and Manohar Lall, JJ.*) BANWARI LAL *v.* SHEIKH SHUKRULLAH. **19 Pat. 1=188 I.C. 337=6 B.R. 653=12 R.P. 697=A.I.R. 1940 Pat. 204.**

——**O. 20, R. 16**—*Preliminary decree for accounts—Proceeding under, to obtain final decree—Nature of.*

Under the Code of 1908, the proceedings under a preliminary decree for accounts to obtain a final decree for money are proceedings in the suit and are not proceedings in execution in the technical sense of that word as used in the Code. (*Sir George Rankin.*) VAISHNO DITTI *v.* RAMESHRI. **64 I.A. 191=168 I.C. 427=41 C.W.N. 814=39 P.L.R. 472=1937 A.L.J. 1000=46 L.W. 52=1937 A.L.R. 412=1937 O.L.R. 308=18 Lah. 502=1937 O.W.N. 699=39 Bom. L R 787=31 S.L.R. 367=1937 A.W.R. 1021=9 R.P.C. 295=18 Pat.L.T. 445=65 C.L.J. 387=1937 P.W.N. 473=3 B.R. 503=1937 M.W.N. 678=A.I.R. 1937 P.C. 163=(1937) 2 M L.J. 1 (P.C.).**

——**O. 20, R. 16**—*Suit for accounts—Preliminary decree if and when necessary.*

Although in O. 20, R. 16, C. P. Code, the expression "shall pass a preliminary decree" is used, there are two clear qualifications to it: (1) the rule says "where it is necessary . . . that an account should be taken" and (2) that the Court is to direct "such accounts to be taken as it thinks fit." Accordingly, where it is not necessary, the Court need not pass a preliminary decree and the words "such account to be taken as it thinks fit" obviously mean that the Court need not order any account to be taken unless it thinks fit. No hard and fast rule can be drawn between cases which are simple where a preliminary is unnecessary and cases which are complicated where a preliminary decree is necessary. (*Stone, C.J. and Clarke, J.*) HUKUMCHAND *v.* MOHAMMADJI. **I.L.R. (1940) Nag. 569=1940 N.L.J. 295=A.I.R. 1940 Nag. 207.**

——**O. 20, R. 16**—*Suit by principal against agent for accounts—Decree in favour of defendant—Permissibility.*

In a suit for rendition of accounts brought by a principal against a commission agent, it is permissible to a Court to pass a decree in favour of the defendant, if it turns out that a balance is due to him. (*Collister and Bajpai, JJ.*) BHAWANI SAHAI SELIG RAM *v.* CHHAJJU MAL. **1937 A.L.J. 115=1937 A.W.R. 16=168 I.C. 983=9 R.A. 693=1937 A L.R. 433=A.I.R. 1937 All. 276.**

——**O. 20, R. 17**—Scope—Effect of on Rr. 114 to 120 of the Madras Civil Rules of Practice—Validity of latter rules. *See* MADRAS CIVIL RULES OF PRACTICE, RR. 114 TO 120. **(1938) 1 M.L.J. 495 (F.B).**

——**O. 20, R. 18**—*Partition decree—Essentials—Duty of Courts.*

O. 20, R. 18 enjoins the Court first to ascertain judicially who all the persons are who are interested in the property to be partitioned and then in its decree to declare who they are and also what their rights are. It goes to the whole root of the matter that at the outset the entire interests in the property should be ascertained and fixed. Not only must the parties themselves to the partition suit take care that they bring before the Court all persons who are or may be interested in what it is proposed to divide but the duty lies upon the Court itself in matters such as these to see that it has before it every one whose presence is necessary to enable it to make the declaration which it is required to make by O. 20, R. 18. The rights of the parties cannot be judicially determined in the absence of the persons interested to contest them. When O. 20, R. 18 lays upon the Court the duty of declaring what the rights of the parties interested in the property are it means that there shall be a judicial declaration and not a mere *ex parte* declaration in the absence of some of the parties. (*Braund, J.*) NOOR MAHAMMAD *v.* ZAINUL ABDIN. **1940 A.W. R. (H.C.) 375=A.I.R. 1940 All. 399.**

——**O. 20, R. 18**—*Revenue-paying property—Partition—How to be effected.*

The partition of revenue-paying properties is to be effected by the Collector or by his subordinate in accordance with S. 54 read with O. 20, R. 18, C. P. Code. It is only if the Collector is unable or declines to effect the partition, the Court will appoint a Commissioner to partition the same by metes and bounds. (*R.C. Mitter and Akram, JJ.*) RANADA KISHORE ROY *v.* SWARNAMOYEE DEBI. **188 I.C. 761=12 R.C. 24=70 C.L.J. 355=44 C. W.N. 114=A.I.R. 1940 Cal. 33.**

——**O. 20, R. 18** (1)—*Limitation—Partition of lands assessed to Government revenue—Order decreeing partition and directing Collector to carry out division and to put parties in possession—Application by parties to send papers to Collector—If one in execution—Limitation.*

Where in a parition suit, an order is made decreeing partition of lands assessed to Government revenue and directing the parties to be put into possession and referring it to the Collector to carry out the partition, the duties of the Court are finished, and it is for the Collector to partition the property and put the parties into possession. The Court would send the papers to the Collector without being asked. But if as a matter of practice the parties ask the Court to send the papers to the Collector in the form of an ordinary darkhast, that is not an application in execution at all, for there is nothing in a case of this sort for the Court to execute. Asking the Court to send the papers to the Collector is really asking the Judge to do a ministerial act. There is no article of the Limitation Act relating to an application of that sort, and Art. 182 of the Limitation Act does not apply to such an application. (*Beaumont, C.J. and Wadia, J.*) JACINTO *v.* FERNANDEZ. **186 I.C. 119=12 R.B. 297=41 Bom.L. R. 921=A.I.R. 1939 Bom. 454.**

——**O. 20, R. 19**—*Lease of supply of water—Expenses connected with repairs of embankments—Lessee's right to set-off against arrears of rent.*

Where under a lease of a supply of water the lessor is bound to carry out the usual repairs of the embankments which resulted in such supply, the lessee, in a suit for arrears of rent against him, is entitled to claim a set-off on account of the expenses connected with the repairs which he had to do. Such a claim is admissible within the provisions of O. 20, R. 19, and it is not necessary for a set-off that it should be limited to O. 8, R. 6. (*Bennet and Smith, JJ.*) KAMAL DEVI *v.* KHUDADAD. **163 I.C. 872=9 R.A. 94=1936 R.D. 254=1936 A.L.J. 625=1935 A.W.R. 533=A.I.R. 1936 All. 522.**

——**O. 20, R. 19** (3)—Set-off—Legal set-off and equitable set-off—Set-off and counter-claim—Distinction. *See* C. P. CODE, O. 8, R. 6. **A.I.R. 1936 Cal. 277.**

——**O. 21**—Applicability—Execution of—Revenue Court decree under Agra Tenancy Act—Procedure—U. P. Revenue Manual, Ch. 40. *See* C. P. CODE, Ss. 68, 69, 70, 71 AND 72. **1936 R.D. 197.**

See also **1937 R.D. 37.**

——**O. 21**—Applicability—Order for costs by Registrar under S. 75 (4), Registration Act—Execution—Procedure *See* REGISTRATION ACT, S. 75 (4). **(1937) 1 M.L.J. 635.**

——**O. 21**—*Attachment—Formalities.*

O. 21, C. P. Code, is a very formal matter, and no property can be declared to be attached until all the formalities prescribed by the Code and the rules are complied with. (*Mockett, J.*) BALUSAMI *v.* OFFICIAL ASSIGNEE OF MADRAS. **189 I.C. 406=1939 M.W.N. 573=A.I.R. 1939 Mad. 811.**

——**O. 21, R 1**—*Applicability—Compromise of claim proceedings—Agreement to receive in instalments—In default of payment on due dates, whole amount to be paid—Default on due date, a holiday—Tender into Court next day—Right to apply for full amount, if arises.*

The agreement between parties was that the amount due should be paid in instalments, and if there was any default in such payment, the whole of the amount is to become payable. In such a case where the due date fell on a holiday and the instalment was not paid, it could not be deposited in Court on the next working day relying upon O. 21, R. 1, C. P. Code, for where two alternatives are provided one cannot be chosen in such a manner as to prejudice the rights of the other party. One could not commit a default and thereby extend the time in derogation of the terms settled between the parties. In such a case the entire amount becomes payable. (*Bennet, Ag.C.J. and Ganga Nath, J.*) ROSHAN LAL *v.* GANPAT LAL. **I.L.R. (1938) All. 337=174 I.C. 986=10 R.A. 641=1938 A.L.R. 365=1938 A.L J. 121=1938 A. W.R. (H.C.) 93=A.I.R. 1938 All. 199.**

——**O. 21, Rr. 1 (1) (a) and 2**—*Joint decree-holders—Payment to one and admission of satisfaction by him—If binds the rest.*

Payment of the decree amount to one of several decree-holders and admission of satisfaction by him will not bind the others in the absence of evidence to prove that he received it on behalf of all. (*Norman, I.C.S.*) MUHAMMAD AZIZ ULLAH *v.* ABDULLAH. **1936 A.M.L.J. 32.**

——**O. 21, R. 1**—*Payment into Court—Decree-holder if entitled to interest up-to-date of notice of payment.*

Where a decree awards interest till date of payment and the judgment-debtor pays the decree amount into Court, interest ceases to run from that date and the decree-holder cannot claim interest up to the date of the notice to him under O. 21, R. 1 (2), C. P. Code. (*Stone, C. J. and Bose, J.*) SETH LAXMINARAYAN *v.* SETH GHASIRAM. **183 I.C. 256=1939 N.L.J. 211=A.I.R. 1939 Nag. 191.**

——**O. 21, R. 2**—*Adjustment—Acceptance of mere agreement.*

A decree can be adjusted or satisfied by the making of an agreement between the decree-holder and the judgment-debtor. An obvious instance is the taking of a negotiable instrument which is nothing but a particular form of promise. The decree-holder may accept and the parties may have recorded in lieu of the performance of the terms of the decree an agreement to perform something else. In that case it is the new agreement itself which has been accepted and which is recorded and not the performance or terms of the agreement. The latter would be substituting a new decree. (*Ameer Ali, J.*) SURPUT SINGH *v.* MAHARAJ BAHADUR SINGH. **172 I.C. 282=10 R.C. 356=42 C.W.N. 519=A.I.R. 1936 Cal. 222.**

——**O. 21, R. 2**—*Adjustment—Adjustment of decree pending appeal—Adjustment not certified—Court, if debarred from recognising the adjustment.*

When there is an executable decree and an adjustment of that decree, O. 21, R. 2 requires that adjustment to be certified, quite regardless of whether there is or is not an appeal pending against that decree; for, the fact that an appeal is pending does not prevent the lower Court's decree from being executed, and if any adjustment is come to after the decree and before the decision of the appeal and is not certified or recorded as required under O. 21, R. 2, the Court is debarred by sub-R. 3 from recognizing such an adjustment. (*Wadsworth, J.*) KRISHNAMACHARI *v.* APPALACHARYULU. **161 I.C. 751=8 R.M. 865=1936 M.W.N. 123=43 L.W. 601=A.I.R. 1936 Mad. 494.**

——**O. 21, R. 2**—*Adjustment—Certification—Presumption as to—Burden of proving non-certification.*

An adjustment of a decree must be presumed to have been duly certified, regard being had to the cardinal rule of evidence that all things are presumed to have been rightly done; and until the contrary is proved the burden of proving that an adjustment has not been duly certified is on the party who says that it has not been so certified. (*Stone, C.J. and Niyogi, J.*) RAGHOJI *v.* VITHOBA. **169 I.C. 110=9 R.N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.**

——**O. 21, R. 2**— *Adjustment—Compromise under which judgment-debtor makes over certain decrees to decree-holder in partial adjustment of claim and agrees to pay balance in instalments—Compromise, if adjustment.*

Where a compromise states that certain decrees which are the property of the judgment-debtor had been made over to the decree-holder in partial adjustment of his claim and that the balance would be paid by means of instalments, the compromise amounts to an adjustment. The provision regarding instalments does not amount to substitution of a new decree for the old decree. (*Abdul Rashid, J.*) DARU MAL *v.* TODAR. **181 I.C. 243=11 R.L. 796=40 P.L.R. 264=A.I.R. 1938 Lah. 602.**

——**O. 21, R. 2**—*Adjustment—Conditions of validity—Actual payment—If necessary.*

It is not necessary that there should be an actual payment in order to constitute a valid adjustment within the meaning of O. 21, R. 2, C. P. Code. (*Broomfield and Wadia, JJ.*) SHANKAR ATMARAM *v.* KESHAV GOVIND. **60 Bom. 729=164 I.C. 9=9 R.B. 70=38 Bom.L.R. 505=A.I.R. 1936 Bom. 277.**

——**O. 21, R. 2**—*Adjustment—Contract that judgment-debtor will do something in future.*

A promise to do something in future is legal consideration, and if the decree-holder chooses to accept such a promise by the judgment-debtor there is nothing in law to prevent him from doing so, and such a promise by the judgment-debtor and acceptance thereof by the decree-holder is a legal adjustment of the decree. Thus if *A* holds a decree against *B* and *B* offers to transfer certain property to *A*, and *A* accepts that promise to transfer in whole or part satisfaction of his decree that is a binding contract which constitutes an adjustment of the decree in whole or in part and can be pleaded by *B* in bar of execution. But if *A*, as is usually the case, agrees to accept the transfer of the property in whole or part satisfaction of his decree, at that stage there is no concluded agreement between the parties, but *A* has really made a counter-offer which can be accepted by *B* only by performance, *i.e.*, by the actual transfer of the property. In this latter case there is no adjustment until the property has been actually transferred. (*Roberts, C.J., Dunkley and Braund, JJ.*) ARUNACHALAM CHETTYAR *v.* V.M.R.P. FIRM. **1938 Rang. L.R. 385=175 I.C. 498=10 R.R. 500=A.I.R. 1938 Rang. 202 (F.B).**

——**O. 21, R. 2**—*Adjustment—Execution—Reference to arbitration—Award—Validity—Power of Court to give permission for reference and file award in execution—Sch. II.*

There is no illegality in adopting the procedure provided by Sch. II, C. P. Code, to execution proceedings, if those proceedings are regarded merely as a means to the adjustment of the decree. It is open to the parties to adjust their differences under O. 21, R. 2, C. P. Code, in execution proceedings and it is perfectly competent to the executing Court to give permission to the parties to refer their disputes to arbitration. The award would be valid and the result of the award would be only an adjustment of the original decree, and not the passing of a new decree which the executing Court cannot do. The order of the Court directing the award to be filed and a decree to be drawn up accordingly is a sufficient record of the adjustment. (*Broomfield and Macklin, JJ.*) ZUMAKLAL MOTIRAM *v.* FULCHAND TARACHAND. **42 Bom.L.R. 867.**

——**O. 21, R. 2**—"Adjustment"—Executory agreement—If can be "adjustment"—Agreement varying time or manner of enforcement of decree—Enforceability in execution—Agreement totally adjusting decree and extinguishing decree immediately—Effect of—Right to execute original decree. *See* C. P. CODE, S. 47 AND O. 21, R. 2. **I.L.R. (1939) Kar. 725.**

——**O. 21, R. 2**—*Adjustment—Executory contract.*

An executory contract may form the subject of an adjustment. But where a compromise does not completely extinguish the rights of the plaintiff under the preliminary decree, but provides for their revival in cases of default, such a compromise is not an adjustment. (*Baguley and Mosely, JJ.*) V.N.A. FIRM *v.* BANK OF CHETTINAD, LTD. **179 I.C. 875=11 R.R. 351=A.I.R. 1938 Rang. 353.**

——**O. 21, R. 2 and S. 47**—*Adjustment—Executory contract—Compromise not an adjustment—Remedy of decree-holder—Execution or separate suit.*

An executory contract is not an adjustment within the meaning of O. 21, R. 2, C. P. Code, and cannot be pleaded as a bar in execution. A compromise which is not an adjustment within the meaning of O. 21, R. 2, C. P. Code, clearly does not extinguish the original decree, since it can be executed in spite of the compromise. Hence a separate suit on the compromise is barred by

S. 47, C. P. Code. (*Norman, I.C.S.*) GOPI *v.* RATAN LAL. 1939 A.M.L.J. 21.

——**O. 21, R. 2**—*Adjustment—Executory contract—If enough.*

A decree can be lawfully adjusted by a contract. It is not necessary that there must be a completed transaction. It is enough if the decree-holder enters into a fresh contract with the judgment-debtors for the satisfaction of the decree and if the contract is lawfully enforcible even though executory, it might operate as an adjustment of the decree. Distinction must be made, however, between a case where the decree-holder accepts as an immediate satisfaction or adjustment of the decree a promise of the judgment-debtors to do something in future and the case where the agreement is to accept a decree as adjusted or satisfied only if the thing promised is actually done at a future date. (*Mukherjea, J.*) SERAJUL HAQUE *v.* NOABALI MEAH. **42 C.W.N. 313.**

——**O. 21, R. 2**—*"Adjustment"—Meaning and effect of.*

Adjustment of a decree within the meaning of O. 21, R. 2, C. P. Code, means the extinguishing of a decree by satisfaction out of Court. It is to all intents and purposes executed and no question of the execution of the adjusted decree is possible. The wording of O. 21, R. 2, C. P. Code, implies a finality which excludes any future application in execution to the Court. A decree can be adjusted within the meaning of R. 2 of O. 21, C. P. Code. only by an executed agreement and not by an executory agreement. It is not an adjustment of a decree within the meaning of R. 2 for one decree requiring execution by the Court to be substituted by agreement of the parties for the decree of the Court, for, if this principle were accepted, the Court might be called upon to execute not the decree it passed, but a hundred decrees, not one of which it passed or which any other Court passed, but which the parties choose to substitute by mutual agreement for the decree of the Court. Hence where by a subsequent agreement the decree is varied, the substituted decree cannot be executed. (*Davis, J.C. and Lobo, A.J.C.*) RAMIBAI JETHMAL *v.* REWACHAND SANTOKRAM. **171 I.C. 477=10 R.S. 107=31 S.L.R. 491=A.I.R. 1937 Sind 229.**

——**O. 21, R. 2**—*Adjustment—Statement by decree-holder that understanding has been arrived at which judgment-debtor and that time has been given to complete it—If amounts to.*

Where on the statement of the decree-holder's agent that an understanding had been arrived at with the judgment-debtor and at his request he was being allowed to complete it and that in case of non-completion of the understanding proper application for further proceedings would be presented, the executing Court adjourned the case to a certain date and on that date consigned the proceedings to the record room.

Held, that the alleged adjustment was merely an inchoate agreement; and adjustment was under consideration and was to be made on the fulfilment of certain conditions; and that it was not an adjustment actually made and completed, based on a future promise; and it did not therefore, come within the purview of O. 21, R. 2, C.P. Code. (*Addison and Din Mahomed, JJ.*) BHARAT NATIONAL BANK, LTD. *v.* BHAGWAN SINGH. **I.L. R. (1938) Lah. 470.**

——**O. 21, R. 2**—Adjustment—Validity—Adjustment before sale—Application to be recorded after sale. *See* C. P. CODE, O. 21, RR. 92 AND 2. **41 P.L.R. 220.**

——**O. 21, R. 2**—*"Agreement"—Arrangement by judgment-debtor with decree-holder providing for satisfaction of decree in different mode from that in decree.*

An act of the parties agreeing to vary the decree is not an adjustment of the decree; but an agreement made by a judgment-debtor with a decree-holder providing for the satisfaction of a decree which differs from the one mentioned in the decree itself is not a variation of the decree directing payment of money, but is merely an adjustment to the satisfaction of the decree-holder as contemplated by O. 21, R. 2 (1). (*Guha and Bartley, JJ.*) KURANI DEBYA *v.* JOGAMAYA DEBYA. **167 I.C. 285=9 R.C. 680=66 C.L.J. 21 =A.I.R. 1936 Cal. 518.**

——**O. 21, R. 2**—*Agreement—Contract by judgment-debtor to assign property to decree-holder in future—If amounts to adjustment.*

There is no reason why a decree should not be adjusted or extinguished by a new contract in which the judgment-debtor agrees to do something in future. A contract under which it is agreed that the judgment-debtor should for a certain sum of money assign a certain property to the decree-holder is an adjustment coming under O. 21, R. 2, C. P. Code. (*Courtney-Terrell, C.J. and Saunders, J.*) SATYABADI SAHU *v.* MANI SAHU. **15 Pat. 390=165 I.C. 940=18 P.L.T. 110=3 B.R. 106=9 R.P. 236=A.I.R. 1936 Pat. 619.**

——**O. 21, R. 2**—*Agreement— Decree-holder promising to cancel decree if judgment-debtor does something in future—If amounts to.*

Where in execution of a decree for money the decree-holder agrees that if the judgment-debtor transfers some land and pays a certain sum of money to him, the decree would be regarded as fully adjusted but the judgment-debtor, neither transfers the land nor prays the sum agreed upon, it cannot be said that there has been an adjustment of the decree. The alleged adjustment, if sought to be proved, is not an adjustment at all within the meaning of O. 21, R. 2. It is nothing more than a promise to cancel the decree if the judgment-debtor shall have done something in the future. A.I.R. 1933 Mad. 28, Appl. (*Baguley and Mosely, JJ.*) S. T. R. M. CHETTYAR FIRM *v.* ANDATHAL. **164 I.C. 106=9 R.R. 58=A.I.R. 1936 Rang. 289.**

——**O. 21, R. 2**—*"Agreement"—Oral agreement between decree-holder and judgment-debtor that former will accept some acres of land in satisfaction of decree—If adjustment.*

O. 21, R. 2 contemplates an adjustment which is capable of execution and which extinguishes the decree. There was an oral agreement between the decree-holder and the judgment-debtor that the former shall accept some acres of land in satisfaction of the decree.

Held, that the oral agreement was not capable of being enforced or executed and hence could not constitute an adjustment within the meaning of O. 21, R. 2. (*Haveliwala and Lobo, A.J.Cs.*) UDHARAM BAHARMAL *v.* MURARI LAL. **167 I.C. 417=9 R.S. 182=30 S.L.R. 249=A.I.R. 1936 Sind 191.**

——**O. 21, R. 2**—*Agreement—Substitution of fresh contract in place of decree.*

The parties to a decree are competent to substitute a fresh contract for the decree, and when such a contract comes into existence it is open to the judgment-debtor to apply under O. 21, R. 2, C. P. Code, to record the adjustment. But an agreement that at some future time on delivery of property the decree would be considered satisfied cannot amount to an "adjustment" of the decree as contemplated by O. 21, R. 2. (*Weston.*) Mala *v.* Awana. **1935 A.M.L.J. 97.**

——**O. 21, R. 2**—*Agreement between parties superseding decree, recorded as adjustment—New agreement so recorded—If capable of execution.*

The main principle is that a decree once made cannot be varied; so where a decree has been made, and a subsequent agreement between the parties superseding the original decree is recorded as adjustment, the new agreement is not *prima facie* capable of execution because, if it is made capable of execution, it would automatically vary the decree. The same principle applies even where the decree-holder has accepted in satisfaction an agreement which itself contains a condition or term that the subsequent agreement shall be capable of execution. Logically, if the effect of a subsequent agreement containing such a clause is, as it must be, to vary the old decree, it is not the proper subject matter of an application to record an adjustment because it produces in effect what the law precludes. Put otherwise, the agreement is capable of being recorded as an adjustment but incapable of being the subject matter of execution. It is an agreement merely. (*Ameer Ali, J.*) Surput Singh *v.* Maharaj Bahadur Singh. **172 I.C. 282=10 R.C. 356=42 C.W.N. 519=A.I.R. 1937 Cal. 222.**

——**O. 21, R. 2**—*Agreement relating to time and manner of enforcement of decree—If can be recorded.*

An agreement intended to govern the liability of the debtor under the decree and to have effect upon the time and manner of its enforcement is a matter to be dealt with under S. 47, C. P. Code, and cannot be properly recorded by the Court. 43 C.W.N. 501 (P.C.), Rel. on. (*Mitter and Rau, JJ.*) Pattu Kumari *v.* Nirmal Kumar. **185 I.C. 691=12 R.C. 392=70 C.L.J. 5=43 C.W.N. 907=A I.R. 1939 Cal. 569.**

——**O. 21, R. 2**—*Agreement that decree should be executed in certain way—Agreement recorded in Court—Objection by third party to execution in such way—Permissibility.*

When the parties have agreed that a decree should be executed certain way and that agreement has been recorded in Court, it is not permissible for a third party to object to execution in the way the parties to the suit have chosen. (*Panckridge, J.*) Mannalal Srimal *v.* Nehalchand Samsukha. **41 C.W.N. 1133.**

——**O. 21, R. 2**—*Applicability—Decree for possession.*

The words "the decree" in O. 21, R. 2, surely mean 'a decree of any kind' and would include a decree for possession of a house. No adjustment of such decree can be recognised by the Court unless it is certified and no application for certification can be made except within 90 days (*Jai Lal, J.*) Shadi *v* Ram Ditta. **165 I.C. 35. (1)=9 R.L. 246=39 P.L.R. 6=A.I.R. 1936 Lah. 842.**

——**O. 21, R. 2**—*Applicability—Execution by attachment of decrees in favour of judgment-debtor—Realisation—If a payment out of Court.*

Where a decree-holder applied for execution by attachment of certain decrees in favour of his judgment-debtor and in pursuance of an order of Court proceeded to realise the amounts due in respect of the attached decrees, the payments made by the judgment-debtor under the attached decrees, are to be deemed to have been made in Court and not outside Court. Hence O. 21, R. 2 has no application to cases of such payments. (*Rachhpal Singh and Ismail, JJ.*) Thomas Skinner *v.* Ram Rachpal. **I.L.R. (1938) All. 294=174 I.C. 439=1938 A.L.R. 276=10 R.A. 572=1938 A.L.J. 59=1938 A.W.R. (H.C.) 80=A.I.R. 1938 All. 141.**

——**O. 21, R. 2**—*Applicability—Payment prior to decree—If can be pleaded.*

O. 21, R. 2, C. P. Code, applies only where money payable under a decree is paid out of Court. But where money is paid at a time when there was no decree in existence, O. 21, R. 2 cannot apply. (*Pollock, J.*) Bhaskar Dattatraya *v.* Nilkanth Dattatraya. **177 I.C. 673=11 R. N. 159=1938 N.L.J. 148==A.I.R. 1938 Nag. 265.**

——**O. 21, R. 2—(Patna Amendment)**—*Applicability—Pending execution.*

O. 21, R. 2 refers to the stage when there is no execution case pending and when the judgment-debtor comes to notify to the Court an adjustment outside the Court. The rule therefore does not apply when an execution case is pending. (*Mohamad Noor, J.*) Surajmal *v.* Manbodh Bhagad Lall Chand Ram. **4 B.R. 501=174 I.C. 1007=10 R.A. 563=A.I.R. 1938 Pat. 204.**

——**O. 21, R. 2**—*Applicability—Preliminary decree under O. 34, R. 4.*

A preliminary decree passed in a mortgage suit for sale under O. 34, R. 4, C. P. Code, not being executable the provisions of O. 21, R. 2, C. P. Code, do not apply. (*Bhide, J.*) Raja Ram *v.* Allahabad Bank, Ltd. **I.L.R. (1939) Lah. 313 =185 I.C. 75=12 R.L. 263 (2)=41 P.L.R. 26= A.I.R. 1939 Lah. 79.**

——**O. 21, R. 2**—Certification—Decree under execution by Collector—Certification of adjustment—Jurisdiction—Collector's powers. *See* C. P. Code, S. 68 and O. 21, R. 2. **19 N.L.J. 175.**

——**O. 21, R. 2**—*Certification—Forum—Decree transferred to another Court for execution.*

When a decree has been transferred for execution and execution has been taken out in the transferee Court, the judgment-debtor can make an application to that Court for the certification of a satisfaction of the decree and such transferee Court has jurisdiction to record the satisfaction, if it finds after due enquiry that the satisfaction has been made. Certification of adjustment is governed by O. 21, R. 2. In construing the expression 'the Court' occurring in sub-R. (2) of R. 2 of O. 21, reference must be made to sub-R. (1) of the same rule, and sub-R. (1) says that the Court is the Court whose duty it is to execute the decree. (*Roberts, C.J. and Dunkley, J.*) Jagadish Mishra *v.* Saw Eu Hoke. **1940 Rang.L.R. 356=A.I.R. 1940 Rang. 236.**

——**O. 21, R. 2**—*Certification—Statement of decree-holder in reply to judgment-debtor's application under O. 21, R. 2 (2)—If amounts to certification.*

Where a judgment-debtor applies under O. 21, R. 2 (2) for recording of certain payments and the decree-holder in reply files a statement that certain sums of money were received but that they were paid on account of interest, not allowed by the decree, but agreed to be paid in consequence of a separate agreement entered into after the passing of the decree, it cannot be an admission that the payments were in satisfaction of the money due under the decree and cannot therefore amount to a certification. (*Verma, J.*) Abid Husain *v.* Kunj Behari Lal. **184 I.C. 668=12 R.A. 269=1939 A.W.R. (H.C.) 635=A.I.R. 1939 All. 581.**

——**O. 21, R. 2**—*Compromise after decree—Recording of—If barred.*

Where an alleged compromise was admittedly subsequent to the passing of a final decree in a suit, and it was filed under O. 23, R. 3, C. P. Code, to be recorded and the application was rejected, it was held that there was no bar in law to the recording of that compromise under O. 21, R. 2, C. P. Code. (*Bennet and Verma, JJ.*) Gaya Prashad *v.* Ram Charan. **I.L.R. (1940) All. 190=187 I.C. 805 =12 R.A. 569=1940 A.W.R. (H.C.) 105=1940 A.L.J. 88=A.I.R. 1940 All. 184.**

——**O. 21, R. 2**—Decree-holder—If includes attaching decree-holder—Holder of attaching decree—If competent to certify satisfaction of attached decree. *See* C. P. Code, O. 21, R. 53 (3). **51 L.W. 148=(1940) 1 M.L.J. 292.**

——**O. 21, R. 2**—*Joint decree-holders—Receipt of payment and certification of satisfaction by one only—Competency.*

One of several decree-holders cannot, by receiving payment of the decretal amount out of Court, certify satisfaction of the entire decree, if he is not authorised by his co-decree-holders to do so. (*R. C. Mitter, J.*) Arshedali Sheik *v.* Mektauddin Sheikh. **62 C.L.J. 560.**

——**O. 21, R. 2**—*Jurisdiction to record satisfaction—Power of executing Court to record satisfaction of decree outside its jurisdiction.*

An executing Court has no power to record satisfaction of a decree over which it has no jurisdiction and a report to the executing Court of satisfaction of some decree pending before another Court is of no effect. (*Wadsworth, J.*) Ahamad Ibrahim Rowther *v.* Allapichai Rowther. **51 L.W. 148=1940 M.W.N. 505=A.I.R. 1940 Mad. 534 =(1940) 1 M.L.J. 292.**

——**O. 21, R. 2**—Limitation—Application by one judgment-debtor to certify payment by another—Limitation—Execution sale of properties of one judgment-debtor—Application to set aside on ground of satisfaction of decree by uncertified payment by co-judgment-debtor—Maintainability after 90 days—S. 47—If applicable. *See* C. P. Code, S. 47 and O. 21, R. 2. **17 Pat.L.T. 195.**

——**O. 21, R. 2**—*Limitation—Certification by decree-holder—Right of judgment-debtor to have satisfaction recorded.*

There is no limitation for a decree-holder to certify payments received by him under the decree, and if the decree-holder has really certified at one stage, the judgment-debtor is entitled to take advantage of it and request the Court to record satisfaction to that extent. (*Somayya, J.*) Muthukrishna Raja *v.* Viswalinga Kadavarayar. **1940 M.W.N. 547.**

——**O. 21, R. 2**—*Payment or adjustment—Inquiry as to, if contemplated.*

O. 21, R. 2, C. P. Code, does contemplate and inquiry into an alleged payment or adjustment by the Court to which an application is made under that provision and that Court is bound to hold such inquiry. (*Zia-ul-Hasan and Yorke, JJ.*) Baijnath *v.* Bishwanath. **189 I.C. 271=1940 O.W.N. 629=1940 O.L.R. 426=1940 O.A. 499 =1940 A.W.R. (C.C.) 257.**

——**O. 21, R. 2 and Limitation Act (IX of 1908), Art. 174**—*Payment of decree amount—Decree-holder applying to record satisfaction of decree—Absence at the time of enquiry—Dismissal of application—Subsequent application by judgment-debtor to enter satisfaction—Dismissal of it as being time-barred—If sustainable—Proper procedure.*

A decree-holder was alleged to have received the decree amount. Within 30 days of the alleged payment he himself applied to record satisfaction of the decree. A third party who had attached the decree raised objection and an enquiry was held in that connection. Then the decree-holder denied the payment but was absent from the enquiry and his vakil reported no instructions. The Court struck off the decree-holder's petition but reserved the judgment-debtor's right to claim full satisfaction in proper proceedings. The judgment-debtor accordingly applied for satisfaction of the decree being recorded. The lower Court dismissed the application as being time-barred.

Held, on revision, that the application if treated as an independent application was not saved by S. 5 or S. 14 of the Limitation Act; but the lower Court was not justified in striking off the application of the decree-holder. At any rate at the later stage, the Court ought to have proceeded with the original application of the decree-holder, treating the application of the judgment-debtor only as an application to continue the former proceeding. (1918) 35 M.L.J. 253, Foll. (*Varadachariar, J.*) Kailasa Padiachi *v.* Duraippa Kachirayar. **180 I.C. 437=11 R.M. 705=48 L.W. 916=1938 M.W.N. 1245=A.I.R. 1939 Mad. 163 =(1938) 2 M.L.J. 936.**

——**O. 21, R. 2**—*Predecretal agreement—Mortgage suit—Agreement between preliminary and final decree—If could be pleaded in bar of execution.*

Where an unregistered agreement was alleged to have been executed by the decree-holder after the passing of the preliminary decree and before the final decree whereby he agreed not to execute the decree against some of the items of the hypotheca, it was held that there was nothing in the above agreement which showed that it was intended to attack the decree sought to be executed, for it could not be said that it was intended to attack the final decree which had not yet been passed. Any agreement which merely relates to the execution or the decree and does not attack decree itself could be pleaded in bar of execution. (*Pandrang Row and Abdur Rahman, JJ.*) Meenakshisundaram Ayyar *v.* Swaminatha Iyer. **I.L.R. (1938) Mad. 451=1938 M.W.N. 193=174**

I.C. 681=10 R.M. 737=48 L.W. 448=A.I.R. 1938 Mad. 456=(1938) 2 M.L.J. 404.

——**O. 21, R. 2**—*Power of Court—Certification by decree-holder—Enquiry by Court as to actual amount of payment—Jurisdiction to hold.*

Although there is no specific provision in the Code in that behalf, when a decree-holder certifies part satisfaction and the materials put before the Court by the decree-holder are such as to put the Court on notice that there was a dispute between the parties as to whether the amount certified was less than the amount which had been actually paid, it is quite competent for the Court to give notice to the judgment-debtor and enter into an enquiry as to whether more has been paid than that which the decree-holder certifies. (*Wadsworth, J.*) VEERARAGAVIAH *v.* VENKATA LAKSEMAYYA, **164 I.C. 434 (1)=9 R.M. 123=1936 M.W.N. 140=A.I.R. 1936 Mad. 468.**

——**O. 21, Rr. 2 and 16**—*Proceeding under R. 16—Judgment-debtor if can plead uncertified adjustment—Relation between parties to adjustment not that of decree-holder and judgment-debtor—Effect of.*

In a proceeding on notice under O. 21, R. 16, C. P. Code, the judgment debtor cannot plead an uncertified adjustment for the purpose of showing that the decree having been satisfied before its assignment, the assignee got nothing by the assignment, there being then nothing to assign. The fact that at the time of the adjustment the relations between the parties to it was not that of decree-holder and judgment-debtor does not make the provisions of O 21, R. 2 inapplicable. (*Guha and Bartley, JJ.*) SHAHEDAN BIBI *v.* MIR ALI. **10 R.C. 17=169 I.C. 602=40 C.W.N. 301=62 C.L.J. 316=A.I.R. 1937 Cal. 31.**

——**O. 21, R. 2**—*Adjustment between judgment-debtor and third party—If can be recognised—Plea that decree-holder is some one other than the one named in the decree as such—If open to judgment-debtor.*

It is not open to a judgment-debtor in execution proceedings to assert that the real holder of the decree is some one other than the person named as the decree-holder in the decree, unless there has been an assignment or devolution by process of law; and under O. 21, R. 2, C. P. Code, he can only claim entry of satisfaction of the decree when payment has been made either to the decree-holder or to some other person definitely held out by the decree-holder as his agent for the purpose of payment.

Rowland, J.—An adjustment to which the decree-holder is not a party cannot be recognised by the executing Court. O. 21, R. 2 does not recognise any payment or adjustment to the satisfaction of some third party. (*James and Rowland, JJ.*) RANBAHADUR SINGH *v.* AWADHBEHARI PRASAD SINGH. **18 Pat. 318=11 R.P. 575=181 I. C. 184=21 Pat. L.T. 138=5 B.R. 537=A.I.R. 1939 Pat. 411.**

——**O. 21, R. 2**—*Scope—Certification of adjustment—Effect of—Refusal of Court to record adjustment—If justifies decree-holder in executing decree.*

Once the decree-holder has certified the fact of an adjustment, an error of the Court in refusing or neglecting to record the same cannot be held to prejudice the parties. Where both the decree-holder and the judgment-debtor certified to the Court an adjustment of the decree by a joint application, but the Court refused to record the compromise and the decree-holder thereupon sold the property obtained under the compromise and proceeded to realize the balance of the decretal amount.

Held, the decree-holder could not under the circumstances proceed to execute the decree. (*Roberts, C. J. and Leach, J.*) SWAMINATHA PADIACHI *v.* SAMBASIVAM PADIACHI. **174 I.C. 18=10 R.R. 383=A.I.R. 1937 Rang. 507.**

——**O. 21, R. 2** -*Scope—Certification by decree-holder—Form of and limitation for—Certification in execution application—Sufficiency.*

There is no limit of time within which and no particular form in which the decree-holder is required to certify a payment or adjustment under O. 21, R. 2, C. P Code. He may do so at any time, and if an execution application is made within three years from the date of the payment or adjustment, he may certify the same even in his application for execution. That will be a valid certification by him and the executing Court should record the payment so certified. (*Fazl Ali and Manohar Lall, JJ.*) SONYA BISOI *v.* ANANDA PADHANO. **6 Cut.L.T. 7=21 P.L.T. 650.**

——**O. 21, R. 2**—*Scope—Certification—What amounts to—Form of—Admission by decree-holder to executing Court of receipt of payment—Effect—Right to execute for that sum over again.*

A decree-holder who admits to the executing Court that he has received a payment cannot be allowed by that Court to execute his decree for the same amount over again. If the payment is brought by the decree-holder to the notice of the executing Court, that is enough to constitute certification and would satisfy the requirements of O. 21, R. 2, C. P. Code. It does not matter under what circumstances the payment is brought to the notice of the Court by the decree-holder. If it is brought to the notice of the Court that is sufficient to prevent him from executing over again for the sum that he admits having received and he cannot contend that is an uncertified payment. (*Beasley, C J. and Horwill, J.*) BAPANNA *v.* VENGAYYA. **45 L.W. 291=1937 M.W.N. 529=171 I C. 581=10 R.M 369=A.I.R. 1937 Mad. 511=(1937) 1 M.L.J. 296.**

——**O. 21, R. 2**—*Scope—Decree for specified amount against two persons and for costs against them and another—Receipt by decree-holder of amounts by way of rateable distribution amounting to half of decree-amount— Appropriation—Right of decree-holder to adjust towards decree-amount proper excluding costs—Liability in respect of costs—If reduced* pro tanto.

A decree awarded to the decree-holder a certain sum payable by defendants 1 and 2, and also a further sum by way of cost payable by defendant 3 as well as by defendants 1 and 2. The decree was executed by the decree-holder and, in his own execution as well as in another execution by another creditor of defendants 1 and 2, the decree-holder realised a sum amounting roughly to about one-half of the total decree amount including costs, by way of rateable distribution.

Held, that the decree-holder was able to get as much as he did by way of rateable distribution because of the total of the two debts (the decree amount and the costs), and it would clearly be inequitable and unfair for him to claim after receiving the money that it must all go towards the satisfaction of the first of these two debts, the amount received by him must go towards the payment of every rupee of his debt, and the decree for costs as against the third defendant must therefore be regarded as having been reduced by half, so that the third defendant could, on payment of the balance of costs, claim to have full satisfaction entered in his favour with regard to that portion of the decree for which he was liable, namely, costs. (*King, J.*) Gopal Rao *v.* Lakshminarasamma. **I.L.R. (1939) Mad. 301=181 I.C 388=1938 M.W.N. 1210=11 R.M. 804=50 L.W. 908=A.I.R. 1939 Mad. 268=(1939) 1 M.L.J. 137.**

——**O. 21, Rr. 2 and 16**—*Scope—Payment towards decree uncertified—Assignment of decree—Deed reciting payment and transferring right to execute for balance—Application by transferee for recognition of assignment—If certification—Right of assignee to ignore payment and to execute for entire amount.*

A decree-holder who had received certain sums due under the decree from the judgment-debtor out of Court, some of which were not certified, transferred the decree to another, the deed of transfer reciting that specified sums had been collected towards the decree amount and that the right to execute for the balance was transferred to the transferee. The transferee filed an execution application for recognition of the assignment asking the Court to peruse the records, and after examining the deed of transfer to issue notice to the defendant under O. 21, R. 16, C. P. Code, and then to recognise the transfer, with a further prayer to transfer the decree to another Court for execution.

Held, that this was sufficient to draw the attention of the Court to the deed of transfer which recited that there was a payment by the judgment-debtor and that the right conferred by the decree-holder on the assignee was one to execute for such amount as might be due after deducting that payment, and that the assignee decree-holder could not ignore the payment and claim to execute for the entire amount on the ground that the payment was uncertified. The deed with the recital and the execution application would be sufficient to constitute a certification as required by O. 21, R. 2, C. P. Code, and Cl. (3) of O. 21, R. (2) did not, therefore, stand in the way of the payment being recognised by the executing Court. Neither the transferee decree-holder nor the executing Court could ignore the terms of the transfer deed and the rights which the transferee obtained under the deed. (*Begsley, C. J. and Horwill, J.*) Bapanna *v.* Vengayya. **45 L.W. 291=1937 M.W.N 529=171 I.C. 581=11 R.M. 369=A.I R. 1937 Mad. 511=(1937) 1 M.L.J 296.**

[On appeal from. **161 I. C. 830=43 L.W. 585=8 R.M. 879=1936 M.W.N. 138=A.I.R. 1936 Mad. 472.**]

——**O. 21, R. 2**—*Scope of—Preliminary decree for sale on mortgage—Adjustment with reference to—If can be recorded under O. 21, R. 2—Provision of law applicable.*

O. 21, R. 2, C. P. Code, is confined in its operation to decrees that are capable of execution. Where an alleged adjustment relates only to a preliminary decree for sale on a mortgage in which no final decree for sale had yet been passed it could not be recorded by the Court under O. 21, R. 2 for the reason that the preliminary decree is not a decree capable of execution. Such an application falls within the purview of either R. 1 or R. 3 of O. 23. (*Iqbal Ahmad and Bajpai, JJ.*) Ram Niwas *v.* Ram Dayal. **180 I.C. 244=11 R.A. 435=1938 A.W.R. (H.C.) 859=1938 A.L.J. 1231=A.I.R. 1939 All. 174.**

——**O. 21, R. 2**—*Scope—Scheme sanctioned under S. 153, Companies Act, superseding decree—If an adjustment of decree.*

A scheme which is sanctioned by the Court under S. 153 of the Companies Act and which supersedes a decree, is not an adjustment of the decree as contemplated by O. 21, R. 2, C. P. Code, and is not, therefore, required to be certified or recorded by that rule. The rule contemplates an adjustment which is binding between the decree-holder and the judgment-debtor as an agreement by reason of their consent to it. It does not contemplate an adjustment which, although not consented to, is made binding by operation of law. (*Nasim Ali and R.C. Mitter, JJ.*) Mahiganj Loan Office, Ltd. *v.* Behari Lal Chaki. **I.L.R. (1937) 1 Cal. 781=65 C. L. J. 361=10 R. C. 239=171 I.C. 198=41 C.W.N. 406=A.I.R. 1937 Cal. 211.**

——**O. 21, Rr. 2 and 16**—*Scope—Transfer of decree by assignment—Subsequent adjustment of decree between decree-holder and judgment-debtor and certification by former without knowledge of transferee—Application by transferee for execution—Competency—Plea of adjustment by judgment-debtor—If bar to execution—"Decree-holder"—Remedy of transferee.*

Where a decree-holder transfers his decree and then makes an adjustment of the decree with the judgment-debtor and certifies satisfaction of the decree without the knowledge of the transferee before the latter applies to have the assignment recognised, that is a valid adjustment binding on the transferee. If the transferee applies thereafter for recognition of the transfer under O. 21, R. 16, C. P. Code, the judgment-debtor can successfully plead the adjustment in bar of the application. "Decree-holder" in O. 21, R. 2, C. P. Code, means the person in whose favour a decree has been passed, and until the transferee has taken steps under O. 21, R. 16, for sanction to execute the decree, the executing Court cannot recognise any other person than the decree-holder on record. The transferee has his remedy by way of suit against his transferor but the executing Court is not concerned with it. (*Cornish, J.*) Rangayya Setti *v.* Venkata Subba Reddi. **10 R.M. 93=45 L.W. 562=169 I.C. 704=1937 M.W.N. 372=A.I.R. 1937 Mad. 605.**

——**O. 21, R. 2**—*Uncertified adjustment—Application for execution by assignee of decree—Adjustment not duly certified—If can be pleaded as bar.*

An adjustment of the whole decree, not certified within the period prescribed, cannot be pleaded by the judgment-debtors as an objection to the execution of the decree by the assignee of the decree. 1932 Mad. 372, Foll. (*Mosely and Mackney, JJ.*) K. M. Esoof *v.* Hamida Bibi. **163 I.C. 671=9 R.R. 43=A.I.R. 1936 Rang. 218.**

——**O. 21, R. 2**—*Uncertified payment—Double payment to avoid execution—Suit for damages—Maintainability.*

Where a decree-holder executes his decree, notwithstanding the payment of the decree amount by the judgment-debtor, and the latter pays the amount once over to avoid the sale of his property, he can maintain a separate suit against the decree-holder to recover damages for breach of contract represented by the adjustment or payment, for the executing Court is debarred from going into the question, when the alleged payment is uncertified. It is not a case where the plaintiff seeks to set aside a decree or to recover any money paid thereunder; all that he wants is to recover damages for loss incurred by the payment twice over in respect of the same liability. (*Manohar Lall, J.*) Ram Das Sahu *v.* Sukhdeo Ram. **178 I.C. 196=5 B.R. 71=11 R.P. 228=A.I.R. 1939 Pat. 156.**

——**O. 21, R. 2**—*Uncertified adjustment—Duty of Court to take notice of in execution—Limitation for execution—Starting point.*

If there is an adjustment of decree between the parties and even if that adjustment is not certified, the Court is bound to take notice of that adjustment and call for evidence to prove it when an application for execution is made by the decree holder. Limitation for such execution application runs from the dates of various payments according to adjustment. (*Gruer, J.*) Baijnath *v.* Kanhaiyalal. **I.L.R. (1937) Nag. 106=165 I.C. 804=9 R.N. 94=A.I.R. 1936 Nag 281.**

——**O. 21, R. 2**—*Uncertified adjustment—Omission to record adjustment—Effect—Mortgage by judgment-debtor of attached property after adjustment of decree—Suit on mortgage—Plea of non-certification of adjustment—Power of Court to recognize adjustment.*

The only effect of an adjustment not being certified as required by O. 21, R. 2, C. P. Code, is that it cannot be recognized by the executing Court; but it does not prevent a Court trying a suit on a mortgage in respect of the property attached in execution, executed by the judgment-debtor after an uncertified adjustment of the decree, from recognizing that adjustment in the course of the suit. S. 47, C. P. Code, is no bar to the recognition of the adjustment by the Court trying the suit. (*Stone, C. J. and Niyogi, J.*) Raghoji *v.* Vithoba. **169 I.C. 110=9 R.N. 302=19 N.L.J. 175=A.I.R. 1937 Nag. 217.**

——**O. 21, R. 2**—*Uncertified payments—Suit for recovery—Cause of action, when arises.*

Where, on a failure to get all the payments alleged to have been made by a judgment-debtor to the decree-holder certified, the judgment-debtor files a suit against the decree-holder for the recovery of such of the payments not certified, he has no cause of action and his suit is premature. It is in substance a suit for damages for breach of contract though no damages have in fact resulted so far. The plaintiff will have a cause of action only if the defendant puts the decree into execution and realises any amount from the plaintiff over and above the payments alleged to have been made by him. (*Mulla, J.*) Jagdeo Dube *v.* Deoki Nath Tewari. **183 I.C. 450=12 R.A. 142=1939 A.W.R. (H.C.) 402=1939 A.L.J. 403=A.I.R. 1939 All. 495.**

——**O. 21, R. 2 (1)**—*Adjustment—Instalment decree—Execution — Compromise providing for payment by instalments—Compromise recorded by Court and execution case dismissed as partly satisfied—Payments according to compromise—Default—Execution for entire debt—Maintainability.*

On an application for execution of a decree which provided for payment of the decretal debt by instalments, and in the course of the proceedings in execution, a compromise was arrived at between the parties, providing for satisfaction of the original decree by instalments. The terms of the compromise were set out in a petition and filed in Court. The Court recorded the compromise, and ordered dismissal of the execution case on part satisfaction crediting Rs. 100 in the decree. Some instalments were subsequently paid in accordance with the compromise but default was made and entire decretal amount fell due as per compromise. Decree-holder applied for execution. Judgment-debtor thereupon raised an objection under S. 47, application was barred by limitation.

Held, that the application was not barred by limitation. The compromise petition and the order of the executing Court thereon amounted to an adjustment of the decree in part to the satisfaction of the decree-holder within O. 21, R. 2 (1), and the payments made in accordance with the compromise were by way of adjustment of the decree as contemplated by law and the compromise did not create a decree at variance with the original decree. (*Guha and Bartley, JJ.*) Kurani Debya *v.* Jogamaya Debya. **167 I.C. 285=9 R.C. 680=66 C.L.J. 21=A.I.R. 1936 Cal. 518.**

——**O. 21, R. 2 (1)**—*Compliance—Certificate by decree-holder—Validity — Order by Court—If essential—Enquiry into truth or otherwise of adjustment—If necessary—Recording of satisfaction—What amounts to—Duty of Court.*

In order that a certification of adjustment by the decree-holder may have effect, it is not necessary that there should be any specific order by the Court. A certificate presented by the decree-holder is none the less operative and enures none the less for the benefit of the judgment-debtor, because the Court has passed no order recording satisfaction of the decree. The record contemplated under O. 21, R. 2 (1) is merely an order that the certificate of the decree-holder be placed on the record. The Court is not required to go into the question whether there has or has not been an adjustment as stated. The certificate is sufficient and all that the Court need do is to say that the certificate shall be kept upon the record. It is only under sub-R. (2) of O. 21, R. 2, when the judgment-debtor makes an application that it is necessary for the Court to go into the question whether his allegations are or not true. (*Allsop, J.*) Champi Bai *v.* Pearey Lal. **174 I C. 254=1938 A.L.R. 249=10 R.A. 555=1937 A.W.R. 1200=1937 A.L.J. 1305=A.I.R. 1938 All. 116.**

——**O. 21, R. 2 (1)**—*Limitation—Certification by decree-holder.*

Certification to Court under O. 21, R. 2 (1) by a decree-holder of payments or adjustments is not governed by Art. 181, Limitation Act, nor expressly limited by any other article. Such certification can take place where execution of the decree is barred but for the payment certified. (*Gruer, J.*) BAIJNATH *v.* KANHAIYALAL. **I. L.R.** (1937) Nag. 106=**165 I.C. 804=9 R.N. 94 =A.I.R. 1936 Nag. 281.**

——**O. 21, R. 2** (1)—*Application by judgment-debtor—Notice to decree-holder—Duty of Court to issue.*

When a judgment-debtor applies under cl. (2) of R. 2, of O. 21, C. P. Code, the executing Court is bound to issue a notice to the decree-holder to show cause why the payment or adjustment alleged to have been made by the judgment-debtor should not be recorded as certified. (*Kichlu, J.*) KAPOOR & CO. *v.* AGHA ZAFFAR ALI. **39 P.L.R. J. & K. 164.**

——**O. 21, R. 2** (2)—*Burden of proof—Adjustment by agreement.*

In an application under O. 21, R. 2 (2), C. P. Code, the burden is on the judgment-debtor to prove the adjustment set up. When he asks the Court, in the face of a denial by the decree-holder, to hold that the latter has agreed to substitute for his decree an oral agreement for delivery of some property when admittedly no property has as yet been delivered, the burden is heavily on the judgment-debtor to prove the agreement and the factum of adjustment of the decree. Nor is the burden discharged by evidence of talk of compromise or by proof of the terms which he was putting forward to secure such a compromise. (*Weston.*) MALA *v.* JAWANA. **1935 A.M.L.J. 97.**

——**O. 21, R. 2** (3)—*Adjustment and payment — Difference between — Limitation — Starting point.*

Per *Mya Bu, J.*—That there is a substantial distinction between an adjustment and a payment cannot be doubted; for such distinction is recognized by Art. 174, Limitation Act. A payment is not a contract of an executory nature whereas an adjustment is a contract of such nature. Art. 174 fixes the time of commencement of the period of limitation at the date of the making of the adjustment. (*Mya Bu and Sharpe, JJ.*) CHOKALINGAM CHETTYAR *v.* NARAYANA CHETTYAR. **178 I.C. 20=11 R.R. 215 =A.I.R. 1938 Rang. 328.**

——**O. 21, R. 2** (3)—*Agreement between judgment-debtor and decree-holder that balance of decree would be paid by instalments and that decree-holder will not be entitled to interest amount to adjustment—If cannot be recognised unless certified.*

The obvious policy of the legislature is to prevent a controversy during execution proceedings as to whether the dispute between the parties has been settled and the legislature enacting O. 21, R. 2 has used words which are of widest implication. Reference has been made not merely to payment but a payment of a part or a whole. Where part payment of the amount due under a decree is made by the judgment-debtor and it is agreed between the parties that not only the balance of the decree but also another decree should be paid by instalments and that the decree-holder would accept the instalments without interest, the arrangement amounts to an agreement which is certifiable under O. 21, R. 2, although only part of the decree is paid. Such an agreement affects the right of the decree-holder to execute the decree and it amounts to an adjustment and cannot be recognised unless certified. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. **162 I.C. 482=8 R.P. 534 (2)=1936 P.W.N. 219 =A.I.R. 1936 Pat. 253.**

——**O. 21, R. 2** (3)—*Agreement, not certified—If can be urged as objection to execution—Application for certification to be before objection to execution.*

Sub-Cl. (3) of R. 2, O. 21, clearly contemplates a certification before the objection is taken to the execution on the basis of an adjustment or payment in satisfaction of the decree or when the executing Court is about the business of execution, and, as such it is too late to apply for certification under O. 21. It is too late, when an objection is taken to the proceedings in execution, to assert that there is an agreement which has not so far been certified. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. **162 I.C. 482=8 R.P. 534 (2)=1936 P.W.N. 219=A.I.R. 1936 Pat. 253.**

——**O. 21, R. 2** (3)—Applicability and scope—Instalment decree with default clause—Execution —Plea of payment and non-default—Burden of proof—Power of executing Court to inquire into payments. *See* C. P. CODE, S. 47 AND O. 21, R. 2 (3). **17 Pat. 128.**

——**O. 21, R. 2** (3)—*Scope—Maintenance decree charging properties—Execution against one property—Sale and purchase by decree-holder—Sale subsequently set aside—Subsequent execution against another item in the hands of purchaser in execution of money decree—Plea that decree was satisfied by receipt of usufruct by decree-holder between sale and its setting aside—Maintainability.*

The respondent, a Hindu widow, got a maintenance decree on 27—9—1932 charging her maintenance on all the properties of the members of the joint family. One of those properties was put up for sale in execution of a money decree obtained by the appellant against the joint family and was purchased by himself on 19—12—1932, the sale being confirmed on 24—8—1933. The respondent in execution of her decree put up for sale one item of family property, other than that purchased by the appellant, and purchased it herself. The sale was confirmed and she got possession on 12—11—1933. The sale was, however, set aside on 30—6—1934, when she lost possession. In a subsequent execution, the respondent sought to enforce her charge against the property purchased by the appellant, and the latter pleaded that the respondent decree-holder, in the interval between the sale and its setting aside, was enjoying the usufruct of the property which was more than sufficient to satisfy her entire dues under the decree, and that therefore that decree was not executable any longer.

Held, that the plea raised by the appellant fell under O. 21, R. 2 (3), of a payment or adjustment, which was not certified or recorded in the manner provided for in the rule, and that no such payment or adjustment could be recognised by the executing Court.

Held, further, that the objection was without merit also as the objector was not the owner of the property in question, the sale of which was set aside. (*Varma and Rowland, JJ.*) SAH RADHA KRISHNA *v.* MT. BECHNI DEBI. **186 I.C.**

187=6 B.R. 302=12 R.P. 456=1939 P.W.N. 716 =A.I.R 1940 Pat. 56.

——— **O. 21, R. 2 (3)**—*Scope and effect of—Uncertified payment—If can be taken note of to save limitation for execution.*

A decree-holder cannot certify an alleged payment by the judgment-debtor in order to save limitation for execution after an objection has been taken either by an officer of the Court before issue of notice to the judgment-debtor or by the judgment-debtor when he appears to contest the application for execution on the score of limitation. A payment which is not previously certified by the decree-holder as required by O. 21, R. 2, C. P. Code, cannot be relied on by him or regarded by the Courts as saving limitation. (*Harries, C. J.*) BHOBANI NAIK *v.* BALARAM DHAL. **6 Cut.L.T. 5.**

——— **O. 21, R. 2 (3)**—*Uncertified adjustment—Claim to restitution—Adjustment of claim—Non-certification—Effect.*

An adjustment of a claim to restitution consequent on the variation of a decree on appeal is not the same thing as the adjustment of a decree, though it is no doubt based on the appellate Court's decree. A claim for restitution before it is allowed by the Court of first instance, cannot be regarded as a decree or order of the Court and an adjustment of a claim to restitution, which is uncertified, is not hit by O. 21, R. 2, (*Pandrang Row, J.*) SUNDARARAJAN CHETTIAR *v.* SETHURAMA SWAMI CHETTY. **1936 M.W.N. 758 =166 I.C. 911=9 R.M. 408=44 L.W. 287=A.I.R. 1936 Mad. 840=71 M.L.J. 344.**

——— **O. 21, R. 2 (3)**—*Uncertified payment—If will be recognised.*

O. 21, R. 2 (3) is mandatory and means that, if there is a question of any payment in satisfaction of the decree or adjustment of the decree which has not been certified, the Court shall refuse to recognise it in execution proceedings. (*Wort, J.*) BANARSI LAL *v.* BORHO SAHU. **162 I.C. 482=8 R.P. 534 (2)=1936 P.W.N. 219=A.I.R. 1936 Pat. 253.**

——— **O. 21, R. 4**—*Decree in suit excluded from cognisance of Small Cause Court—Order transferring decree for execution to Small Cause Court—Validity of order—Jurisdiction of Small Cause Court to question.*

Where an application is made under O. 21, R. 4, C. P. Code, for transmission of a decree to a Small Cause Court for execution by the latter, it is the function of the transferring Court to decide whether the transfer can or cannot be made, and if it does transfer the decree, the Court to which it is transferred is not competent to reopen that order, on the ground that in its opinion the suit in which the decree in question has been passed was one exempted from the cognisance of the Small Cause Court and that it has no jurisdiction to execute the decree. Once the decree has been transferred after notice to the judgment-debtor, the transferee Court must take the transfer to be valid and execute the decree; it has no jurisdiction to determine the correctness or propriety of the order transferring the decree to it for execution. (*McNair, J.*) JYOTESWAR BANERJEE *v.* SURENDRA NATH GHOSE. **165 I.C. 625=9 R.C. 436=40 C.W.N. 267.**

——— **O. 21, Rr. 5 and 8**—*Applicability and scope—Decree—Transfer to another Court for execution—Order of transfer when takes effect—Transfer to District Court for transmission to Court of execution or transfer to District Court for execution—Distinction.*

Rr. 5 and 8 of O. 21, C.P. Code, are distinct and independent. R. 8 applies only to those cases in which a decree is sent for execution to the District Court in the same or another District, in which cases the District Court is not obliged to execute the decree itself. When the decree is not sent to the District Court for execution, but for transmission to a Subordinate Court for execution, the District Court cannot execute decree. In such cases, the order of transfer takes effect from the date on which the order for transfer is made. (*Burn and Stodart, JJ.*) VENKATARATNAM *v.* CHINNAYYA. **187 I.C. 758=12 R.M. 759=1939 M.W.N. 1244=50 L.W. 764=A.I.R. 1940 Mad. 214.**

——— **O. 21, R. 5**—*Decree not transferred through District Court—Effect.*

The provisions of O. 21, R. 5, C. P. Code, are mandatory, and a decree cannot but be sent to the District Court. Consequently if it is sent to any other Court that Court has no jurisdiction at all from the very start. (*Din Mohammad, J.*) BARKAT RAM *v.* BHAGWAN SINGH. **42 P.L.R. 404 =A.I.R. 1940 Lah. 394.**

——— **O. 21, R. 5**—*Munsiff transferring decree for execution to Sub-Judge in same district—Legality.*

A Munsiff transferred a decree for execution to the Subordinate Judge in the same district, though there was no express prayer for the transfer by the decree-holders. There was some irregularity in the manner of transfer but the decree-holders acquiesced in it.

Held, that the Munsiff could transfer the decree as both the Courts were situate in the same district, and the irregularity in the manner of transfer did not prevent the Subordinate Judge from having seisin over the execution. (*R. C. Mitter, J.*) KSHIRODE CHANDRA PAL *v.* BRAHMANATH PAL. **166 I.C. 374=9 R.C. 508= 64 C.L J. 47=A.I.R. 1936 Cal. 571.**

——— **O. 21, R. 5**—*Transfer of decree to another district—Omission to send it through District Court—Irregularity, if can be waived.*

There is no justification for the view that if the mode of transfer laid down in O. 21, R. 5 is not strictly followed, the proceedings of the Court to which the decree had been transferred must of necessity be without jurisdiction and become a nullity. Where a decree is transferred to another district for execution the omission to transfer the decree through the Court of the District Judge as required by the rule, is an irregularity in procedure which could be waived. Where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who allows the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence. (*Coldstream, J.*) CHETAN LAL *v.* JAGAT PRASAD. **164 I.C. 917=9 R.L. 173=39 P.L.R. 284=A.I.R. 1937 Lah. 174.**

——— **O. 21, Rr. 5 and 6**—*Transfer on decree to another District—Certificate of non-satisfaction sent to Senior Subordinate Judge instead of to District Judge—Irregularity.*

If a decree is transferred to another district for execution, the certificate of non-satisfaction should no doubt be addressed to the District Judge of that district. But where it is addressed to the Senior Subordinate Judge but is actually presented to the District Judge who transferred the same for execution of the decree to a Subordinate Court of the district, the mistake in the certificate is an accidental one, and the proceedings in execution taken before the Subordinate Court are not illegal and *ultra vires*, especially when no objection is taken at the earliest opportunity by the judgment debtor. (*Jai Lal, J.*) DUNI CHAND GOKAL CHAND *v.* BRIJ LAL & SONS. **164 I.C. 693=9 R.L. 153 (1)=38 P.L.R. 505=A.I.R. 1936 Lah. 765.**

———**O. 21, R. 6**—Order under S. 39, allowing simultaneous execution in two Courts—Notice to judgment-debtor—Necessity. *See* C. P. CODE, S. 47. **41 Bom.L.R. 481.**

———**O. 21, R. 6 (b)**—*Scope—Mistake as to number of suits and names of judgment-debtors in certificate—Effect—If fatal—Application for execution—If not in accordance with law—Omission of decree-holder to correct mistake—If invalidates application for execution—Limitation Act, Art.* 182 (5).

Where the Court transmitting a decree for execution to another Court has fully complied with all the requirements of O. 21, R. 6, C.P. Code, and the copy of the decree sent to the executing Court contains all the correct particulars as to the number of suit and the names of the judgment-debtors, the mere fact that there is a mistake in the certificate of non-satisfaction of the decree as to the number of the suit and the names of the judgment-debtors would not affect the jurisdiction of the execution Court to proceed with the execution. The mistake is a mere irregularity. Even an omission to send the certificate of non-satisfaction would only be an irregularity and would not affect the jurisdiction of the transferee Court to entertain an application for execution of decree. Neither the mistake in the certificate of non-satisfaction nor the omission of the decree-holder to have the mistake in the certificate corrected would render his application for execution one not in accordance with law. Any default on the part of the decree-holder in prosecuting his application for execution after it has been filed cannot invalidate his application which is otherwise in accordance with law. (*Fazl Ali and Agarwala, JJ.*) KAMESHWAR PRASAD SINGH *v.* LALU MAL. **178 I.C. 624=11 R.P. 279=5 B.R. 124=1938 P.W.N. 73=A.I.R. 1938 Pat. 513.**

———**O. 21, R. 6 (2) (Allahabad)**—*Decree-holder returning copy and certificate to issuing Court—Effect of.*

It is open to a decree-holder, who obtains personally the certificate and copy of the decree in accordance with O. 21, R. 6 (2), either to take them to the Court to which they are sent, or, if for some reason he does not desire to do so, to return the copy and the certificate to the Court which issued them. If he takes the latter action, then the Court which passed the decree becomes again seized of the matter, and is either able to grant execution itself, or to grant a new certificate for transfer. (*Sulaiman, C.J. and Bennet, J.*) MANSA RAM *v.* BADRI PRASAD. **163 I.C. 231=8 R.A. 950=1936 A.L.J. 254=1936 A.W.R. 294=A.I.R. 1936 All. 369.**

———**O. 21, R. 7**—*Transfer of decree for execution—Jurisdiction of transferee Court—Power to go behind decree—Jurisdiction of Court which passed the decree—If can be question.*

A Court to which a decree has been transferred for execution under O. 21, R. 7, C. P. Code, has no power to go behind the decree and to question, or to enquire into, the jurisdiction of the Court which passed the decree. (*Wadia and Macklin, JJ.*) JAGANNATH *v.* SHIVNARAYAN. **166 I.C. 961=9 R.P. 262=38 Bom.L.R. 1023=A.I.R. 1937 Bom. 19.**

———**O. 21, R. 10**—Decree transferred for execution—Power of transferring Court to execute decree subsequently before return of certificate of satisfaction. *See* C. P. CODE, S. 38 AND O. 21, R. 10. **A.I.R. 1940 Sind 11.**

———**O. 21, R. 10**—*Execution application presented after office hours—Validity.*

An application for execution presented to a clerk duly authorised to receive it, is valid though it is presented beyond the office hours, provided the clerk has accepted it. (*Puranik, J.*) KISHAN LAL RAM NIWAS *v.* NARAEN KISAN. **I.L.R. (1938) Nag. 451=174 I.C. 597=10 R.N. 404=A.I.R. 1938 Nag. 46.**

———**O. 21, R. 10**—Holder of decree—If decree-holder as defined by S. 2 (3). *See* C. P. CODE, S. 2 (3) AND O. 21, R. 10. **21 Pat.L.T. 146.**

———**O. 21, R. 10**—Holder of a decree—Meaning. *See* C. P. CODE, O. 21, R. 16. **A.I.R. 1937 Pat. 607.**

———**O. 21, Rr. 10 and 11**—*Transfer of British Indian decree to Burma Court for execution—Transfer prior to 1st April,* 1937, *but application for execution after that date—Effect.*

Where a decree of a British Indian Court is transferred for purposes of execution to a Court in Burma before the 1st of April, 1937, the date on which Burma became separated, but the application for execution as required by O. 20, Rr. 10 and 11 was in fact made after that date, it cannot be executed by Courts in Burma as after the 1st of April, 1937, the British Indian Court has become a foreign Court and its decree cannot be executed when there is no reciprocal arrangement between India and Burma for purposes of execution. (*Baguley and Mosely, JJ.*) K. K. K. M. CHETTIAR *v.* SELLAMI ACHI. **1938 Rang.L.R. 355=179 I.C. 374=11 R.R. 313=A.I.R. 1938 Rang. 385.**

———**O. 21, R. 11**—*Absence of verification and particulars—Effect.*

Where an execution application was not verified, nor contained the particulars required by R. 11 of O. 21 it should not be entertained. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

———**O. 21, R. 11**—*Amendment of execution application—Form.*

An application to amend an existing or pending execution application, should be in the form prescribed by O. 21, R. 11. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

———**O. 21, R. 11**—Applicability—Decree for payment of money—Proceedings between husband and wife under Guardians and Wards Act for custody of minor children—Consent order for payment of maintenance and school expenses of children to wife or school authorities—Executability as money decree. *See* GUARDIANS AND WARDS ACT. **41 Bom.L.R. 625.**

——O. 21, R. 11—Applicability—Restitution—Application for—Form of. *See* C. P. Code, S. 144. **A.I.R. 1937 Mad. 173.**

——**O. 21, R. 11**—*Application for arrest of judgment-debtor—High Court on revision directing judgment-debtor to pay certain sum monthly as condition for exemption from arrest—Subsequent application by decree-holder for arrest of judgment-debtor—Discretion of lower Court.*

Where on application by the decree-holder under O. 21, R. 11 for leave to execute a decree by the arrest and imprisonment of the judgment-debtor, the judgment-debtor, although it is open to him under O. 21, R. 11 to apply for instalments does not file a formal application to that effect but merely relies on an affidavit praying for instalments and the Court orders payment of decree by instalments but the High Court on revison from the order, passes an order, directing the judgment-debtor to pay a certain sum monthly as a condition for his exemption from arrest and imprisonment and it appears that the High Court in passing the order regarded the application before it as being what was the right order for the lower Court to pass on an application under O.20, R. 11 and that it did not purport to consider the case on the footing that the order sought to be revised was one under O. 21, R. 40, the discretion of the lower Court on a subsequent application for execution under O. 21, R. 11 is not fettered by the order of the High Court and it is open to it to pass on order which it, in its discretion, deems fit. (*Page, C.J. and Ba U, J.*) Mahomed Siddique Ahmed *v.* Karam Ali Khan. **163 I.C. 578=9 R.R. 31=A.I.R. 1936 Rang. 280.**

——**O. 21, R. 11**—*Application for execution—Application for sale of goods attached before judgment—If one for execution—Order at time of decree that attachment before judgment shall continue—If one in execution—Calcutta High Court Rules (O.S.), Ch. 27, R. 10—C. P. Code, O. 39, R. 6.*

An order by the Court at the time of the decree that the attachment effected before the judgment shall continue is not an order in execution. Nor can an application made by the plaintiff under O. 39, R. 6, C. P. Code, for sale of the goods attached before judgment be regarded as an application for execution of a decree as contemplated by O. 21, R. 11, C. P. Code, or by R. 10 of Ch 27 of the High Court (O.S.) Rules. (*Mc Nair, J.*) Grahams Trading Co., Ltd. *v.* Narrottamdas Harjeebandas. **I.L.R. (1937) 2 Cal. 1=40 C. W.N. 1317.**

——**O. 21, Rr. 11 and 17**—*Application not complying with provisions laid down—Effect of.*

An application to take effect under O. 21 should be presented in accordance with the provisions as laid down therein, and unless the Court rejects the application or calls upon the decree-holder to amend it under sub-R. (1) of R. 17, there is no proper application before the Court. (*Addison and Din Mahomed, JJ.*) Pir Taj-ud-din *v.* Khambatta. **179 I.C. 146=11 R.L. 536=40 P. L.R. 857=A.I.R. 1938 Lah. 515.**

——**O. 21, R. 11**—Requirements of—If necessary for applications under S. 39, C. P. Code. *See* C. P. Code, S. 39. **1937 A.M.L.J. 113.**

——**O. 21, R. 11 (2)**—*Application presented by son of decree-holder—No mention in application that son was acquainted with facts of case—If properly made.*

Where an application for execution was presented by the son of a decree-holder on his behalf and the Court returned the application for amendment as not being made by the proper person under O. 21, R. 11 (2), C. P. Code, no mention being made in the application that the son was acquainted with the facts of the case.

Held that the application was rightly returned by the Court under O. 21, R. 11 (2), C. P. Code, and such application could not be said to be pending in Court when it was not filed afterwards by making proper amendment. (*Davis, J.C. and Mehta, A.J.C.*) Lakhmichand *v.* Gokaldas. **31 S.L.R. 14=170 I.C. 493=10 R.S. 60=A.I.R. 1937 Sind 108.**

——**O. 21, R. 11 (2)**—*Construction and scope—Right to apply for execution—Application not signed by decree-holder and presented by vakil without authority—Sufficiency of.*

O. 21, R. 11 (2) only describes the form of an execution application and merely sets out the forms in which the application is to be drafted. Any person acquainted with the facts can sign or verify the written application, but only the holder of the decree can apply to the Court for execution. An execution application which is not signed by the decree-holder and presented by a vakil without proper authority is not a proper application at all. It cannot be regarded as effective as having been presented by a person acquainted with the facts. (*Horwill, J.*) Appaji Chetti *v.* Govindaswamy Reddi. **174 I.C. 28=10 R.M. 661=1937 M.W.N. 355=A.I.R. 1937 Mad. 760.**

——**O. 21, R. 11 (2)**—*Execution application—Ground of extension of limitation—Omission to mention—If fatal.*

It is only under O. 7, R. 6, C. P. Code, that the ground of exemption from the law of limitation should be expressly urged but no corresponding provision is made in the case of applications for execution. Consequently an omission to mention the ground of extension of the period of limitation in an application for execution cannot be treated as fatal. (*Din Mohammad, J.*) Ismail *v.* Anjuman Imdad Qarza, Mauza Banga. **188 I.C. 891=13 R.L. 64=42 P.L.R. 10=A.I.R. 1940 Lah. 178.**

——**O. 21, R. 11 (g)**—*Particulars of interest due—When may be furnished.*

Particulars of interest due are not required by O. 21, R. 11 (*g*) or by any other provision of the Code; that is to say, as it is not required that applications for execution shall contain these particulars they can be furnished by the decree-holder at any time after issue of notice to the judgment-debtor, when evidence is taken or before orders are passed for the purpose of ascertaining the amount due. (*Mya Bu and Mosely, JJ.*) P. L. S. P. Chettyar *v.* U. Than Pe. **184 I.C. 769=12 R.R. 170=A.I.R. 1939 Rang. 345.**

——**O. 21, R. 11 (2) (i)**—*Decree against firm—Execution against partner—Right of decree-holder.*

In the case of a decree against a firm, the decree-holder or a transferee decree-holder has a right to apply for execution against any one or more of the partners of the firm, the firm being only a collective name of the individuals who are the members of the partnership. (*Wadia, J.*)

BAIJNATH RAMCHANDER *v.* BINJRAJ JOOWARMAL BATIA & Co. I.L.R. (1937) Bom. 691=39 **Bom. L.R.** 540=170 **I.C.** 877=10 **R.B.** 143=**A.I.R. 1937 Bom.** 365.

——**O. 21, R. 12**—*Application for attachment of movable property in possession of judgment-debtor—Decree-holder, if bound to supply inventory of articles or their value.*

Where the movable property sought to be attached is in the possession of the judgment-debtor, the decree holder cannot reasonably be called upon to supply either an inventory with an accurate description of the articles sought to be attached or their approximate value. (*Bartley and Nazim Ali, JJ.*) MUNICIPAL COMMISSIONER OF HOWRAH *v.* SHAIK MOSAFIR. **174 I.C. 878** (1)=10 R.C. 739 (1)=**42 C.W.N. 285=A.I.R. 1938 Cal. 235.**

——**O. 21, R. 12**—Scope and applicability. *See* C. P. CODE, S. 50 AND O. 22, RR. 11 AND 12. **1938 N.L.J. 312.**

——**O. 21, R. 13**—Applicability—Arbitration—Reference in pending suit—Order that if award not filed by specified date trial to go on that day—Award not filed—Suit decreed *ex parte*—Application to set aside—Proper procedure. *See* C. P. CODE, SCH. II, PARA. 8. **71 M.L.J. 648.**

——**O. 21, R. 13**—Scope—Omission to give proper description of property—Effect—Application, if not in accordance with law. *See* LIMITATION ACT, ART. 182 (5). **(1940) 1 M.L.J. 477.**

——**O. 21, R 13 (7)**—*Property attached specified as owned by judgment-debtors—Share of each judgment-debtor—If should be mentioned.*

A decree-holder asked the Court to bring to sale certain properties described as a half-share belonging to the judgment-debtors in certain specified holdings. What was the exact interest of each of the judgment-debtors individually in the property was not specified. It was stated that the whole of this half-share belonged to the judgment-debtors. The sale was challenged on the ground that it had not been specified exactly what share each of the different judgment-debtors possessed.

Held, that it was not necessary that this should be done. The decree-holder held a decree against each of the judgment-debtors. He had brought this property to sale because it was the property of one or other or all the judgment-debtors and that was sufficient for his purpose. What the Court sells is the right, title and interest of the judgment-debtors in this property. It is no part of the Court's duty to enter into an enquiry as to the exact proportion of each of the judgment-debtor's interest in this property. (*Mya Bu and Mackney, JJ.*) ARUMUGAM CHETTIAR *v.* RAMANATHAN CHETTIAR. **179 I.C. 162=11 R.R. 301=A.I.R. 1938 Rang. 433.**

——**O. 21, R. 14** — *Applicability—Mortgage decree.*

O. 21, R. 14, C. P. Code, is inapplicable to a mortgage decree. The opening words of the rule clearly show that it applies only to cases where an application is made for attachment of any land, and no attachment is required in the case of a decree for sale based on a mortgage. (*Srivastava, Ag. C.J. and Smith, J.*) CHANDIKA *v.* KAMLA PRASAD. **13 Luck. 162=167 I.C. 34=9 R.O. 358 =1937 O.W.N. 169=1937 O.L.R. 86=A.I.R. 1937 Oudh 233.**

——**O. 21, R. 15**—*Duty of Court under—Application for execution by some decree-holders only.*

K and *G* brought a redemption suit against the mortgagee. While an appeal to the High Court was pending, certain persons purchased the right, title and interest of *K* and *G* in the mortgaged property and were added as parties in the appeal. A decree was passed by the High Court in favour of all including *K* and *G*. Subsequently *K* and *G* applied for payment to themselves the costs incurred in the litigation but the Court rejected their prayer.

Held, that as the names *K* and *G* appeared as decree-holders in the High Court's decree. *K* and *G* could claim the costs incurred in the litigation under O 21, R. 15. The Court should have allowed *K* and *G* to execute the decree after protecting the interest of the remaining decree-holders. (*Rowland, J.*) GUPTESWAR MISSIR *v.* RADHA MOHAN. **3 B.R. 656=10 R.P. 76=170 I.C. 99=A.I.R. 1937 Pat. 253.**

——**O. 21, R. 15**—*Joint decree—Application for execution not on behalf of all—Defect, if fatal.*

Where an execution application although filed by only one of two joint decree-holders, does not purport to have been filed on behalf of both, such a defect is fatal to the application. (*Weston.*) MAN MAL *v.* KANWARI LAL. **1937 A.M.L.J. 89.**

——**O. 21, R. 15**—*Joint decree-holders—Application by one to execute decree—Competency—Conditions.*

In order to comply with R. 15 of O. 21, C. P. Code, it is necessary to state in the application by one joint decree-holder that the application is taken out on behalf of the applicant and for the benefit and on behalf of the other persons entitled to the decree. (*Wort and Varma, JJ.*) SHEIKH MOHAMMAD ANAS *v.* BHUPENDRA PRASAD SHUKUL. **17 Pat. 223=177 I.C. 992=11 R.P. 199=19 Pat.L.T. 901=5 B.R. 41=A.I.R. 1938 Pat. 457.**

——**O. 21, R. 15**—*Joint decree-holders—Execution by one in respect of his share only—Competency.*

It is not open to one of several decree-holders to apply for execution of a joint decree in respect of his share only; nor can the Court allow such execution for a share only. (*Norman, I.C.S.*) MUHAMMAD AZIZ ULLAH *v.* ABDULLA. **1936 A.M.L.J. 32.**

——**O. 21, Rr. 15 and 22**—Notices under—If "revivor"—Limitation Act, Art. 183. *See* LIMITATION ACT, ART. 183, PROVISO. **15 Pat. 102.**

——**O. 21, R 15**—*Omission to state that execution is for benefit of all decree-holders—Application, if invalidated—Execution application by one partner of decree in favour of firm—Effect.*

Where one or any of the decree-holders file an execution application without stating on that application that they are acting in the interests of the whole body of the decree-holders, their action does not necessarily invalidate the execution application and if any such defect is pointed out amendment of the application should be allowed. But these remarks do not apply strictly where a firm is concerned. So soon as the name of the firm is entered in an application, this entry automatically signifies that the application is being made on behalf of all the partners in the firm. (*Davies.*) KISHAN DAS *v.* NOOR MOHAMED. **1939 A.M.L.J. 154.**

———O. 21, R. 15—*Partition decree—Execution by one of defendants for benefit of all—Permissibility.*

A partition decree cannot be regarded as one passed jointly in favour of all the defendants so as to enable one of them to apply for its execution for the benefit of all under O. 21, R. 15, C. P. Code. (*Skemp, J.*) Brahm Dutt *v.* Narsi Ram. **183 I.C. 100=12 R.L. 102=41 P.L.R. 135=A.I.R. 1939 Lah. 302.**

———O. 21, R. 15—*Scope—Application by one of several decree-holders—Omission to state that application is on behalf of all—If fatal.*

In an application to execute a joint decree by one of several joint decree-holders, it is incumbent on the applicant to state specifically in the application that it is filed on behalf of all the decree-holders. Omission to so state is fatal to the application. (*Norman, I C.S.*) Muhammed Aziz Ullah *v.* Abdulla. **1936 A.M.L.J. 32.**

———O. 21, R. 15—*Scope—Non-compliance with—If fatal—Several decree-holders—Execution application by one only—Omission to mention existence of others—Effect—Applicant acting honestly—Power of Court to direct amendment.*

The omission in an application for execution by one of several decree-holders to mention that there are other decree-holders does not necessarily invalidate the application. Where the applicant has acted honestly in filing such an application, the Court should not dismiss the application, but should allow him to amend the application so as to bring it in conformity with the requirements of R. 15 of O 21. (*Burn and Stodart, JJ.*) Veerammani *v.* Rajaveerabasava Chikka Royal. **I.L.R. (1939) Mad. 338=49 L.W. 115=1939 M.W.N. 9=185 I.C. 500=12 R.M. 550=A.I.R. 1939 Mad. 278=(1939) 1 M.L.J. 39.**

———O. 21, R. 16—Applicability—Award under Co-operative Societies Act—Execution by assignee. *See* Madras Co-operative Societies Act, S. 51 and R. 15. **(1940) 2 M.L.J. 216.**

———O. 21, R. 16—*Applicability—Decree against several persons—Death of one judgment-debtor—Right of deceased surviving to decree-holder and some judgment-debtors — Executability of decree.*

In a suit on a promissory note by the assignee thereof, a decree was passed against the executants and the assignor of the note was a Hindu female. The assignor died later on leaving the plaintiff and defendants 8 to 10 as her reversionary heirs. Plaintiff having applied for execution of the decree, defendants 8 to 10 pleaded that the decree had become inexecutable by reason of O. 21, R. 16, C. P. Code.

Held, (i) though O. 21, R. 16, did not in terms apply to the case, the principle underlying the section applied, namely, that where the decree-holder's right and the judgment-debtor's liability became united in one and the same individual, the decree should be treated as satisfied; (ii) that since plaintiff became entitled only to a one-fourth share of the properties of the 7th defendant, the decree became inexecutable only to that extent, and that defendants 8 to 10 could be proceeded against for the three-fourths of the amount of the decree. (*Venkatasubba Rao and Abdur Rahman, JJ.*) Sankaralingam Pillai *v.* Arumugham Pillai. **I.L.R. (1939) Mad. 73=177 I.C. 331=11 R.M. 307=1938 M.W.N. 572=48 L.W. 32=A.I.R. 1938 Mad. 814=(1938) 2 M.L.J. 156.**

———O. 21, R. 16—*Applicability—Decree in favour of father of joint Hindu family—Execution by sons—C. P. Code, O. 21, R. 10.*

A joint Hindu family consisted of father and sons. Partition was effected by metes and bounds between the father and sons by a decree based on as arbitration award. The father subsequently obtained a decree against the judgment-debtor in respect of a joint family debt. Subsequently one of the sons filed an application for execution of the decree.

Held, that as there was no assignment in writing, the provisions of O 21, R. 16 did not apply and no notice was necessary.

Held also, that as the debt on which the decree was based was a debt due to a joint family, the son, had an interest in the decree and they were the holders of the decree within the meaning of O. 21, R. 10. The fact that no mention of the decree was made in the arbitration award was immaterial. The application was therefore in accordance with law. (*Wort and Varma, JJ.*) Ramsewak Prasad *v.* Saran Singh. **172 I.C. 100=10 R.P. 277=1937 P.W.N. 717=A.I.R. 1937 Pat 607.**

———O. 21, R. 16—*Applicability—Decree obtained by Hindu father—Death of father—Execution by sons—Necessity for recognition by Court which passed decree.*

The sons of a deceased Hindu who was the sole decree-holder are not decree-holders who can execute the decree without recognition by the Court which passed the decree on the devolution upon them of the decree. The decree is, on their father's death, transferred to them by operation of law, and O. 21, R. 16, C. P. Code. is applicable. (*Burn and Stodart, JJ.*) Narayanan Chetty *v.* Panchanathan Chettiyar. **I.L.R. (1940) Mad. 79=187 I.C 352=12 R.M. 724=50 L.W. 605=1939 M.W.N. 1046 (1)=A.I.R. 1940 Mad. 89=(1939) 2 M.L.J. 758.**

———O. 21, R. 16—*Applicability—Decree transferred for execution to another Court—Death of decree-holder before starting of proceedings in transferee Court—Procedure—Right of legal representative to continue proceedings in transferee Court—Necessity for application to Court which passed decree under O. 21, R. 16.*

A legal representative of a deceased decree-holder is deemed a transferee of the decree by operation of law, and as such is entitled to apply for the execution of the decree to the Court which passed the decree, under O. 21, R. 16, C. P. Code. The transferee of a decree or the heir of a decree-holder cannot present an application for its execution unless he first obtains an order under O. 21, R. 16, that he is the person entitled to execute the decree as the transferee or the legal representative of the original decree-holder, as the case may be. Where a decree has been transferred for execution to another Court, but the decree-holder dies before starting the execution proceedings in that Court, his legal representative cannot continue the proceedings in the Court to which the decree has been transferred; he has to start fresh proceedings in the Court which passed the decree under O. 21, R. 16. He has to seek an order under O. 21, R. 16 from the Court which passed the decree and have that order remitted to the Court to which the decree has been transferred for execution under O. 21, R. 6 (*c*). If the application under O. 21, R. 16 is granted by the Court which passed the decree, it may make an endorsement of that order on the decree and send a copy of the order along with the other papers to the Court to which the decree is transferred. It is after such an order is passed that the legal representative is clothed with the status of a decree-holder, and is then empowered to institute execution proceedings in the Court to which the decree is transferred. If the decree has ceased to be capable of execution by being time-barred, then the legal representative is not entitled to have an order passed in his favour under O. 21, R. 16. (*Lokur, J.*) Brijmohandas Damodardas *v.* Sadashiv Laxman. **187 I.C. 85=12 R.B. 407=41 Bom.L.R. 1190=A.I.R. 1940 Bom. 5.**

———**O. 21, R. 16**—*Applicability—Preliminary decree for mesne profits—Application for ascertainment—Assignment pending inquiry—Assignee brought on record and final decree passed—Application for execution—If falls under O. 21, R. 16.*

O. 21, R. 16, C. P. Code, is primarily intended for those cases where the name of the applicant for execution of the decree does not appear as a decree-holder in the decree but in which he bases his claim to execute on the ground that he is an assignee or transferee of one or more decree-holders. Where a preliminary decree for mesne profits is assigned pending an inquiry into the mesne profits, and the assignee is substituted and gets a final decree passed, an application by him to execute that final decree is not governed by O. 21, R. 16 or the provisos thereto. (*Fazl Ali and Agarwala, JJ.*) Nand Kishore Lall *v.* Chandrika Prasad Singh. **17 Pat. 206=177 I.C. 830=11 R.P. 189=5 B.R. 26=A.I.R. 1938 Pat. 462.**

———**O. 21, R. 16**—*Application by assignee of decree—Separate application for notice to assignor—If necessary.*

Where an assignee of a decree applies for execution of the decree and requests in the application itself for notice to the assignor it is a sufficient compliance with the law. No separate application for notice to the assignor is required. (*Norman, I.C.S.*) Gulab Chand *v.* Ram Niwas. **1936 A.M.L.J. 79.**

———**O. 21, R. 16**—*Application under—Forum—Decree transferred to another Court for execution — Objection to execution by transferee of decree—If can be entertained by executing Court.*

An application under O. 21, R. 16, C. P. Code can be entertained only by the Court which passed the decree and not by the Court to which the decree is sent for execution. If the judgment-debtor wants to contend that the transferee of the decree is merely a benamidar for the judgment-debtor and the decree could not, therefore, be executed against him, he is bound to raise that objection in the course of proceedings taken on the application under O. 21, R. 16. Such an objection could not be entertained by the Court to which the decree is transferred for execution. (*Srivastava, A.C.J. and Nanavutty, J.*) Jogendra Singh *v.* Oudh Commercial Bank, Ltd. **12 Luck. 755=165 I.C. 891=1936 O.L.R. 696=9 R.O. 267=1936 O.W.N. 1236=A.I.R. 1937 Oudh 111.**

———**O. 21, R. 16**—Application by transferee under—Certification by decree-holder of adjustment without knowledge of transferee—If bar to application by transferee—Remedy of latter. *See* C. P. Code, O. 21, Rr. 2 and 16. **45 L.W. 562.**

———**O. 21, R. 16**—Assignment—Validity of—Right of judgment-debtor to question—Decree in favour of minor assigned by guardian *ad-litem* without leave of Court. *See* C. P. Code, O. 32, Rr. 6 (1) (*b*) and 7 (1). **43 C.W.N. 962.**

———**O. 21, R. 16**—*"Assignment in writing"—Form of—What amounts to—Joint application by holder of decree and another to recognise title of latter to the monies due under decree—Court sanctioning arrangement and passing decree in terms—Effect of.*

Where a joint application is made to the Court by the holder of a decree and another wherein it is stated that the former has no objection to surrender all his rights to the latter and that the Court should confirm that arrangement by a decree declaring the latter's title to the monies claimable under the former's decree, and the Court sanctions such arrangement, there is in effect an assignment in writing as contemplated by O. 21, R. 16, C. P. Code. There is no provision in law prescribing a particular form of such an assignment. Some written authority proceeding from the transferor of the decree is sufficient for the Court to take action on the application of the transferee. (*Wassoodew and Sen, JJ.*) Asundi *v.* Virappa Andaneppa. **I.L.R. (1939) Bom. 271=182 I.C. 779=12 R.B. 44=41 Bom.L.R. 371=A.I.R. 1939 Bom. 221.**

———**O. 21, Rr. 16 and 53, Ss. 47 and 64**—*Assignment of decree after its attachment—Assignee applying to execute decree—Objection by attaching creditor who is also the judgment-debtor, under S. 64 and O. 21, R. 53—Maintainability—Order dismissing the objection—Second appeal.*

N had a decree against *M*, and *M* had a decree against *N* and both of them were decrees for payment of money. *N* attached *M's* decree, and after the attachment, *M* assigned his decree to *G*. *G* made an application under O. 21, R. 16, C. P. Code, for substitution of his name in the place of *M* and for execution of the decree.

Held, that as *N* had a claim enforceable under his attachment, he was entitled to take an objection under the provisions of S. 64, C. P. Code, that the assignment of the decree was void, and that it was also open to him to take an objection under O. 21, R. 53 (6) and show that the decree could not be executed against him.

Held, further, that the order dismissing *N's* objection fell within the scope of S. 47, C. P. Code, and as such a second appeal was competent. (*Ganga Nath, J.*) Narain Sahu *v.* Gopi Nath Naik. **167 I.C. 116=9 R.A. 490=1936 A.W.R. 1167=1937 A.L.R. 128=1936 A.L.J. 1355=A.I.R. 1937 All. 63.**

———**O. 21, R. 16**—*Assignment of decree—Court passing decree making definite order of substitution—Transfer for execution to Court of that province—Power of latter Court to question right of transferee.*

Where the decree-holder has assigned the decree in favour of a person in another province and the Court passing the decree makes a definite order of substitution having complied with the provisions of O. 21, R. 16 and transmits the decree for execution to the Court of that province, the executing Court has to presume that the Court passing the decree has acted according to law, that it complied with the provisions of O. 21, R. 16 and gave notice to the judgment-debtor. Once it is so presumed the executing Court cannot question the transferee's right to the execution of the decree. If there is any defect in the execution application the judgment-debtor should make his objection to the Court which passed the decree. Where he does not do so he cannot object that he had no notice of the transfer and that the executing Court was not competent to execute the decree. (*Haveliwala and Lobo, A.J.Cs.*) Udharam Baharmal *v.* Murari Lal. **167 I.C. 417=9 R.S. 182=30 S.L.R. 249=A.I.R. 1936 Sind 191.**

——**O. 21, R. 16**—*Assignment of decree—Form of.*

No particular form of assignment is prescribed in the case of decrees either under O. 21, R. 16 or by any other provision of law. Anything in writing which transfers a decree and clearly shows that the intention was to assign the decree is sufficient. What is required is an assignment in substance which is in writing. (*Pandrang Row and Menon, JJ.*) Periakatha Nadar *v.* Mahalingam. **1936 M.W.N. 553=166 I.C. 922=9 R. M. 409=44 L.W. 336=A.I.R. 1936 Mad. 543=71 M.L.J. 161.**

——**O. 21, R. 16**—*Assignment of decree pending suit by judgment-debtor against decree-holder with notice of suit—Execution—Right of judgment-debtor to set-off.*

Where the assignee of a decree, has at the time of assignment knowledge of a suit pending at the instance of the assignor's judgment-debtor against the assignor, he purchases the decree subject to the right of the judgment-debtor to claim a set-off when he comes to execute his decree. (*Almond, A.J.C.*) Gopaldas *v.* Beharilal. **161 I.C. 45=8 R. Pesh. 154=A.I.R. 1936 Pesh. 33.**

——**O. 21, R. 16**—*Assignment of decree—Sale of decree by Court—If amounts to—Formal deed of assignment—If necessary.*

Where pending a partnership suit, the Court with a view of protecting the assets of the partnership, itself sells a decree in Court, by auction through Commissioner to the highest bidder from amongst the parties, a formal assignment in the sense of document which in form purports to assign the decree is not required by law provided the orders of the Court amount to an assignment of the decree in substance. (*Pandrang Row and Menon, JJ.*) Periakatha Nadar *v.* Mahalingam. **166 I.C. 922=9 R.M. 409=1936 M.W. N. 553=44 L.W. 336=A.I.R. 1936 Mad. 543=71 M.L.J. 161.**

——**O. 21, R. 16**—*Assignment of decree—What amounts to.*

In a partition suit a decree was passed in favour of the plaintiff. In lieu of the costs incurred by the plaintiff to his solicitors, he executed an indenture in favour of the solicitors. The indenture purported to assign and transfer the full benefit in four sums of money recoverable from the defendants as a result of a decree passed in the partition suit. The solicitors made an application for transfer of the decree for its execution as assignees of the decree.

Held, that as the indenture contained no words which purported to assign the decree itself, the solicitors could not ask for transfer of decree as assignee decree-holders. (*Costello, Ag.C.J. and Edgley, J.*) H. N. Dutta & Co. *v.* Tarubala Dassi. **174 I.C. 936=10 R.C. 735=A.I.R. 1937 Cal. 570.**

——**O. 21, R. 16**—*Construction—"Court which passed the decree"—Award under Co-operative Societies Act—Execution by Civil Court—Assignment—Power of Civil Court to recognise.*

A Civil Court to which an award made by a Registrar of Co-operative Societies under the Co-operative Societies Act has been transmitted for execution has jurisdiction to recognise an assignment of the award under O. 21, R. 16, C. P. Code. (*Wadsworth, J.*) Kannappa Mudali *v.* Varadachariar. **188 I.C. 204=12 R.M. 816=1939 M.W.N. 986=50 L.W. 507=A.I.R. 1940 Mad. 38=(1939) 2 M.L.J. 596.**

——**O. 21, R. 16**—*Construction—"Transfer by operation of law"—"Assignment in writing" if included—Holder of decree declaring title to another decree passed previously—If transferee "by operation of law."*

The phrase "transfer by operation of law" in O. 21, R. 16, C. P. Code, should receive a restrictive interpretation and not an extensive or comprehensive meaning. The expression "assignment in writing" cannot be regarded as illustrative of the supposed general term comprised in the expression "operation of law," the specific import of the two expressions remains unaffected by their connection with one another in O. 21, R. 16. Transfers "by operation of law" are intended to be confined to testamentary and intestate succession, forfeiture, insolvency, and the like. A decree declaring the title of a party to a decree passed previously cannot be regarded as sufficient to effect a transfer "by operation of law" of the right to execute the decree within the meaning of O. 21, R. 16; nor does it *ipso facto* constitute an assignment. At best it creates a right to obtain an assignment of the decree for the purpose of realization of the debt to which the title is conferred. A person who obtains a right to obtain an assignment of a decree already obtained or the monies recoverable thereunder is not a transferee "by operation of law." (*Wassoodew and Sen, JJ.*) Asundi *v.* Virappa Andaneppa. **I.L.R (1939) Bom. 271=181 I.C. 779=12 R. B. 44=41 Bom.L.R. 371=A.I.R. 1939 Bom. 221.**

——**O. 21, R. 16**—*Construction—"Transfer by operation of law".*

The words "operation of law" cannot apply to a case where a person has become the owner of a decree by some transaction *inter vivos.* (*Pandrang Row and Menon, JJ.*) Periakatha Nadar *v.* Mahalingam. **166 I C. 922=9 R.M. 409=1936 M.W.N. 553=44 L.W. 336=A.I.R. 1936 Mad. 543=71 M.L.J. 161.**

——**O. 21, R. 16**—*Construction—"Transferee"—Assignment of decree by deed in writing in name of one benami for another—Benamidar—If transferee—Application by real assignee—If one "in accordance with law"—Limitation Act, Art. 182 (5).*

Where a decree is transferred by a deed of assignment in writing the person named as the assignee in the deed is the "transferee" who is entitled to apply for execution under O. 21, R. 16, C. P. Code, though the assignment in his name is *benami* for another. The real or beneficial transferee is not the "transferee." An application by the real assignee for execution is not in "accordance with law" which would save limitation for a later application under Art. 182 (5) of the Limitation Act. The mere fact that the real assignee gets a decree in a suit declaring that he is the real owner of the decree or the real assignee cannot entitle him to apply in execution or to make his application one in accordance with law. (*Wort and Varma, JJ.*) Shaikh Mohammad Anas *v.* Bhupendra Prasad Shukul. **17 Pat. 223=177 I C. 992=11 R.P. 199=19 Pat.L.T. 901=5 B.R. 41=A.I.R. 1938 Pat. 457.**

——**O. 21, R. 16 and S. 146**—*Decree-holder dying pending execution application—Transfer of decree before his death—Right of transferee and his legal representative to continue pending application.*

A pending execution application does not abate by reason of the death of the decree-holder. In these circumstances, S. 146, C. P. Code, would appear to indicate that the continuation of proceedings which was open to the deceased decree-holder, is also open to the person claiming under him. O. 21, R. 16 no doubt lays down that the transferee of a decree may apply for its execution to the Court which passed it, but it should not be interpreted as implying that he must make a regular and fresh application. O. 21, R. 16 primarily applies in the case where no execution application is already pending, in which case even the original decree-holder can only seek for execution by an application. S. 146, C. P. Code, however refers not only to applications made, but also to proceedings which may be taken. In a case of this nature the decree-holder has the right to proceed with his pending application, and S. 146 gives authority for the person claiming under him to do the same. It is true that S. 146 is qualified by the words "save as otherwise provided by this Code," but there being no express provision of the Code regarding continuance of pending execution application upon the death of the decree-holder, this proviso does not prevent S. 146 being applied to continuation of pending execution application. A.I.R. 1931 Bom. 423; A.I.R. 1930 Cal. 614; A.I.R. 1926 Cal. 957; 3 I.C. 324; 26 Cal. 250; A.I.R. 1932 Mad. 73 (F.B.); A.I.R. 1921 Pat. 180; A.I.R. 1924 Pat. 576 and A.I.R. 1930 Sind 283, Rel. on; A.I.R. 1927 All. 165 (F.B.) Diss. (*Middleton, J. C.*) Mt. Wazir Jan *v.* Ghulam Hussain. **167 I.C. 575=9 R. Pesh. 97=A.I.R. 1937 Pesh. 18.**

——**O. 21, R. 16**—*Decree obtained by Bank transferred to another Court for execution—Bank going into liquidation—Right of official liquidator to apply to transferee Court for execution.*

A decree obtained by a Bank was transferred to another Court for execution. In the meantime the Bank went into liquidation and the official liquidator applied to transferee Court for execution. It was contended that O. 21, R. 16, does apply to the facts of the case, as the official liquidator does not come within the ambit of the expression 'transferee of the decree.'

Held, that the official liquidator was merely the agent of the Court for the purposes of liquidation of the Bank. The decree did not vest in him. He could not take any proceedings in execution in his own name. S. 179, Companies Act, makes it quite clear that the official liquidator was not the transferee of the decree and therefore the decree could be executed by the transferee Court on his application made on behalf of the Bank in liquidation and in its name. (*Jai Lal, J.*) Lyallpur Bank, Ltd. *v.* Manohar Lal. **161 I.C. 662=8 R.L. 783 (1)=A.I.R. 1936 Lah. 152.**

——**O. 21, R. 16**—*Non-service of notice—Assignors and judgment-debtor waiving right—Validity of execution sale.*

The notices to which reference is made in O. 21, R. 16, C. P. Code, are merely for the benefit of the transferors and the judgment-debtors and it was apparently the intention of the Legislature to ensure that execution proceedings should not be continued unless the transferors and the judgment-debtors had had a suitable opportunity of coming forward to contest the validity of the assignment if they wished to do so. If, however, the persons directly interested waive their right, acknowledge the validity of the assignment and raise no objection so far as the execution proceedings are concerned, non-compliance with the technical requirements of O 21, R. 16 would not render a sale a nullity, which had been held in the course of execution proceedings in which notices under O. 21, R. 16 had not been served. (*Edgley, J.*) Charubala Dei *v.* Baikuntha Nath Jana. **43 C.W.N. 743=182 I.C. 980=12 R.C. 124=A.I.R. 1939 Cal. 419.**

——**O. 21, R. 16**—*Non-service of notice—Validity of sale.*

The service of notice under O. 21, R. 16, C. P. Code, is an essential pre-requisite to the assumption of jurisdiction by the Court in a proceeding to execute the decree, if the application for execution purports to have been made by one who is not the original decree-holder but describes himself as an assignee of the decree-holder. The non-service of such notice makes the sale held in execution of that decree void *ab initio,* although the purchaser is not the decree-holder himself but an absolute stranger. (*Mukherjea, J.*) Surifa Khatoon *v.* Assimannessa Bibi. **178 I.C. 257=42 C.W.N. 949=11 R.C. 336=A.I.R. 1938 Cal. 734.**

——**O. 21, R. 16**—*Person obtaining decree against decree-holder entitling him to share in decretal amount—If transferee of decree.*

A person cannot be regarded as transferee of a decree by operation of law by his merely obtaining a decree against the decree-holder entitling him to a certain share in the decretal amount. Such a person, therefore, has no *locus standi* to maintain an application under O. 21, R. 16, C. P. Code. (*Srivastava, C.J. and Madeley, J.*) Taqir Husain *v.* Mahomed Akhtar. **13 Luck. 549=170 I.C. 904=10 R.O. 58=1937 O.L.R. 489=1937 O.W.N. 882=A.I.R. 1937 Oudh 471.**

——**O. 21, R. 16**—*Procedure—Execution by transferee—Procedure—Preliminaries—Jurisdiction to issue notice and to recognise assignment—Court which passed the decree or transferee Court.*

The proper procedure to be followed by the transferee of a decree under O. 21, R. 16, C. P. Code, is that he must first apply for execution of the decree to the Court which passed the decree, and pray that the usual notice do issue. After the objections, if any, are heard and the notice is made absolute, the decree may be executed by the transferee in the same manner and subject to the same conditions as if the application were by the decree-holder. The transferee must then apply for execution in the usual mode under O. 21, R. 11, specifying the mode or modes in which the Court's assistance is required. If he desires the decree to be transmitted for execution to another Court he must make the application therefor to the Court which passed the decree. But the mode in which execution is sought need not be stated at first in the application under R. 16. The notice required by that rule must first be issued by the Court which passed the decree. Such a notice cannot be issued by the transferee Court. It is only when the notice is made absolute that the transferee acquires a right to apply for execution under R. 11 (2). (*Wadia, J.*) Baijnath Ramchander *v.* Binjraj Joowarmal Batia & Co. **I.L.R. (1937) Bom. 691=39 Bom.L.R. 540=170 I.C. 877=10 R.B. 143=A.I.R. 1937 Bom. 365**.

——**O. 21, R. 16**—*Recording of assignment of decree—Application for—Maintainability.*

There is no justification for reading into O. 21, R. 16, C. P. Code, provision for anything more than a single application for execution by a transferee of a decree. An application by him for merely recording the assignment of the decree is therefore not competent. (*Sen, J.*) Radha Nath Das *v.* Produmna Kumar Sarkar. **I.L.R. (1939) 2 Cal. 325.**

——**O. 21, Rr. 16 and 18**—*Relative scope—Cross decrees—Assignment of one—If bar to set-off.*

O. 21, R. 18, C. P. Code, is not inapplicable to the case of an assignee of a decree, and R. 16 of O. 21, is no bar to the application of R. 18. When a question of cross-decrees arises the provisions of R. 18 of O. 21 cannot be ignored. (*Bennet, J.*) Girdhar Das *v.* Triloki Nath. **174 I.C. 53=10 R.A. 536=1938 A.L.R. 224=1937 A.L.J. 1371=1938 A.W.R. (H.C.) 3=A.I.R. 1938 All. 130.**

——**O. 21, R. 16**—*Right of assignor—Right to execute.*

There is no authority for the proposition that from the date of assignment of his decree the assignor-decree-holder is precluded from executing the decree. Until the necessary application under O. 21, R. 16, C. P. Code, is made to the Court which passed the decree by the assignee thereof, the only person who can execute it is the person whose name appears on the record as the decree-holder, *i.e.*, the assignor. (*Dunkley, J.*) Ma Tin *v.* Ko Ba Thet. **1939 Rang.L.R. 152=184 I.C. 74=12 R.R. 121=A.I.R. 1939 Rang. 245.**

——**O. 21, R. 16**—Scope—"Decree"—Assignment of—Necessity for writing—Oral assignment—Validity. *See* Sale of Goods Act, S. 2 (7). **41 Bom.L.R. 33.**

——**O. 21, R. 16**—*Transfer by operation of law—Notice to judgment-debtor—Necessity.*

Under O. 21, R. 16, in the case of a decree transferred by operation of law, it is not necessary that notice to the judgment-debtor should

issue. (*Bennet, A.C.J. and Ganga Nath, J.*) Narain Sarup *v.* Daya Shanker. **I.L.R. (1938) All. 425=175 I.C. 590=10 R.A. 700=1938 A.L.R. 450=1938 A.L.J. 308=1938 A.W.R. (H.C.) 160=A.I.R. 1938 All. 256.**

——**O. 21, R. 16**—Transferee decree-holder—Rights—Payment made to decree-holder uncertified but recited in deed of transfer—Right of transferee to execute for whole amount ignoring payment as uncertified. *See* C. P. Code, O. 21, Rr. 2 and 16. **(1937) 1 M.L.J. 296.**

——**O. 21, R. 16 second proviso**—*Applicability—Conditions — Decree for mesne profits — If money decree before ascertainment of amount.*

Before the second proviso to O. 21, R. 16, C. P. Code, can apply, it must be shown that that the decree transferred, is a money decree and that the transfer took place after the decree sought to be executed was passed.

Quaere.—Whether a decree for mesne profits, before the amount is ascertained, can be regarded as a money decree. (*Fazl Ali and Agarwala, JJ.*) Nand Kishore Lall *v.* Chandrika Prasad Singh. **17 Pat. 206=177 I.C 830=5 B.R. 26=11 R.P. 189=A.I.R. 1938 Pat. 462.**

——**O. 21, R. 16, proviso 2**—*Applicability to mortgage decrees.*

A mortgage decree is not a decree for the payment of money within the meaning of proviso 2 to O. 21, R. 16. The proviso therefore does not apply to mortgage decrees as such, but it comes into operation only after the property is sold and a personal decree is passed. (*Rupchand Bilaram and Haveliwala, A.J.Cs.*) Pribhol Narumal *v.* Jethanand Santdas. **31 S.L.R. 47=70 I.C. 46=10 R.S. 38=A.I.R. 1937 Sind 112.**

——**O. 21, R. 16, second proviso**—*Decree for payment of money—If includes mortgage decree for sale.*

The phrase "decree for the payment of money" occurring in the second proviso to O. 21, R. 16 does not include a decree for sale passed in a mortgage suit. Hence there is no bar to the assignee of the decree proceeding on with the execution, although before the assignment of the decree in his favour, he had acquired the interest of one of the judgment-debtors, and the property in his hands was liable to be sold in execution thereof. (*R.C. Mitter and Khundkar, JJ.*) C. K. Bezbarua *v.* Golak Chandra Bizbarua. **183 I.C. 792=12 R.C. 187=70 C.L.J. 143=A.I.R. 1939 Cal. 425.**

——**O. 21, R. 16, second proviso**—*Order substituting purchaser of decree—Subsequent objection that he is benamidar for one of judgment-debtors—If barred by* res judicata.

An objection by a judgment-debtor under the second proviso to O. 21, R. 16, C. P. Code, that the purchaser of the decree whose name has been ordered to be substituted is a benamidar for one of the judgment-debtors, is not barred by *res judicata* by his failure to raise that objection when notice of the application for substitution was served on him, if he was not aware of that fact at that time. (*Zia-ul-Hasan and Hamilton, JJ.*) Sheo Darshan Singh *v.* Rajendra Singh. **173 I.C. 880=1938 O.L.R. 146=10 R.O. 230=1938 O.W.N. 346=1938 O.A. 246=A.I.R. 1938 Oudh 106.**

——**O. 21, R. 17**—*Amendment — Powers of Court—Application for execution by attachment*

—*Particulars of property to be attached not specified—Application to amend by giving particulars after limitation—If can be allowed.*

Under O. 21, R. 17, C. P. Code, it is open to the Court at any time, up to and including the hearing, to make an amendment of an application for execution under the terms of the rule. Where an application for execution by attachment of immovable property, does not specify any property, an application to amend by giving the particulars of the property to be attached may be allowed at the hearing of the application. Rule 17 gives express power to the Court to make amendments and the fact that limitation has expired is irrelevant. Even apart from O. 21, R. 17, the Court has a general jurisdiction to allow amendments. (*Beaumont, C.J. and Wadia, J.*) MAHOMEDBHAI *v.* DAWOODBHAI & Co. **I.L.R. (1938) Bom. 708=177 I.C. 989=11 R.B. 142=40 Bom.L.R. 676=A.I.R. 1938 Bom. 405.**

——**O. 21, R. 17**—Amendment of execution application—Final decree in mortgage suit—Execution—Subsequent decision of appeal from preliminary decree—Necessity to amend final decree or for fresh final decree—Amendment of execution petition in accordance with modification in appeal—Procedure. *See* LIMITATION ACT, ART. 182 (2). **(1937) 1 M.L.J. 407.**

——**O. 21, R. 17**—Amendment of execution petition—Power of Court—Application to amend made after 12 years from date of decree—Competency. *See* EXECUTION—LIMITATION. **71 M.L.J. 256.**

——**O. 21, R. 17**—*Application for execution for a certain relief—Second application asking for a different kind of relief—If one for amendment of the previous application—Decree barred on the date of the second applications—Second application ordered—Legality — Conditions for the applicability of O. 21, R. 17.*

A decree-holder filed an application for execution and asked for the arrest of the judgment-debtor and sale of the holding, if necessary. About nine months afterwards he filed another application for attachment of movables which was ordered.

Held, that the second application is not one for amendment of the previous application under O. 21, R. 17. It is an independent application, asking for a different kind of relief. It marks a substantial departure from the previous application and not a continuation of the execution initiated by that application. It cannot be treated as an application presented on the date on which the original application was presented. As the decree was barred on the date of the second application the attachment is without jurisdiction. The provisions of O. 21, R. 17 require that that the application for execution be returned for amendment for non-compliance with the provisions of Rr 11-14 and the application is thus amended. (*S. K. Ghose, J.*) AZIZ RAHAMAN MOLLA *v.* BEPIN BEHARI MUKHERJI. **174 I.C. 589=10 R.C. 687=66 C.L.J. 57=A.I.R. 1938 Cal. 162.**

——**O. 21, R. 17**—*Scope—Amendment—Powers of Court — Nature of amendment permissible under rule.*

Rowland, J.—The C. P. Code does not make provision for amendment of applications to execute a decree except for the purpose of removing formal defects by reason of which the applications fail to conform to the requirements of O. 21, Rr. 11 to 14 and the decree-holder applies to amend the application under R. 17. Otherwise there is nothing in the Code itself to warrant an execution proceeding being carried on in a different form from that in which it is started. (*Agarwala and Rowland, JJ.*) RAM RAN BIJOY PRASAD SINGH *v.* KESHO PRASAD SINGH. **21 Pat.L.T. 407=A.I.R. 1940 Pat. 571.**

——**O. 21, R. 17 (1)**—*Scope — Power of Court under—Application for amendment of application after limitation—Application for execution made in time—Amendment—If may be allowed—Discretion of Court—Exercise of—Considerations.*

O. 21, R. 17 (1) requires a substantial compliance with Rr. 11 to 14, and if an application is defective, the Court can in its discretion allow the defect to be remedied either then and there or within a time to be fixed by it. It can allow an amendment under the rule, where the amendment is applied for after the expiry of the statutory period of limitation, provided the execution application has been made within time. An amendment of the application made after the period of limitation, should not be dismissed on that ground, but must be considered on its merits, having regard to all the circumstances of the case. The Court has a discretion which it must exercise with regard to all the circumstances. If the amendment will not prejudice the rights of the other parties existing at the time of the application for amendment, the Court can allow it; and the amendment, if allowed, relates back to the date of the application for execution which must have been made within time. (*Wadia, J.*) BAIJNATH RAMCHANDER *v.* BINJRAJ JOOWARMAL BATIA & Co. **I.L.R. (1937) Bom. 691=170 I.C. 877=10 R.B. 143=39 Bom.L.R. 540=A.I.R. 1937 Bom. 365**

——**O. 21, R. 17 (2)**—*Applicability—Execution application—Return for amendment—Re-presentation after due amendment—Effect—Original application not containing list of properties—If bars application of R. 17 (2).*

Under O. 21, R. 17, C. P. Code, where an execution application returned for satisfying any of the requirements of O. 21, Rr. 11 to 14, is re-presented, the effect is that the re-presentation dates back to the date of the original presentation. The mere fact that a list of the properties to be sold for realising the decree amount was not given in the original application would not deprive the decree-holder of the benefit of O. 21, R. 17 (2). (*Somayya, J.*) MUTHUKRISHNA RAJA *v.* VISWALINGA KADAVARAYAR. **1940 M.W.N. 547.**

——**O. 21, R. 18**—Applicability—If affected by S. 73. *See* C. P. CODE, S. 73 AND O. 21, R. 18. **1937 A.L.J. 1371=1938 A.W.R. (H.C.) 3.**

——**O. 21, R. 18**—Applicability to assignee of decree—Set-off—Right to. *See* C. P. CODE, O. 21, RR. 16 AND 18. **1937 A.L.J. 1371=1938 A.W.R. (H.C.) 3.**

——**O. 21, Rr. 18-20**—*Mortgage decree and simple money decree—If can be set-off.*

All that R. 20 lays down is that the provisions of Rr. 18 and 19 shall apply to cross-mortgage decrees, *i.e.*, if two contending parties hold mortgage decrees against each other then they will be able to set off decrees one against the other. There is nothing in the provisions of R. 20 which will warrant the Court in holding that a decree obtained on the foot of a mortgage becomes a decree for payment of money and therefore it can be set off against a simple money decree held by the opposite party. (*Thom and Rachhpal Singh, JJ.*) NAGESAR RAM *v.* RAJNET RAM. **58 All. 907=162 I C. 289=8 R A. 857=1936 A.W. R. 405=1936 A.L.J. 562=A.I R. 1936 All. 639.**

———**O. 21, Rr. 18 to 20**—*Right of set-off—Principle of the rules.*

If *X* has a decree against *A* and *A* and *B* have a decree against *X*, it is clear from illustration (*b*) to R. 18 of O. 21, C. P. Code, as well as on principle, that *X* cannot insist on a set-off. But if *B* and *A* both ask for the set-off and it appears that *A* incurred the debt to *X* on behalf of himself and *B*, the set-off need not necessarily be refused. It is true that under Rr. 18 to 20 of O. 21, C. P. Code, the set-off of decrees is not a discretionary matter depending upon equitable considerations such as may emerge from the circumstances that both decrees arise out of the same transaction. Whatever they arise from, circuity of proceedings thereunder can be avoided and should be avoided—this is the principle of the rules. (*Sir George Rankin.*) HAZARIRAM MARWARI *v.* BANSIDHAR DHANDANIA. **64 I.A. 67=16 Pat. 127=65 C.L.J. 56=1937 A.L.J 553=1937 A.L.R. 117=39 Bom.L.R. 369=1937 P.W.N. 133=1937 O.L.R. 65=3 B.R. 269=166 I.C. 653=1937 A.W.R. 180=45 L.W. 198=18 Pat. L.T. 127=1937 M.W.N. 248=41 C.W.N. 449=9 R.P.C. 156=1937 O.W.N. 150=A.I.R. 1937 P.C. 39=(1937) 1 M.L.J. 254 (P.C.).**

———**O. 21, R. 18**—*Scope—Cross-decrees—Smaller decree—Executability by attaching creditor of smaller decree-holder—Rateable distribution in respect of such decree.*

Under O. 21, R. 18, C. P. Code, in the case of cross-decrees, the smaller decree must always be set off against the larger decree; a creditor who attaches the smaller decree has no greater rights than the holder of such smaller decree, and cannot claim to execute it in spite of the existence of the larger decree held by the judgment-debtor under the attached decree which is smaller. The rule laid down by O. 21, R. 18, C. P. Code, has first to be applied before any question of rateable distribution can arise under S. 73, C. P. Code. The smaller decree merges in the larger decree and cannot be executed. (*Sulaiman, C.J. and Bennet, J.*) RAJMAN RAM *v.* SARJOO PRASAD. **1937 A.L.J. 473=1937 A.W.R. 441=169 I.C. 639=10 R.A. 47=1937 A.L.R. 567=A.I.R. 1937 All. 422.**

———**O. 21, Rr. 18 and 19**--*Scope—If exhaustive—Different claims arising at different stages in same suit or proceeding—Set-off—Inherent powers of Court.*

Rr. 18 and 19 of O. 21, C. P. Code, are not exhaustive of the cases in which a set-off may be allowed in execution proceedings. The Court, apart from these rules, has inherent jurisdiction on equitable principles to allow a set-off of claims arising at different stages in the same suit or proceeding, and this even if the right to recover the claim sought to be set off is barred by time. Costs payable to one party by another in an appeal from a final decree in a partition suit can be set off against the amount payable by that party to the other under final decree, when the latter applies to execute the decree in his favour.

(*Rupchand Bilaram, Ag. J.C. and Lobo, J.*) MT. NONIBAI *v.* JETHANAND. **32 S.L.R. 162=10 R.S. 218=173 I.C. 574=A.I.R. 1938 Sind 31.**

———**O. 21, R. 18**—Scope—If inconsistent with S. 49. *See* C. P. CODE, S. 49 AND O. 21, R. 18. **1937 A.W.R. 191=A.I.R. 1937 All. 351.**

———**O. 21, Rr. 18 and 19**—*Scope of—If exhaustive.*

The provisions of the Code regarding a set-off are contained in Rr. 18 and 19 of O. 21. It is clear that those rules have been specifically restricted in their application and unless a case can be brought strictly within the terms of those provisions, no set-off can be allowed. (*Almond, J.C.*) CHANDAR BHAN *v.* KUDA BAKSH. **10 R. Pesh. 55=173 I.C. 719=A.I.R. 1937 Pesh. 83.**

———**O. 21, Rr. 18 and 19**—*Set-off of time barred claims—Inherent jurisdiction of Court.*

Apart from the provisions of Rr. 18 and 19 of O. 21, the Court has inherent jurisdiction to allow set-off of the claims arising at different stages in the same suit or proceeding even if the right to recover the claim sought to be set off is barred by limitation. (*Bhide, J.*) BADRI NATH MEHRA *v.* MOTI RAM MEHRA. **183 I.C. 61=12 R.L. 94=41 P.L.R. 385=A.I.R. 1939 Lah. 85.**

———**O. 21, R. 18 (2)**—*Applicability—Claim to set off by assignee of decree—Maintainability—Conditions.*

There is no room for the application of O. 21, R. 18 (2) unless the person claiming the set-off has come on the scene in time. The assignee claiming set-off must have got the assignment before applications are made to execute the decrees. (*Stone, C. J.*) MIRTUNJAYA PRASAD *v.* BIHARILAL. **20 N.L.J. 70.**

———**O. 21, R. 19**—*Applicability—Creditors of parties also concerned.*

O. 21, R. 19 deals with a case in which only the two parties are entitled to recover sums of money from each other. As such it cannot cover a case in which the creditors of one of the parties are also concerned. (*Thomas, C. J. and Zia-ul-Hasan, J.*) BADRI DAS *v.* RAJA BIRENDRA BIKRAM SINGH. **14 Luck. 106=175 I.C. 169=1938 O.A. 461=1938 O.L R. 276=10 R.O. 313=1938 A.W. R. (C.C.) 61=1938 O.W.N. 722=1938 R.D. 708=A.I.R. 1938 Oudh 169.**

———**O. 21, R. 19**—Applicability and scope—If exhaustive in regard to questions relating to execution, discharge or satisfaction under S. 47. *See* C. P. CODE, S. 47. **A.I.R. 1936 Cal. 409.**

———**O. 21, R. 19**—*Applicability—Mortgage suit—Decree for amount recoverable from mortgaged properties—Decree for smaller sum by way of costs in favour of mortgagor personally against mortgagee --Set-off—Right of mortgagor—Defendant to execute his decree.*

O. 21, R. 19, C P. Code, only requires that the two parties must be held entitled to recover sums of money from each other. A decree to *A* against *B* for a sum of money to be recoverable from his property is as much a decree to recover the sum of money from *B*. The decree need not necessarily be a decree directing *A* to recover the sum of money from *B* personally. The section does not say or provide in what manner the decree is to be executed. The rule would apply even to the case of a decree for sale in enforcement of a mortgage or charge. Where a decree for sale in a mortgage suit provides that *A* shall recover certain sums of money from certain properties belonging to *B* and mortgaged by *B* to *A*, and also provides that *B* should be entitled to recover a smaller amount of money from *A* personally for the proportionate costs decreed in *B's* favour, O. 21, R. 19, C. P. Code, would apply, and *B* is not entitled to execute the decree in his favour. The two decrees can be set off under O. 21, R. 19, C. P. Code. (*Burn and Venkataramana Rao, JJ.*) Damodar Shanbhogue *v.* Gange. **177 I.C. 464=11 R.M. 338=1938 M. W.N. 277=47 L.W. 382=A.I.R. 1938 Mad. 638=(1938) 1 M.L.J. 417.**

——O. 21, R. 19—*Scope—Decree for specific performance—Direction to plaintiff to deposit certain amount within specified time—Direction that on such deposit defendant was to execute and register deed of conveyance—Costs allowed to plaintiff—Right of plaintiff to deduct costs and interest out of amount to be deposited—Inherent power of Court to allow set-off.*

A decree for specific performance provided that on the plaintiff depositing into Court Rs. 500 within the time mentioned there, the defendant was to execute and get registered a deed of conveyance in the plaintiff's favour; the decree further provided that the defendant was to pay the plaintiff a certain amount by way of costs. Plaintiff deposited into Court within the time limited not the full amount of Rs. 500, but that amount *less* (1) the costs awarded by the decree; (2) a further sum representing certain other costs by way of restitution which accrued in virtue of the same decree; and (3) the interest at 6 per cent. on the costs.

Held, that the plaintiff was entitled to make the above deductions by way of equitable set-off and that the deposit made was proper; assuming that O. 21, R. 19, C. P. Code, was inapplicable to the case, independent of that rule on general principles and in the exercise of the Court's inherent powers such a claim to set off could be given effect to. (*Venkatasubba Row and Cornish, JJ.*) Chinnammal *v.* Chidambara Kothanar. **I.L.R. (1937) Mad. 59=165 I.C. 484=9 R.M. 262=1936 M.W.N. 703=44 L.W. 34=A.I.R. 1936 Mad. 626=71 M.L.J. 506.**

——O. 21, R. 19—*Scope—Set-off not falling under—Power of executing Court to entertain.*

On general principles and in the exercise of its inherent power, an executing Court can entertain and give effect to a claim to set-off even in cases which do not come strictly under O. 21, R. 19, C. P. Code. (*Guha and Bartley, JJ.*) Bank of Dacca, Ltd. *v.* Gour Gopal Saha. **I.L.R. (1937) 1 Cal. 57=166 I.C. 855=9 R.C. 602=65 C.L.J. 74=A.I.R. 1936 Cal. 409.**

——O. 21, R. 19 (b)—Applicability—Pre-emption decrees. *See* Pre-emption—Decree for. **1939 A.L.J. 48.**

——O. 21, R. 20—*Applicability—Decree for sale in enforcement of charge and decree for mesne profits—Right of set-off.*

The application of R. 20 of O. 21, C. P. Code, is not confined to cases where both decrees are mortgage decrees. A decree for sale in enforcement of a charge can, therefore, be set off against a decree for mesne profits. (*Sir George Rankin.*) Hazariram Marwari *v.* Bansidhar Dhandania. **64 I.A. 67=1937 A.L.J. 553=1937 A.L.R. 117=16 Pat. 127=65 C.L.J. 56=39 Bom.L.R. 369=**

1937 P.W.N. 133=1937 O.L.R. 65=3 B.R. 269=166 I.C. 653=1937 A.W.R. 180=45 L.W. 198=18 Pat.L.T. 127=1937 M.W.N. 248=41 C.W. N. 449=9 R.P.C. 156=1937 O.W.N. 150=A.I.R. 1937 P.C. 39=(1937) 1 M L.J. 254 (P.C.).

——O. 21, R. 20—*"Decrees for sale in enforcement of a mortgage or charge"—If can be restricted to personal judgments.*

The words of O. 21, R. 20, C. P. Code, "decrees for sale in enforcement of a mortgage or charge"—cannot be restricted to personal judgments such as may be given under O. 34, R. 6. (*Sir George Rankin.*) Hazariram Marwari *v.* Bansidhar Dhandania. **64 I.A. 67=1937 A.L.J. 553=1937 A.L.R. 117=16 Pat. 127=65 C.L.J. 56=39 Bom.L.R. 369=1937 P.W.N. 133=1937 O.L. R 65=3 B.R. 269=166 I.C. 653=1937 A.W.R. 180=45 L.W. 198=18 Pat.L.T. 127=1937 M. W.N. 248=41 C.W.N. 449=9 R.P.C. 156=1937 O.W.N. 150=A.I.R. 1937 P.C. 39=(1937) 1 M. L.J. 254 (P.C.).**

——O. 21, R. 21—Application under—Decree under execution by Collector—Jurisdiction to recognize adjustment—Collector or Court. *See* C. P. Code, S. 68 and O. 21, R. 2. **38 Bom.L.R. 505.**

——O. 21, R. 22—*"Against the party"—Meaning.*

Expression "against the party" means adverse to the party. Hence an order directing the execution proceedings to be struct off for the default of the decree-holder cannot be held to be an order made against the judgment-debtor within the meaning of the proviso to O. 21, R. 22. (*Fazl Ali and Rowland, JJ.*) Brajobala Debi *v.* Thakur Madhusudan Singh. **174 I.C. 463=4 B.R. 446=10 R.P. 523=A I.R. 1938 Pat. 162.**

——O. 21, R. 22—*Construction — "Date of decree"—Decree amended—Period of one year—Starting point of—Date of original decree or amended decree.*

The decree contemplated in O. 21, R. 22 must be the decree to be executed not only when it is an appellate decree dealt with in Cl. (2) but also when it is a decree which has been reviewed or amended, as dealt with in Cl. (3) and Cl. (4) of Art. 182, Limitation Act. Hence where a decree is amended the period of one year is to be counted from the date of the amended decree and not the date of the original decree. (*Dhavle and Meredith, JJ.*) Mahesh Singh *v.* Gajadhar Singh. **187 I.C. 79=6 B.R. 421=12 R.P. 557=A.I.R. 1940 Pat. 5.**

——O. 21, R. 22—*Decree against father and son—Son dying before execution — Execution taken out against father personally and not as heir of son—Notice under O. 21, R. 22 is not necessary.*

Where a decree is passed against father and son and the son dies before the institution of the execution proceedings and execution is taken out against the father not as heir of his son but against him personally, notice under O. 21, R. 22 is not necessary. (*Wort, J.*) Banarsi Lal *v.* Borho Sahu. **162 I.C. 482=19 P.W.N. 219=8 R.P. 534 (2)=A.I.R 1936 Pat. 253.**

——O. 21, R. 22—*Execution against property of deceased judgment-debtor—Substitution of wrong person by Court passing decree—If final—Jurisdiction of executing Court to hold otherwise.*

It is a serious irregularity to proceed in execution against the property of a deceased judgment-debtor in the absence of his proper legal representative. The executing Court is not precluded from deciding that a person is not the proper legal representative by reason of the fact that the Court which passed the decree has already substituted that person as legal representative after notice to him but in his absence. When the proper legal representative is some other person, namely, the widow of the judgment-debtor, the order substituting a wrong person cannot be taken to be a decision to the effect that the widow is not the legal representative of the judgment-debtor. (*Fazl Ali and Agarwala, JJ.*) Sarju Singh *v.* Bhagwat Prasad Singh. **176 I.C. 566 =1938 P.W.N. 259=4 B.R. 738=11 R.P. 91=19 Pat.L.T. 193=A.I.R. 1938 Pat. 372.**

——**O. 21, R. 22**—Legal representatives—Hindu father—Decree against—Execution against sons—Insolvency and death of father after attachment of joint family property—Sons—If liable to be proceeded against. *See* C. P. Code, Ss 2 (11), 50 and 53 and O. 21, R. 22. **38 Bom.L.R. 977.**

——**O. 21, R. 22**—*Notice—Absence of—Objection as to—When to be raised.*

As the absence of notice under O. 21, R. 22 goes to the root of the jurisdiction of the executing Court, the objection can be taken at any time. (*Fazl Ali and Rowland, JJ.*) Brajobala Debi *v.* Madhusudan Singh. **174 I.C. 463=4 B.R. 446 =10 R.P. 523=A.I.R. 1938 Pat. 162.**

——**O. 21, R. 22**—*Notice—Omission to give to one of legal representatives—Validity of sale.*

Where one of the judgment-debtors has died at the time of the execution of the decree, and one of his sons is substituted for him in the application for execution, but another son is left out, the sale must be held to be void for want of notice under O. 21, R. 22, in so far as the share of the latter son is concerned. But as regards the shares of other judgment-debtors the sale cannot be held to be void. (*S. K. Ghose, J.*) Anil Kumar Roy *v.* Ahammed Ali. **187 I.C. 121=12 R.C. 546=A.I.R. 1940 Cal. 23.**

——**O. 21, R. 22**—*Notice—Omission to issue or to record reasons—Irregularity—Notice issued under R.* 66—*Effect of.*

Ordinarily, the failure to issue a notice under O. 21, R. 22, C. P. Code, or to record reasons for not issuing such notice would be fatal, and a sale concluded in such circumstances would be void. But where notice of the execution proceedings and sale thereunder is issued under O. 21, R. 66 and the judgment-debtor appears and contests these proceedings, it is unnecessary to give the judgment-debtor notice of proceedings that he is already well aware of, and failure to give notice under O. 21, R. 22 and the omission to record reasons dispensing with this notice is no more than an irregularity which does not take away the jurisdiction of the Court. (*Ram Lall, J.*) Ladli Prashad *v.* Chaman Lal. **I.L.R. (1940) Lah. 231=185 I.C. 843=12 R.L. 324=41 P.L.R. 632 =A.I.R. 1939 Lah. 473.**

——**O. 21, R. 22**—*Notice—Waiver of—Judgment-debtor putting in appearance and asking for adjournment of sale—If can plead want of notice.*

Where the judgment-debtor has put in appearance and repeatedly asked for adjournment of the sale, obviously with the knowledge of the sale, he cannot plead want of notice under O. 21, R. 22 for setting aside the sale. (*S.K. Ghose, J.*) Anil Kumar Roy *v.* Ahammed Ali. **187 I.C. 121=12 R.C. 546=A.I.R. 1940 Cal. 23.**

——**O. 21, R. 22**—*Scope—Compliance—Minor judgment-debtor attaining majority — Notice issued to him as minor—Decree-holder and Court unaware of true age of judgment-debtor—Sale—If nullity—Irregularity—If ground for setting aside sale.*

The issue of a notice to a major judgment-debtor as if he were a minor is not necessarily fatal to further proceedings in execution, and a sale in execution cannot be held to be null and void on that ground. If no notice of any kind is issued to a judgment-debtor, there is a refusal to carry out the plain duty imposed upon the Court by O. 21, R. 22, C. P. Code, and the Court has no jurisdiction to conduct the sale subsequently. But there is a very clear distinction between a case in which no notice is issued at all to a particular defendant and a case in which notice is issued to him as if he were still a minor. Where notice of execution of a decree against a father and his son is issued to the son as minor represented by his guardian, the father, after he has become a major, the reason for issuing such notice being that both the decree-holder and the Court are aware of the true age of that defendant, there is sufficient compliance with the provisions of O. 21, R. 22 and no question of jurisdiction arises, if the facts subsequently show that the defendant was not a minor but a major, the issuing of the notice might amount to an irregularity, which, if it results in substantial loss, would be a ground for setting aside of the sale. (*King and Krishnaswami Aiyangar, JJ.*) Kodandarama Reddiar *v.* Parthasaraty Ayyangar. **180 I.C. 549=11 R.M. 718=1938 M.W.N. 1061=48 L.W. 586=A.I.R. 1939 Mad. 5=(1939) 1 M.L.J. 93.**

——**O. 21, R. 22**—Scope—Execution against surety for judgment-debtor—Death of surety pending sale—Notice to heirs to show cause against continuance of execution — Necessity. *See* C. P. Code, S. 55 (4). **18 Pat. 761.**

——**O. 21, R. 22**—*Scope—Major judgment-debtor allowing himself to be described as minor represented by guardian* ad litem—*Notice sent to guardian* ad litem—*Sale—If a nullity—Right of judgment-debtor to plead invalidity on ground of non-compliance with O. 21, R. 22.*

Where a defendant judgment-debtor is in fact a major but is described in the execution application as a minor represented by his guardian *ad litem* without any objection being raised by him, and notice under O. 21, R. 22, C. P. Code, is sent not to him direct, but to his guardian *ad litem*, he cannot be heard to say that O. 21, R. 22, C. P. Code, has not been complied with and therefore the execution sale held under such circumstances is a nullity. He himself having led the Court to believe that a notice directed to the guardian *ad litem* would be properly served, by holding himself out to be a minor, cannot turn round and challenge the sale on that ground. There is no non-compliance with O. 21, R. 22 in such a case. (*Agarwala and Rowland, JJ.*) Rajendra Prasad *v.* Debi Prasad. **19 Pat. 393=188 I.C. 725=6 B.R. 729=13 R.P. 18=(1940) P.W.N. 105=21 Pat.L.T. 223=A.I.R. 1940 Pat. 303.**

——**O. 21, R. 22**—*Scope — Non-compliance—Effect on sale.*

Once the Court has found that the legal conditions do not exist for proceeding with an execution, there is a lack of jurisdiction in the carrying on of that execution; and all the proceedings taken in the execution which was not properly constituted in the absence of proper notice under O. 21, R. 22 must fall to the ground. In a suit against members of a joint family the minor members were represented by a pleader *M* appointed by the Court to be their guardian *ad litem*; but in the execution application no reference was made to the above named pleader. Execution was sought to be taken against the minors describing them as under the guardianship of *G*. No notice was issued to *M* under O. 21, R. 22 and to the minors through him. There was no order of the Court either removing him or appointing *G* as guardian *ad litem* so as to authorize the latter to represent the minors in the execution proceedings and to make any admissions on their behalf or any terms with the decree-holders with reference to the proceedings in the execution and to such matters as adjournments on conditions:

Held, that the sale of the share of the minors was unsustainable. (*Rowland and Chatterji, JJ.*) BACHOO PRASAD *v.* GOBARDHAN DAS. **187 I.C. 492 =12 R.P. 599=6 B.R. 478=A.I.R. 1940 Pat. 62.**

——**O. 21, R. 22**—Scope—Non-compliance with—Sale after death of judgment-debtor without impleading legal representatives—Validity. *See* C. P. CODE, S. 50 AND O. 21, R. 22. **43 L.W. 238 =1936 M.W.N. 60=A.I.R. 1936 Mad. 205=70 M.L.J. 162 (F.B.).**

——**O. 21, R. 24**—*Execution of process—Delegation—Power of Nazir.*

Ministerial acts can always be delegated where such acts do not require the exercise of any discretion or judgment. A Nazir can, therefore, delegate the execution of the process to his subordinates. (*Tek Chand and Dalip Singh, JJ.*) PILADA RAM *v.* TULSI DAS ASA NAND. **186 I.C. 633=12 R.L. 407=41 P.L.R. 838=A.I.R. 1940 Lah. 30.**

——**O. 21, R. 24**—*Return of warrant to process-server for endorsement — Process-server re-executing warrant—Legality — Process-server if protected.*

The bailiff has power to delegate the execution of the warrant to the process-server. But where the bailiff did not delegate his authority to arrest to the process-server but merely returned the warrant to him for endorsement and not for further execution and the process-server re-executed the warrant instead of endorsing it, the re-arrest is unlawful. But the process-server would be protected under S. 79, I. P. Code, as he made a genuine mistake of fact and thought that the process was returned to him for re-execution and was not actuated by malice. (*Mosley, J.*) MAUNG HTWE *v.* BA THANT. **1940 Rang.L.R. 253=188 I.C. 303=41 Cr.L.J. 567=12 R.R. 364 =A.I.R. 1940 Rang. 112.**

——**O. 21, R. 24**—*Warrant of arrest—When deemed to be executed.*

When the judgment-debtor is arrested and brought before the Court the warrant of arrest is executed, that is to say, the arrest has been carried out, though it may not have been carried out in accordance with law and may have resulted in the discharge of the judgment-debtor. (*Mosley, J.*) MAUNG HTWE *v.* BA THANT. **1940 Rang.L.R. 253=188 I.C. 303=41 Cr.L.J. 567= 12 R.R. 364=A.I.R. 1940 Rang. 112.**

——**O. 21, R. 24 (2)**—Warrant without seal of Court—Validity. *See* PENAL CODE, S. 225-B. **1939 Rang.L.R. 445.**

——**O. 21, R. 26**—Surety under—Liability of—Dismissal of execution petition on ground of stay order—If final disposal—Surety—If discharged. *See* EXECUTION—APPLICATION FOR. **46 L.W. 350 =A.I.R. 1937 Mad. 721.**

——**O. 21, R. 28**—*Parent Court directing stay of all proceedings relating to confirmation of sale —Executing Court merely postponing confirmation of sale and dismissing objections by judgment-debtor for setting aside sale—Order, if* ultra vires.

An *ex parte* decree obtained at *L* was transferred to *P* for execution and certain property belonging to the judgment-debtors was sold. The judgment-debtors put in objections before the executing Court for setting aside the sale and at the same time applied in the Court at *L* for setting aside the *ex parte* decree. The Court at *L*, at the instance of the judgment-debtors, issued a robkar to Court at *P* directing that proceedings with respect to the confirmation of the sale should be stayed, the words used being 'karwali-manzuri multawi-ki-jawe'. The executing Court ordered that the confirmation of the sale was to be postponed but rejected the objections by the judgment-debtors. The sale was confirmed by successor of the Judge.

Held, that the robkar clearly meant that all proceedings leading up to the confirmation of the sale were to be stayed and that the executing Court in holding that the order merely directed postponement of confirmation of sale put a wrong interpretation on it.

Held, further, that the executing Court had no jurisdiction to consider the objections of the judgment-debtor after it had received the robkar and its order dismissing the objections was *ultra vires* and the order of confirmation of sale was also without jurisdiction. The executing Court having assumed jurisdiction not vested in it the orders were open to revision. (*Mir Ahmad, A. J. C.*) BUNDHELKHAND MOTOR AND CYCLE AGENCY *v.* PEOPLES BANK OF NORTHERN INDIA, LTD., LAHORE. **162 I.C. 416=8 R. Pesh. 197=A.I.R. 1936 Pesh. 97.**

——**O. 21, R. 29**—*Applicability—Suit by judgment-debtor against assignee decree-holder — Claim for damages for breach of contract to get satisfaction entered up—Application for stay of execution—Maintainability.*

A suit by the judgment-debtor against the assignee-decree-holder for damages for breach of an agreement between them whereby the defendant agreed to receive in satisfaction of the assigned decree certain bonds and to get satisfaction entered up, is one to which O. 21, R. 29, C. P. Code, applies and an order can therefore be made in such suit staying the execution of the decree assigned pending disposal of the suit. (*Beasley, J.*) KANNAMMAL *v.* MUTHUKUMARASWAMI CHETTY. **160 I.C. 563=8 R.M. 667=43 L.W.**

493=1936 M.W.N. 349=A.I.R. 1936 Mad. 102 =70 M.L.J. 120.

——O. 21, R. 29—Equitable right under—If available against assignee of decree. *See* C. P. Code, S. 49 and O. 21, R. 29. **40 Bom.L.R. 188.**

——O. 21, R. 30—*Simultaneous execution by two or more methods—Discretion of Court.*

No doubt, cases may conceivably occur in which simultaneous execution by two or more methods might be reasonable and feasible; but where there is already sufficient security for the realisation of the decretal amount and the procedure of the decree-holder savours rather of harassment than a genuine desire to realise the decretal amount, the Court may in its discretion refuse the relief against the person of the judgment-debtor. (*Macpherson and Mahomed Noor, JJ.*) Aditya Prasad *v.* Ishwar Singh. **160 I.C. 685=8 R.P. 377=A.I.R. 1936 Pat. 28.**

——O. 21, Rr. 30 and 21—*Decree for money—Warrant of arrest—Right of decree-holder.*

The discretion given to the Court by O. 21, R. 21, C. P. Code, to refuse simultaneous execution against the person and the property does not extend to compelling the decree-holder to take either one of these methods. The executing Court should not disallow an application for the arrest of a defaulting judgment-debtor on the ground that the latter has sufficient properties against which the decree-holder might proceed in the first instance. A debtor who is able to pay but does not pay is in the position of a person in contempt of Court. The proper course for such a person is to purge his contempt by fulfilling the order of the Court and pay the decretal amount. (*James and Rowland, JJ.*) Kamaldhari Lal *v.* Kamleshwari Sahay. **18 Pat. 366=5 B.R. 485 =180 I.C. 767=11 R.P. 531=1939 P.W.N. 604= A.I.R. 1939 Pat. 380.**

——O. 21, Rr. 30 and 64—Scope and effect of —Power of Court to sell without attachment. *See* Execution sale. **41 Bom.L.R. 463.**

——O. 21, R. 31—*Decrees executable under.*

A decree for delivery of specific movable property which can be enforced by the stringent method prescribed by O 21, R. 31, C. P. Code, can be passed only in a suit where the plaintiff alleges and proves facts which give him a right to compel its delivery under the provisions of S. 11 of the Specific Relief Act. 39 M. 1 (F.B.), Rel. on. (*S. K. Ghose and Nasim Ali, JJ.*) Karnani Industrial Bank, Ltd. *v.* Barabani Coal Concern, Ltd. **178 I.C. 833=11 R.C. 411=42 C.W.N. 523=A.I.R. 1938 Cal. 471.**

——O. 21, R. 31—*'Specific movable'—If includes money.*

The words "specific movable' in R. 31 do not include money. 37 M. 381, Rel. on. (*S. K. Ghose and Nasim Ali, JJ.*) Karnani Industrial Bank, Ltd. *v.* Barabani Coal Concern, Ltd. **178 I.C. 833=11 R.C. 411=42 C.W.N. 523=A.I.R. 1938 Cal. 471.**

——O. 21, R. 32—Applicability to scheme decree—Clause in decree directing payment by trustee—Executability. *See* C. P. Code, S. 92. **71 M.L.J. 87.**

——O. 21, R. 32 (as amended in Rangoon)—*Decree for restitution of conjugal rights—Property attached and sold within three months from date of attachment—Sale, if void.*

The Code of Civil Procedure does not empower the Court to change a decree for the restitution of conjugal rights into a decree for the payment of money. All that it empowers the Court to do is to sell the property attached and out of the proceeds allow the decree-holder compensation. But this is subject to the condition that the attachment must have been in force for a period of three months or for such further period not exceeding twelve months as the Court may have decided. Where in a case a decree for restitution of conjugal rights was passed and the property of the judgment-debtor was attached and the Court ordered the property to be sold before it had been under attachment for three months wrongly treating the decree as one for the payment of money.

Held, that the Court had no jurisdiction to order the property to be sold and that the sale therefore was void. (*Leach, J.*) Ma We Gyan *v.* Maung Than Byu. **1937 Rang.L.R. 164=169 I.C. 967=10 R.R. 48=A.I.R. 1937 Rang. 126.**

——O. 21, R. 32—*Restitution of conjugal rights —Decree for—Mode of enforcement.*

Under O. 21, R. 32, C. P. Code, as amended, a decree for restitution of conjugal rights can be enforced by attachment of property and not by imprisonment. (*Abdul Qayoom, C.J. and Wazar, J.*) Khatuni *v.* Ramzan Mir. **41 P.L.R.J. and K. 80.**

——O. 21, R. 32—*Scope—Decree for injunction —Execution—Application by decree-holder for issue of notice to defendant embodying terms of decree—Maintainability.*

There is no provision of law which entitles the holder of a decree for an injunction to apply to the Court for the issue of a special order or notice embodying the terms of the decree and for having it served through Court on the defendant. It may be that the Court has an inherent power to do so, but the decree-holder has no right to ask the Court to do so. Where it is not shown that the defendant has done any act which can be construed as disobedience or failure to obey the decree of the Court, no such application is maintainable, under O. 21, R. 32, C. P. Code, especially when it is admitted that the time for enforcing the injunction has not yet arrived. (*Pandrang Row, J.*) Rangayya Naidu *v.* Subbayya Naidu. **164 I.C. 668=9 R.M. 166=1936 M.W.N. 773=44 L.W. 308=A.I.R 1936 Mad. 706=71 M.L.J. 286.**

——O. 21, R. 32—*Scope—Prohibitory injunction—Disobedience by defendant— Remedy of plaintiff—Fresh suit—Necessity.*

Where a decree granting a prohibitory injunction is disobeyed by the defendant, the plaintiff is not bound to bring a fresh suit to convert the prohibitory injunction into a mandatory injunction so as to enable him to apply under O. 21, R. 32 (5), C. P. Code. The relief to which the plaintiff is entitled is laid down by R. 32 itself, that is, detention of the defendant in the civil prison, or attachment of his property or both. The plaintiff can apply for any of those reliefs or for both, and the fact that he claims relief under O. 21, R. 32 (5) would not preclude him from claiming the proper relief by applying to the proper Court. (*Wort, A.C.J. and Manohar Lall, J.*) Toon Lal *v.* Sonoo Lal. **178 I.C. 807=5 B.R. 139=11 R.P. 300=1938 P.W.N. 625=A.I.R. 1938 Pat. 522.**

——**O. 21, R. 32 (5)**—*Applicability—Prohibitory injunctions.*

The act required to be done by O. 21, R. 32 (5) has reference only to a positive act such as is required to be done under a mandatory injunction. Hence, Cl. 5 of R. 32 of O. 21 does not apply to prohibitory injunctions. (*Thom, C.J. and Ganga Nath, J.*) Angad *v.* Madho Ram. **I. L.R. (1938) All. 673=1938 A.W.R. (H.C.) 368 =176 I.C. 488=10 R.A. 108=1938 A.L.J. 558= 1938 A.L.R. 628=A.I.R. 1938 All. 416.**

——**O. 21, R. 32 (5)**—*Applicability—Prohibitory injunction—Relief under R. 32 (5)—Availability.*

The injunction contemplated by O. 21, R. 32 (5) is a mandatory injunction and not a prohibitory injunction, and the relief to which a party is entitled under Cl. (5) of R. 32 can be claimed only in the case of a mandatory injunction and is not available in the case of a prohibitory injunction. (*Wort, A.C.J. and Manohar Lall, J.*) Toon Lal *v.* Sonoo Lal. **178 I.C. 807=5 B.R. 139=11 R. P. 300=1938 P.W.N. 625=A.I.R. 1938 Pat. 522.**

——**O. 21, R. 34**—*Decree absolute for divorce directing judgment-debtor to secure to his wife a certain amount and to execute proper instrument—Judgment-debtor not complying with direction—Power of Court to execute on behalf of judgment-debtor special power-of-attorney authorising wife to withdraw amount decreed out of provident fund of judgment-debtor—Provident Funds Act, S. 3 (1).*

Where a decree absolute for divorce directs the jugment-debtor to secure to his wife a certain amount and to execute a proper instrument securing that payment, and the judgment-debtor does not take any steps to comply with the direction, the Court can under O. 21, R. 34, C. P. Code, execute a special power of attorney in favour of the wife authorising her on behalf of the judgment-debtor to withdraw the amount decreed out of the provident fund of the judgment-debtor in a railway company in which he was employed. The execution of such a special power of attorney does not contravene the provisions of S. 3 (1) of the Provident Funds Act. (*Zia-ul-Hasan and Madeley, JJ.*) N. A. M. Moore *v.* A. R. Moore. **13 Luck. 466=170 I.C. 656=10 R.O. 55 =1937 O.L.R. 476=1937 O.W.N. 863=A.I.R. 1938 Oudh 48.**

——**O. 21, R. 34**—*Decree for execution of document—If may be passed in any suit.*

There is no foundation for the view that an order under O. 21, R. 34, C. P. Code, can be made only when a decree for execution of a document is made in a suit for specific performance of contracts. The rule simply contemplates that there should be a decree for execution of a document. It may be passed in any suit. (*Bartley and Nasim Ali, JJ.*) Birendra Nath Roy Bahadur *v.* Puran Chand Nohata. **178 I.C. 998=11 R.C. 457=67 C.L.J. 235=A.I.R. 1938 Cal. 767.**

——**O. 21, R. 35**—*Applicability—Final decree in foreclosure suit—Execution against party in possession not bound by decree—Legality.*

Under O. 21, R. 35, C. P. Code, a final decree for foreclosure and possession can only be executed against the person bound by the decree. When a person not bound by the decree is in possession of his share in the property, the decree for possession cannot be legally executed against such person. If the Police assist the decree-holder in removing that person from possession they exceed the powers given by O. 21, R. 35 (3), C. P. Code. (*Greenfield, F.C.*) Gopidas *v.* Seth Mishrilal. **1938 N.L.J. 45.**

——**O. 21, R. 35**—*Delivery of possession of land—If includes crops standing thereon.*

Where the decree-holder is put in possession of land such possession includes the standing crops. The judgment-debtor cannot re-enter in order to reap and dispose of the crops which he had cultivated upon the land. (*Mya Bu, J.*) Maung Kan *v.* Maung Po Tok. **1940 Rang. L R. 157= 12 R.R. 183=185 I.C. 119=41 Cr.L.J. 123=A.I. R. 1939 Rang. 388.**

——**O. 21, R. 35 (2)**—*Decree for joint possession—Nature—Effect of—Actual physical possession—How obtainable.*

A decree for joint possession can be executed only in the mode prescribed by O. 21, R. 35 (2), C. P. Code. Such possession cannot be actual physical possession. Nor can such a decree entitle one to take actual physical possession to the ouster of the persons in actual possession of the plot in dispute. If such a decree-holder wishes to obtain actual physical possession he has to bring a suit for partition. (*Mulla, J.*) Jainti Prasad *v.* Sheo Sahai. **1939 A.W.R. (H.C.) 311=1939 A.L.J. 375=1939 R.D. 264.**

——**O. 21, R. 35 (2)**—*Decree for joint possession—Possession not delivered in manner prescribed—Effect of.*

In giving joint possession to a party in execution of a decree, the procedure prescribed by O. 21, R. 35 (2) must be strictly followed. Joint possession under a decree granting joint possession, can only be delivered in the particular manner prescribed by the legislature in O. 21, R. 35 (2). It is not within the competence of anybody to attempt to give joint possession in any other manner, and if the patwari or any other person takes upon himself to deliver such joint possession in a manner contrary to the express language of the legislature, their action would not have any legal effect. Such possession is not effective for purposes of limitation and does not provide a fresh starting point for limitation. A.I.R. 1933 Lah. 427, Rel on. (*Agha Haidar, J.*) Bhagat Ram *v.* Ali Bakhsh. **166 I.C. 377=9 R.L. 363=A.I.R. 1936 Lah. 749.**

——**O. 21, R. 35 (2)**—*Decree-holder obtaining symbolical possession—Possession of judgment-debtor—If adverse.*

Where, in execution of a decree, the decree-holder is given only a symbolical possession of property, actual possession of it being impossible, the possession of it by the judgment-debtor cannot be adverse to that of the decree-holder. A.I. R. 1917 P.C. 197, Rel. on. (*Sulaiman, C.J. and Bennet, J.*) Mt. Maharaji *v.* Bhagwati Prasad. **160 I.C. 1037=8 R.A. 689=1936 A.W.R. 69=1936 A.L.J. 80=1936 A.L.R. 224=A.I.R. 1936 All. 85.**

——**O. 21, R. 35 (2)**—*Decree-holder put in symbolical possession—Judgment-debtor continuing in possession—Effect of—Suit by decree-holder for possession—Limitation.*

The passing of a decree for joint possession and handing over of symbolical possession in pursuance thereof under O. 21, R. 35, C. P. Code, terminates all claims to adverse title previously put forward by the defendants. But the fact that the person in possession continues to be in enjoyment of the property just after the formality under O. 21, R. 35 is over, does to all intents and purposes amount to an immediate dispossession of the decree-holder after he has been put in possession. The decree-holder must under Art. 142, Limitation Act, come within 12 years to recover possession again and if he does not, his suit is time barred. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) MT. JAN SULTAN *v.* ABDUL MANAN. **160 I.C. 441=8 R. Pesh. 108 (2)=A.I.R. 1936 Pesh. 7.**

———**O. 21, R. 35 (2)**—*Delivery of possession proclaimed merely by beat of drum with consent of judgment-debtor—Copy of warrant not affixed on property—Effect of.*

Where with the approval and consent of the judgment-debtor, delivery of possession was proclaimed merely by beat of drum without affixing a copy of the warrant on the property as required by O. 21, R. 35 (2), C. P. Code, the delivery of possession must be deemed to be valid and effective as against the judgment-debtor. (*Srivastava, Ag. C.J.*) HARDEO SINGH *v.* HIRA SINGH. **13 Luck. 96=166 I.C. 404=9 R.O. 313=1937 O.L.R. 22=1937 R.D. 33=1937 O.W.N. 58=A.I.R. 1937 Oudh 275.**

———**O. 21, R. 35 (2)**—*Joint undivided property—Mode of delivery of possession.*

Where the property covered by the decree is joint undivided property, the proper mode of delivery of possession in execution proceedings is in the manner provided by O. 21, R. 35 (2), C. P. Code. (*Guha and Mitter, JJ.*) DWARIKA NATH MONDAL *v.* RAM NATH BARMAN. **67 C.L.J. 39.**

———**O. 21, R. 37**—*Warrant for arrest of judgment-debtor at place A—Judgment-debtor arrested at place B within Court's jurisdiction—Legality of arrest.*

If a warrant is addressed to the bailiff authorising him to arrest a judgment-debtor at a place *A* and the judgment-debtor happens to be found at the place *B* within the jurisdiction of the Court, the bailiff is authorised to make the arrest at the place where the judgment-debtor is actually found. (*Din Mohammad, J.*) BABU RAM *v.* HARI RAM DAULAT RAM. **42 P.L.R. 374.**

———**O. 21, R. 40**—*Arrest of judgment-debtor—Person not earning more than Rs. 40—Arrest, if can be ordered.*

As the normal limit under which a man cannot reasonably be expected to support himself and a family should be taken to be Rs. 40, because of S. 60 (1) (*i*), C. P. Code, unless there is anything on the record from which it can be said to have been proved that a judgment-debtor earns more than Rs. 40 a month, and fails to pay the excess to the decree-holder the Court should not order arrest of a judgment-debtor. (*Baguley and Mosley, JJ.*) SATYANARAYANA *v.* SEETHA RAMASWAMY. **178 I.C. 989=11 R.R. 293=A.I.R. 1938 Rang. 477.**

———**O. 21, Rr. 41 and 42**—*Applicability—Decree directing inquiry into damages—Application for an order for examination of judgment-debtor—Competency.*

A decree directing an inquiry as to damages is a decree for money within the meaning of O. 21, R. 42, C. P. Code, and a plaintiff who has obtained such a decree directing an inquiry as to damages is entitled to invoke the aid of O. 21, R. 41 and apply for an order for the examination of the judgment-debtor in order to enable him to effect an attachment in pursuance of the right given to him under O. 21, R. 42. The Court is vested with the discretion whether to give the relief under R. 41 or not, and it must exercise its discretion after considering the circumstances of the case. (*Venkataramana Rao, J.*) UNITED MOTOR FINANCE CO. *v.* FIAT MOTORS EASTERN INDIA AGENCY. **189 I.C. 294=49 L.W. 696=13 R.M. 231=1939 M.W.N. 627=A.I.R. 1939 Mad. 699=(1939) 2 M.L.J. 80.**

———**O. 21, R. 41**—*Scope and object of—"Any other person"—Garnishee denying debt—Power of Court to summon and to order to produce account books.*

Rule 41 of O. 21, C. P. Code, is in effect a provision to obtain delivery in aid of the execution of the decree which the decree-holder has obtained. The expression "any other person" might include a garnishee, *i.e.*, a person who owes or is alleged to owe a debt to the judgment-debtor. The Court is empowered to summon any person including the garnishee whom it thinks necessary and may require the person summoned to produce any document in his possession or power. But this power should be cautiously exercised. The discretionary power vested in the Court under R. 41 of O. 21, to examine the garnishee must ordinarily be limited to cases where the garnishee admits the debt, and the Court may find out the exact amount of the debt before ordering the execution. But if the debt is totally denied, the Court ought not ordinarily to examine the garnishee or direct him to produce account books unless it is satisfied on the affidavits or on the examination of the judgment-debtor that in the interests of the decree-holder the garnishee should be examined and his books produced to better enable him to proceed with the execution and to prevent a possible fraud or collusion between the judgment-debtor and the garnishee. For that purpose the alleged garnishee may be examined with reference to the books or other documents which he may be directed to produce for finding out whether there were dealings between him and the judgment-debtor probabilising a debt. The garnishee ought not to be subjected to any examination or cross-examination for the purpose of determining whether the liability subsists or not. Further only those books or documents which would throw light on the question of debt should be ordered to be produced. Any order for further production would be oppressive. (*Venkataramana Rao, J.*) MATHIAM BIVI AMMAL *v.* UNION BANK, LTD., KUMBAKONAM. **48 L.W. 157=178 I.C. 212=1938 M.W.N. 702=11 R.M. 422=A.I.R. 1938 Mad. 771.**

———**O. 21, R. 42**—*"Any other matter"—If includes preliminary decree for accounts in partnership suit.*

The words "any other matter" in O. 21, R. 42, C. P. Code, cannot include a preliminary decree directing the taking of accounts in a partnership suit. (*D. N. Mitter and S. K. Ghose, JJ.*) SAILENDRA KRISHNA CHOUDHURY *v.* HARENDRA KUMAR ROY. **167 I.C. 430=9 R.C. 686=40 C.W.N. 1393=A.I.R. 1937 Cal. 4.**

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———**O. 21, R. 44**—*Compliance with rule—Presumption.*

An attachment which is not in accordance with the provisions of O. 21, R. 44, C. P. Code, would, no doubt, not operate to transfer possession of the property to the Court. But the presumption of law is that anything which is done by the officer of the Court is properly done until the contrary is shown. *Omnia praesumuntur rite acta.* (*Allsop, J.*) RAM BAHAL AHIR *v.* EMPEROR. **162 I.C. 653=8 R.A. 882=37 Cr.L.J. 675=1936 A.W.R. 325=1936 A. Cr. C. 105=1936 A.L.J. 283=1936 Cr.C. 428=1936 A.L.R. 462=A.I.R. 1936 All. 364.**

———**O. 21, R. 46**—*Attachment of debt due to judgment-debtor—Equitable charge already created by judgment-debtor over such debt—Position of attaching creditor—Equitable charge—What amounts to—Charge on future property—Validity.*

In a garnishee proceeding, the attaching creditor stands in the shoes of the judgment-debtor. No attachment could be made, when there is no existing debt due by the garnishee to the judgment-debtor, and if the judgment-debtor has already parted with his interest in the debt by assignment or created an equitable charge in respect of the same in favour of another person, the attaching creditor acquires no larger rights than his debtor. An agreement between a debtor and a creditor that a fund should be applied in a particular way will not create a valid equitable charge upon the fund. It is further necessary that an obligation should be imposed in favour of the creditor to pay the debt out of the fund. The test really is whether there was an intention to assign or create a charge, which will give the assignee an equitable interest in the fund itself. An assignment by way of charge on future property is a perfectly valid assignment in equity, which will attach to the property, when it comes into existence. Where *X* advanced money to *Y* for the purpose of enabling the latter to carry out his contracts with *Z* and it was stipulated that all bills made out by *Y* against *Z* would be forthwith made over to *X* who would have the exclusive right to collect the monies due on the bills under an irrevocable power of attorney executed by *Y* in his favour and the amounts thus realised would be appropriated by *X* towards repayment of the advances made by him.

Held, that there was an intention to create a charge in favour of *X* in respect of the money due on the bills and that an attachment of the bills by a creditor of *Y* must be taken to be subject to that charge. (*Mukherjea, J.*) LEGDIR NANJI *v.* SURENDRA MOHAN. **177 I.C. 920=11 R.C. 289=68 C.L.J. 97=42 C.W.N. 971=A.I.R. 1938 Cal. 606.**

———**O. 21, R. 46**—*Attachment of patent—Service of prohibitory order on Controller of Patents—Sufficiency.*

It is impossible to hold that the Controller of Patents is a "person in possession of the same" within the meaning of O. 21, R. 46, C. P. Code. Therefore, the service of a prohibitory order upon the Controller of Patents is not an attachment of the patent within the meaning of S. 51, C. P. Code. (*Panckridge, J.*) RADHA KISSEN

v. HIRALAL BANJARA. **I.L.R. (1938) 2 Cal. 618=181 I.C. 909=11 R.C. 869=42 C. W. N. 1086=A.I.R. 1939 Cal. 283.**

———**O. 21, R. 46**—*"Debt"—Dividend payable in insolvency to creditor not yet declared—If attachable.*

A dividend payable to a creditor in insolvency is not a debt liable to be attached under O. 21, R. 46; when no dividend has at all been declared, there is nothing to attach. (*Mockett, J.*) BALUSAMI *v.* OFFICIAL ASSIGNEE OF MADRAS. **189 I.C. 406=1939 M.W.N. 573=A.I.R. 1939 Mad. 811.**

———**O. 21, R. 46**—*Debt outside jurisdiction—Attachment of—Power of Court.*

It is not competent to a Court to attach in execution of a decree a debt payable to the judgment-debtor outside its jurisdiction by a person not resident within its jurisdiction. (*Baguley, J.*) SHEERAZEE *v.* REDDY. **1939 Rang.L.R. 694=187 I.C. 105=12 R.R. 305=A.I.R. 1940 Rang. 34.**

———**O. 21, R. 46**—*Debt payable to judgment-debtor outside jurisdiction—Attachment of—Jurisdiction of Court.*

A debt payable to the judgment-debtor outside the jurisdiction of the Court by a person not resident within its jurisdiction, cannot be attached under O. 21, R. 46, C. P. Code. (*Derbyshire, C.J. and Nasim Ali, J.*) SATYAPRIYA BANERJEE *v.* KUNDAN MULL BASU. **I.L.R. (1939) 1 Cal. 523=183 I.C. 818=12 R.C. 196=69 C.L.J. 267=43 C.W.N. 512=A.I.R. 1939 Cal. 428.**

———**O. 21, R. 46**—*Garnishee denying debt—Enquiry into the truth or existence of debt—Power of executing Court.*

Where a debt is attached in execution and the garnishee denies that any debt is due by him to the judgment-debtor, it is not for the executing Court to enquire into or decide whether the debt attached is really due or not. Consequently, when an objection by the garnishee denying the debt is disallowed, the objection and the order of the executing Court disallowing the objection and ordering him to pay into Court do not come within the purview of O. 21, Rr. 58 to 63, C. P. Code, so as to preclude him from denying the debt in a suit subsequently instituted against him by the decree-holder as receiver for realising the debts on the basis of the attachment. (*Burn and K. S. Menon, JJ.*) BUTCHAYYA CHETTY *v.* KRISHNAMACHARI. **59 Mad. 966=160 I.C. 534=8 R. M. 663=1936 M.W.N. 54=43 L.W. 68=A. I. R. 1936 Mad. 152=70 M.L.J. 20.**

———**O. 21, R. 46**—*Garnishee denying debt and objecting to jurisdiction of Court—No investigation or decision—Sale—Subsequent suit by purchaser—Plea of denial of debt—If open.*

Where a garnishee denies the debt and objects to the jurisdiction of the Court to compel him to deposit the debt, but does not ask to have the matter investigated and there is no investigation or decision on the point raised by him, and the Court orders sale of the debt for whatever it is worth, the garnishee can raise the matter in the subsequent suit by the purchaser. (*Vivian Bose, J.*) JAGANNATH *v.* JAMNAVALLABH. **168 I. C. 266=9 R.N. 247=A.I.R. 1936 Nag. 218.**

———**O. 21, Rr. 46 and 58**—*Garnishee—No denial of debt—Plea of set-off as between himself* *and judgment-debtor—If can be gone into in execution.*

A decree-holder sought to attach some moneys owing to his judgment-debtor from a third party. The third party objected to the attachment on the ground that the judgment-debtor owed him a sum or sums of money which extinguished his debt to the judgment-debtor and further contended that the set-off had been recognized in other cases by the Court. He claimed therefore to have the question of set-off considered. The executing Court refused to investigate into the question.

Held, that though the existence of the debt due by the garnishee to the judgment-debtor could not in execution proceedings be challenged, yet the garnishee was entitled to give evidence to prove that there was a debt owing to him by the judgment-debtor either diminishing or extinguishing the debt in question and such matters could be gone into in execution proceedings. (*Beasley, C.J.*) Satyanarayanamurty *v.* Venkateswara Rao. **175 I.C. 513=10 R.M. 789=A.I.R. 1937 Mad. 848.**

——**O. 21, R. 46**—*Joint debt—Attachability—Royalty payable under mining lease jointly to judgment-debtor and another—Judgment-debtor's share, if can be attached—Preliminary decree passed in partition suit between judgment-debtor and the other—Effect of.*

Garnishee proceedings cannot be had in respect of a joint debt. Where, therefore, the debt is in respect of royalty payable under a mining lease jointly to the judgment-debtor and another, the creditor has no right to obtain a *garnishee* order attaching the share of the judgment-debtor. The fact that a preliminary decree has been passed in a partition suit between the judgment-debtor and the other does not alter the position. Any change in the rights of the lessors *inter se* by reason of the partition cannot affect their lessee. The latter is entitled to rely on his lease which contemplates a joint debt. (*McNair, J.*) Lakshminarain *v.* Amar Nath. **I.L.R. (1937) 2 Cal. 440=41 C. W.N. 1074.**

——**O. 21, R. 46**—*Judgment-debtor having share in shop—Mode of attachment.*

Where in execution a decree-holder seeks to attach the share of the judgment-debtor in a shop, attachment can be made only by prohibiting the judgment-debtor from transferring his share and subsequently such share can be sold in execution of the decree, but specific goods in the shop can neither be attached nor sold. (*Jai Lal, J.*) Mohan Lal-Lakshmi Das *v.* People's Bank of Northern India, Ltd. **174 I.C. 692=10 R.L. 583=A.I.R. 1937 Lah. 313.**

——**O. 21, R. 46**—*Jurisdiction—Prohibitory order to garnishee residing beyond jurisdiction—Power of Court to issue.*

A Court is not competent, in execution of a decree for money, to attach, at the instance of the decree-holder, a debt payable to the judgment-debtor outside its jurisdiction by a person not resident within the jurisdiction of that Court. It cannot directly issue a prohibitory order to a garnishee resident beyond its jurisdiction. (*Mockett, J.*) Balusami *v.* Official Assignee of Madras. **189 I.C. 406=1939 M.W.N. 573=A. I.R. 1939 Mad. 811.**

——**O. 21, R. 46**—*Share of debt—Prohibitory order, if can be issued.*

Even if a share of a debt (*i.e.*) a debt due to the judgment-debtor and other persons jointly, cannot be attached under O. 21, R. 46, C. P. Code, or under any other rule prescribed, a prohibitory order similar to one under R. 46 can be made under the inherent powers of the Court where the Court finds it necessary for the ends of justice. (*Nasim Ali and R.C. Mitter, JJ.*) Upendra Mohan Pal Chowdhury *v.* Nalini Mohan Ray Choudhury. **I.L.R. (1937) 2 Cal. 48=41 C.W.N. 410=171 I.C. 119=10 R.C. 226=A.I.R. 1937 Cal. 199.**

——**O. 21, R. 46 (1) (a) and (c)**—*Applicability—Deposit by member of East India Cotton Association to the Association under the Rules—Attachability.*

A deposit made by a member of the East India Cotton Association with that Association under their rules is not liable to attachment in execution of a decree against the depositor-member under O. 21, R. 46 (1) (*a*) or (*c*). The interest which the member has in the deposited sum is not "movable property not in the possession of the judgment-debtor" within the meaning of Cl. (*c*) of O. 21, R. 46 (1); nor is it "debt" within the meaning of Cl. (*a*). It is a sum of money which is repayable only in certain contingencies. (*Beaumont, C. J. and Rangnekar, J.*) Gajroj Sheokaran *v.* Hukamchand. **I.L.R. (1939) Bom. 109=180 I.C. 360=11 R.B. 296=41 Bom. L.R. 19=A.I.R. 1939 Bom. 90.**

——**O. 21, R. 46 (3)**—*"Payment"—Meaning of—Payment contrary to attachment—If effective.*

Payment contemplated in O. 21, R. 46 (3) is payment into the attaching Court so as to be available for the attaching decree-holder and not payment into the particular Court even when the payment is earmarked for some other purpose. S. 64, C. P. Code, provides that any payment to the judgment-debtor of the attached debt contrary to the attachment shall be void as against all claims enforceable under the attachment. The mere fact that the debtor does not pay money into the hands of the judgment-debtor but to somebody else will not make it any the less payment contrary to the attachment if payment is made at the instance of or for the benefit of the judgment-debtor. If therefore such a debtor pays the amount not in attaching Court but in another Court not under compulsion on behalf of the judgment-debtor, such payment is not sufficient to discharge him from his liability to the attaching creditor. (*Varadachariar, J.*) Narayanaswami Ayyar *v.* A. Mallu. **161 I.C. 473=8 R.M. 829=43 L.W. 713=1936 M.W.N. 147=A.I.R. 1936 Mad. 251=71 M.L.J. 243.**

——**O. 21, R. 47**—Applicability—Decree for rent obtained by lambardar under C. P. Tenancy Act. *See* C. P. Code, O. 21, Rr. 53, 60 and 47. **1940 N.L.J. 56.**

——**O. 21, R. 47**—*Applicability—Judgment-debtor member of joint Hindu family.*

Quaere.—Whether O. 21, R. 47, C. P. Code, applies to the members of a Hindu coparcenery, one of whom happens to be a judgment-debtor? (*Venkatasubba Rao, J.*) Kollivenkataratnam *v.* The Collector of Kistna. **163 I.C. 480 (2) =9 R.M. 23=37 Cr.L.J. 836=43 L.W. 760=**

1936 M.W.N. 728=1936 Cr.C. 672=A.I.R. 1936 Mad. 560=70 M.L.J. 717.

——**O. 21, R. 48 and Ss. 73 and 151**—*Issue of prohibitory order at the instance of one of the decree-holders—Nature of his rights—Existence of other decree-holders, if a ground to cancel order—Order directing distribution among all creditors—Legality—Inherent powers—Limits.*

Where on the application of one of the decree-holders a prohibitory order under O. 21, R. 48 attaching a portion of the salary of the judgment-debtor has been issued, that decree-holder is lawfully entitled to receive the whole amount deducted from the judgment-debtor's salary under the prohibitory order, save and in so far as a proper order under S. 73, C. P. Code, if any, that might have been passed. In the absence of any such order the Judge has no jurisdiction to cancel the prohibitory order at the instance of the judgment-debtor and direct that a sum fixed to be deposited by the judgment-debtor should be *pro rata* distributed amongst all the decree-holders, when no one of them has asked for it. The inherent powers of the Court cannot be used for the purpose of overriding the rights of one party for the benefit of the other. (*Roberts, C.J., Mya Bu and Dunkley, JJ.*) SOLOMON NAHOME *v.* A. E. McCANN. **1940 Rang.L.R. 421=A.I.R. 1940 Rang. 201 (S.B.).**

——**O. 21, Rr. 48 and 58**—*Notice for attachment of salary of Government servant—Objection raised by Secretary of State—Order of Court holding salary to be attachable—Revision, if competent.*

Notice under O. 21, R. 48, C. P. Code, was issued to the Secretary of State for attachment of salary of a Government servant. The Secretary of State objected to it, but the Court ordered that it was attachable. No appeal was filed by the Secretary of State from this order.

Held, that as the Secretary of State raised the objection that the salary was not attachable, the procedure came within the purview of O. 21, R. 58, C. P. Code, and unless it was challenged by a regular suit under O. 21, R. 63, the order of the executing Court was conclusive and the revision application must fail.

Held, further, that the order passed under O. 21, R. 48 was an order passed in execution of the decree under S. 47, C. P. Code, and as such was subject to an appeal and hence revision was incompetent. A.I.R. 1933 Bom. 185, Rel. on. (*Agha Haidar, J.*) SECRETARY OF STATE *v.* ISHAR DAS. **166 I.C. 214=9 R.L. 354=A.I.R. 1936 Lah. 761.**

——**O. 21, Rr. 48 and 46**—*Salary of M.L.A.—Liability to attachment.*

An elected member of the Provincial Legislative Assembly is not a 'public officer' within the meaning of S. 2 (17), C. P. Code, and consequently his salary cannot be attached under O. 21, R. 48. Nor can it be attached under O. 21, R. 46 as a debt, before it becomes payable. The amendments to S. 60, C. P. Code, introduced by the Act of 1937, may alter the position somewhat in a case of this kind. (*Derbyshire, C.J. and Nasim Ali, J.*) SATYAPRIYA BANERJEE *v.* KUNDAN MULL BASU. **I.L.R. (1939) 1 Cal. 523=183 I.C. 818 =12 R.C. 196=69 C.L.J. 267=43 C.W.N. 512 =A.I.R. 1939 Cal. 428.**

——**O. 21, R. 49**—*Appointment of receiver under—Matters to be decided prior to—Absence of service of notice of application—Effect.*

Unless the questions whether the judgment-debtor was a partner of the partnership and whether any money was due to him from it, are decided, no receiver could be appointed. Further any order passed would be unsupportable, if notice of the application had not been served as required by R. 49 (4) of O. 21. (*Ganga Nath, J.*) PIRTHI NATH *v.* NIRANJAN LAL BHARGAVA. **189 I.C. 24=1940 A.L.J. 120=13 R.A. 75=1940 A.W.R. (H.C.) 153 (1)=A.I.R. 1940 All. 250.**

——**O. 21, R. 49**—*Interest of partner in partnership assets—If movable property.*

An interest of a partner in partnership assets is intended to be treated as movable property under R. 49 of O. 21. (*Addison and Din Mohammad, JJ.*) BARKAT RAM *v.* BHAGWAN SINGH. **177 I.C. 116=11 R.L. 269=A.I.R. 1938 Lah. 65.**

——**O. 21, R. 49 (2)**—*Interest of a partner—Meaning.*

O. 21, R. 49 (2) charges the interest of the partner in the partnership property and profits. The partner's interest is his right to participate in the net assets of the firm, that is, in the value or proceeds of the assets less the liabilities to third parties and not less any liability to himself; for any liability to himself only increases his interest in the property at the expense of other partners. An advance is but an item in the partnership account. The Court charges and orders the sale of whatever the partner is entitled to from the partnership business as between that partner and the other partners, as if on dissolution of the firm. (*Mosely and Sharpe, JJ.*) T. R. M. RAMASWAMY CHETTIAR *v.* M. M. K. KUITAIN CHETTYAR. **189 I.C. 446=A. I. R. 1940 Rang. 153.**

——**O. 21, R. 50**—*Applicability—Award—If "decree."*

The provisions of O. 21, R. 50, C. P. Code, apply to an award against a firm passed in arbitration proceedings; an award stands on the same footing as a decree. (*Davis, J.C. and Mehta, A.J.C.*) PIARALAL NANAK CHAND *v.* THE BOMBAY CO. **30 S.L.R. 6=165 I.C. 826=9 R.S. 108 =A.I.R. 1936 Sind 211.**

——**O. 21, R. 50**—*Applicability—Joint Hindu family firm.*

O. 21, R. 50, C. P. Code, applies to a joint Hindu family firm. (*Rowland and Chatterji, JJ.*) NATHUNI PRASAD *v.* RADHA KISHUN DUTT RAI FIRM. **6 B.R. 64=184 I.C. 701=21 Pat.L.T. 618=12 R.P. 261=A.I.R. 1940 Pat. 149.**

——**O. 21, R. 50**—*Decree against limited liability Company—Order making shareholders liable—If a nullity.*

No order under O. 21, R. 50, C. P. Code, could be passed making the shareholders liable when the decree is against a limited liability company. Such an order must be deemed to be a nullity and must be ignored by the Executing Court. (*Jai Lal, J.*) NIHAL CHAND *v.* KHARAK SINGH-SUNDAR SINGH. **164 I.C. 513=9 R.L. 134=39 P.L.R. 163=A.I.R. 1937 Lah. 59.**

——**O. 21, R. 50**—*Decree obtained against firm by serving summons in suit upon two persons as partners—Execution petition stating three others* *as remaining partners—Leave not obtained from Court—Validity of execution.*

Where a decree is obtained against a firm by serving summons in the suit upon two persons as partners of that firm, the mere fact that three other persons are stated to be the remaining partners of the firm in the petition for execution of the decree cannot make the execution invalid. These other persons do not, no doubt, come under O. 21, R. 50 (1) (*b*) and (*c*), C. P. Code. The decree-holder cannot execute the decree against them unless he has obtained leave from the Court which has passed the decree. If this leave has not been obtained, he is entitled to proceed against the other two judgment-debtors, and the execution petition is valid so far as they are concerned. (*Bartley and Nasim Ali, JJ.*) Radha Canta Pal *v.* Pulin Krishna Pal. **177 I.C. 812=11 R.C. 277=42 C.W.N. 310=A.I.R. 1938 Cal. 316.**

——**O. 21, R. 50 (2)**—*Application for leave under—Limitation—Execution against partner more than three years after date of decree—Competency—Limitation Act, Arts.* 181 *and* 182.

An application for leave to execute a decree against a partner of a firm under O. 21, R. 50 (2), C. P. Code, is an application in execution of the decree against the firm, and falls under Art. 182 and not Art. 181 of the Limitation Act. The application can be made at any time during which the decree remains capable of being executed; and a decree-holder can apply for execution against an individual partner, obtaining leave if necessary, even if more than three years have elapsed since the passing of the decree, provided the execution is not barred in any other way. (*Davis, J.C. and Lobo, A.J.C.*) Kishinchand Butamal *v.* Dhaniram Jamnadas. **30 S.L.R. 88=164 I.C. 1011=9 R.S. 82=A.I.R. 1936 Sind 138.**

——**O. 21, R. 50 (2)**—*Duty to grant leave under—Decree transferred for execution to another Court.*

A decree against a firm was sought to be executed against a person alleged as being a partner of the firm. The Bombay High Court sent the decree for execution to Karachi Court and imposed upon it the duty to grant leave under R. 50 (2) and determine the liability of the person.

Held, that so far as the duty imposed was concerned the order of the first High Court was *ultra vires* and that part could not be executed by the latter High Court, as under O. 21, R. 50 (2) it is for the Court which passed the decree to grant leave or to decide the disputed liability of the partner. (*Davis, J.C. and Mehta, A.J.C.*) British India Steam Navigation Co., Ltd. *v.* A. M. Jiwanjee & Co. **30 S.L.R. 290=161 I.C. 524=8 R.S. 149=A.I.R. 1936 Sind 11.**

——**O. 21, R. 50 (2)**—*Enquiry under—Scope—If affects legal representatives of partner.*

The enquiry under O. 21, R. 50 (2), C. P. Code, is limited to the determination as to whether the persons who are sought to be made liable under the decree are partners or not. It is not intended to affect the legal representatives of the partner. (*D. N. Mitter and S. K. Ghose, JJ.*) Purna Chandra Shaha *v.* Hossain Kasim Dada. **41 C.W.N. 566.**

——**O. 21, R. 50 (2)**—Ex parte *decree obtained against firm mentioning individuals constituting it—Application to set aside* ex parte *decree dismissed on footing that decree was against firm—Sale of personal properties of partners without leave of Court—Validity—Decree-holder, if can contend that decree was against individuals composing firm.*

A decree was obtained against a firm mentioning also the individuals that constituted the firm. Execution was taken and a certain property was brought to sale and purchased by the decree-holders. Upon this judgment-debtor No. 1 and the sons of judgment-debtor No. 2, who had died since the passing of the decree, objected that the property did not belong to the firm; that the decree-holders had not obtained any order under O. 21, R. 50, making the partners of the firm personally liable and that the sale was accordingly without jurisdiction. This objection was allowed by the lower appellate Court. On appeal against the appellate order, it was contended on behalf of the decree-holder appellant that the decree under execution was not a decree against the firm at all and that it was, therefore, unnecessary to obtain any order under O. 21, R. 50. It appeared that at a later stage judgment-debtors Nos. 1 and 2 applied under O. 9, R. 13 (as the decree had been passed *ex parte* against them) to have it set aside. This application was dismissed but only on the finding that though they had not been individually served with summonses the decree was quite valid in view of the service of summons on defendant No. 4 who had been stated by the plaintiffs to be the manager of the business of the firm. The Court which dealt with the application further held that it would be "open to defendants Nos. 1 and 2 to come under O. 21, R. 50, C. P. Code, in the execution stage to object to the attachment of their personal properties."

Held, that in view of what happened in the proceedings under O. 9, R. 13, it was no longer open to the decree-holders to contend that what they had was a decree against the individuals composing the firm and not merely a decree against the firm, and that, therefore, their appeal should fail. (*Courtney-Terrell, C.J. and Dhavle, J.*) Ramanand Ganpat Rai *v.* Rakhal Mandal. **163 I.C. 34=8 R.P. 631=1936 P. W. N. 527=A.I.R. 1936 Pat. 496.**

——**O. 21, R. 50 (2)**—*Jurisdiction.*

Difference between an order under O. 21, R. 50 (2) and an order under S. 47 is that an order under S. 47 may be passed by the Court executing the decree whereas an order under O. 21, R. 50 (2) may be passed only by the Court which passed the decree. (*Davis, J.C., Lobo and Weston, JJ.*) Seoomal Khemchand *v.* Sh. Lahnibai. **I.L.R. (1939) Kar. 589=182 I.C. 470=12 R.S. 13=A.I.R. 1939 Sind 161 (F.B.).**

——**O. 21, R. 50 (2)**—*Jurisdiction—Application for leave under—Decree transferred for execution to another Court—Subsequent application to original Court for leave under O. 21, R. 50 (2)—Competency—Order granting leave—If* ultra vires.

The Court which passed the decree is competent and has jurisdiction to grant leave to the decree-holder under O. 21, R. 50 (2), C. P. Code, even after the decree has been transferred for execution to another Court. Merely because the decree is transferred for execution by it to another Court, it does not cease to have jurisdiction to grant such leave. (*Sulaiman, C.J. and Yorke, J.*) KRISHNA CHANDRA AGARWAL *v.* MOHAN LAL BIKRAM DAS & CO. **I.L.R. (1937) All. 946=10 R.A. 433=1938 A.L.R. 41=172 I.C. 901=1937 A.W.R. 850=1937 A.L.J. 1165=A. I. R. 1937 All. 758.**

——**O. 21, R. 50 (2)**—*"Partner"—Legal representative of deceased partner—Question as to liability—If can be raised in execution.*

The term "partner" in O. 21, R. 50 (2), C. P. Code, includes his legal representative; and the question of the liability of the legal representative of a deceased partner of a firm can therefore be raised and decided in execution proceedings. (*Davis, J.C. and Mehta, A.J.C.*) PIARALAL NANAK CHAND *v.* THE BOMBAY CO. **30 S. L.R. 6=165 I.C. 826=9 R.S. 108=A.I.R. 1936 Sind 211.**

——**O. 21, R. 50 (2)**—*Person filing objection under protest under O. 30, R. 8—Enquiry into his liability—If excluded.*

A person who files an objection under protest under O. 30, R. 8, C. P. Code, denying that he is a partner, does not fall under the category of persons to whom O. 21, R. 50 (1) (*b*) applies, and an enquiry into his liability under O. 21, R. 52 (2) is, therefore, not excluded. (*D. N. Mitter and S. K. Ghose, JJ.*) PURNA CHANDRA SHAHA *v.* HOSSAIN KASIM DADA. **41 C.W.N. 566.**

——**O. 21, R. 50 (2)**—*Procedure—Application for leave under—Prior application for execution—If condition precedent.*

There is no warrant for holding that an application under O. 21, R. 50 (2), C. P. Code, for leave to execute a decree obtained against a firm as against some partner or partners cannot be made unless in the first instance a regular darkhast has been filed under O. 21, R. 11, C. P. Code. The logical course is to apply for leave first and then to execute the decree afterwards. (*Beaumont, C.J. and Kania, J.*) COOVERJI VARJANG *v.* COOVERBAI. **I.L.R. (1940) Bom. 562=42 Bom.L.R. 564.**

——**O. 21, R. 50 (2)**—Question of liability under—Jurisdiction to decide—Transferee Court—Competency of. *See* C. P. CODE, S. 42. **A.I.R. 1937 Pesh. 96.**

——**O. 21, R. 50 (2)**—*Scope—Arbitration—Award—Filing of—Application for—Objection that party is not partner of firm—Maintainability—Question—When to be raised.*

The question whether all or any of the persons served with notices of an award or of its filing in Court are partners in a firm can only be litigated when an application under O. 21, R. 50, C. P. Code, is made against persons alleged to be partners and permission is sought to enforce the award against them. Such a question cannot be gone into in proceedings for filing the award and the hearing of objections directed against it. (*Rupchand Bilaram, A.J.C.*) FLEMING SHAW & CO. *v.* BAHADUR & CO. **29 S.L.R. 292=164 I.C. 1015=9 R.S. 83=A.I.R. 1936 Sind 121.**

——**O. 21, R. 50 (2)**—*Scope—Grounds on which liability may be disputed.*

O. 21, R. 50 (2), C. P. Code, is sufficiently wide to permit a person desiring to dispute his liability as a partner to do so not only on the ground that he is not a partner, but on other grounds as well. He can dispute his liability by establishing that a contract of sale was beyond the scope of the partnership. He can also contend that the individual partners had no authority on behalf of the partnership to refer disputes between the firm and persons with whom the firm had dealings, to arbitration. (*Panckridge, J.*) TOLARAM NATH MULL, *In re.* **I.L.R. (1939) 2 Cal. 312=185 I. C. 44=12 R.C. 427=43 C.W.N. 997=A. I. R. 1940 Cal. 28.**

——**O. 21, R. 52**—Applicability—Surplus sale proceeds in Court. *See* C. P. CODE, S. 60 (*m*). **A.I.R. 1937 Nag. 391.**

——**O. 21, R. 52**—*Attachment before judgment in force—Another decree-holder without giving notice to Court putting to sale property in execution of his decree and purchasing it—Property again sold in execution of decree, in which it was attached before judgment—Right of decree-holder previously purchasing property to damages.*

An attachment before judgment, is made in the interest of the decree-holder subsequently obtaining decree in the suit, in order to prevent the judgment-debtor from disposing of the property before the sale and does not operate against any other creditor of the judgment-debtor. Where however a creditor putting property to sale in execution of his decree and purchasing it, while an attachment before judgment is in force, omits to give notice according to O. 21, R. 52 to the Court attaching the property before judgment, and the property is again sold in execution of the decree in that suit, the decree-holder purchasing the property and omitting to give notice under O. 21, R. 52, is not entitled to get any damages from the other decree-holder, as the decree-holder by omitting to take action under O. 21, R. 52 prejudices the other decree-holder. (*M.C. Ghose, J.*) SASHI BHUSAN GHOSE *v.* BHUPENDRA NATH PAL. **167 I.C. 455=9 R.C. 693=A.I.R. 1936 Cal. 112.**

——**O. 21, R. 52**—*Scope—Dividend in Official Assignee's hand due to judgment-debtor—Attachability before declaration of dividend.*

O. 21, R. 52, C. P. Code, deals with the position where property is in the custody of the Court and says how it shall be attached. Where no dividend in the Official Assignee's hands to which judgment-debtor is entitled is declared until a particular date, the creditors of the judgment-debtor are entitled to nothing prior to that date since there is nothing in the Official Assignee's hands to which they can lay claim. (*Roberts, C. J. and Leach, J.*) RAMASWAMY CHETTYAR *v.* DAYABHOY & SONS. **175 I.C. 869=11 R.R. 13=A.I.R. 1937 Rang. 538.**

——**O. 21, R. 52**—*Suit by* A *for recovery of rent due from paddy lands—Appointment of receiver—*A *applying for attachment of amount collected by receiver—Other decree-holders,* C *and* D, *also applying for permission to attach the money—Permission granted—No order under O. 21, R. 52, issued—Right of* A *to the amount.*

A, a company, filed a suit against *B* for recovery of a sum of money being rent due from paddy lands. *A* also applied for an injunction restraining *B* from dealing with the rental paddy for the current year. The application was treated as an application for appointment of a receiver of the rental paddy of the land from which rent was due and a receiver was appointed. The receiver filed his accounts and reported a certain sum as the balance in his hands available for distribution. *A* subsequently applied in execution of his decree by arrest of *B*, but on advice of the Court applied for attachment of the amount collected by the receiver. Meanwhile two other decree-holders *C* and *D* holding decrees against *B* filed applications praying for permission to attach the money in the hands of the receiver. The permission was granted but neither party took any further steps. No order was issued under O. 21, R. 52, requesting that the money should be held subject to further orders nor was there anything on the record showing that the decrees of *C* and *D* were transferred to the Court in which the application for execution was made. On application by *A* for payment of the amount deposited by the receiver, *C* and *D* filed objections. The Court holding that *C* and *D* had effected an attachment of the amount decided that they alone were entitled to utilise the amount towards the satisfaction of their decrees, and that they had a prior claim to *A* inasmuch as their attachments were prior. *A* appealed from the order.

Held, that the order of the lower Court was wrong. *C* and *D* had not effected a valid attachment of the amount in question. All that they did was to go to the Court holding the 'assets' and ask for permission to attach it. That was not sufficient. Their proper procedure was to apply to the Court executing their decrees for an order under O. 21, R. 52.

Held, further, that there was no provision of law under which the Court could have appointed the receiver. The appointment of receiver being made by agreement or consent of parties, only such amount could be attached by any other creditor of *B* which was in excess of the amount due to *A*. *C* and *D* had no claim whatever to the amount deposited by the receiver. *A* company was entitled to have the amount paid to them towards satisfaction of their decree. (*Ba U and Mackney, JJ.*) SYRIAM LAND CO., LTD. *v.* GURA BISWAL. **A.I.R. 1936 Rang. 83.**

———**O. 21, R. 52, Proviso**—Construction and scope—Right to money in deposit under attachment—Dispute between decree-holder and judgment-debtor—Jurisdiction to decide—Custody Court or executing Court. *See* C. P. CODE, S. 47. **19 N.L.J. 287.**

———**O. 21, R. 52, Proviso**—*Right of suit—If barred.*

Any decision in a proceeding under O. 21, R. 52, proviso, C. P. Code, between the decree-holder and a third person would not be a decision under S. 47, C. P. Code and therefore a regular suit would not be barred. (*Syed Nasim Ali and Sen, JJ.*) KANJI VALJI *v.* KALIDAS THAKURSAY. **182 I.C. 860=12 R.C. 104 (2)=69 C.L.J. 108=A.I.R. 1939 Cal. 413.**

———**O. 21, R. 53**—*Attachment before judgment of decree held by defendant—Decree passed in suit—Effect of—Rights of attaching decree-holder.*

Per *Nazim Ali, J.*—Where a plaintiff in a suit attaches before judgment a decree that the defendant had obtained in his favour against another, the attachment, after a decree is passed in the suit, operates as an assignment of the attached decree in favour of the plaintiff-decree-holder for the *pro tanto* satisfaction of his decree. Money realised in execution of the attached decree must be taken as lying in Court to his credit for *pro tanto* satisfaction of his decree, at any rate, after he applies for payment of the money to him.

Per *Mitter, J.*—When the plaintiff obtains a decree against the defendant and attaches the decree which the defendant had obtained against another, he becomes entitled to all the rights which are given to the attaching decree-holder under O. 21, R. 53, C. P. Code. Any payment by the judgment-debtor of the attached decree would go to satisfy not only that decree but also the decree of the attaching decree-holder. (*Nazim Ali and Mitter, JJ.*) UDAI RAM *v.* NATHMALL. **43 C.W.N. 1076.**

———**O. 21, R. 53**—*Decree attached in execution—Execution case subsequently dismissed for default—Right of decree-holder to execute attached decree.*

A decree-holder in execution of his decree attached another decree in favour of the judgment-debtor along with his other property. He proceeded only against the other property and later on with the object of executing the attached decree filed another execution case and got his name substituted as a decree-holder for that of the judgment-debtor. The Sub-Judge in seisin of the first execution case dismissed the same in default on the ground that no steps had been taken and the judgment-debtors of the attached decree applied under S. 47 objecting to the execution.

Held, that having obtained an order of attachment the decree-holder had automatically become authorized to put the attached decree into execution under O. 21, R. 53 in so far as the attached decree was concerned. Any subsequent dismissal for default of the previous execution case on account of any default of the decree-holder in connection with matters left outstanding in those execution proceedings after the attachment of the decree could not be regarded as an obstacle to prevent the decree-holder from executing that decree in a subsequent execution proceeding properly instituted for the purpose under O. 21, R. 53 of the Code. (*Edgley, J.*) SATISH CHANDRA *v.* BIRESWAR SUR. **A.I.R. 1939 Cal. 465.**

———**O. 21, Rr. 53, 60 and 47**—*Decree for arrears of rent under C. P. Tenancy Act—If attachable under Civil Procedure Code—Lambardar and attaching decree-holder forming the only co-sharers—Effect.*

A decree for arrears of rent against a tenant whose tenure is governed by the C. P. Tenancy Act is a simple money decree and in itself does not differ from any other decree of that character. There is nothing special or peculiar to it *qua* decree. It can therefore, so far as Civil Procedure Code is concerned, be executed in the same way as any other decree. Hence it is also attachable as any other decree under O. 21, R. 53. Where the decree is obtained by the lambardar who together with the attaching decree-holder form the only two co-sharers of the village, O. 21, R. 60, C. P. Code, would not apply, for the words 'some other person' occurring in the rule, can only mean, when the context is considered some person other than the attaching decree-holder or judgment-debtor. Nor would R. 47 of O. 21 apply to the case. O. 21 deals separately with different kinds of property and lays down different modes of attachment in respect of each. In view of the special provisions, decrees cannot be dealt with as 'movable property' and are not so treated for the purpose of the special provisions which relate to attachment. Again, R. 47 which contemplates two or more 'co-owners' in the property sought to be attached can have no application inasmuch as according to the special rules obtaining in the C. P. Tenancy Act the lambardar alone is the decree-holder. (*Stone, C.J. and Bose, J.*) CHINTAMAN *v.* MAHADEO. **189 I.C. 807=1940 N.L.J. 56=A.I.R. 1940 Nag. 270.**

———**O. 21, R. 53**—*Decree for payment of money—Meaning of—Preliminary decree for accounts in suit for dissolution of partnership—Attachability.*

A preliminary decree for accounts in a suit for dissolution of partnership is not a decree for the payment of money within the meaning of O. 21, R. 53, C. P. Code and is therefore not attachable and saleable in execution. (*D. N. Mitter and S. K. Ghose, JJ.*) SAILENDRA KRISHNA CHOUDHURY *v.* HARENDRA KUMAR ROY. **167 I.C. 430=9 R.C. 686=40 C.W.N. 1393=A.I.R. 1937 Cal. 4.**

———**O. 21, Rr. 53 and 54**—*Decree for possession by partition—Mode of attachment.*

When a decree is for possession by partition of property, it is not even a preliminary decree for partition and hence if such a decree is to be attached, one has to proceed under O. 21, R. 53, and attachment under O. 21, R. 54 is invalid as it deals with attachment of immovable property. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SAYED AHMAD ALI *v.* RADHA KISHAN. **166 I.C. 867=9 R. Pesh. 77=A.I.R. 1937 Pesh. 13.**

———**O. 21, R. 53**—*Notice to judgment-debtor and decree-holder if necessary to make attachment effective.*

When a decree-holder seeks to execute his decree by attachment of another decree, in order that the attachment may be effective notices to the decree-holder and judgment-debtor of the attached decree are imperative and the mere order communicating the fact of attachment to the Court passing the decree is not enough. (*Vivian Bose, J.*) GOWARDHAN *v.* HARGOVIND. **180 I.C. 305=11 R.N. 353=1939 N.L.J. 73=A.I.R. 1939 Nag. 17.**

———**O. 21, R. 53**—*Preliminary decree for sale of property covered by security bond—Attachment of—Final decree passed in favour of transferee decree-holder—*Locus standi *of attaching creditor to execute final decree.*

A preliminary decree for sale of property covered by a security bond cannot be regarded as one for the payment of money, or for enforcement of a mortgage or charge nor is it capable of execution. An attaching creditor of such a decree has no *locus standi* as regards the execution of the final decree that is subsequently passed in favour of a transferee from the decree-

holder. (*Nanavutty and Smith, JJ.*) FAQIR BAKHSH *v.* MARIYAM. **13 Luck. 237=168 I.C. 154=9 R.O. 445=1937 O.L.R. 224=1937 O.W.N. 519=A.I.R. 1937 Oudh 365.**

———**O. 21, R. 53 (1) (b)**—*Notice not issued to Court which passed decree sought to be attached—Validity of attachment.*

The provisions of O. 21, R. 53 (1) (*b*), C. P. Code, are mandatory. The only manner in which a decree is to be attached is by issuing a notice by the Court which passed the decree sought to be executed to the Court, which passed the decree sought to be attached and further if the latter decree had been transferred for execution to another Court, by a further notice to that Court. If such notices are not issued, there is no legal attachment, and the holder of the decree sought to be executed does not become the representative of the holder of the decree sought to be attached and he cannot, therefore, execute the same. (*Mitter and Khundkar, JJ.*) ANIL KUMAR *v.* JUGAL KISHORE. **43 C.W.N. 374.**

———**O. 21, R. 53 (1) (b) (ii) (Lahore amendment) and R. 53 (3)**—*Decree-holder attaching in execution decree obtained by his judgment-debtor in another Court—Execution of attached decree by attaching decree-holder—Consent of attaching Court—If necessary—No consent is necessary for attaching decree-holder to execute attached decree.*

O. 21, R. 53 (1) (*b*) (*ii*), C. P. Code (Lahore amendment) and O. 21, R. 53 (3) are to be read together. Where a decree-holder attaches in execution a decree obtained by his judgment-debtor in another Court such decree-holder becomes the representative of his judgment-debtor under O. 21, R. 53 (3), with respect to the decree obtained by such judgment-debtor and he is entitled to execute the attached decree in any lawful manner. The consent in writing as required by R. 53 (1) (*b*) (*ii*) (Lahore), of the attaching decree-holder or of the attaching Court, is necessary when the judgment-debtor whose decree is attached seeks to execute it. Such consent is not necessary when the attaching decree-holder executes the attached decree. (*Jai Lal, J.*) WASDEV *v.* KIDAR NATH. **173 I.C. 300=10 R.L. 430=39 P.L.R. 583=A.I.R. 1937 Lah. 368.**

———**O. 21, R. 53 (2)**—Scope and effect—Attachment of same decree by several decree-holders—Right to rateable distribution—Decree-holder starting execution first—If entitled to benefit of entire deposit—C. P. Code, S. 73. *See* C. P. CODE, S. 73. **40 C.W.N. 1249.**

———**O. 21, R. 53 (3) and S. 146**—Attaching decree-holder—Position of—Right to adjust attached decree to his satisfaction. *See* BENGAL PUBLIC DEMANDS RECOVERY ACT, S. 19 (3). **41 C.W.N. 880=A.I.R. 1937 Cal. 468.**

———**O. 21, R. 53 (3)**—*Construction—Attaching decree-holder—Power to certify satisfaction of attached decree under O. 21, R. 2.*

The mere use of the word "representative" in O. 21, R. 53 (3), C. P. Code, cannot be taken as justifying the conclusion that the attaching decree-holder is the representative of the holder of the attached decree for all purposes. The holder of the attaching decree can be treated as the representative of the holder of the attached decree only for the purpose contemplated in O. 21, R. 53 (3), namely, for the purpose of execution, but he cannot exercise the power conferred under O. 21, R. 2 upon the decree-holder himself of certifying an adjustment made out of Court as a satisfaction of the decree. (*Wadsworth, J.*) AHAMAD IBRAHIM ROWTHER *v.* ALLAPICHAI ROWTHER. **51 L.W. 148=1940 M.W.N. 505=A.I.R. 1940 Mad. 534=(1940) 1 M.L.J. 292.**

———**O. 21, R. 53 (4)**—Applicability—Partnership—Decree for dissolution and accounts—Attachment—Mode of. *See* C. P. CODE, S. 60. **18 Pat. 688.**

———**O. 21, R. 53 (4)**—*Construction—"Court which passed the decree"—If includes Court to which decree is sent for execution—Decree—Transfer for execution to another Court—Jurisdiction of latter Court to attach and sell partition decree of judgment-debtor.*

The words "the Court which passed the decree" in O. 21, R. 53 (4), C. P. Code, include the Court to which the decree has been sent for execution and such Court, and not only the Court which actually passed the decree, has jurisdiction to attach a decree passed in favour of a judgment-debtor, in the manner laid down by O. 21, R. 53 (4). Having regard to the terms of S. 42, C. P. Code, the Court to which the decree has been sent for execution is empowered to execute it in any of the ways prescribed by S. 51, C. P. Code, that is applicable to the particular kind of decree, and in the case of a partition decree, the executing Court is empowered, by reason of S. 42, to effect attachment in the manner prescribed by O. 21, R. 53 (4).

Rowland, J.—The steps contemplated by O. 21, R. 53 (4), C. P. Code, are things to be done in executing the decree, and, therefore, in this matter the powers of the Court to which a decree has been sent are co-extensive with the powers of the Court which passed the decree even without the addition in the rule of words specifically permitting the Court to which the decree has been sent to do a particular thing. (*Agarwala and Rowland, JJ.*) PIRTHI RAJ GANESH DAS *v.* BAI MAKUND MARWARI. **188 I.C. 488=13 R.P. 1=6 B.R. 698=21 Pat.L.T. 427=A.I.R. 1940 Pat. 557.**

———**O. 21, R. 53 (4) and (6)**—*Sale of attached decree before receipt of notice of attachment—Right of purchaser to execute decree.*

A purchaser of an attached decree has no right to execute that decree for himself, although no notice of attachment was served upon his vendor previous to the sale by him of his decree. Sub-Cl. (6) of R. 53 of O. 21, C. P. Code, affords no help to the purchaser at all. Its purpose is to protect payments made by the judgment-debtor of the attached decree to his creditor before he receives notice of the attachment. Nor is sub-Cl. (4) of any avail to the purchaser. The mere fact that the decree was sold after the attachment would not prevent the attaching creditor from executing the decree himself. (*Henderson, J.*) SARAT CHANDRA DAS *v.* JATINDRA NATH CHAKRAVARTI. **175 I.C. 912=11 R.C. 18=66 C.L.J. 459=A.I.R. 1938 Cal. 401.**

———**O. 21, R. 53 (6)**—*Notice not issued to judgment-debtor—Adjustment between him and his decree-holder—Validity.*

If no notice under O. 21, R. 53 (6), C. P. Code, is issued on the judgment-debtor and bound by the attached decree, an adjustment between him and his decree-holder would be valid. (*Mitter and Khundkar, JJ.*) ANIL KUMAR *v.* JUGAL KISHORE. **43 C.W.N. 374.**

———**O. 21, R. 54**—Applicability—Attachment before judgment—Mode of effecting. *See* C. P. CODE, O. 38, R. 7. **A.I.R. 1939 Pat. 81.**

———**O. 21, R. 54**—*Attachment by non-official—Validity.*

An attachment under O. 21, R. 54, C. P. Code, cannot be made by a non-official who has no authority to effect any attachment at all. (*Tek Chand and Dalip Singh, JJ.*) PILADA RAM *v.* TULSI DAS ASA NAND. **186 I.C. 633=12 R.L. 407=41 P.L.R. 838=A.I.R. 1940 Lah. 30.**

———**O. 21, R. 54**—Attachment of property—Validity of—Part of such property vesting in judgment-debtor only after attachment. *See* C. P. CODE, S. 64. **42 Pat.L.R. 356.**

———**O. 21, R. 54**—*Compliance with—Attachment under—Essentials of.*

In order to effect an attachment of immovable property, it is necessary (1) to pass an order prohibiting the judgment-debtor from transferring or charging the property in any way, and (2) to have that order proclaimed by beat of tom-tom near the property and to have copies of the order affixed on a conspicuous part of the property, of the Court-house, and also in the office of the Collector of the district. The prohibitory order must be passed by the Court, and it is not enough for the Court to say "attach" and for the Amin to say "I have attached," to constitute a valid attachment. (*Burn, J.*) NOOR MAHOMED MOHIDEEN PILLAI *v.* PECHI AMMAL. **50 L.W. 656=1939 M.W.N. 783=A.I.R. 1939 Mad. 793=(1939) 2 M.L.J. 375.**

———**O. 21, R. 54 and O. 38, R. 5**—*Conditional order of attachment before judgment—No order absolute—Requirements of O. 21, R. 54 complied with—No process issued—Validity of attachment.*

Where there was a conditional order of attachment before judgment and no order absolute was later on made and where though no process was issued under O. 21, R. 54, all other requirements were observed.

Held, that the attachment was validly made and that the mere omission to record an order absolute does not make the attachment ineffectual. (*M. C. Ghose, J.*) AMODINI DASI *v.* RAGHUNATH MALLICK. **176 I.C. 166=11 R.C. 45=66 C.L.J. 222=A.I.R. 1938 Cal. 236.**

———**O. 21, Rr. 54 and 90**—*Failure to affix copy of proclamation at Court-house—Material irregularity.*

Failure to affix a copy of the sale proclamation at the Court-house of the execution Judge amounts to irregularity of a material character as described in O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE AND MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———**O. 21, R. 54**—*Issue of prohibitory order—If includes service of copy of order on judgment-debtor.*

Issue of a prohibitory order under Sub-R. (1) does not mean or include the service of a copy of the order on the judgment-debtor or defendant as the case may be. All that is required under R. 54 is making of a prohibitory order by the Court after the procedure has been followed, and then the proclamation of that order in the manner laid down in Sub-R. (2). (*Mya Bu and Dunkley, JJ.*) Nayasha Kursoon Bee Bee *v.* S.P.S.T.R.M. Chettyar Firm. **164 I.C. 1044=9 R.R. 172=A.I.R. 1936 Rang. 403.**

———**O. 21, R. 54**—*Notice to Judgment-debtor living outside jurisdiction—Power of Court—Property to be attached lying within jurisdiction.*

There is nothing to prevent a Court issuing a notice to a judgment-debtor living outside its own jurisdiction on an application made for attachment of property situate within its jurisdiction. (*Baguley, J.*) U Maung Maung *v.* Sahul Hamid. **186 I.C. 42=12 R.R. 243=1939 Rang. L.R. 587=A.I.R. 1939 Rang. 433.**

———**O. 21, R. 54**—Order of attachment—Compliance with formalities—Presumption, when process-server's report is available. *See* Evidence Act, S. 114, Ill. (*e*). **41 P.L.R. 149.**

———**O. 21, R. 54**—*Personal service of prohibitory order on Judgment-debtor—Necessity for.*

Under O. 21, R. 54, C. P. Code, personal service of the prohibitory order on the judgment-debtor is not necessary. (*Roberts, C.J., Mya Bu and Mosely, JJ.*) S. T. R. M. Chettyar Firm *v.* Andathal. **185 I.C. 386=12 R.R. 192=1939 Rang.L.R. 594=A.I.R. 1939 Rang. 434 (S.B.).**

———**O. 21, R. 54 (2)**—*Attachment of single parcel of land with buildings thereon—Copy of order of attachment affixed to one building—Validity of attachment.*

When a single parcel of land with the buildings thereon is to be attached, the attachment is validly made, within the terms of Sub-R. (2), R. 54, if a copy of the order of attachment is affixed on some one part of the property. This one part need not necessarily be a building at all, as long as it is a conspicuous part. If a copy of the order is affixed on one of the buildings, then that copy of the order will be sufficient to include in the attachment all the buildings standing upon the land attached. (*Mya Bu and Dunkley, JJ.*) Nayasha Kursoon Bee Bee *v.* S. P. S. T. R. M. Chettyar Firm. **164 I.C. 1044=9 R.R. 172=A.I.R. 1936 Rang. 403.**

———**O. 21, R. 54 (2)**—*Non-affixing of order on Court-house—Validity of attachment.*

There is no valid attachment if a copy of the order is not affixed on the Court-house as required by O. 21, R. 54, C. P. Code. (*Bhide, J.*) Maidatt Manak Chand *v.* Mst. Lachho. **41 P.L.R. 149=A.I.R. 1939 Lah. 284.**

———**O. 21, R. 54 (2)**—*Omission to affix notice and make proclamation—Validity of attachment.*

No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Civil Procedure Code have been done. The omission to affix notice, etc., and make proclamation cannot be looked upon as a trivial irregularity as that is the only way in which the public is informed of the existence of an attachment. (*Bhide, J.*) Derajat Bank, Ltd. *v.* Sardar Bibi. **173 I.C. 527=10 R.L. 455=39 P.L.R. 887=A.I.R. 1937 Lah. 671.**

———**O. 21, R. 54 (2)**—*Order of attachment—Formality of affixing a copy on the Court house—Non-mention on the endorsement on the back of the warrant—Effect.*

Where it is not in dispute that an order of attachment was made and the order was proclaimed as required by O. 21, R. 54 (2) and a copy of the order was affixed in the office of the Collector, and the only thing that is disputed is the affixing of a copy of the order on a conspicuous part of the Court house, which fact is not specifically mentioned on the back of the warrant and there is no evidence that this formality was not observed.

Held, it must be presumed that this formality also has been complied with. It is enough if the bailiff stated that the order of the Court had been complied with. It is not necessary for him to have entered into minute details. (*Din Mahomed, J.*) Lachman Singh *v.* Dasaundhi Ram Babu Ram. **175 I.C. 400=10 R.L. 716=39 P.L.R. 870=A.I.R. 1938 Lah. 16.**

———**O. 21, R. 54 (2)**—*Scope—Non-compliance—Failure to affix order in Court house—Effect.*

Where an order for attachment is proclaimed by beat of drum and a copy of the same affixed on the property attached but no copy is affixed to the notice board of the Court as required by O. 21, R. 54 (2) the attachment cannot be regarded as complete. In such a case there cannot be any question that there is no attachment in fact. But that will not affect the right of the person obtaining the order of attachment to apply as an attaching creditor to set aside a sale of the property in execution of another decree held after his order of attachment and decree. (*R. C. Mitter, J.*) Govinda Prasad Dalal *v.* Brindabon Chandra Nasipuri. **167 I.C. 600=9 R.C. 703=63 C.L.J. 560=40 C.W.N. 1338=A.I.R. 1937 Cal. 7.**

———**O. 21, R. 54 (3) (Allahabad)**—*Construction—'Date', meaning of—Priority as between sale and attachment on the same day—Rules for determination—General Clauses Act, S.* 5 (3), *if can be applied.*

Sub-R. (3) added by Allahabad High Court to O. 21, R. 54, C. P. Code, speaks of the 'date' but makes no provision as to the 'time' from which the order shall take effect as against the person mentioned therein. The word 'date' in the rule, must be interpreted to mean 'time'. Therefore where the execution of the sale-deed and the attachment of the same property take place on the same date, there is no statutory provision for priority as between the two. As such, rules of justice, equity and good conscience must be followed. S. 5 (3) of the General Clauses Act cannot be applied to such a case. That deals with the Acts of the Governor-General in Council and lays down that unless the contrary is expressed such Acts shall be construed as coming into operation immediately on the expiration of the day preceding their commencement. That is a very different matter and can be of no assistance in the present case. (*Bennet and Verma, JJ.*) Rameshwar Prasad *v.* Gaya Prasad. **180 I.C. 83=11 R.A. 423=1939 A.L.J. 7=1938 A.W.R. (H.C.) 876=A.I.R. 1939 All. 154.**

———**O. 21, R. 54 (3) (Nagpur)**—*"Good faith"—What constitutes—Mortgage in favour of* *creditor—Mortgage effected after order of attachment—Mortgage complete before property actually attached—Validity—If void under S. 64, C. P. Code.*

A creditor who takes a mortgage from his debtor to secure his debt cannot be deemed to be fraudulent in so doing, even though he knows that another creditor has obtained an order of attachment of the property mortgaged and even though the mortgage is for an amount higher than his pre-existing debt. He should not be presumed to be effecting the mortgage to defeat or delay the attachment, but rather to secure his debt. Such a mortgage cannot be held to be one not made in good faith—When such a mortgage is effected and completed before the attachment of the property is actually effected by affixing the order on the property in question, the mortgage is not void under S. 64, C. P. Code. (*Stone, C.J. and Niyogi, J.*) BEHARILAL *v.* ANAND MANGAL. **19 N.L.J. 94.**

———**O. 21, R. 54 (3) (Nagpur)**—*"Purchaser"—Meaning—If includes mortgagee.*

The word "purchaser" in sub-rule (3) to rule 54 of order 21, C. P. Code, is used in its technical English legal sense and includes a mortgagee. (*Stone, C.J. and Niyogi, J.*) BEHARI LAL *v.* ANANDA MANGAL. **19 N.L.J. 94.**

———**O. 21, R. 55**—*Attachment of money—How long subsists.*

The attachment of money must be deemed to continue so long as that money which is brought into Court by the attachment is not disposed of by the Court attaching that money. (*Thomas, C. J. and Srivastava, J.*) HARSHI KESH v. GULAM HAIDER KHAN. **189 I.C. 236=1940 A. W. R. (C.C.) 282=1940 O.L.R. 419=1940 O.W.N. 591 =1940 O.A. 516=A.I.R. 1940 Oudh 360.**

———**O. 21, R. 55 and S. 64**—*Attachment released on reversal of decree—Decree passed again after remand—Attachment, if revives—Alienation after the release of attachment and before second attachment—Validity.*

Where an attachment is released owing to the reversal of the decree, it should not be deemed to have revived on the passing of the decree once again after remand, and to relate back to the date of the original attachment. When the first attachment is removed, there is no bar left to any alienation until a second attachment takes place. (*Bhide, J.*) PARMANAND *v.* THARU LAL. **163 I.C. 892=9 R.L. 60=39 P.L.R. 306=A.I.R. 1937 Lah. 169.**

———**O. 21, R. 55**—Scope—If subject to S. 73—Money paid to satisfy particular decree debt—Liability to rateable distribution. *See* C. P. CODE, S. 73. **1939 P.W.N. 242.**

———**O. 21, R. 55 (a)**—*Construction—Duty to avoid conflict with S. 73—Attachment when to be deemed to be withdrawn.*

O. 21, R. 55 (*a*), C. P. Code, should be read in such a way that it does not conflict with S. 73, C. P. Code. Attachment shall be deemed to be withdrawn on payment under O. 21, R. 55 (*a*), only when the decree has been satisfied, and the decree can be satisfied only if the amount deposited is available to the decree-holder in full satisfaction of the decree. This result cannot ensue in cases falling under S. 73 which are imperative. The law intervenes in such a case and directs that although the full amount is intended to be paid to the particular decree-holder whose attachment is sought to be got rid of, it has to be diverted by reason of S. 73. (*Fazl Ali and Manohar Lall, JJ.*) SATNARAIN PRASAD CHOWDHURY *v.* MAHABIR PRASAD CHOWDHURY. **18 Pat. 404=183 I.C. 409=5 B.R. 914=12 R.P. 137=20 P.L.T. 646=1939 P.W.N. 242=A.I.R. 1939 Pat. 392.**

———**O. 21, R. 55 (2) (b) (as amended by Oudh Chief Court)**—*Applicant for rateable distribution—When entitled to benefit of original attachment.*

O. 21, R. 55 (2) (*b*), C. P. Code, as amended by the Oudh Chief Court, undoubtedly means that unless along with the decree of the attaching creditor, the decree of an applicant for rateable distribution is also satisfied, the attachment shall not be deemed to be withdrawn. In other words, the meaning is that the original attachment shall enure for the benefit of the decree-holder who has applied for rateable distribution of assets under S. 73 of the Code. This, however, does not and cannot mean that the attachment will enure for the benefit even of those who may apply for execution by rateable distribution of assets in future. The words "notice of which *has been sent* to the sale officer under sub-R. (1)" clearly show that R. 55 (2) can be availed of only by those decree-holders who have applied for rateable distribution prior to the satisfaction of the decree. (*Srivastava, Ag. C. J. and Ziaul-Hasan, J.*) BISMOHAN SINGH *v.* JAGAT BAHADUR SINGH. **12 Luck. 365=164 I.C. 1031=9 R. O. 126=1936 O.W.N. 861.**

———**O. 21, R. 57**—*Applicability—"Attached in execution"—If covers attachment before judgment—Application for execution after attachment before judgment—Dismissal for default—If terminates attachment—Sale without further attachment—If void—C. P. Code, O. 38, R. 11.*

An attachment obtained before judgment was raised on the objection of the defendant on the ground that certain idol was involved whose shebait the defendant was. Plaintiff having instituted a regular suit under O. 21, R. 63, C. P. Code, got a decree in his favour with the result that the attachment before judgment was revived. After further execution and part satisfaction he applied for execution by the arrest of the defendant, but the application was dismissed for default. He then lodged another execution in pursuance of which the property attached before judgment was sold without further attachment. *Held,* (1) that O. 21, R. 57, C. P. Code, did not apply so as to invalidate the sale in execution without a fresh attachment, as the attachment before judgment, which once failed and was revived by the decree in the suit under O. 21, R. 63, C. P. Code, did not come to an end on the dismissal of the previous execution for default; (2) that there was nothing in O. 38, R. 11, C. P. Code, to give colour to the view that for purposes of O. 21, R. 57, C. P. Code, the words "attached in execution" covered attachment before judgment, and that "the attachment" in R. 57 of O. 21, C. P. Code, meant only attachment in execution of the decree; and, therefore, (3) the sale without further attachment was not void. (*Courtney-Terrell, C.J. and Manohar Lall, J.*) MOTI JHA *v.* JWALA PRASAD MARWARI. **18 Pat.L.T. 585=16**

Pat. 589=172 I.C. 193=10 R.P. 307=1937 P. W.N. 895=A.I.R. 1937 Pat. 626.

———O. 21, R. 57—*Applicability—Attachment before judgment—Determination of—Rule as to —Application for sale of attached property—Disposal—Order for continuance of attachment with consent of parties—Effect of.*

Where a sale of property attached before judgment is prayed for in a darkhast and the darkast is disposed of, the attachment is determined so far as such property is concerned. This is a general rule applicable to the determination of an attachment before judgment after the disposal of the darkhast in which the property attached is sought to be sold; it does not, however, apply to a case where there is a specific order for continuance of the attachment made with the consent of the parties. (*Lokur, J.*) Baliram Narayan *v.* Sakharam Ramji. **190 I.C. 21=42 Bom.L. R. 423=A.I.R. 1940 Bom. 250.**

———O. 21, R. 57—*Applicability—"Default of decree-holder"—Attachment — Subsequent insolvency of judgment-debtor—Order dismissing execution petition—If terminates attachment—Subsequent annulment of adjudication—Property if reverts free of attachment—Provincial Insolvency Act, Ss. 29 and 37.*

An adjudication of the judgment-debtor as an insolvent does not automatically raise an attachment effected on his properties prior to the adjudication, and it cannot be said that there will be no attachment if and when the adjudication is annulled. Where the executing Court on being informed of the insolvency erroneously passes an order dismissing the execution petition then pending, instead of staying the proceedings as it should under S. 29 of the Provincial Insolvency Act, it cannot be said that the order of dismissal is an order of dismissal for default of the decree-holder within the meaning of O. 21, R. 57, C. P. Code, so as to have the effect of automatically terminating the attachment. In such a case, where there has been an attachment at the time of the adjudication, and the insolvency is not prosecuted with the result that the adjudication is annulled, subject to the special contingencies contemplated by S. 37 of the Provincial Insolvency Act, the property goes back to the debtor with any burdens which existed upon it at the time of the adjudication. His interest in the property would still be bound by the attachment on the date of the annulment. (*Wadsworth, J.*) Parandamayya *v.* Surayya. **1939 M.W.N. 1111 =50 L.W. 716=A.I.R. 1940 Mad. 129=(1939) 2 M.L.J. 786.**

———O. 21, R. 57—*Applicability—Rejection of execution application under O. 21, R. 17—If dismissal terminating attachment.*

R. 57 of O. 21, C. P. Code, deals in terms with a case where on the petition which is ultimately dismissed an attachment has taken place. In such case the execution petition must *ex hypothesi* have been taken cognizance of and execution ordered and it is only at a later stage that it must be dismissed as contemplated by R. 57. The words of the rule must be applied with caution to cases in which an attachment has taken place before judgment or on a prior execution application. In these classes of cases, if an application execution is rejected under R. 17 of O. 21, *in limine* as not complying with the formal requirements of law, it does not amount to a "dismissal" within the meaning of O. 21, R. 57, C. P. Code. The legal position is that no execution application in accordance with law must be deemed to have been filed; and therefore an attachment effected before judgment and existing does not come to an end. (*Varadachariar and Abdur Rahman, JJ.*) Sathappa Chettiar *v.* Chokkalingam Chettiar. **1940 M.W.N. 69=A.I.R. 1940 Mad. 615.**

———O. 21, R. 57 (as amended in Nagpur)—*Application "struck off" as infructuous but attachment kept pending—Effect of—If dismissed or merely adjourned—Subsequent receipt of assets by Court—Right to rateable distribution—C. P. Code, S. 73.*

Under R. 57 of O. 21, C. P. Code, as it now stands after its amendment in Nagpur in 1930, a Court has power to dismiss an execution application and to continue the attachment. Where a Court passes an order to the effect that "the case is struck off as wholly infructuous at the instance of the decree-holder; house shall remain under attachment for three months," it must be held that the Court dismisses the application and not merely adjourns it. The execution application in such a case cannot be held to be pending for the purpose of enabling the decree-holder to claim rateable distribution of assets received on a date subsequent to such dismissal. The expression "struck off" is ambiguous and unauthorized and should not be used. (*Pollock, J.*) Gulabchand Sheolal *v.* Dongarmal Harak Chand. **I.L.R. (1938) Nag. 346=168 I.C. 475=9 R.N. 257 (1) =A.I.R. 1936 Nag. 277.**

———O. 21, R. 57—*Construction—"Dismissal of such application"—Meaning of—Dismissal of interlocutory application in pending execution application—Effect on attachment—Obtaining of fresh attachment during continuance of prior attachment—If terminates prior subsisting attachment.*

It is clear from the language of R. 57 of O. 21, C. P. Code, that before a pending attachment shall cease, there must be a dismissal of the application for execution in which the attachment was effected. As long as that application for execution is pending and no final orders have been passed on it, any order of dismissal passed on an interlocutory application in the pending execution petition would not terminate the attachment. The fact that owing to a mistake or ignorance of legal rights the decree-holder obtains a fresh attachment would not terminate the previous attachment which is already subsisting. The fresh attachment is a superfluity. (*Venkataramana Rao, J.*) Karuppan Chettiar *v.* Rajangam. **1939 M.W.N. 1157=A.I.R. 1940 Mad. 172=(1939) 2 M.L.J. 916.**

———O. 21, R. 57—*'Default'—Decree-holder's inability to get property attached—If amounts to.*

On an application by a decree-holder, a warrant of attachment of certain movable property belonging to the judgment-debtor was issued. When the bailiff went to the spot accompanied by the decree-holder's representative, he was informed that the property was already sold. On a report being submitted by him to that effect, the execution Court made an order that the case be consigned to the record room inasmuch as the decree-holder's representative had failed to get the property attached.

Held, that the inability on the part of the decree holder to get the property attached did not amount to default contemplated by O. 21, R. 57 and the consignment of the execution case to the record room did not amount to a dismissal of the application so as to attract the penal provisions of O. 21, R. 57, and this being so a fresh application by the decree-holder for execution was not barred. A.I.R. 1938 Lah. 123=175 I.C. 801=11 R.L. 53=39 P.L.R. 967; Reversed. (*Addison and Din Mohammad, JJ.*) Peoples Bank of Northern India, Lahore *v.* Durga Dass. **181 I.C. 900=11 R.L. 898=A.I.R. 1938 Lah. 728.**

———O. 21, R. 57—*"Default"—Meaning of—If covers non-prosecution.*

The term "default" in O. 21, R. 57, in so far as it applies to the decree-holder means default not merely in the sense of non-appearance or non-payment of process fees, etc., but also includes the case of non-prosecution. (*Divatia, J.*) Baba Punjaji *v.* Kisan Narayan. **172 I.C. 848=10 R.B. 296=39 Bom.L.R. 1105=A.I.R. 1938 Bom. 18.**

———O. 21, R. 57—*Execution application consigned to record room at request of decree-holder—Termination of attachment.*

Where at the request of the decree-holder, the executing Court consigned his application for execution to the record room but maintained the attachment,

Held, that the application for execution was dismissed by the executing Court, that the attachment terminated with the dismissal of the application and that it was not possible to revive that application. (*Abdul Rashid, J.*) Nanu Mal *v.* Amar Nath. **181 I.C. 14=11 R.L. 746=40 P.L.R. 473=A.I.R. 1938 Lah. 590.**

———O. 21, R. 57—*Order consigning case to record room—If tantamount to dismissal.*

The question whether a particular order is or is not to be taken as tantamount to dismissal has to be decided on facts of each case. A decree-holder who had attached property made a statement to the effect that the proceedings might be consigned to the record room for the time being, the attachment being kept intact and that certain documents on the record might be returned to him and that he would present an application again within two days. The Court accordingly passed an order consigning the proceedings to the record room and directing that the attachment would continue.

Held, that the order consigning the case to the record room could not be looked upon as one of dismissal. (*Bhide, J.*) Daulat Ram *v.* Pritam Singh. **188 I.C. 335=12 R.L. 519=A.I.R. 1940 Lah. 78.**

———O. 21, R. 57—*Order consigning execution to record room—Effect on attachment.*

In execution proceedings the lower Court, finding that all the representatives of the deceased decree-holder were not included in the application for substitution, passed an order consigning the application to the record room, though the attachment in that execution was to remain in force.

Held, that the order of the lower Court was erroneous to the extent that instead of consigning the proceedings to the record room, it should have got the application for substitution amended. But the order was not tantamount to dismissal of the application for execution, nor did it have the effect of terminating the prior attachment. All that the order meant was that execution proceedings should stand adjourned *sine die.* 1922 All. 62 and 1926 All. 734, *Rel. on.* (*Tek Chand, J.*) Mangal Singh *v.* Sagar. **169 I.C. 255=9 R.L. 729=A.I.R. 1936 Lah. 873.**

———O. 21, Rr. 57, 58 and 63—*Scope—Execution petition finally dismissed though not for default—Effect on attachment—Defeated claimant—If bound to sue under O. 21, R. 63—Fresh attachment—Claim—If barred by failure to file suit to set aside order on claim under prior attachment.*

R. 57 of O. 21, C. P. Code, is not exhaustive of all the ways in which an attachment can be raised. It must be held that when an execution petition has been in fact and intention dismissed finally, even though the dismissal might be due to causes which cannot be described as the default of the decree-holder, then the attachment made under that petition must automatically cease to operate. When an attachment ceases to operate there is no longer any occasion for a defeated claimant to file a suit under O. 21, R. 63. Nor can it be contended that when there is a subsequent attachment and a claim against such attachment, the claim must be related back to the prior attachment; the claim under the subsequent attachment is not barred by the claimant's failure to file a suit to set aside the dismissal of the claim under the earlier attachment which has come to an end owing to an order dismissing the execution petition. (*Wadsworth, J.*) Unnamalai Ammal *v.* Baghyathammal. **1940 M. W. N. 459=A.I.R. 1940 Mad. 763.**

———O. 21, R. 57—*Termination of attachment—Execution petition—Order to the effect "Adjourn Rejected"—If amounts to dismissal.*

In connection with execution petitions, the legal result of orders, such as "rejected," "struck off," "closed," "recorded" and "dismissed," is a matter to be ascertained with reference to the attendant circumstances and not merely from the form of the order. Under O. 21, R. 57, C. P. Code, the Court, where it is unable to proceed further with an execution application, even when it is by reason of the decree-holder's default, can either adjourn the matter or dismiss the petition. Where the order is "Adjourn-Rejected," the order does not amount to a dismissal, but is clearly one of adjournment only. The petition does not cease to be pending and the attachment does not terminate. (*Varadachariar and Mockett, JJ.*) Somasundaram Chettiar *v.* Alamelu Achi. **1937 M..W.N. 480.**

———O. 21, R. 58 and S. 47—*Appeal or revision—Creditor attaching money in receiver's hands—Attachment raised by Court's order.*

Where a creditor attaches the money of his debtor in the hands of the receiver and the attachment is raised by the order of the Court, the order falls within the provisions of O. 21, R. 58, C. P. Code, and not within S. 47 and therefore no appeal lies against the order. Neither can a revision against the order lie as the aggrieved party has a remedy by way of a suit. **1932 Cal. 302,** Rel. on. ***(Davis, J.C. and D.C. Mehta, A.J.C.)***

GHANSHAMDAS *v.* SHIVALDAS. **160 I.C. 383=30 S.L.R. 288=8 R.S. 126=A.I.R. 1936 Sind 2.**

———O. 21, Rr. 58 to 63—Applicability and scope—Attachment of debt—Garnishee denying any debt due—Order disallowing objection and directing him to pay—Finality—Subsequent suit by decree-holder as receiver for realising debt attached—Plea denying debt—If barred. *See* C. P. CODE, O. 21, R. 46. **70 M.L.J. 20.**

———O. 21, Rr. 58, 63 and 100—*Applicability—Attachment of mortgaged property—Claim by mortgagee—Dismissal—Failure to sue under O. 21, R. 63—Execution sale and purchase by decree-holder—Delivery of possession—Application by decree-holder under R. 100—If barred.*

The holder of a money decree can merely attach and sell the right, title and interest of the judgment-debtor in his property, and when the property is subject to mortgage, all that the decree-holder can do is to put up for sale the judgment-debtor's equity of redemption. The threatened sale cannot affect the rights of the mortgagee even if he be the mortgagee in possession. O. 21, R. 58, C. P. Code, has no application, and the mortgagee need not object under the rule. Even if he objects and fails, O. 21, R. 63 will not apply so as to make it incumbent on him to file a suit. In such a case there is no decision which can be made the subject of litigation under O. 21, R. 63. Consequently, if the decree-holder purchasing the property, *i.e.*, the equity of redemption at his execution sale obtains delivery of possession the mortgagee is entitled to apply to the executing Court under O. 21, R. 63, C. P. Code. The only remedy properly left to the mortgagee is to press his claim under O. 21, R. 100. The abortive proceedings under O. 21, R. 58, and the failure to file a suit under O. 21, R. 63 are no bar to the subsequent proceedings by the mortgagee under O. 21, R. 100. 1 Pat. 159 appr. (*Courtney Terrell, C.J., Fazl Ali and James, JJ.*) SUNDER PRASAD SINGH *v.* DEODHARI SINGH. **16 Pat. 54=166 I.C. 463=9 R.P. 299 (2)=3 B.R. 175=17 Pat.L.T. 812=1936 P.W.N. 847=A.I.R. 1937 Pat. 63 (F.B.).**

———O. 21, R. 58—Applicability—Claim by judgment-debtor as shebait—Objection that property attached is debutter—Order on—Appeal. *See* C. P. CODE, S. 47. **17 Pat.L.T. 810.**

———O. 21, R. 58—Applicability—Decree for rent against wrong person—Execution—Claim by third party—Maintainability. *See* BIHAR TENANCY ACT, S. 170. **15 Pat. 812.**

———O. 21, R. 53—Applicability—"Decree"—Suit for unpaid consideration due under mortgage deed—Preliminary decree—Attachment—Procedure. *See* C. P. CODE, S. 60. **1937 A.W.R. 649=A.I.R. 1937 All. 652.**

———O. 21, R. 58—Applicability—Execution of rent decree—Claim—If lies. *See* B. T. ACT, S. 170. **17 Pat.L.T. 385.**

———O. 21, R. 58—*Applicability—Mortgage decree for sale—Attachment wrongly effected—Claim under O. 21, R. 58—If competent.*

When an attachment of mortgaged property in a decree for its sale has actually been made although such an attachment was unnecessary, an objector is entitled to come into Court and make an objection under O. 21, R. 58, C. P. Code. 29 I.C. 941, (F.B.), and A.I.R. 1928 Mad. 525, Foll.; 33 I.C. 603, Dist.; A.I.R. 1918 Lah. 368; 18 Bom. 98; 19 All. 480; A.I.R. 1930 Mad. 712 and 18 I.C. 215, Not Foll. (*Almond, A.J.C.*) DIWAN CHAND *v.* RUPCHAND. **161 I.C. 194=8 R. Pesh. 165=A.I.R. 1936 Pesh. 53.**

———O. 21, R. 58—Applicability—Personal decree in mortgage suit—Execution—Claim to attached property by person party to mortgage suit but not impleaded as party to personal decree proceedings—Procedure applicable—S. 47. *See* C. P. CODE, S. 47. **(1940) 2 M.L.J. 305.**

———O. 21, R. 58—Applicability—Receiver of properties of judgment-debtor—Attachment of monies in his hands in execution of decree against judgment-debtor—Objection by receiver—Order allowing—Appeal—S. 47. *See* C. P. CODE, S. 47. **30 S.L.R. 288.**

———O. 21, R. 58—Applicability—Rent-decree—Sale of holding in execution—Claim by purchaser at sale in execution of prior rent decree—Maintainability. *See* BIHAR TENANCY ACT, S. 170. **A.I.R. 1937 Pat. 341.**

———O. 21, Rr. 58 and 63—*Applicability—Sale of mortgaged property in execution—Application by mortgagee under O. 21, R. 58 as against purchaser—Dismissal—Suit by mortgagee on mortgage beyond one year—Maintainability—Limitation.*

Where a mortgagee makes an application under O. 21, R. 58, C.P. Code, in respect of the mortgaged property as against the purchaser of that property in execution, and that application is dismissed, whether for default or not, the mortgagee must bring a suit on his mortgage within one year. A suit by him on the mortgage more than one year after the disposal of his application under O. 21, R. 58, is barred and must fail as against the purchaser on the ground of the effluxion of time. O. 21, R. 58 is not inapplicable to the case of relationship of mortgagee and the purchaser, either of the equity of redemption or of the security. It may be unnecessary for a purchaser or a mortgagee to make an application under O. 21, R. 58, but R. 62 of O. 21 contemplates the possibility of such an application being made. If an application is made and is unsuccessful, as regards those parties, O. 21, R. 63 would apply. (*Wort, A.C.J. and Manohar Lall, J.*) RAGHUBIR PRASAD *v.* RAMNATH SINGH. **177 I.C. 702=5 B.R. 9=11 R.P. 175=19 Pat.L.T. 746=1938 P.W.N. 752=A.I.R. 1939 Pat. 21.**

———O. 21, R. 58—Applicability—Suit for rent by landlord against occupancy tenant—Transfer of holding by tenant *pendente lite*—Nonjoinder of transferee—Landlord having knowledge of transfer—Decree—Execution against holding—Claim by transferee—Maintainability. *See* B.T. ACT, CH. XIV. **40 C.W.N. 683=A.I.R. 1936 Cal. 279.**

———O. 21, R. 58—*Application under—If can be made after sale.*

Attachment must be deemed to continue until the sale is confirmed and so till then an objection to the attachment could be made under O. 21, R. 58 even though the execution sale is over. (*Gruer, J.*) BABA RAMCHANDRA KOMTI *v.* KONDOO JAGNA

Wa[illegible]ai. **184 I.C. 797=1939 N.L.J. 496=12 R.N. 124=A.I.R. 1940 Nag. 7.**

———**O. 21, R. 58**—Burden of proof—Decree against Hindu Co-parcener—Execution against joint family property—Objection by other co-parceners—Onus of proof of binding character of decree. *See* Hindu Law—Joint Family. **A.I.R. 1936 Pat. 319.**

———**O. 21, Rr. 58 and 63**—*Claim under R. 58 by a third party—Disallowance of claim—Suit under R. 63 by defeated claimant—Proof that attachment was invalid by reason of debtor's insolvency—If enough to decree the suit—Question of title to be gone into—Meaning of 'establish the right to' in R. 63.*

Where in execution of a decree, the decree-holder attached certain properties belonging to the judgment-debtor, and a claim was put in under O. 21, R. 58, by the judgment-debtor's wife that it was her property but which claim was disallowed.

Held, that in a suit under O. 21, R. 63, by the wife to set aside claim order, it is not enough to find that the attachment was invalid by reason of the fact that prior to the date of attachment, the judgment-debtor was adjudicated an insolvent and the execution was conducted without the leave of the Insolvency Court, but the Court must also find if the claimant was entitled to the property. The words 'to establish the right' in R. 63 clearly indicate that the plaintiff has to establish his *title* to the property in dispute before he can get the relief he wants, namely, the release of the property from attachment. (*Venkataramana Rao, J.*) Bavamma *v.* Papanna. **1936 M.W.N. 904=44 L.W. 728=165 I.C. 620=9 R.M. 271=A.I.R, 1936 Mad. 971=(1937) 1 M.L.J. 133.**

———**O. 21, R. 58**—*Deposit in connection with cash certificate attached—Application of Post Master General—Duty of Court to adjudicate.*

One *R* was the owner of cash certificates of certain value in the custody of the Post Master General. He subsequently died but his heirs did not take any steps to obtain a transfer to them of the cash certificates in accordance with the provisions of the Post Office Rules. Later on certain persons obtained a decree against the assets of *R* in hands of his heirs. The Court thereupon called upon the Post Master General to remit certain sum deposited in the Post Office in connection with cash certificates and allowed the attachment to stand. The Post Master General thereupon made a formal application to the Court under O. 21, R. 58 of C.P. Code. The Court dismissed the application as not maintainable.

Held, that the Post Master General was in possession of the cash certificates which stood in the name of *R* and he was empowered to deal with them in conformity with the provisions of the Post Office Cash Certificate Act. This being the case the Court ought to have adjudicated on the application under O. 21, R. 58.

Held, further, that having regard to the provisions of S. 214 of Succession Act, the Court should not have proceeded to execute the decree against the cash certificates in possession of Post Master General except on production by the decree-holders of one of the documents mentioned in the latter part of the section. (*Edgley, J.*) Secretary of State *v.* Girindra Nath. **178 I.C. 152=11 R.C. 327=A.I.R. 1938 Cal. 445.**

———**O. 21, R. 58**—*Effect of order—Raising of attachment on claim by third party—Judgment-debtor, if bound by order.*

Where on a claim by a third party that he is the owner of a property attached in execution of a decree against another, the attachment is set aside on that ground, the decision, that the third party is the owner of the property is not binding as between the judgment-debtor and the claimant. No doubt, if the judgment-debtor had appeared and opposed the claim and the matter is decided, the decision may be binding on him. (*Allsop, J.*) Mahomed Umar *v.* Abdul Ghani. **1939 A.W.R. (H.C.) 729=A.I.R. 1939 All. 728.**

———**O. 21, R. 58**—*Enquiry—Necessity—Scope and extent—Refusal to enquire—Revision.*

Where an applicant under O. 21, R. 58 claims that he has a share in, and is in joint possession with the judgment-debtor along with certain other members of the family, of the attached property, as provided by R. 58, the Court should proceed to investigate the claim. No doubt the extent of the investigation to be carried out would depend upon the circumstances of each case, but a refusal to moke any investigation at all is a failure to exercise jurisdiction vested in the Court and is open to revision. (*Weston*). Bismillah *v.* Nasirabad Urban Co-operative Bank, Ltd. **1938 A.M.L.J. 23.**

———**O. 21, Rr. 58-62**—*Enquiry under—Scope of—Claimant claiming under sale deed executed by judgment-debtor—Power of Court to consider validity of sale-deed—Refusal to do so—Revision.*

In some cases the decision of the question whether the person in possession of the attached property is in possession on his own account or on account of the judgment-debtor depends upon a consideration of the title to the property, and, therefore, in such cases it is necessary, even in a summary inquiry under Rr. 58 to 62, O. 21 of the Code of Civil Procedure, to decide what is the nature of the title, if any, of the person in possession. Where, therefore, a person applies under O. 21, R. 58 for removal of an attachment on certain property on the ground that it belongs to him and has been in his possession and bases his claim on a deed of sale executed by the judgment-debtor in his favour, but it appears on the facts appearing on the face of the sale-deed itself, that the sale is invalid in passing any title to the property. In such a case the investigating Court must, in order to decide whether the possession of the claimant is possession on his own account or possession in trust for the judgment-debtor, come to a decision as to the validity of the deed of sale whereby the property attached is purported to be conveyed from the judgment-debtor to the claimant, for if the deed of sale is not established the property still remains the property of the judgment-debtor and is in the possession of the claimant in trust for and on behalf of the judgment-debtor. Where the Court fails to consider the question of the validity or otherwise of the sale-deed and refuses to go into the question of title, it fails to exercise jurisdiction vested in it by law and its order is open to revision. (*Dunkley, J.*) VEDNATH SINGH *v.* U BA DIN. **14 Rang. 516=164 I.C. 608=9 R.R. 116=A.I.R. 1936 Rang. 306.**

——**O. 21, R. 58**—*Enquiry under—Scope—Question of benami.*

In a proceeding under O. 21, R. 58, C.P. Code, the Court should not allow the parties to go into questions of *benami* to the practical rejection of the direct evidence of possession. The claimants are after all merely advancing claims and not bringing title suits. If a claim case is treated as a title suit, the claimant is taken by surprise, and if the claim case is dismissed, the onus on him in the suit that he may have to bring under O. 21, R. 63 would be rather heavier than in an ordinary title suit. Where although purporting to deal with the question of possession the Court has really been considering the question of *benami*, the High Court will interfere with its order in revision. (*Dhavle, J.*) JHUNABATI *v.* KAMESHWAR SINGH. **6 B.R. 696=188 I.C. 481 =13 R.P. 3.**

——**O. 21, Rr. 58 to 62**—Inquiry—Scope of —Plea of benami—If open. *See* C.P. CODE, O. 21, R. 63. **19 Pat. 494.**

——**O. 21, Rr. 58, 59 and 60**—*Inquiry under —Scope—Question of possession—Title—If can be gone into—House purchased in name of Hindu wife—Wife in possession—Attachment in execution of decree against husband—Claim by wife —Onus—Proof of possession—Duty of Court—Allegation or suspicion of* benami *purchase—If ground for rejection of claim.*

In a claim matter the question for investigation is whether the claimant or the judgment-debtor (or his trustee) is in possession of the property attached. There is also a supplementary question of trust as to whether the judgment-debtor is or is not the beneficiary in possession. On the question of possession the onus of proof is obviously on the claimant or objector, and on the supplementary question, taken by itself, the onus of proof of beneficiary ownership is on the decree-holder. But taking the whole as a compound question, the question is one of possession which is the only question to be decided under Rr. 59 and 60 of O. 21, C.P. Code. Where a claim is made by a Hindu wife to a house purchased in her name, which is attached in execution of a decree against her husband, if she is found to be in possession on the date of the attachment her claim should be allowed. It is not enough for the decree-holder to plead that she is only a *benamidar* for her husband, the judgment-debtor. Nor will the suspicion that it is a *benami* transaction be a ground for the Court disallowing the claim, when the claimant's possession has been made out. (*Ameer Ali, J.*) BUTTO KRISTO PAUL & CO., LTD. *v.* HARENDRA NATH GHOSE. **172 I.C. 151=10 R.C. 343=64 C.L.J. 399=A.I.R. 1937 Cal. 639.**

——**O. 21, R. 58**—Inquiry—Scope of—Question of title—Inquiry under S. 47—Difference. *See* C.P. CODE, S. 47 and O. 21, R. 58. **(1940) 2 M.L.J. 305.**

——**O. 21, Rr. 58 and 63**—*Jurisdiction—Claim petition—Power of Court to investigate after sale—Order dismissing petition for default after sale—Limitation Act, Art.* 11.

Where a sale has actually taken place the executing Court has no jurisdiction to investigate a claim or objection filed under O. 21, R. 58, C.P. Code, even though it was filed before the sale was actually held and the sale has not yet been confirmed. It follows, therefore, that an order of dismissal of the claim petition for default passed after the sale is without jurisdiction, and consequently limitation under Art. 11 of the Limitation Act for a suit for declaration of title and recovery of possession does not run from the date of the order of dismissal. (*S. K. Ghose and Patterson, JJ.*) SASHI CHARAN BISWAS BANIK *v.* GOPAL CHANDRA SHAHA. **172 I.C. 503=10 R.C. 380=65 C.L.J. 353=41 C.W.N. 845=A.I.R. 1937 Cal. 390.**

——**O.21, R. 58**—*Jurisdiction—Sale held but not confirmed—Court's jurisdiction to hear claim petition—If lost.*

The fact that an execution sale of the attached property has already taken place does not deprive the Court of jurisdiction to hear the claim petition under O. 21, R. 58, C.P. Code, **so long** as the sale is not confirmed by the Court. The mere accident of the sale having taken place would not shut out a claimant for ever from getting his property released from attachment. (*Wort, J.*) DEOKI SINGH *v.* RAGHVINDRA BHAGWAN. **183 I.C. 371=5 B.R. 922=12 R.P. 135 =1939 P.W.N. 229=A.I.R. 1939 Pat. 430.**

——**O. 21, R. 58**—Locus standi *to object—Attachment of share of member in Co-operative Society*—Locus standi *of Society.*

A Co-operative Society has an interest in the shares of a member as these shares form part of its capital. Hence where these shares are attached by a person in execution of a decree against the member, the Society has *locus standi* to object to the attachment of these shares. Apart from this when the Society is being made personally liable it has a right to show that the attachment order was *ultra vires* as the shares held by a member are not liable to attachment and sale under S. 20, Co-operative Sicieties Act. (*Bhide, J.*) HIRA LAL *v.* RAJO KHERI CO-OPERATIVE CREDIT SOCIETY. **42 P.L.R. 225=A.I.R. 1939 Lah. 305.**

——**O. 21, R. 58**—Locus standi *to object—Mortgagee in possession—His proper remedy.*

A mortgagee in possession is not entitled to object under O. 21, R. 58, C.P. Code, to the attachment of the property at the instance of a person who holds a decree against the mortgagor, His proper remedy is to wait and to take action under O. 21, Rr. 100 and 103, C.P. Code, at the proper time, provided always that he does not in the meantime bring a suit to have the property sold. (*Addison and Din Mohammad, JJ.*) SANT LAL *v.* FIRM UDHO RAM WALAIT RAM. **I.L.R. (1938) Lah. 593=177 I.C. 928=11 R.L. 378 =40 P.L.R. 522=A.I.R. 1938 Lah. 568.**

——**O. 21, Rr. 58 and 63**—*Mortgage decree—Proceedings by way of attachment—Dismissal of objections—Objector's right to bring declaratory suit.*

While proceedings by way of attachment are not appropriate to mortgage decrees, claims and objections to the attachment can be made under O. 21, R. 58, C.P. Code, if the decree-holder applies for and obtains an order of attachment and the property is attached. On dismissal of his objection, the objector is entitled to bring a suit for declaration of his title under O. 21, R. 63. (*Coldstream and Bhide, JJ.*) RAHMAT-ULLAH *v.* ATTA MOHAMMAD KHAN. **173 I.C. 198=10 R.L. 409=39 P.L.R. 568=A.I.R. 1937 Lah. 360.**

———O. 21, Rr. 58, 63—*Objection accepted in default of decree-holder—Remedy of latter.*

Where an objection preferred in execution under O. 21, R. 58 has been accepted *ex parte* in the decree-holder's default, the order accepting the objector's claim is conclusive within the meaning of O. 21, R. 63 and the decree-holder's only remedy is by way of a separate suit. Such objection cannot be restored and re-heard on the decree-holder's application. It would not also be competent for the Court to restore such order by virtue of its own inherent powers under S. 151. (*Fraser, J.C. and Saad-Ud-Din, A.J.C.*) PIARA RAM *v.* SOMA RAM. **A.I.R. 1936 Pesh. 115.**

———O. 21, Rr. 58 and 63—Objection by legal representative of judgment-debtor in personal capacity—Dismissal of—Right of suit. *See* C.P. CODE, S. 47—BAR OF SUIT. **179 I.C. 538.**

———O. 21, Rr. 58 and 55—*Objections, if can be filed after sale.*

O. 21, R. 55, C.P. Code, is not exhaustive of the modes in which attachment ceases. An attachment ceases as soon as the sale of the property attached takes place. It is wrong to suppose that an attachment subsists until the confirmation of the sale, because in the event of a re-sale being ordered a fresh attachment is not necessary. In a case where a re-sale is ordered without a fresh order of attachment, the real reason is not that the original attachment continues, but the first sale and all subsequent proceedings are set aside, the *status quo* before the sale is restored and the attachment revived. Therefore an objection under O. 21, R. 58 must be brought before the sole takes place and the Court cannot pass orders on objections under R. 58 after the sale has taken place. (*Almond, J.C. and Mir Ahmad, A.J.C.*) KISHAN SINGH *v.* VAISHNO DAS. **171 I.C. 302=10 R. Pesh. 30=A.I.R. 1937 Pesh. 90.**

———O. 21, R. 58.—*Objection lodged after execution sale—Competency.*

An objection under O. 21, R. 58, C.P. Code, lodged after the execution sale which is subsequently confirmed is incompetent. (*Addison and Din Muhammed, JJ.*) SANT LAL *v.* UDHORAM WALIT RAM. **40 P.L.R. 522=177 I.C. 928=11 R.L. 378=I.L.R. (1938) Lah. 593=A.I. R. 1938 Lah. 568.**

———O. 21, Rr. 58 and 64—*Objection to sale by third person on ground of title acquired subsequent to attachment—Duty of executing Court.*

An objection to the sale of a property by a third person on the ground that subsequent to its attachment he has purchased it at an auction sale in execution of another decree against the same judgment-debtor is, no doubt, not maintainable under O. 21, R. 58, C.P. Code. Although the objection is wrongly put in under that rule, the executing Court will be justified in taking notice of it. For as the judgment-debtor has no longer any saleable interest in the property owing to the valid title acquired by the objector by a prior sale in execution in his favour, the property is not 'liable to sale' under O. 21, R. 64, C.P. Code, and therefore could not be sold again. The objection could at least be entertained in the exercise of inherent powers under S. 151, C.P. Code, and it would be desirable to do so to prevent unnecessary complications, which would otherwise result from a second sale. (*Bhide, J.*) PREM CHAND *v.* MULKH RAJ. **188 I.C. 529=12 R.L. 535=41 P.L.R. 305= A.I.R. 1939 Lah. 380.**

———O. 21, Rr. 58, 60 and 63 and S. 115—*Objection under O. 21, R. 51—Duty of Court dealing with—If can go into question of title—Breach of R. 60, if a material irregularity liable to be revised—Revision, if excluded by R. 63.*

When an objection is raised under O. 21, R. 58, C.P. Code, the Court dealing with it has to concentrate its attention only to the question of possession and to decide whether the judgment-debtor, is in possession of the property on his own behalf or on account of or in trust for some person. If the property is found to be in possession of somebody else, then it has to be decided whether it is in trust or on behalf of the judgment-debtor. The question of title to the property, is not the Court's concern, nor is it competent to consider and decide it. The order of the Court must be based entirely upon the finding on the question of possession. As the provisions of R. 60 are clearly mandatory and any breach of those provisions is at the very least a material irregularity. The powers of the High Court to interfere in revision with an order under O. 21, R. 58 is not precluded by the fact that a remedy by suit is available to the applicant under O. 21, R. 63. (*Mulla, J.*) BACHU LAL *v.* RAM DIN. **180 I.C. 349=11 R.A. 447=1938 A.L.J. 1118 =1938 A.W.R. (H.C.) 816=A.I.R. 1939 All. 117.**

———O. 21, R. 58 and Sch. II—*Objection under O. 21, R. 58—Nature of—Sch. II, if applicable.*

An objection under O. 21, R. 58 creating as it does a dispute between the decree-holder and a person claiming property which the decree-holder seeks to put to sale as being the property of his judgment-debtor, is a matter relating to the execution, discharge or satisfaction of a decree, and is, therefore, a proceeding in execution. Sch. II of the Code does not apply of its own force to such a proceeding, nor is it rendered applicable under the provisions of S. 141. (*Collister and Bajpai, JJ.*) SARJU LAL BEHARI LAL *v.* SUKHDEO PRASAD. **58 All. 797=161 I.C. 107 =8 R.A. 731=1936 A.W.R. 251=1936 All. L.R. 281=1936 A.L.J. 142=A.I.R. 1936 All. 378.**

——**O. 21, R. 58**—*Objection under—If can be made after sale.*

The attachment does not cease when the property is sold in execution; and a valid objection can be made even after sale to the attachment under O. 21, R. 58. (*Niyogi, J.*) RAMCHANDRA JAGANNATH *v.* KAYAM HUSSAIN ABDUL ALI. **I. L.R. (1940) Nag. 306=11 R.N. 225=178 I.C. 410=A.I.R. 1938 Nag. 475.**

——**O. 21, Rr. 58 and 63**—*Onus—Father making gift of property to daughters—Property attached in execution of decree against daughters—Claim by father dismissed—Suit by him under O. 21, R. 63—Burden of proof.*

A person made a gift of his property to his daughters. The property was attached in execution of a decree against the daughters. The father's claim under O. 21, R. 58 having been dismissed, he instituted a suit under O. 21, R. 63.

Held, that the burden was on him to show that he was entitled to resist the attachment of the property. (*James and Rowland, JJ.*) MT. NAUROZI *v.* NAJAF ALI SHAH. **184 I.C. 508=6 B. R. 53=12 R.P. 248=A.I.R. 1939 Pat. 321.**

——**O. 21, R. 58**—*Order under—Appeal.*

An order passed by the Court under O. 21, R. 58, is conclusive and can only be challenged in a suit brought under O. 21, R. 63. No appeal lies against such order. (*Aga Haidar, J.*) SAIN DAS *v.* TIKKA SANT SINGH. **165 I.C. 519=9 R.L. 254=A.I.R. 1936 Lah. 830.**

——**O. 21, R. 58**—*Release from attachment—Effect—Subsequent decreeing of suit under O, 21, R. 63—If renders sale in the interval void.*

The order for release from attachment in a case under O. 21, R. 58, C.P. Code, does not put an end to the attachment. If a suit is subsequently brought **under O. 21, R. 63** and decreed, the effect of the decree is to set aside the order of release and to maintain uninterrupted the attachment originally made. Hence any alienation in the interim period is void by reason of S. 64, C.P. Code. (*Zia-ul-Hasan, J.*) ANANDEI *v.* LALA RAM. **14 Luck. 543=181 I.C. 362=1939 O. W.N. 408=11 R.O. 305=1939 O.L.R. 268 =1939 O.A. 388=A.I.R. 1939 Oudh 178.**

——**O. 21, R. 58**—Revision—Dismissal of objections—Interference by High Court. *See* C. P. CODE, S. 115—REVISION. **A.I.R. 1938 Rang. 319.**

——**O. 21, Rr. 58, 61 and 63**—*Revision—Order refusing to entertain objections.*

An order of the executing Court refusing to entertain objections under O. 21, R. 58, is not one under O. 21, R. 61, so as to give a right of suit under O. 21, R. 63 to the objectors and objectors are not precluded from going in revision against the order on the ground that another remedy, *i.e.*, one by way of suit under O. 21, R. 63, is open to them. The remedy by way of obection under O. 21, R. 58 is a summary remedy provided by legislature in lieu of a suit, and a refusal of that remedy can be legimately considered in revision. (*Middleton, J.C.*) MT. ZAMRUT *v.* PEOPLES BANK OF NORTHERN INDIA. **164 I.C. 1012=9 R. Pesh. 41=A.I.R. 1936 Pesh. 185.**

——**O. 21, R. 58, proviso and S. 115**—*Revision—Summary dismissal of objection—Objector not allowed opportunity—Revision.*

A Court cannot dismiss an objection filed under O. 21, R. 58, C.P. Code, summarily on the ground that there is an unnecessary delay without giving an opportunity to the objector or his Counsel to explain the delay. Where no such opportunity is allowed to the objector, the Court acts with material irregularity in dismissing the objection, and its order is, therefore, liable to be set aside in revision. (*Srivatsava, Ag. C.J. and Zia-ul-Hasan, J.*) BARATI MIAN *v.* RAM ADHIN. **13 Luck. 111=166 I.C. 337=9 R.O. 307=1937 O.W.N. 48=1937 O.L.R. 8=A.I. R. 1937 Oudh 268.**

——**O. 21, R. 58 (2) (All.)**—*Claim—If can be investigated and heard after sale.*

The addition by the Allahabad High Court to sub-cl. (2) of R. 58 of O. 21, C.P. Code, to the effect, that the Court may in its discretion make an order 'postponing the delivery of the property after the sale pending such investigation and that in no such case shall the sale become absolute until the claim or objection has been decided' obviously contemplates the decision of a claim after the sale. Sale can go on and confirmation can be stayed pending decision of claim or objections. (*Bajpai, J.*) TUNDI RAM SHEO SHANKER RAM *v.* GHURE LAL. **1939 A.W.R. (H.C.) 495=1939 A.L.J. 622=A.I.R. 1939 All. 598.**

——**O. 21, R. 58 (2)**—*Scope—Sale proclamation pending claim—Power of Court to issue.*

It is not competent to a Court to order the issue of a praclamation of sale while a claim petition is pending. (*Burn, J.*) GOVINDARAJULU CHETTY *v.* RAMASWAMY CHETTY. **1939 M.W. N. 776=50 L.W. 338 (1)=A.I.R. 1940 Mad. 6=(1939) 2 M.L.J. 505.**

——**O. 21, R. 60**—Applicaability—Decree for rent obtained by lambardar under C. P. Tenancy Act—Lambardar and attaching decree-holder forming the only co-sharers in the village. *See* C.P. CODE, O. 21, RR. 53, 60 AND 47. **1940 N.L. J. 56.**

——**O. 21, R. 60**—*Inquiry under—Scope of.*

All that a Court has to find under O. 21, R. 60, C.P. Code, is whether the properties in respect of which the claim is preferred were, on the date of the attachment, in the possession of the claimant on his own account or on account of the judgment-debtor or in trust for him. The question of title may be only relevant to determine this matter. (*Venkataramana Rao, J.*) VOIKARAN *v.* KOTHANDAPANI PILLAI. **1937 M.W.N. 320 (1).**

——**O. 21, R. 60**—*Release of property from attachment—Attachment of standing crops—Claim to—Allowance of and release of crops from attachment—Crops burnt and destroyed in the meanwhile—Right of owner to value of crops.*

Where property belonging to another person than the judgment-debtor is wrongly attached and the attachment is raised on a claim preferred by that person, the latter has the right to have the property restored to him in *status quo ante* the attachment and that right can in no way be whittled down by the subsequent deterioration or loss of the properties attached. *A* in execution of his decree against *B* attached certain standing crops belonging to *C*. The crops were put in the custody of a supratdar and subsequently reaped, and after they had been reaped, they were accidentally burnt. *C* objected to the attachment of the crops on the ground that he had grown them and his objection was allowed shortly after the crops had been burt.

Held, that *C* was entitled to recover the value of the crops that had been accidentally burt. (*Pollock, J.*) MOTIRAM TUKARAM *v.* NILIKANTH RAO. **I.L.R. (1937) Nag. 19=168 I.C. 463=9 R.N. 254=A.I.R. 1936 Nag. 257.**

———O. 21, R. 62—*Applicability—Petition informing incumbrance and praying notification—Order of dismissal holding mortgage discharged—If should be set aside within a year.*

The question whether an order by the executing Court with reference to an attached property is conclusive unless set aside within a year or not depends upon the nature of the petition on which the order is made. If a mortgagee files a *petition of objection or claim then* an order adverse to the mortgagee is conclusive unless set aside within a year. But where the mortgagee apart from informing the Court about his encumrance and praying that it may be notified in the auction notification does nothing more, but the Court on the allegation of the judgment-debtor goes into the question of the satisfaction of the mortgage and finds that it is discharged and dismisses the mortgagee's petition, the order is not one passed under O. 21, R. 62, C.P. Code, and hence the mortgagee is not bound to bring a suit to set it aside within a year. (*Bajpai, J.*) BHUDEO PRASAD *v.* SRI NATH. **185 I.C. 660=12 R.A. 343=1939 A.W.R. (H.C.) 644=A.I.R. 1939 All. 657.**

———O. 21, Rr. 62 and 63—*Application by mortgagee for continuance of attachment subject to mortgage—Dimissal of—Effect.*

If on an application by the mortgagee under O. 21, R. 62, C.P. Code, the Court passes an order directing the continuance of attachment subject to his mortgage, the summary order becomes conclusive, and the decree-holder or the purchaser cannot dispute the mortgage unless he brings a suit to set aside the order under O. 21, R. 63, C.P Code. The same principle applies even if the mortgagee's application is dismissed or refused. (*Mukherjea and Latifur Rahman, JJ.*) AMBICA PROSAD SANYAL *v.* SOORAJMAL. **I.L.R. (1939) 2 Cal. 291=185 I.C. 523=12 R.C. 378=43 C.W.N. 999=A.I.R. 1939 Cal. 620.**

———O. 21, Rr. 62 and 66—*Application by mortgagee that attached property might be notified for sale subject to mortgage—Nature of.*

An application made by a mortgagee after attachment heading it to be one under O. 21, R. 62, C.P. Code, and praying that the fact of the property attached being subject to a mortgage might be notified and proclaimed at the time when the sale takes place, is really a claim petition made under O. 21, R. 62, C.P. Code. It is not a mere application for insertion of an incumbrance in the sale proclamation under O. 21, R. 66, C. P. Code. If, therefore it is dismissed, the order is conclusive unless it is set aside by a suit under O. 21, R. 63, C.P. Code. (*Mukherjea and Latifur Rahman, JJ.*) AMBICA PROSAD SANYAL *v.* SOORAJMULL. **I.L.R. (1939) 2 Cal. 291=43 C.W.N. 999=185 I.C. 523=12 R.C. 378=A.I.R. 1939 Cal. 620.**

———O. 21, R. 62—*Claim on ground that property is subject to mortgage—Refusal by Court to investigate—Order that sale would be held with notice of mortgage—Legality.*

If a person prefers a claim on the ground that the properties attached in execution of a rent decree are subject to a mortgage in his favour, the Court must proceed to investigate the claim and cannot order simply without investigation that the sale would be held with notice of the mortgage. Such an order is not one contemplated by O. 21, R. 62, C.P. Code, and cannot be sustained. (*Bartley and Nasim Ali, JJ.*) KHAGENDRA NATH *v.* JORAD KUMARI DASI. **67 C.L.J. 79.**

———O. 21, Rr. 62 and 66—*Construction—'Subject to such mortgage', meaning of—Distinction between such a sale and one where notice of encumbrance is given in the proclamation—Right of auction-purchaser to question mortgage.*

The expression 'subject to such mortgage' occurring in O. 21, R. 62, C.P. Code, means that what is sold is the equity of redemption. There is a distinction between an express order directing the property to be sold 'subject to a mortgage' and cases where notice of an alleged mortgage is given in the sale proclamation. While in the former case the would-be purchaser is made aware of what exactly he is purchasing in the latter case he merely takes a chance of the mortgage being either not in force or enforceable. The price would vary considerably according as to whether a sale is 'subject to a mortgage' or whether a mortgage is merely notified in the sale proclamation. An auction-purchaser who is the decree-holder cannot challenge the finding that a mortgage subsists when the sale is 'subject to a mortgage' (*Grille, J.*) SETH MISHRILAL OSWAL *v.* BARIK JURSI KIRAR. **I.L.R. (1939) Nag. 665=1939 N.L.J. 487=185 I.C. 727=12 R.N. 169=A.I.R. 1939 Nag. 305.**

———O. 21, R. 63—*Applicability—Absence of valid attachment—Order dismissing objections and suit because relief was cognizable under S. 47—Finality of.*

Where no valid attachment was subsisting, a declaratory suit praying that property was not liable to be attached was redundant and an order dismissing such suit cannot operate as conclusive under O. 21, R. 63. Moreover when such suit was dismissed not on merits but because Court thought that the relief was cognizable under S. 47, C.P. Code, the decision cannot operate as *res judicata* under S. 11, C.P. Code. Nor can the dismissal of a claim petition when there is no attachment subsisting attract the operation of O. 21, R. 63, and make the order of dismissal conclusive. (*Mir Ahmad, A.J.C.*) GHULAM RAZA *v.* MT. IKBAL SULTAN. **160 I.C. 835=8 R. Pesh. 132=A.I.R. 1936 Pesh. 41.**

———**O. 21, R. 63**—*Applicability—Attachment of pro-note—Objection by executant that debt discharged—Order for sale without investigation—If against claimant—Subsequent suit on pro-note by purchaser in execution—Plea of discharge—If barred.*

A executed a pro-note in favour of *B*. In an execution against *B* the pro-note was ordered to be sold. *A* objected to the sale contending that the pro-note had been satisfied by him. The Court refusing to go into the question ordered the sale. The pro-note was accordingly sold to *C*. *C* brought a suit on the pro-note against *A* and *B*. *A* claimed satisfaction of the pro-note. *C* contended that as this defence was raised by *A* in the previous execution proceedings it was not open for him to raise the same objection again.

Held, that in the execution proceedings there was no order under R. 61, and therefore R. 63 did not apply. Therefore it was open to *A* to take the same objection again. (*Pollock, J.*) Sitaram Shamrao *v.* Ganpati Maroti. **171 I.C. 759=10 R.N. 133=A.I.R. 1937 Nag. 149.**

———**O. 21, R. 63**—*Applicability—Claim—Rejection on the ground that execution has already been transferred to Collector—Order—If "against" claimant—Suit after* 1 *year—If barred.*

Where a claim petition is summarily rejected on the ground that "the execution has already been transferred to the Collector," the order is an ambigous order which must be construed in favour of the claimant against whom it is made. It is not therefore an order "against" the claimant within the meaning of O. 21, R. 63, and Art. 11 of the Limitation Act cannot apply. A suit filed by the claimant more than one year is not therefore barred. (*Bose, J.*) Chaitanlal *v.* Ghansyamsingh. **19 N.L.J. 308.**

———**O. 21, R. 63**—Applicability—Dismissal of claim by mortgagee—Failure to sue within one year—Execution sale and purchase by decree-holder—Delivery of possession—Application by mortgagee under R. 100—If barred. *See* C.P. Code, O 21, Rr. 58, 62 and 100. **17 Pat.L.T. 812 (F.B.).**

———**O. 21, R. 63**—Applicability—Order against —Order directing notification of mortgage and of decree-holder's allegation of collusive character at time of sale—If against mortgagee—Suit on mortgage after one year—If barred. *See* Limitatin Act, Art. 11. **52 L.W. 354=(1940) 2 M.L.J. 402.**

———**O. 21, R. 63**—Applicability—Proceedings under Oudh Rent Act. *See* Oudh Rent—S. 116. **1937 O.W.N. 1164.**

———**O. 21, R. 63**—*Burden of proof.*

Where the facts are fully established and the inference from them is clear, the question of *onus* is not material. (*Sir George Lowndes.*) Md. Ismail *v.* Hanuman Parshad. **I. L. R. (1939) Kar. 31=11 R. P. C. 106=1939 O.A. 98=1939 M.W.N. 24=1939 P.W.N. 1=5 B.R. 168=20 P.L.T. 81=1939 A.L.J. 296=1938 A. L.R. 910=178 I.C. 476=1938 A.W.R. (P.C.) 209=1938 O.W.N. 1248=1938 O.L.R. 510= A.I.R. 1938 P.C. 290 (P.C.).**

———**O. 21, R. 63**—Burden of proof. *See infra* under O. 21, R. 63—Suit under. **A.I.R. 1937 Rang. 362.**

———**O. 21, R. 63**—*Burden of proof.*

In a suit under O. 21, R. 63, C. P. Code, the burden is upon the plaintiff, who was unsuccessful in the execution proceedings, to establish his case. If his suit is dismissed, a double burden lies upon him in appeal. (*Addison and Ram Lall, JJ.*) Ahmad Din Allah Ditta *v.* Partap Singh. **41 P.L.R. 373=A.I.R. 1939 Lah. 438.**

———**O. 21, R. 63**—*Burden of proof—Burden on plaintiff to show title.*

Where an application under O. 21, R. 58, C.P. Code, has been dismissed and a suit is filed under O. 21, R. 63, the onus is on the plaintiff to show affirmatively that not only the ostensible but the real title is in him. The presumption as to the correctness of the order is ordinarily sufficient to rebut or at least to considerably weaken the presumption that ostensible owner is the real purchaser. A.I.R. 1916 Cal. 666 and 30 All. 321, Rel. on. (*Mosely, J.*) M. S. M. Chettyar Firm *v.* Mrs. A. Murray. **172 I.C. 52=10 R. R. 206=A.I.R. 1937 Rang. 252.**

———**O. 21, R. 63**—*Burden of proof—Claim based on registered sale-deed of attached property —Dismissal—Suit to set aside claim order—Onus of proving consideration and validity.*

Where an order has been made rejecting a claim to attached property, based on a registered sale-deed obtained by the claimant, it is not enough for the defeated claimant suing to set aside the claim order, to produce and prove a duly registered deed executed by the owner of the property. He must show, in order to succeed in the suit, that the sale in his favour was a genuine transaction and that he had purchased the property for valuable consideration. That is a fact specially within the plaintiff's knowledge and the burden of proving it must obviously lie on him. The recital as to the passing of consideration in the sale-deed cannot be of any evidentiary value by itself against a person who was not a party to the deed. (*Venkataramana Rao and Abdur Rahman, JJ.*) Mahomed Kassim Sahib *v.* Subramanian Chettiar. **51 L.W. 34=1940 M.W.N. 557=A.I.R. 1940 Mad. 444.**

———**O. 21, R. 63**—*Burden of proof—Plaintiff relying on gift made to him by judgment-debtor after decree.*

In a suit under O. 21, R. 63, C. P. Code, instituted by an unsuccessful objector in execution proceedings, the onus lies heavily on the plaintiff to prove not only the factum of the gift of the property in dispute alleged to have been made in his favour by the judgment-debtor after the passing of the decree, but also to establish its *bona fides* and show that it was not intended to defeat and delay the creditors of the donor. (*Tek Chand, J.*) Mela Ram *v.* Inayat Begam. **169 I.C. 123 =9 R.L. 706=40 P.L.R. 462=A.I.R. 1937 Lah. 847.**

———**O. 21, R. 63**—*Burden of proof—Suit against successful claimant and parties—Judgment-debtors—If necessary parties—Proof of title—Onus.*

In a suit under O. 21, R. 63, against the successful claimant, the judgment-debtors, his vendors, through whom he holds, are not necessary parties. They having parted with their interest in the property, it matters not to them if the defendant or the plaintiff has it, but the rules of evidence which require a plaintiff to prove his claim are not abrogated in his favour because he brings a suit against a successful claimant. The plaintiff must therefore succeed on the strength of his own title and must prove his case by legally admissible evidence and by the best evidence available. (*Davis, J.C. and Weston, J.*) HARCHANDRAI *v.* GOPALDAS. **I.L.R. (1939) Kar. 539=183 I.C. 797=12 R.S. 81=A.I.R. 1939 Sind 177.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant.*

If a creditor has attached in execution the property of the judgment-debtor, and the objection by third person that property is his because of a sale made in his favour by the judgment-debtor, is lost, the fraudulent nature of the sale is presumed, and in an ensuing suit by the objector, the burden to prove that the sale was for consideration and in good faith is upon the objector and in such suit if he once establishes the consideration, good faith follows, as a matter of course, except in cases of exceptional nature. (*Bose, J.*) GOPAL SINGH *v.* SHEOKUMAR SINGH. **169 I.C. 954=10 R.N. 33=A.I.R. 1937 Nag. 85.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus—Proof that attachment is invalid—If sufficient—Proof of claimant's title —Necessity for.*

Where a claim to attached property is disallowed on the ground that the sale-deed under which the claimant lays claim to the property is *benami* and not *bona fide*, the burden of proof, in a suit instituted by the claimant to establish the claimant's right to the property, is on the claimant; and the latter must prove that he has title to the property in dispute. (*Venkataramana Rao, J.*) BAVAMMA *v.* PAPANNA. **165 I.C. 620=9 R. M. 271=1936 M.W.N. 904=44 L.W. 728=A.I. R. 1936 Mad. 971=(1937) 1 M.L.J. 133.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus.*

Where in proceedings under O. 21, R. 58 evidence is called and a person's claim to the attached property is rejected upon the merits, the *onus* in a suit by him under O. 21, R. 63 is upon him to show that he is the owner of the property. (*Harries, C.J. and Chatterji, J.*) SAHDEO KARAN SINGH *v.* USMAN ALI KHAN. **184 I.C. 113=6 B.R. 14=12 R.P. 225=20 P.L.T. 787=A.I.R. 1939 Pat. 462.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus.*

Where an objection by an alienee of certain property to attachment in execution is dismissed and he files a suit for a declaration, the burden of proof is upon him to show that the alienation is not a fraudulent alienation, and that it was made *bona fide* and for consideration. (*Stone, C.J. and Niyagi, J.*) KASTURCHAND *v.* MT. WAZIR BEGAM. **167 I.C. 48=9 R.N. 160=I.L.R. (1937) Nag. 291=A.I.R. 1937 Nag. 1.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Claimant producing registered sale-deed and proving execution and valuable consideration and possession also—Effect.*

Where in a suit by the vendee for the establishment of a right to the attached property, he proves the execution and registration of the sale-deed and valuable consideration therefor and further proves that he is in possession of the property under the sale-deed, and that he is not a party to and has no knowledge of the vendor's fraud, if any, the burden of proving that the sale is bogus, fraudulent and collusive shifts on to the attaching creditor. (*Stone, C.J.*) CHAMPAT RAO *v.* MAHADEO BAJIRAO. **174 I.C. 321=10 R. N. 370=A.I.R. 1937 Nag. 143.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Onus.*

In a suit for a declaration by a defeated claimant, the onus is on the plaintiff to prove that he has the right which he claims. (*Courtney-Terrell, C.J. and James, J.*) RADHA KISHUN *v.* KEOLA PRASAD. **167 I.C. 118=9 R.P. 377=3 B.R. 264=1936 P.W.N. 812=17 Pat.L.T. 785= A.I.R. 1937 Pat. 76.**

———O. 21, R. 63—*Burden of proof—Suit by defeated claimant—Purchase by duly registered sale-deed reciting passing of consideration—Effect —Onus—If shifted.*

Where a claim to attached property made by a purchaser of such property is dismissed and the purchaser files a regular suit, the initial onus is on the plaintiff. But if he proves his purchase by producing a duly registered sale-deed which contains recitals of consideration, the onus is shifted on to the defendant who has to prove that the consideration is utterly inadequate and the sale is fraudulent. (*Stone, C.J.*) JAGOBA KASHIBA KASAR *v.* ANANDRAO. **169 I.C. 449=9 R.N. 6= A.I.R. 1937 Nag. 9.**

———O. 21, R. 63—*Effect of order—Claim by person in adverse possession—Dismissal—If interrupts adverse possession—Attachment subsequently raised after a year—Effect.*

Where a person has been actually in possession of certain properties adversely to the owner thereof the dismissal of a claim petition preferred by him under O. 21, R. 63, C. P. Code, does not operate as an interruption of that adverse possession by operation of law, especially when the attachment is raised subsequently. The fact that the attachment is raised only beyond a year of the dismissal of the claim does not make any difference, because once it is raised, it ceases to be effective even from the date of the attachment itself. An attachment, further, does not operate as a disturbance of the possession. (*Harwill, J.*) DHARAPURAM JANOPAKARA NIDHI LTD. *v.* LAKSHMINARAYANA CHETTIAR. **166 I.C. 308 (2)= 9 R.M. 358=1936 M.W.N. 1113=44 L.W. 617 =A.I.R. 1937 Mad. 44=(1937) 1 M.L.J. 642.**

———O. 21, R. 63—*Frame of suit—Mere declaration—If sufficient—Prayer for consequential relief—Necessity—Specific Relief Act, S. 42, Proviso.*

A plaintiff suing under O. 21, R. 63, C. P. Code, is only required to obtain a declaration of his rights or title in so far as it is affected by the order which he seeks to impeach. He is not bound to ask for a consequential relief. The proviso to S. 42 of the Specific Relief Act does not operate to take away from a party against whom an adverse order is made on a claim petition the special right conferred by O. 21, R. 63 to sue for a declaration. (*Leach, C.J. and Lakshmana Rao, J.*) NARAYANA SINGH *v.* BATCHA SAHEB. **181 I.C. 887=11 R. M. 873=47 L.W. 724=1938 M.W.N. 514=A.I. R. 1938 Mad. 741=(1938) 1 M.L.J. 803.**

———**O. 21, R. 63**—*Limitation—Order under O. 21, R. 58—Finality—Conditions—Disallowance of claim—Subsequent setting aside of sale in execution—Suit within one year—If necessary.*

The conclusiveness of an order on a claim petition is conditional on the continuance of the execution proceedings and of the attachment issuing therefrom. Where after the disallowance of a claim, the execution proceedings come to an end by reason of the execution-sale being set aside, the attachment goes and with it the order disallowing the claim also goes and becomes useless and inoperative. A suit brought by the defeated claimant for declaration of his title to the property in question beyond one year is not therefore barred under Art. 11 of the Limitation Act, as the order on the claim is no longer a bar. Art. 11, Limitation Act, will have no application whether the execution proceedings terminate as a result of the setting aside of the sale, within or beyond one year after the adverse claim order. (*Nasim Ali and Henderson, JJ.*) BAMAPADA BANDOPADHYA *v.* RAMANATH MANDAL. **165 I.C. 84=9 R.C. 340=40 C.W.N. 146.**

———**O. 21, R. 63**—*Limitation—Summary rejection of claim—If final—Suit within one year—If necessary.*

The ordinary rule of law is that a party who is aggrieved by the attachment and sale of his property has a longer period of limitation within which to sue than that prescribed under Art. 11, Limitation Act, which is an exception to the general law and curtails the plaintiff's rights very considerably. Consequently, if an order under O. 21, R. 63, C. P. Code, is intended to operate to the prejudice of any person, it should be couched in clear and unambiguous terms, so that there can be no misapprehension as to exactly what is meant. When an order is passed by the Court in an ambiguous way it should be construed in favour of the party against whom it is made. An objection to attachment of certain property in execution of a decree was filed but the Court passed an order in the following terms: "The application is summarily rejected as the execution has been transferred to the Collector. Applicant's cost Rs. 1. Non-applicant's costs nil". The objector filed a suit for a declaration that the property attached belonged to him and could not therefore be proceeded against in execution. It was contended by the defendant decree-holder that the suit was barred by time as having been brought more than a year from the order rejecting the plaintiff's application.

Held, that the order being ambiguous should be construed in favour of the plaintiff and the application was not dismissed by the Court but rejected as it had no jurisdiction to entertain it, the case being transferred to the Collector. The plaintiff, therefore, could bring a suit within the longer period of limitation allowed under the general law and his suit though brought more than a year from the order rejecting his application was not barred. (*Bose, J.*) CHETAN LAL *v.* LALJI. **I.L.R. (1938) Nag. 276=19 N.L.J. 308 =168 I.C. 601=9 R.N. 261 (2)=A.I.R. 1937 Nag. 170.**

———**O. 21, R. 63**—*Objection filed by mortgagee to attachment dismissed—Suit by him for possession—Nature of—Onus of proof in such suit.*

O. 21, R. 63, C. P. Code, is clearly intended to apply only to claims and objections which can properly be preferred under R. 58. A mortgagee cannot come to Court under R. 58 and argue that the mortgaged property is not liable to attachment. If a mortgagee who is not in possession of the property files a suit for possession after the dismissal of the objection preferred by him under R. 58, the suit cannot properly be described as one under O. 21, R. 63, but it is simply one for possession on the footing of the alleged mortgage. To such a suit, the rule that the onus of proving title lies on the plaintiff who had raised an unsuccessful objection before the executing Court has no application. (*Beckett, J.*) HARCHAND *v.* HIRA LAL. **180 I.C. 138=11 R.L. 663=40 P.L. R. 682=A.I.R. 1938 Lah. 760.**

———**O. 21, R. 63**—*Occupancy rights of judgment-debtor attached in execution of decree—Declaratory suit by landlord—Maintainability.*

Where the occupancy rights held by a judgment-debtor are attached in execution of a decree against him, the landlord of the land in which the occupancy rights are held, is entitled to bring a suit under O. 21, R. 63 for a declaration that the occupancy rights cannot be attached and sold in execution of the decree. (*Addison and Din Mohammad, JJ.*) KARAM CHAND *v.* AMAR KAUR. **179 I.C. 58=11 R.L. 518=40 P.L.R. 946=A.I. R. 1938 Lah. 677.**

———**O. 21, R. 63**—*Order dismissing claim for non-prosecution—Finality.*

In order to bring a case within the purview of O. 21, R. 63, C. P. Code, the question as to whether the claim was investigated or not is immaterial. Even if a claim is dismissed for non-prosecution, the claimant is bound to institute a suit under O. 21, R. 63, failing which the order becomes conclusive and final. (*Mukherjea and Latifur Rahman, JJ.*) AMBICA PROSAD SANYAL *v.* SOORAJMULL NAGARMULL. **185 I.C. 523=12 R.C. 378=I.L.R. (1939) 2 Cal. 291=43 C.W.N. 999=A.I.R. 1939 Cal. 620.**

———**O. 21, R. 63**—*Parties—Suit by defeated claimant—Execution sale pending suit—Purchaser—If necessary party.*

A decree-holder put his decree into execution attaching the prrperty which had been mortgaged under O. 21, R. 54. A person preferred a claim under O. 21, R. 58, which was dismissed. He then instituted the suit under O. 21, R. 63 making the decree-holder and the judgment-debtors defendants. During the pendency of the suit, the property was brought to sale in the execution proceedings and was purchased by a stranger who was not a party to the suit.

Held, that the claimant was entitled to institute a suit under O. 21, R. 63 against the persons who had been parties to the case under O. 21, R. 58 and he was not obliged subsequently to implead the auction-purchaser. (*James and Rowland, JJ.*) MT. NAUROZI *v.* NAJAF ALI SHAH. **184 I.C. 508=6 B.R. 53=12 R.P. 248=A.I.R. 1939 Pat. 321.**

———**O. 21, R. 63**—*Right of suit—Attachment of share of debtor in property inherited from mother—Claim by daughter as mortgagee from mother allowed—Suit on mortgage—Suit by creditor under O. 21, R. 63 alleging mortgage to be collusive*—Locus standi.

A creditor having attached and brought to sale the one-third share of the judgment-debtor which he had inherited from his mother, the latter's daughter objected under O. 21, R. 58 on the ground that she was a mortgagee of the whole property from the mother. Her objection was upheld and the share was sold subject to her mortgage. She filed a suit on her mortgage whereupon the creditor objected to the mortgage and also brought a suit under O. 21, R. 63, for a declaration that the mortgage was collusive and without consideration. It was contended that the creditor firm had no *locus standi* and could not be allowed to challenge the mortgage as being without consideration.

Held, that the firm by purchasing land at the Court-auction succeeded to the rights of the judgment-debtor in his mother's property and he, being the representative of his mother, the firm was also a representative of the mother and therefore had a right to challenge the mortgage and to assert that it was a sham and collusive transaction and without consideration. (*Dunkley, J.*) A. K. R. M. S. CHETTYAR FIRM *v.* DAW PWA THET. **161 I.C. 342=8 R.R. 467=A.I.R. 1936 Rang. 2.**

———**O. 21, R. 63**—*Right of suit—Decree-holder consenting to claim being allowed—Subsequent suit to declare property liable to attachment as belonging to judgment-debtor being held benami by claimant—Maintainability.*

An executing Court cannot go into the question as to whether a transaction is benami or not in summary proceedings under O. 21, R. 58, C. P. Code. The fact that the decree-holder does not contest a claim to attached property preferred by the person in whose name the attached property stands and agrees to the claim being allowed does not debar him from bringing a suit for a declaration under O. 21, R. 63, C. P. Code, that the property really belongs to the judgment-debtor and liable to attachment and the purchase in the name of the claimant is only benami and a fraudulent and colourable transaction. Where a decree-holder cannot successfully hope to resist a claim under O. 21, R. 58, C. P. Code, because the question cannot be gone into and decided by the executing Court he may well ask the Court to allow the claim in order to enable him to bring proceedings under O. 21, R. 63 without delay. Where he does not give up his right to contest the matter by means of a suit, his admission in the claim must be confined to the claim only and he does not lose his right of suit under O. 21, R. 63. A party who realises the hopelessness of resisting a claim in summary proceedings and consents to the claim being allowed is nevertheless a party against whom an order is made and consequently he can bring a suit under O. 21, R. 63; unless a party has clearly contracted himself out of his statutory rights given to him by O. 21, R. 63, he cannot be debarred from instituting a suit under the rule to obtain the appropriate relief. (*Harries, C.J. and Manohar Lal, J.*) RAMRUP RAI *v.* MAHADEO LAL NATHMAL. **19 Pat. 494.**

———**O. 21, R. 63 and T. P. Act, S. 53**—*Right of suit—Defeated attaching creditor, claimant—Avoidance of transfer necessary—Suit, if to be in representative character.*

It is very doubtful as to whether the fact that a plaintiff has instituted his suit under O. 21, R. 63, C. P. Code, to declare his right to attach and sell certain property after setting aside a transfer as having been made with a view to defeat creditors, is sufficient in itself to exclude the operation of the provisions of S. 53 (1) of the T. P. Act. (*Smith and Madeley, JJ.*) GIRRAJ *v.* SANKTA PRASAD. **171 I.C. 927=1937 O.L.R. 582=1937 O.W.N. 1169=10 R.O. 148=A.I.R. 1938 Oudh 33.**

———**O. 21, R. 63**—*Right of suit—Property in possession of auction-purchaser of a Hindu widow's limited interest—Attachment by creditor of estate, after widow's death—Release on objection by auction-purchaser—Attaching creditor, if can sue under O. 21, R. 63.*

A sale in execution of a decree in a suit based on the personal debt of a Hindu widow, can only convey her life-interest in the property. On her death, the interest of an auction-purchaser of such property, will terminate. If he remains in possession, he does so without any right or title, and his sale need not be set aside. A creditor of the estate whose attachment of such property has been released on objection by the auction-purchaser, can sue for a declaration under O. 21, R. 63. (*Smith and Madeley, JJ.*) RAMESHAR BUX SINGH *v.* PATRAJ KUER. **172 I.C. 94=10 R.O. 155=1937 O.L.R. 595=1937 O.W.N. 1181=A.I.R. 1938 Oudh 35.**

———**O. 21, R. 63**—*Scope of.*

(Per *Braund, J.*)—O. 21, R. 63, C. P. Code, does not itself confer a right but only gives the creditor the opportunity of enforcing whatever rights he has by a civil suit. (*Collister and Braund, JJ.*) PARBHU NATH PRASAD *v.* SARJU PRASAD. **1940 A.W.R. (H.C.) 422=1940 A.L.J. 470=A.I.R. 1940 All. 407.**

———**O. 21, R. 63**—Scope and effect—Attachment—Claim — Rejection — Attachment ceasing owing to dismissal of execution petition—Failure to institute suit to set aside claim order—Subsequent attachment—Fresh claim—If barred by order on prior claim. *See* C. P. CODE, O. 21, RR. 57, 58 AND 63. **1940 M.W.N. 459.**

———**O. 21, R. 63**—*Scope—Order allowing claim to attached property—Suit by decree-holder—Frame of—If to be representative suit on behalf of all creditors of judgment-debtor—Right of decree-holder—If subject to S. 53, T. P. Act.*

A judgment-creditor who is defeated at the instance of an intervener in proceedings taken in execution of his decree is not bound necessarily to file a suit under S. 53 of the T. P. Act. He is entitled under O. 21, R. 63, C. P. Code, to bring a suit for a declaration that the intervener-claimant has no title and that he (the decree-holder) has the right to attach the property and bring it to sale in execution of his decree. O. 21, R. 63, C. P. Code, does not say that the suit by the defeated decree-holder must be a representative suit brought by the judgment-creditor for and on behalf of the general body of creditors of the judgment-debtor. The rule is not subject to S. 53 of the T. P. Act. All that the last paragraph of S. 53 (1), T. P. Act, says is that if a creditor (which term includes a decree-holder) wants to avoid a transfer on the ground that it has been made with intent to defeat or delay the *creditors* of the transferor, then he must sue on behalf and for the benefit of all the creditors. But it does not say that a creditor who wants to enforce his own right to property as against another creditor or a transferee must bring a representative suit. A suit to establish the decree-holder's priority need not be a representative suit. S. 53 does not cover the case of a transfer in which the intention is only to prefer one creditor to another; the section does not refer to the question of priority or preference among the creditors of the transferor or the debtor under the section the intention must be to defeat or delay the creditors generally. Though a suit under S. 53 (1), last paragraph, has to be brought by the plaintiff on behalf of himself and all other creditors of the debtor, a suit under O. 21, R. 63, C. P. Code, need not necessarily be on behalf of the defeated decree-holder and all other creditors. S. 53, T. P. Act, merely confers a privilege upon a creditor (or decree-holder) to impeach a transaction of his debtor in the interest of other creditors; but there is nothing in it which compels a decree-holder who wants to entablish his own rights as against a transferee from the judgment-debtor in order to realize the fruits of his decree to bring a representative suit under S. 53, T. P. Act. (*Rangnekar, J.*) SHRIMAL *v.* HIRALAL. **I.L.R. (1938) Bom. 445=175 I.C. 843=11 R.B. 7=40 Bom. L.R. 371=A.I.R. 1938 Bom. 289.**

——**O. 21, R. 63**—*Scope—Order—allowing claim—Suit by decree-holder more than 12 years after attachment—Maintainability—Discretion of Court to grant declaration of right to attach.*

A suit under O. 21, R. 63, C. P. Code, is in form and substance a declaratory suit, and it would be an unreasonable exercise of discretion by the Court to make a declaration of the decree-holder's right to attach if the period of limitation of 12 years has expired between the date of attachment and the date of the suit unless the property in question has already been sold in time. The suit is often but a step to enable the decree-holder to bring the property to sale; if by reason of the extinction of the title of the judgment-debtor before the sale, there would be nothing to be sold, as declaration in the decree-holder's favour in a suit under O. 21, R. 63, C. P. Code, would not only be futile but sometimes even be mischievous, as it may lead an unwary purchaser into thinking that he is buying a subsisting interest. (*Varadachariar, Lakshmana Rao and Gentle, JJ.*) DHARAPURAM JANOPAKARA NIDHI, LTD. *v.* LAKSHMINARAYANA CHETTIAR. **I.L.R. (1939) Mad. 803=182 I.C. 999=12 R.M. 239=49 L.W. 671=1939 M.W.N. 488=A.I.R. 1939 Mad. 456=(1939) 1 M.L.J. 802 (F.B.).**

——**O. 21, R. 63**—*Scope—Order allowing claim by transferee from judgment-debtor—Suit by decree-holder—Allegation of fraudulent transfer—Suit—If falls under S. 53, T. P. Act.*

There is no absolute distinction between a suit brought under O. 21, R. 63, C. P. Code, and one brought under S. 53, T. P. Act. A suit by a defeated decree-holder under O. 21, R. 63, alleging that the claimant's title is based on a transfer which is voidable as having been made fraudulently to defeat and delay his claim, must be treated as coming under S. 53, T. P. Act also, though the plaint may not specifically refer to S. 53. The fact that the suit is by the decree-holder alone and not by all the creditors or on behalf of all the creditors does not make the suit non-maintainable. (*Norman, I.C.S.*) AMOLAK CHAND *v.* RAM NATH RAM NARAIN. **1936 A. M.L.J. 104.**

——**O. 21, R. 63**—Scope—Order dismissing claim by person in adverse possession—Omission to file suit—Sale in execution subsequently set aside—Decree satisfied otherwise—Effect—Order of dismissal—If breaks adverse possession or estops claimant from pleading it. *See* ADVERSE POSSESSION—INTERRUPTION. **(1939) 1 M.L.J. 802 (F.B.).**

——**O. 21, R. 63**—*Scope—Order filing objection, without adjudication—If "against" objector—Suit within one year—If obligatory.*

The suit property was mortgaged first to *R* and subsequently to *M. R* obtained a mortgage decree and took out execution of his decree. The property was attached and *M* presented an objection to the executing Court in which he asked for the raising of *R's* attachment or in alternative for the sale of property subject to his mortgage. In the meantime a declaratory suit was filed by a stranger and execution was stayed. The executing Court filed the application for execution with the direction that attachment should subsist. The same Judge filed *M's* objection on the ground that the connected petition for execution had been stayed. On dismissal of the declaratory suit the sale of the property took place in execution of *R's* decree and was knocked down in favour of *J. M* asking himself to be paid out of sale proceeds gave a petition to executing Court which was dismissed for default and sale was confirmed. *M* then brought a suit under O. 34, C. P. Code, for a mortgage decree to be granted to him. *J* contested the suit urging that *R* had a prior mortgage and that his mortgage money must be paid before *M* could obtain the relief asked for and that O. 21, R. 63 was a bar to the suit.

Held, that *M's* objection which was filed because injunction had been received to stay the connected application was not adjudicated upon. It could not be said therefore that the order filing the objection amounted to either a dismissal or acceptance of the request contained in that petition. It is necessary under O. 21, Rr. 58 to 63, C. P. Code, that the Court should investigate the claim and give its decision on the merits. Hence the order filing the objection was not one which should have been set aside by a declaratory suit under O. 21, R. 63 and therefore O. 21, R. 63 was no bar to the present suit.

Held also, that the dismissal of *M's* application after the sale for default was not such a final order as to make a suit under O. 21, R. 63 necessary as the attachment had ceased to exist directly the property was auctioned and no application under O. 21, R. 58 was necessary. (*Almond, J. C. and Mir Ahmad, A.J.C.*) Moti Ram Nihal Chand *v.* Basheshar Nath. **171 I.C. 810=10 R. Pesh. 36=A.I.R. 1937 Pesh. 97.**

———**O. 21, R. 63**—*Scope—Suit under—Decree under execution whether justifiable—If relevant question for decision.*

In a suit by a defeated decree-holder under O. 21, R. 63, C. P. Code, the plaintiff should not be forced to try out the suit in which he has already obtained a decree. It may be that the decree which is the basis of the execution is not a justifiable decree; but that is not the question for decision in the suit under O. 21, R. 63, C. P. Code. (*Wort, J.*) Deoki Singh *v.* Raghvindra Bhagwan. **183 I.C. 371=5 B.R. 922=12 R.P. 135=1939 P.W.N. 229=A.I.R. 1939 Pat. 430.**

———**O. 21, R. 63**—*Scope and effect of—Attachment of mortgaged property—Claim by mortgagee—Mortgage upheld by Court—Order not impeached—Effect—Sale in execution—Purchaser in execution and purchaser from him—Right to impeach mortgage.*

Where a mortgagee prefers a claim to the mortgaged property attached in execution of a money decree, and the Court upholds the claim based on the mortgage, and no steps are taken to impeach the order within the time limited, the order becomes conclusive between the parties; and when the equity of redemption only in the property is sold in court auction (sale being subject to the mortgage), neither the decree-holder nor the auction-purchaser nor a purchaser from him can go behind the order in the claim proceedings. (*Varadachariar and Abdur Rahman, JJ.*) Mahalakshmi *v.* Somaraju. **I.L.R. (1939) Mad. 600=189 I.C. 17=1939 M.W.N. 159=49 L.W. 280=A.I.R. 1939 Mad. 393=(1939) 2 M. L.J. 72.**

———**O. 21, R. 63**—*"Suit"—If includes application under Provincial Insolvency Act, S. 4.*

The suit contemplated by O. 21, R. 63, is a suit under the Civil Procedure Code, which commences by the filing of a plaint. An application under S. 4 of the Provincial Insolvency Act is not a suit for purposes of O. 21, R. 63. (*Venkataramana Rao, J.*) Sanga Pillai Muthirian *v.* Official Receiver, Trichinopoly. **1937 M.W. N. 1046.**

———**O. 21, R. 63**—*Suit by unsuccessful decree-holder—Frame of—If to be in representative capacity on behalf of all creditors—T. P. Act, S. 53.*

A suit by a decree-holder to set aside an order allowing a claim to attached property is one which can be brought by the decree-holder alone on his own behalf. It is not necessary that he should sue in a representative capacity on behalf of all the creditors of the judgment-debtor. S. 53, T. P. Act does not apply to such a suit under O. 21, R. 63. (*Fazl Ali and Agarwala, JJ.*) Mt. Bas Kuer *v.* Gaya Municipality. **17 Pat. 588=180 I.C. 983=11 R.P. 563=5 B.R. 514=20 P. L.T. 76=A.I.R. 1939 Pat. 138.**

———**O. 21, R. 63**—*Suit under—Attached property in possession of judgment-debtor—Decree-holder if can rely on presumption drawn from possession.*

Where a decree-holder, who has attached property in possession of his judgment-debtor, is unsuccessful in the claim proceedings under O. 21, R. 58 of C. P. Code, and therefore brings a declaratory suit under O. 21, R. 63, in such suit he can rest himself on the presumption drawn from possession, that property attached belonged to the judgment-debtor on his behalf and the burden to prove that this was not so is on the defendant. (*Mosely, J.*) Ramji Das *v.* Maung Than Maung. **172 I.C. 572=10 R.R. 261=A.I. R. 1937 Rang. 362.**

———**O. 21, R. 63**—*Suit under—Burden of proof.*

In a declaratory suit under O. 21, R. 63, C. P. Code, the burden of proving good faith in the first instance is on the plaintiff when objections filed by him in execution proceedings have been dismissed on a summary finding of fraud. The position is not altered when objections are dismissed for reasons not affecting the merits of the case. (*Beckett, J.*) Krishan Chand *v.* Kanshi Ram. **40 P.L.R. 705.**

———**O. 21, R. 63**—*Suit under—Court-fee.*

If an objection made in the executing Court under O. 21, R. 58, C. P. Code, is dismissed, the sole remedy of the objector is a suit under O. 21, R. 63, and such a suit falls within Art. 17 of Sch. II of the Court-Fees Act. (*Niyogi and Pollock, JJ.*) Kisan *v.* Totaram. **I.L.R. (1937) Nag. 342=169 I.C. 590 (1)=10 R.N. 13=A.I.R. 1937 Nag. 253.**

———**O. 21, R. 63**—*Suit under, by alienee of judgment-debtor—Burden of proof.*

In a suit under O. 21, R. 63, C. P. Code, by the alienees from a judgment-debtor, whose properties have been attached by the decree-holder as properties belonging to the judgment-debtor it is not sufficient for the alienees to prove the deed of transfer. The burden of proving that the transfer was for consideration and was in good faith also lies on them. A.I.R. 1932 Lah. 174 and A.I.R. 1930 P.C. 255, Rel. on. (*Jai Lal and Coldstream, JJ.*) Hanuman Prasad *v.* Mahomed Ismail. **162 I.C. 495=8 R.L. 909=38 P.L.R. 263=A.I.R. 1936 Lah. 72.**

———**O. 21, R. 63**—*Suit under by defeated decree-holder—Frame of—If to be representative—Objection to frame of—When to be taken.*

Where a suit is brought under O. 21, R. 63 by an attaching creditor to establish his right to attach and bring to sale certain property by avoiding a transfer of the property, on the ground that it has been made with intent to defeat or delay the creditors of the transferor, it is the duty of the trial Court to see that the suit is brought in a representative capacity and it can if such a suit is brought by one creditor in his individual capacity, direct the plaintiff to take proper steps to put matters right. Where, however, such a suit is not brought in a representative capacity and no objection is taken as to the form of the suit in the trial Court but is only raised for the first time in appeal the objection cannot be allowed in the appellate Court. The Court has inherent jurisdiction in a case of this nature although its jurisdiction is irregularly invoked and the defendant by his conduct is precluded from maintaining in appeal that the suit was not maintainable as framed. Second Appeal No. 244 of 1932; A.I.R.

1935 Rang. 489 and A.I.R. 1933 Rang. 52, Foll.; A.I.R. 1934 Rang. 303, Ref.; A.I.R. 1934 Rang. 334, Not Foll. (*Mya Bu and Baguley, JJ.*) Asgar Ali *v.* C. V. R. M. Firm. **14 Rang. 81=161 I.C. 887=8 R.R. 522=A.I.R. 1936 Rang. 117.**

———O. 21, R. 63—Suit under by defeated decree-holder—If one under S. 53, T. P. Act. *See* T. P. Act, S. 53. **62 C.L.J. 548.**

———O. 21, R. 63—*Suit under—Failure to institute—Order dismissing objection—Subsequent release of attachment—Finality of order.*

A summary order of dismissal of objections under O. 21, R. 58, C. P. Code, is vacated if the attachment itself is subsequently released owing to the reversal of the decree, and the property in question is not sold. Such an order does not, therefore, become final by reason of failure to institute a suit under O. 21, R. 63. (*Bhide, J.*) Parma Nand *v.* Tharu Lal. **163 I.C. 892=9 R.L. 60=39 P.L.R. 306=A.I.R. 1937 Lah. 169.**

———O. 21, R. 63—*Suit under—Frame of—If should be a representative suit under S. 53, T. P. Act.*

A suit by the judgment-creditor under O. 21, R. 63, C. P. Code, praying for a declaration that a sale-deed, on which the successful claimant based his claim, is void, and that the property covered by it is liable to attachment and sale in execution of his decree, need not necessarily be one on behalf of himself and all other creditors of the judgment-debtor, as falling under S. 53, T. P. Act. The creditor should not be compelled to prove that the sale-deed was made with intent to defeat and delay creditors generally, when he only wants a declaration in a limited form that the transfer is void as against him. (*Beaumont, C. J.*) Guljarkhan *v.* Husenkhan. **172 I.C. 165=10 R.B. 253 (1)=39 Bom.L.R. 917=A.I.R. 1937 Bom. 476.**

———O. 21, R. 63—Suit under—Frame of—If to be on behalf of all creditors. *See* Transfer of Property Act (as amended in 1929), S. 53. **51 L.W. 608=(1940) 1 M.L.J. 872.**

———O. 21, R. 63—*Suit under—Frame of—Prayer for declaration of right as against decree-holder—Necessity for—Suit merely for possession as against persons in possession—If proper—Decree-holder—If necessary party.*

In a suit by a defeated claimant, it is incumbent on the plaintiff to seek a declaration against the decree-holder who attached the property in execution of his decree, to establish his right to the property attached. If he merely claims possession of the property from the persons in possession, and merely makes the decree-holder a party without claiming any relief against him, that would not amount to compliance with O. 21, R. 63, C. P. Code. To such a suit for possession alone, the decree-holder is not a necessary party. (*Pollock, J.*) Jangludeo *v.* Raghudeo. **20 N.L.J. 199.**

———O. 21, R. 63—*Suit under—If one in continuation of claim proceedings—Order allowing claim—Subsequent transferee from claimant—If alienee* pendente lite—*Transfer if void under S. 64—Joinder of transferee as party to suit after one year—Effect—Suit—If barred.*

A suit brought under O. 21, R. 63, C. P. Code, to set aside an order allowing a claim to attached property is a mere continuation of the proceedings in the claim petition. A purchaser of the attached property from the successful claimant after the order and before a suit under O. 21, R. 63, is an alienee *pendente lite.* Such an alienee is not a necessary party to the suit under O. 21, R. 63; the transfer in favour of such alienee is also void under S. 64, C. P. Code. In that view also, the transferee is not a necessary party. If the transfer is not also a real one, the transferee would then too be not a necessary party to the suit. S. 22 (1) of the Limitation Act has no application to the addition of such a party after the period of limitation for the suit. (*Fazl Ali and Agarwala, JJ.*) Mt. Bas Kuer *v.* Gaya Municipality. **17 Pat. 588=180 I.C. 983=11 R.P. 563=5 B.R. 514=20 Pat.L.T. 76=A.I.R. 1939 Pat. 138.**

———O. 21, R. 63—*Suit under—Nature of—Decree in—Effect on prior summary order—Dismissal of claim under O. 21, R. 58 with costs—Suit under O. 21, R. 63 decreed—Both sides to bear their own costs—Costs awarded by summary order—If executable.*

Where a claim is preferred under O. 21, R. 58, C. P. Code, and is rejected with costs and the defeated claimant files a suit under O. 21, R. 63, it is substantially one to set aside the summary order and where the suit is decreed, each party being directed to bear its own costs it amounts to a setting aside of the summary order, and superseding of the prior order as to costs and hence the prior order as to costs is unexecutable. The prior summary order must be deemed to have been set aside wholly and not in part. (*Niyogi, J.*) Chintaman Ramjipant *v.* Govind Vithal. **175 I.C. 753=11 R.N. 12=A.I.R. 1938 Nag. 376.**

———O. 21, Rr. 63 and 58 and O. 2, R. 2—*Suit under—Nature of—Property sold at Court-auction—Suit for bare declaration without consequential relief—If lies.*

Where there has been a claim under O. 21, R. 58, a suit for a bare declaration will always lie under O. 21, R. 63 and even where the goods have been sold before the suit is filed, the plaintiff is not bound in either law or practice to claim any consequential relief, for once he has obtained his declaration, he is not barred by the provisions of O. 2, R. 2 from filing a subsequent suit for recovery of the value of the property or the auction price or whatever it may be he sues for. (*Mosely, J.*) **Kakayan *v.* Lee Like. 169 I.C. 258=9 R.R. 393 (1)=A.I.R. 1937 Rang. 133.**

[Followed in (*Mosely, J.*) Maung Khin Gyi *v.* Rahim Ulla Khan. **10 R.R. 140=171 I.C. 14=A.I.R. 1937 Rang. 249.**]

———O. 21, R. 63—*Suit under—Objections not raised earlier but raised later in execution—Maintainability.*

Suit under O. 21, R. 63 is in essence a continuation of the execution proceedings. Such a suit is for decision of a question of title and there is no reason for holding that a plaintiff may not rely upon points which he had not raised in the summary objection proceedings to begin with but which he urged during these proceedings later on. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) Sayed Ahmad Ali *v.* Radha Kishan. **166 I.C. 869=9 R. Pesh. 77=A.I.R. 1937 Pesh. 13.**

———**O. 21, R. 63**—*Suit under*—Onus.

An adverse order against the claimant in the claim proceeding under O. 21, R. 58 is conclusive unless it is displaced by a declaratory suit brought under the provisions of O. 21, R. 63 and the *onus* is certainly upon the claimant to show that he has a right which was denied by the order. The burden cannot be discharged merely by pointing to the innocent appearance of the instruments under which the plaintiff claims. He must prove that they are as good as they look and it is not for the defendant to make out that they are collusive. (*Mukherjea and Latifur Rahman, JJ.*) DHIRENDRA NATH DAS *v.* INDRA CHANDRA KISRIWALA. **185 I.C. 871=12 R.C. 418=A.I.R. 1939 Cal. 578.**

———**O. 21, R. 63 and Transfer of Property Act, S. 53**—*Suit under O. 21, R. 63 by creditor—If should be on behalf of the body of creditors—Absence of other creditors, when can be presumed.*

A creditor proceeding under O. 21, R. 63, C. P. Code, who does not know of the existence of other creditors is not bound to bring a representative suit to represent persons of which existence he is not aware. It is for the defendant who as debtor knows whether he has other creditors to object that there are other creditors and that a representative suit should be filed. If no such objection is raised by him, the Court is entitled to hold that there are no other creditors and that the plaintiff can sue for himself alone. (*Hamilton, J.*) SURAJ BAKHSH SINGH *v.* THAKUR DAS. **15 Luck. 503=12 R.O. 355=187 I.C. 90=1940 O.A. 260=1940 O.L.R. 167=1940 O.W.N. 285=1940 A.W.R. (C.C.) 148=A.I.R. 1940 Oudh 200.**

———**O. 21, R. 63**—*Suit under—Parties—Decree-holder, if necessary party.*

Where the plaintiff, whose property is attached and sold in execution of a decree, brings a suit under O. 21, R. 63, for a declaration that suit property belongs to him and is not liable to attachment, the cause of action in such a suit is the attachment. If a declaration be granted in favour of the plaintiff, without making decree-holder a party to the proceedings, against the auction-purchaser, the latter will be immediately entitled to sue the decree-holder for the return of the auction-money. The decree-holder not being a party there will be no question of *res judicata* in the subsequent suit, but the decree-holder will be obliged to resist the conclusions arrived at in the present suit, to which he is not a party, and the Court in which the suit is brought cannot grant relief without traversing the orders given in the present suit. Therefore, the decree-holder is a necessary party in the present suit to enable the adjudication of the main question involved in the suit. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) SANT LALL *v.* MIAN FEROZ SHAH. **165 I.C. 252 =9 R. Pesh. 42=A.I.R. 1936 Pesh. 189.**

———**O. 21, R. 63**—*Suit under—Parties—Judgment-debtor—If proper party.*

Plaintiff obtained a decree against respondents 3 and 4 and in execution of the decree attached certain property. Respondents 1 and 2 objected to the attachment and their objection was upheld and the attachment removed. Plaintiff filed a declaratory suit under O. 21, R. 63, against the objectors and in the same suit joint respondents 3 and 4 as defendants. Respondents 1 and 2 objected to the joining of respondents 3 and 4 as parties, as the declaratory suit was based on the removal of attachment and respondents 3 and 4 had no connection with the proceedings for removal of attachment.

Held, that the respondents 3 and 4 were possible and proper parties to this suit though not necessary parties. 28 All. 41 and 35 Cal. 202 (P.C.), Dist. (*Mya Bu and Baguley, JJ.*) S. N. V. R. CHETTYAR FIRM *v.* MA LAY. **161 I.C. 950=8 R.R. 518=A.I.R. 1936 Rang. 56.**

———**O. 21, R. 63**—*Suit under—Parties—Legal representatives of judgment-debtor.*

For a suit under O. 21, R. 63, C. P. Code, the judgment-debtor's legal representatives are necessary parties. 28 All. 41, Rel. on. (*Mosely, J.*) MAUNG KHIN GYI *v.* RAHIM ULLA KHAN. **171 I.C. 14=10 R.R. 140=A.I.R. 1937 Rang. 249.**

———**O. 21, R. 63**—*Suit under—Parties—Non-joinder of judgment-debtor—Effect.*

The absence of judgment-debtor from the suit for declaration gives rise to prolonged litigation unless the judgment-debtor is brought on the record in the suit for declaration. The mere fact that he was impliedly a party to the removal of attachment proceedings will not make the decree in the declaratory suit binding upon him. 11 Bom. 114; 15 Cal. 674; 30 Mad. 335 and A.I.R. 1924 All. 274, Foll. (*Mya Bu and Baguley, JJ.*) S. N. V. R. CHETTYAR FIRM *v.* MA LAY. **161 I.C. 950=8 R.R. 518=A.I.R. 1936 Rang. 56.**

———**O. 21, R. 63**—*Suit under—Plaintiff, if bound to prove his title to the property.*

R. 63 lays down that where a claim or an objection is preferred under the preceding rules of O. 21 the party against whom an order is made may institute a suit to establish "the right which he claims to the property in dispute." Obviously these words do not mean that the plaintiff has to establish his ownership of the property in dispute. All that he is required to do is to establish "the right which he claims to the property in dispute." If the suit has been instituted by the decree-holder, against whom an order has been passed under R. 60 releasing the property from attachment, the right which he claims in the suit is the right to have the property attached in execution of the decree against his judgment-debtor. If, on the other hand, the plaintiff is the objector, who has been unsuccessful in the objection proceedings before the executing Court, the right which he claims in the suit is the right to have the property in dispute released from attachment, it not being the property of the judgment-debtor. It will be seen, that in either case it is not necessary for the plaintiff to establish his own "title" in the property in question, but what he has to establish is, in the first case, the claim to have the property attached, and in the other to have it released from attachment. (*Tek Chand, J.*) JAWAHAR MAL *v.* PUNJAB NATIONAL BANK, LTD. **17 Lah. 668=166 I.C. 521=9 R.L. 397=39 P.L.R. 68=A.I.R. 1936 Lah. 524.**

———**O. 21, R. 63**—*Suit under—Plaintiff, if must press whole of claim raised in objection under R.* 58.

It is not obligatory on a plaintiff in a suit under O. 21, R. 63 to press the whole of the claim raised by him in the objection under O. 21, R. 58. If he realises that part of his claim in objection cannot be sustained, he is entitled to omit it when bringing a suit under O. 21, R. 63. (*Middleton, J.C. and Mir Ahmad, A.J.C.*) Mahomed Aslam *v.* Moti Ram. **166 I.C. 372=9 R. Pesh. 66=A.I.R. 1936 Pesh. 206.**

———**O. 21, R. 63**—*Suit under—Plea that sale colourable and without consideration—Onus of proof.*

Where the judgment-debtor has sold his property to another person, the fact that he was seriously embarrassed at that time by pressing creditors and had motive for disposing of the property to persons out of their reach does not prevent the burden from still lying on decree-holder to show that the transaction of sale was not a real transfer. (*Rowland and Chatterji, JJ.*) Sadhu Prasad Sah *v.* Satnarain Sah. **182 I.C. 748=5 B.R. 820=12 R.P. 62=A.I.R. 1939 Pat. 81.**

———**O. 21, R. 63**—*Suit under—Prayer for declaration that a sale-deed was void and property attachable and saleable—Proper frame of suit—Suit, if should be under S. 53, Transfer of Property Act.*

Where a person sues to get it declared that certain property was attachable and saleable in execution of a decree obtained by him against another and also prays for a declaration that certain sale-deeds executed by his judgment-debtor were void, it is not necessary that such a suit should be under S. 53 of Transfer of Property Act on behalf of all the creditors. He can institute the suit on behalf of himself only under O. 21, R. 63, C. P. Code. (*Ismail, J.*) Asghar Ali *v.* Ishaq Ali. **I.L.R. (1940) All. 31=187 I.C. 383=12 R.A. 531=1939 A.W.R. (H. C.) 798=1939 A.L.J. 1020=A.I.R. 1940 All. 72.**

———**O. 21, R. 63**—Suit under—Proper relief—Execution sale held pending suit by defeated claimant—Sale set aside at his instance under O. 21, R. 89—Amendment of plaint to add relief of injunction to restrain decree-holder from withdrawing amount deposited in Court—If allowable. *See* C. P. Code, O. 21, R. 89 (2). **20 Pat.L.T. 640.**

———**O. 21, R. 63**—*Suit under—Rights of parties—Determination—Crucial date—Date of suit or date of claim order or attachment—Adverse possession not complete on date of claim order but complete on date of suit on claim order—If can be taken into account.*

In a suit to set aside a claim order, the rights of the parties on the date of the attachment or on the date of the order on the claim petition are the rights which have to be taken into consideration. Where an unsuccessful claimant has not been in possession of the property in dispute which he claims to have purchased, for 12 years on the date of the attachment or on the date of the order dismissing his claim, and has not perfected his title by prescription on either of those dates, he cannot by waiting for some months and then bringing his suit, be permitted to say that on the date of the suit he has completed twelve years and thereby got a title by prescription. It is not possible for the plaintiff to clothe himself with additional rights by waiting for some months and then compel the rightful owner (the judgment-debtor) to lose his right to the property. (*Burn and Stodart, JJ.*) Venkata Rangacharyulu *v.* Turanga Rao. **182 I.C. 858=12 R.M. 151=48 L.W. 375=1938 M.W.N. 918=A.I.R. 1938 Mad. 857=(1938) 2 M.L.J. 430.**

———**O. 21, R. 63**—*Suit under—Right to transferred decree—Plea in defence open.*

Where a transferee of a decree sues under O. 21, R. 63 to establish his right thereto, it is open to those impugning the transfer to allege either that the transfer was a sham transaction executed without consideration and not intended to take effect or that it was a transaction executed for a consideration and intended to take effect, but made with a view to defraud the creditors of the transferor by removing the property out of their reach. (*Pollock, J.*) Motilal *v.* Kashibai. **I.L.R. (1940) Nag. 316=174 I.C. 398=10 R.N. 384=A.I.R. 1938 Nag. 249.**

———**O. 21, R. 63**—*Suit under—Scope—Question under S. 52—If can be gone into—Proper revenue—Executing Court.*

A suit under O. 21, R. 63, C. P. Code, has nothing to do with S. 52 and question under S. 52 must be decided by the Court executing the decree and not by a separate suit. (*Spargo, J.*) A. R. M. N. A. Chettyar Firm *v.* R. M. V. S. Chettyar Firm. **173 I.C. 873=10 R.R. 376=A.I.R. 1937 Rang. 531.**

———**O. 21, R. 63**—Suit under—Title to be gone into—Proof that attachment was invalid—If sufficient—'Establish the right to'—Meaning of. *See* C. P. Code, O. 21, Rr. 58 and 63. **A.I.R. 1936 Mad. 971=(1937) 1 M.L.J. 133.**

———**O. 21, R. 63**—*Suit under—Valuation for jurisdiction—Property already sold in execution.*

The value of a suit under O. 21, R. 63, C. P. Code, for purposes of jurisdiction, is its value to the plaintiff. If the value of the property is less than the value of the decree, the value of the action to the plaintiff would be not the decretal amount but the market-value of the property. If, however, the value of the decree is less than the value of the property, then the value of the decree affects the value of the suit. If the property has already been sold in execution of the decree before the suit, the value of the suit to the plaintiff is the value of the property which he has lost by reason of the execution proceedings. (*Mitter and Khundkar, JJ.*) Banjor Dorabji *v.* The Calcutta Chemical Co., Ltd. **43 C.W.N. 609.**

———**O. 21, Rr. 63 and 66**—*Summary order on an objection to sale proclamation—Effect—If conclusive under R. 63.*

The mere question of whether there was a prior charge would not be an objection to the attachment. It is only when an inquiry is held and an order is passed under one of the Rr. 60 or 61 of O. 21, that there is an order which is conclusive under R. 63; and without an inquiry there can be no such conclusive order. Hence a summary order passed on an objection to the sale proclamation does not have any of the effects of an order under R. 63. (*Bennet, Ag.C.J. and Verma, J.*) Kanhaiya Lal *v.* Banke Behari. **1938 A.W.R. (H.C.) 596=1938 A.L.J. 940=1938 A.L.R. 808=178 I.C. 66=11 R.A. 249=A.I.R. 1938 All. 542.**

———O. 21, R. 63 (A) (Lahore)—*Application under, by decree-holder—Court-fee payable.*

On an application by the decree-holder under O. 21, R. 63 (A) to secure adjudication as to the indebtedness of other persons to his judgment-debtor, a court-fee stamp of only one rupee is payable, and the decree-holder cannot be required to pay an *ad valorem* court-fee on such an application. (*Jai Lal, J.*) Chandgi Ram *v.* Janki Das. **17 Lah. 467=38 P.L.R. 199.**

———O. 21, R. 63-A (Lahore)—*Attachment of debt due to judgment-debtor—Judgment-debtor's claim against garnishee becoming barred during investigation by Court—Final order against garnishee after expiry of limitation—If can be passed.*

In execution a decree-holder attached on 19th February, 1933, a debt due to *A*, judgment-debtor from *B*, the garnishee before the right of *A* to sue for his debt from *B* had become barred. The Court proceeded to investigate the claim of *A* against *B* in September or October, 1933, under O. 21, R. 63 (A) when also the debt due to *A* was not barred. The investigation proceedings continued till 1936 and a final order was passed in March, 1936, when the right of *A* for debt against *B* had become barred on 4th July, 1934, apart from proceedings under O. 21, R. 63-(A). The executing Court refused to order the garnishee *B* to pay the amount in March, 1936.

Held, that the crucial date in such cases was either the date of attachment, which gave a right to the attaching decree-holder to claim an order against the garnishee *B* for payment, or in any case the date when the Court decided to investigate the claim of the judgment-debtor *A* against *B*. Any order, which might subsequently be passed must relate back to the date of attachment or to the date when the Court decided to investigate the claim. Prolongation of proceedings was not material for purposes of limitation. Attachment having taken place on 19th February, 1933, before the debt had become barred and the Court having started investigation under O. 21, R. 63 (A) in September or October, 1933, proceedings about order of payment of debt were instituted at the latest in September or October and hence it was competent to the Court to order the garnishee to pay the amount in spite of the expiry of limitation after attachment or at any rate during investigation under O. 21, R. 63 (A). (*Jai Lal, J.*) Hem Raj *v.* Asa Ram. **174 I.C. 314=10 R.L. 548=A.I.R. 1937 Lah. 255.**

———O. 21, R. 63-A (Lahore)—*Enquiry by Court—When contemplated.*

O. 21, R. 63-A contemplates an inquiry only where the judgment-debtor claims a debt from a garnishee. Where money due to a member from Co-operative Society is attached and prohibition order is issued to the Society but the member does not claim any debt from the Co-operative Society but claims to be a shareholder of the Society at the time when the prohibitory order was issued there is no dispute as regards any debt between the judgment-debtor and the alleged garnishee, which can be inquired into under O. 21, R. 63 (A). It follows therefore that the finding given in the proceedings relating to the objection raised by the judgment-debtor in connexion with the attachment of his shares cannot bind the Society. (*Bhide, J.*) Hira Lal *v.* Rajo Kheri Co-operative Credit Society. **42 P.L.R. 225=A.I.R. 1939 Lah. 305.**

———O. 21, R. 63 (c) (1) (Rangoon)—*Execution against garnishee—When permissible.*

Until there is a definite order against the garnishee to pay under O. 21, R. 63 (*c*) (1), C. P. Code, there is nothing executable directly against the garnishee as a decree. (*Baguley, J.*) Sheerazee *v.* Reddy. **1939 Rang.L.R. 694=187 I.C. 105=12 R.R. 305=A.I.R. 1940 Rang. 34.**

———O. 21, R. 64—Applicability—Property—Preliminary decree in suit for unpaid mortgage money—Saleability in execution—Procedure after attachment—O. 21, R. 53—Applicability. *See* C. P. Code, S. 60. **1937 A.W.R. 649=A.I.R. 1937 All. 652.**

———O. 21, Rr. 64 and 58—Objection to sale by third person on ground of title acquired subsequent to attachment—Duty of executing Court. *See* C. P. Code, O. 21, Rr. 58 and 64. **41 P.L.R. 305.**

———O. 21, R. 65—*Sale, when complete.*

When the officer of the Court or such other person as the Court may appoint to conduct a sale as provided in O. 21, R. 65 knocks down the property to the highest bidder, such person must be deemed to have been declared to be the purchaser of such property. The sale is complete when the property is knocked down to the highest bidder and it is not open to the Court thereafter to offer the property to any person who may be prepared to purchase it for higher amount. 1931 Lah. 78 and 1933 Nag. 123, Foll. (*Addison and Abdul Rashid, JJ.*) Hoshnak Ram *v.* Punjab National Bank, Ltd. **166 I.C. 603=9 R. L. 393 (2)=A.I.R. 1936 Lah. 555.**

———O. 21, R. 66—*Duty of Court under—Settlement of sale proclamation—Procedure.*

The obligation of settling a sale proclamation really rests on the Court. It is incumbent on the Court to see that all the particulars required under O. 21, R. 66 are given properly so as to enable intending bidders to know exactly what they are going for. It is very undesirable that properties should be sold in large lots. The Court would do well to group the lands into small and convenient lots after notice to the parties and settle the sale proclamation with proper upset prices and have the properties sold. (*Venkataramana Rao and Stodart, JJ.*) Rangaswami Ayyangar *v.* Marudanayagam Pillai. **11 R.M. 371=177 I.C. 717=47 L.W. 773=1938 M.W.N. 524=A.I.R. 1938 Mad. 720.**

———O. 21, R. 66—*Duty of decree-holder—Sale statement—Property brought to sale, in possession of third person—No mention of claim of third person in sale statement—Effect.*

A property was sold in execution of a decree. The property was in possession of a third person having a good title thereto. The decree-holder already knew about the claim of such person over such property as he had appeared as a witness in a successful suit by such person for declaration of his title thereto. The decree-holder did not make any mention of the claim of such person in the sale statement.

Held (*obiter*), that failure on the part of the decree-holder to make mention of such person's claim to property brought to sale amounted to neglect of the statutory duty imposed on him. (*Gruer, J.*) SANGIDAS RAMPRATAP *v.* CHAHADU. **20 N.L.J. 111=168 I.C. 970=9 R.N. 288=A.I.R. 1937 Nag. 140.**

———**O. 21, R. 66**—*Construction—Sale proclamation—Court, if bound to value property and to state value in proclamation of sale.*

It is not necessary for the Court in cases of sales in execution to value the property and state the value in the proclamation of sale. To so hold would involve adding a clause to O. 21, R. 66, C. P. Code. If in any case the Court thinks it desirable to value the property and state the value in the proclamation, it ought to state it under O. 21, R. 66 (*v*). (*Beaumont, C.J. and Lokur, J.*) CHARANDAS VASANJI *v.* DOSSABHOY MAGANLAL. **I.L.R. (1939) Bom. 389=182 I.C. 409=12 R.B. 12=41 Bom.L.R. 328=A.I.R. 1939 Bom. 182.**

———**O. 21, Rr. 66 and 90, O. 30, R. 3**—*Judgment-debtors sued not as partners but as individuals—Failure to serve notice on any of them—Material irregularity.*

Where several judgment-debtors are sued not as partners in the name of their firm but as individuals and the decree directs all of them to pay the decretal amount, notices in execution under O. 21, R. 66 must be served on all judgment-debtors. Failure to serve such notice on any of them amounts to an obvious breach of O. 21, R. 66 which cannot be cured under O. 30, R. 3 and which therefore amounts to a material irregularity within the meaning of O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE & MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———**O. 21, R. 66**—*Mortgage noted in sale proclamation—Property, if sold subject to mortgage.*

The mere fact that a mortgage is noted in a sale proclamation does not establish that the property is sold subject to that mortgage, and the auction-purchaser is not, therefore, estopped from raising the question of the validity of the mortgage. (*Thomas and Zia-ul-Hasan, JJ.*) PARSHOTAM DAS *v.* ALI HAIDAR. **13 Luck. 484=171 I.C. 233=10 R.O. 98=1937 O.L.R. 530=1937 O.W.N. 944=A.I.R. 1937 Oudh 493.**

———**O. 21, R. 66**—*Objection to sale by judgment-debtor on ground of defect in proclamation—Objection dismissed on ground that remedy under O. 21, R. 90 is open—Such remedy not found available—Judgment-debtor's right to claim adjudication upon earlier objection.*

Where the judgment-debtor objects to the order of sale on the ground of material defect in the sale proclamation at a time when he was not prevented under law from raising such objection, but the application is dismissed solely on the ground that the remedy under O. 21, R. 90 is open to him and if it is eventually found that that remedy is not available to him under the law, the judgment-debtor is entitled to claim an adjudication upon the objections taken by him at an earlier stage. (*Addison and Din Mohammad, JJ.*) BARKAT RAM *v.* BHAGWAN SINGH. **177 I.C. 116=11 R.L. 269=A.I.R. 1938 Lah. 65.**

———**O. 21, R. 66**—*Order of sale proclamation—Appealability—Valuation set out without enquiry—Remedy.*

Setting out in the proclamation of sale the valuation of the properties as given by the decree-holder without a previous enquiry as to the valuation would be a material irregularity in the publication of the sale, which can be a ground of application for the setting aside of the sale under O. 21, R. 90. Such application can be made only after the sale has taken place, and whether it will succeed or not will depend on whether the under-valuation set out in the proclamation is gross and whether substantial injury has resulted to the applicant on account of such under-valuation. The order approving sale proclamation cannot, however, give the dissatisfied party a right of appealing against the order for issue of the proclamation before the sale takes place. (*Mya Bu and Mackney, JJ.*) L. A. R. LUTCHUMANAN CHETTYAR *v.* HAJI ISMAIL NOOR MOHAMMAD. **171 I.C. 636=10 R.R. 169=A.I.R. 1937 Rang. 157.**

———**O. 21, R. 66**—*Order under—Nature of—Appeal.*

Per *Sulaiman, J.*—An order under O. 21, R. 66 is not a judicial adjudication of any question arising between the parties to the execution, but merely the issuing of directions as to the mode of proclamation of sale. The approximate estimation of the value of the property cannot ever be regarded as a determination of any question arising between the decree-holder and the judgment-debtor within the meaning of S. 47, C. P. Code, and such an order is not appealable as a decree. (*Gwyer, C.J., Sulaiman and Varadachariar, JJ.*) SHYAMAKANT LAL *v.* RAMBHAJAN SINGH. **(1939) F.C.R. 193=12 R.F.C. 1=2 Fed.L.J. 183=43 C.W.N. (F.C.R.) 68=182 I.C. 161=1939 O.L.R. 399=5 B.R. 756=1939 M.W.N. 674=1939 P.W.N. 533=20 Pat.L.T. 473=71 C.L.J. 369=A.I.R. 1939 F.C. 74=(1939) 2 M.L.J. (Supp.) 45.**

———**O. 21, R. 66**—*Procedure—Duty of Court—Mahal constituted by collectorate—Partition out of number of village in estate—Execution sale under final mortgage decree—Proclamation for sale in one lot at one single price—Propriety—Judgment-debtor giving separate valuation for each village and praying for sale in different lots—Duty of Court to accept.*

Under O. 21, R. 66, C. P. Code, the executing Court has to insert in the sale proclamation the valuation given by the judgment-debtor, and that valuation has to be inserted as given by the judgment-debtor and must not be altered or corrected by the decree-holder before insertion. Where in execution of a final decree on a mortgage, a number of villages in an estate constituted into a separate *mahal* by collectorate partition are proclaimed for sale as a single block with a single upset price, and the judgment-debtor puts in a separate valuation of each village and prays that the sale should be held village by village, the Court must accept the same and order a sale village by village, and the *mahal* should, for purposes of sale, be broken up into lots, although the sale is the sale of a single *mahal*. It is not, however, necessary that the proclamation should be separately published in every village affected, but the sale should be directed on the valuation as given by the judgment-debtor for each village, and village by village. (*James and Rowland, JJ.*) SRI KANT LAL *v.* RAM BHAJAN SINGH. **189 I.C. 355=13 R.P. 79=6 B.R. 791=21 Pat.L.T. 108 =A.I.R. 1940 Pat. 422.**

———O. 21, R. 66—*Proclamation—Insertion of judgment-debtor's disputed claim—Legality.*

An order inserting the judgment-debtor's claim in the proclamation for sale is contrary to law if the claim is disputed. (*Mosely and Sharpe, JJ.*) T. R. M. RAMASWAMY CHETTIAR *v.* M. M. K. KUTTAIN CHETTIYAR. **189 I.C. 446=13 R.R. 39 =A.I.R. 1940 Rang. 153.**

———O. 21, R. 66—Sale proclamation—If conclusive of title of purchaser—Statement of existence of mortgage on property sold—How far effective as against purchaser. *See* LIMITATION ACT, S. 19. **A.I.R. 1936 Mad. 70.**

———O. 21, R. 66 (Lahore)—*Sale proclamation—Value of property given by party—Duty of Court to include.*

Under O. 21, R. 66, C. P. Code, as amended by the Lahore High Court, it is incumbent upon the Court issuing the proclamation to include the estimate of the value of the property, if any, given by either or both the parties. (*Din Mohammad, J.*) BARKAT RAM *v.* BHAGWAN SINGH. **42 P.L. R. 404=A.I.R. 1940 Lah. 394.**

———O. 21, R. 66 (Patna)—*Sale proclamation—Entry in, of valuations placed on property by decree-holder and by High Court in earlier proceeding—Such entry made with consent of both parties—Judgment-debtor, if can complain of irregularity.*

Where the valuations placed on the property by the decree-holder and by the High Court in an earlier proceeding are entered in the sale proclamation by agreement of both parties, it is not open to the judgment-debtor to contend subsequently that the entries regarding valuation in the sale proclamation constitute a substantial irregularity in the proceedings for sale. (*Rowland and Chatterji, JJ.*) BAZIA BEGUM *v.* KRISHUNDEO NARAIN MAHTHA. **6 B.R. 177=185 I.C. 404=12 R.P. 367=21 Pat.L.T. 541=A.I.R. 1940 Pat. 286.**

———O. 21, R. 66 (Patna), Proviso—Scope—If repealed by Bihar Money Lenders' Act, S. 16—Repugnancy—Latter section—If void on ground of repugnancy to O. 21, R. 66. *See* BIHAR MONEY-LENDERS' ACT, S. 16. **19 Pat.L.T. 760.**

———O. 21, R. 66 (2)—*Scope—Mortgage decree—Sale proclamation—Notice to judgment-debtor—Omission to raise objection—Subsequent objection that properties not comprised in mortgage are included—Sustainability.*

Where the sale proclamation in respect of proceedings in execution of a mortgage decree are settled in the presence of and after notice to the judgment-debtor who and his attorney are fully cognisant of all that is taking place, and who allow the sale to proceed as proclaimed without raising any objection, the judgment-debtor is precluded from afterwards impeaching the sale on the ground that the mortgagee has caused to be sold in execution properties, which were not comprised in the mortgage and which could not therefore be lawfully sold. (*Derbyshire, C.J. and Costello, J.*) SARADA CHURN *v.* PRATIVA SUNDARI. **40 C.W.N. 428.**

———O. 21, R. 66 (2)—*Scope—Non-compliance with—Effect—Material irregularity—Failure of judgment-debtor to appear on previous occasions—If ground for non-issue of notice.*

The fact that the judgment-debtor has not appeared at any previous stage of the proceedings does not absolve the Court from complying with O. 21, R. 66 (2), which requires a notice to be sent to the judgment-debtor. Omission to give such notice is a material irregularity. (*Greenfield, F.C.*) KHAJA ABDUL GAFUR KHAN *v.* CHOTEKHAN. **20 N.L.J. 283.**

———O. 21, R. 66 (2)—*Specification of particulars—Sale of mining rights.*

At an execution sale, the mining rights which the judgment-debtor had under a certain document of lease were sold. In the sale proclamation, the boundaries of the area covered by the document were indicated but not its extent. Further no indication was given of the nature of the coal deposits. There was also no extract of the document of lease. As regards valuation of the property, there were contradictory statements.

Held, that the sale proclamation did not comply with the terms of O. 21, R. 66 (2), C. P. Code. (*Derbyshire, C.J. and Mukherjea, J.*) KANGAL CHANDRA MONDAL *v.* BEJOY CHAND MAHTAB. **42 C.W.N. 661.**

———O. 21, R. 66 (2)—*"Time of sale"—Meaning of—Bidding—When to commence.*

The time of sale which is required to be set out under O. 21, R. 66 (2), C. P. Code, means the time at which the sale would begin. Bidding ought not therefore to start until the advertised time arrives. (*Norman.*) GAJJI DAS *v.* SURAJMAL. **1936 A.M.L.J. 13.**

———O. 21, R. 66 (2), Proviso (N.W.F.P.) and R. 90—*Decree-holder and judgment-debtor giving separate estimate of value of property—Failure to give both estimates in proclamation—Material irregularity.*

Proviso to O. 21, R. 66 (2) does not condone the failure of the execution Judge to mention the correct estimate of the value of property proposed to be auctioned. When the decree-holder and judgment-debtor give their respective estimates of the value at two different figures, failure to give both the estimates in the proclamation is serious omission likely to influence the minds of those who propose to buy the property and therefore amounts to material irregularity referred in O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE & MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———O. 21, R. 66 (2) (c)—*Sale proclamation—Arrears of property tax—If to be mentioned—Sale by Sheriff on High Court Original Side—Practice—Arrears of municipal rate—If to be deducted out of sale-proceeds.*

Arrears of rates are, under the Calcutta Municipal Act, a statutory charge on the property. It is, therefore, the duty of the party having the carriage of execution proceedings to find out any arrears and to mention them in the sale proclamation under O. 21, R. 66 (2) (*c*), C. P. Code. In sales by the Sheriff on the Original Side of the High Court, the arrears of taxes due to the

Municipality should be set out in the proclamation and deducted by the Sheriff out of the sale proceeds realised in execution. (*McNair, J.*) SHUSHAMABALA DASEE *v.* POORNA CHANDRA DE. **63 Cal. 621.**

———O. 21, Rr. 66 (3) and 90—*Failure to present application—Material irregularity.*

Order 21, R. 66 (3) makes it mandatory that an application by the decree-holder under R. 66 should be given, as it gives advantage to the Court of enabling it to obtain all necessary information required for drawing up a proclamation of sale. Therefore failure of the decree-holder to present an application under O. 21, R. 66 (3) is a material irregularity contemplated by O. 21, R. 90. (*Mir Ahmad, J.*) BUNDHELKHAND CYCLE & MOTOR AGENCY *v.* PEOPLE'S BANK OF NORTHERN INDIA, LTD. **181 I.C. 542=11 R. Pesh. 70=A.I.R. 1939 Pesh. 9.**

———O. 21, R. 69—*Adjournment of sale—Non-intimation of date or hour of adjourned sale—Effect on sale—Liability to be set aside.*

Where a sale is adjourned without stating in the order of adjournment the hour of the adjourned sale, there is no proper adjournment of the sale as contemplated by law, *i.e.*, as provided by O. 21, R. 69, C. P. Code. The omission to state the hour is a serious irregularity and when it results in loss to the judgment-debtor, the sale should be set aside and a fresh sale held. (*Ragavendra Rao, H. M.*) DHARYADHAR *v.* YESHWANT. **19 N.L.J. 103.**

———O. 21, R. 69—*Adjournment of sale—Specification of hour and date—Failure—Material irregularity.*

The omission to specify the hour as well as the date to which the sale is adjourned while being undoubtedly an irregularity, may sometimes not be and sometimes be a material irregularity.

Held, on the facts that the failure to mention the hour was a material irregularity. (*Burn and Lakshmana Rao, JJ.*) TIRUGNANAVALLI AMMAL *v.* VENUGOPALA PILLAI. **1937 M.W.N. 1223 (1).**

———O. 21, R. 69—*Non-compliance with—Sale, if nullity.*

The failure to comply with the provisions of O. 21, R. 69, C. P. Code, would not alone render a Court sale a nullity, but it would be necessary for a person who is aggrieved to treat such non-compliance as a material irregularity which he must urge in a properly constituted application under O. 21, R. 90, C. P. Code. If, therefore, the judgment-debtors themselves take no steps to have the sale set aside on the ground of non-compliance with O. 21, R. 69, it is not open to the Court to treat the sale as a mere nullity. (*Edgley, J.*) JOGENDRA NATH BHATTACHARYA *v.* SHEIK NABI NEWAJ. **178 I.C. 842=11 R.C. 417=67 C.L.J. 96=A.I.R. 1938 Cal. 699.**

———O. 21, R. 69—*Order of Court directing property to be sold at monthly sale commencing from 5th August—Sale held by Nazir on 12th after postponing it from day to day—Validity.*

The executing Court ordered the sale of a certain property to be held in the course of the monthly sales to commence on the 5th August at 12 noon and issued the sale proclamation on that basis. The Nazir postponed the sale on the 5th and 6th August on the ground of absence of the presiding officer, and from 7th to 10th for want of time. 11th was a Sunday and the property was sold on the 12th.

Held, that, assuming that the postponement of the sale on the 5th and 6th August by the Nazir was in excess of his powers, the sale was not taken out of the monthly sales by his act; that the sale held on the 12th must be taken to be a sale in the course of the monthly sales and was, therefore, valid. (*Mitter and Khundkar, JJ.*) RANGPUR LOAN OFFICE, LTD. *v.* TARIT BHUSAN ROY. **I.L.R. (1939) 1 Cal. 530=70 C.L.J. 97=186 I.C. 174=12 R.C. 447=43 C.W.N. 539=A.I.R. 1939 Cal. 369.**

———O. 21, R. 69—*Scope—Sale advertised for particular day and included in sale list for the day—Sale not finished that day and continued next day—If liable to be set aside—"Adjournment"—Meaning of.*

A sale in execution of a decree was fixed for 4—1—1935, and was included in the sale list for that day. As the sales could not be finished that day, the Nazir in charge continued them on the following day in accordance with the procedure prescribed by the General Rules and Circular orders of the Patna High Court. The sale was actually finished the next day. The judgment-debtor applied to have the sale set aside on the ground that it was in contravention of O. 21, R. 69, C. P. Code, having been held on a date not advertised in the sale proclamation and without an express order of the Court adjourning the sale.

Held, (1) that as the sale commenced on the appointed day; though continued on the following day, there was no adjournment within the meaning of O. 21, R. 69, C. P. Code, (2) that O. 21, R. 69 did not refer to a case where sales on the same sale list held in accordance with the rules of the Court continued beyond the first day, and (3) the sale could not, therefore, be set aside. (*Agarwala and Madan, JJ.*) RAJENDRA NARAIN BHUNJ DEO *v.* DEBI CHOUDHURY. **18 Pat.L.T. 326=1937 P.W.N. 337=16 Pat. 408=169 I.C. 877=3 B.R. 637=10 R.P. 54=A.I.R. 1937 Pat. 386.**

———O. 21, R. 69 (2) (as amended in Nagpur)—*Collector's sale—Collector accepting bid at sale held by Tahsildar beyond seven days—Legality.*

In a Collector's sale, it is the Collector who has to accept the bid though it may be the Tahsildar who holds the sale. The period of seven days in O. 21, R. 69 (2), C. P. Code, has been extended to 15 days in Nagpur, and the fact that the Collector accepts the bid beyond 7 days of the sale does not make such acceptance illegal as beyond time and does not render a fresh proclamation of sale necessary. An order of acceptance within 15 days is in time. (*Greenfield, F.C.*) RAMCHANDRA *v.* ARJUN. **1938 N.L.J. 10.**

———O. 21, R. 69 (2)—*Scope and effect—If subject to R. 10 of the Central Provinces Revenue Book Circular—Collector's sale—Sale when complete—Acceptance of bid by Collector—If essential.*

The provisions of O. 21, R. 69 (2) of the C. P. Code are modified in the Central Provinces by R. 10 of the rules in the Revenue Book Circular, Vol. 2-III, framed by the Local Government; R. 10 (2) of the said rules makes it clear that the final bid is not accepted and the purchaser is therefore not declared until the proceedings are adjourned to, and the bid approved by the Collector. Till the Collector accepts the bid, it is only an offer. (*G. P. Burton, R.M.*) Vinayak Rao *v.* Pannalal. **20 N.L.J. 80.**

———**O. 21, R. 69 (2)**—*Waiver of necessity of fresh proclamation—Effect of—Objections to attachment—If waived.*

The waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the face of the sale proclamation. But the waiver of any necessity for a fresh sale proclamation would not imply a waiver of the right to object to any irregularities in the attachment. (*Lord Thankerton.*) Shyam Sunder Singh *v.* Kaluram Agarwala. **32 S.L.R. 879=5 C.L.T. 1=176 I.C. 2=42 C.W.N. 1041=19 Pat.L.T. 561=48 L.W. 199=1938 M.W.N. 814=1938 O.L.R. 344=1938 A.W.R. (P.C.) 186=68 C.L.J. 145=1938 O.W.N. 883=11 R.P.C. 58=1938 A.L.R. 672=4 B.R. 815=1938 O.A. 780=1938 P.W.N. 612=A.I.R. 1938 P.C. 230=(1939) 1 M.L.J. 147 (P.C.).**

———**O. 21, Rr. 71 and 84**—*Applicability—"Re-sale"—Failure of decree-holder purchaser to pay 25 per cent.—Fresh sale after fresh proclamation—Deficiency in price—Liability of decree-holder to make good.*

The liability of a defaulting purchaser under O. 21, R. 71, C. P. Code, is not dependent upon re-sale of the property strictly according to R. 84. There is nothing in R. 71 itself which makes it a condition precedent that the re-sale should take place forthwith. The fact that the re-sale takes place not forthwith but after a fresh proclamation does not relieve the purchaser of his liability under R. 71. Where, therefore, a decree-holder purchases the property and fails to pay the 25 per cent. of the sale price, and a fresh sale is held after the issue of a fresh proclamation, the second sale is a "re-sale" within the meaning of R. 84 of O. 21, C. P. Code, and if it results in any deficiency, the decree-holder is liable under R. 71 to make good that deficiency. (*Niamatullah, J.*) Prag Das *v.* Beni Prasad. **1937 A.W.R. 426=1937 A.L.J. 495=171 I.C. 75=1937 A.L.R. 797=10 R.A. 225=A.I.R. 1937 All. 556.**

———**O. 21, R. 71**—*'Decree-holder'—Meaning of.*

The decree-holder who can recover the deficiency in price resulting on re-sale by reason of the purchaser's default under O. 21, R. 71 is not any decree-holder of the judgment-debtor or any decree-holder who is entitled to share rateably under S. 73, but the decree-holder who brings the property to sale. 49 M. 570, Foll. (*King, C.J. and Nanavutty, J.*) Mahomed Salamatullah *v.* Murlidhar. **163 I.C. 175 (2)=8 R.O. 416=1936 O.W.N. 559=A.I.R. 1936 Oudh 277.**

———**O. 21, Rr. 71 and 84**—*Deficiency—Re-sale held not forthwith but after long time—Defaulting purchaser is not liable for deficiency on re-sale.*

The defaulting purchaser is answerable for the loss on the re-sale, only if the re-sale takes place forthwith. The first sale had taken place on certain date when the auction-purchaser defaulted. The decree-holder instead of having the re-sale conducted properly and openly the same day, or on the following day, or as soon thereafter as was reasonably possible, caused a farcical re-sale

to be held in collusion with the auctioneer and purchased the property himself for a ridiculously small sum. The inquiry into the propriety of this sale continued for 17 months, and eventually the sale in favour of the decree-holder was set aside.

Held, that the subsequent sale conducted after long delay could not be said to be a sale held 'forthwith' within the meaning of R. 84 of O. 21, C. P. Code, and therefore the defaulting purchaser was not liable to make good the deficiency. (*Tek Chand, J.*) Ram Saran Das *v.* Kesho Nath. **176 I.C. 302=11 R.L. 195=A.I.R. 1937 Lah. 924.**

———**O. 21, Rr. 71, 86 and 87**—*Scope—Default of purchaser in paying balance of sale price—Re-sale—Application for—When to be made—Delay caused in re-sale—Deficit sale price—Liability of purchase—If affected—Right of decree-holder to order against defaulting purchaser—Limitation Act, Art.* 181.

Where there has to be a re-sale as the result of the default of the decree-holder under O. 21, R. 86, C. P. Code, the decree-holder has to apply for a re-sale, which under O. 21, R. 87, C. P. Code, has to be made after the issue of a fresh proclamation. The Code contains no provision as to when the application for a re-sale shall be made; the decree-holder is therefore entitled to make the application at any time within three years as Art. 181 of the Limitation Act applies to such an application. If there is a deficiency in the re-sale, the auction purchaser is responsible for the deficit under R. 71 of O. 21. Under O. 21, R. 71, the liability of the defaulting pruchaser is unqualified and hence it cannot be said that the decree-holder is bound to apply for re-sale within a re-assurable time of the default in payment of the balance of price under R. 85. In any case, where a decree-holder takes prompt steps for the securing of an order of re-sale, but the re-sale does not take place early because of erroneous orders passed by the Court, not in a judicial capacity, but in pursuance of a wrong administrative practice, *e.g.*, striking off an application for statistical reasons, the decree-holder cannot be held responsible for the delay in re-sale, so as to disentitle him to an order calling upon the defaulting purchaser to pay the deficit. (*Leach, C.J. and Krishnaswami Aiyangar, J.*) Sivasubramanian Chettiar *v.* Murugesa Mudaliar. **1940 M.W.N. 345=51 L.W. 739=A.I.R. 1940 Mad. 566=(1940) 1 M.L.J. 537.**

———**O. 21, Rr. 72 and 84**—*Decree-holder auction-purchaser—Right to set-off decretal amount.*

A decree-holder auction-purchaser should be allowed to set-off the decretal amount against the purchase-money. (*Bhide, J.*) Mohammad Amir Mohammad Shafi *v.* Rabib-Ud-Din. **40 P.L.R. 544 (1).**

———**O. 21, R. 72**—Execution transferred to Collector—Leave to bid—Jurisdiction to grant—Court or Collector. *See* C. P. Code, Ss. 68, 70 and O. 21, R. 72. **38 Bom.L.R. 276.**

———**O. 21, R. 72**—Interest—Decree awarding interest until date of realisation—Decree-holder granted permission to bid and set-off—"Date of realisation"—Meaning of—Right to interest after date of sale. *See* Decree—Construction. **(1939) 1 M.L.J. 466.**

———**O. 21, Rr. 72, 84 (2) and 92**—*Permission granted to decree-holder to bid and set-off—If dispenses with deposit of 25 per cent.—Order setting aside sale—Appeal.*

In execution of a decree the equity of redemption of the property was ordered to be sold. The decree-holder presented an application in the executing Court under O. 21, R. 72 asking for permission to bid at the auction. In this application, it was stated by the decree-holder that, if he was allowed to bid, the purchase price would be set-off against the amount due under the decree. This application was granted. The equity of redemption was purchased by the decree-holder but as he failed to deposit 25 per cent. of the purchase price, the Court ordered that a fresh auction of the equity of redemption should take place.

Held, that in setting aside the sale, the executing Court had acted under O. 21, R. 92. An appeal lay against such an order under O. 43, R. 1 (*j*). The decree-holder even though he purchased the equity of redemption of the property in dispute, must also be regarded as a party to the proceedings under S. 47, C. P. Code, and the order was consequently subject to appeal.

Held, further, that when permission was accorded under O. 21, R. 72, to decree-holder to bid for and set-off the purchase price, such permission impliedly dispensed with the deposit of the requisite 25 per cent. Hence the Court was not justified in setting aside the sale. (*Abdul Rashid, J.*) Kanshi Gopal *v.* Mrs. J. Peliti. **41 P.L.R. 286=A.I.R. 1939 Lah. 46.**

Reversed in **A.I.R. 1939 Lah. 210.**

———**O. 21, R. 72**—Right of set-off—When to be allowed—Attachment of same property under decree of another Court effected prior to attachment under decree under execution—When a bar. *See* C.P. Code, Ss. 63, 73 and O. 21, R. 72. **A.I.R. 1937 Cal. 55.**

———**O. 21, Rr. 72 and 90**—*Scope—Attachment in execution of one decree—Subsequent decree against same judgment-debtor and attachment of same property—Sale under later decree—Decree-holder allowed to set-off—Effect—Material irregularity.*

When a property has been attached in execution of a decree and subsequently it is attached and sold in execution of a later decree against the same judgment-debtor, the later decree-holder should not be allowed to set-off his purchase money against the decree debt due to him, because there is another decree-holder who, by reason of his having attached the property is entitled to rateable distribution. The executing Court in such a case should order the purchasing decree-holder to pay the purchase price into Court and distribute it rateably among the decree-holders. If it allows a set-off, it amounts to material irregularity and the sale is liable to be set aside under O. 21, R. 90, C.P. Code. (*Varma and Rowland, JJ.*) Durga Prasad Shraff *v.* Mahadeb Lal Singhania. **166 I.C. 873=9 R.P. 348=1936 P.W.N. 785=3 B.R. 229=17 Pat. L.T. 847=A.I.R. 1937 Pat. 50.**

———**O. 21, R. 72 (1)**—*Conditions as to leave to bid—Violation of—Effect.*

Where a decree-holder was given leave to bid on condition that he does not bid for any amount less than the upset price, actually as a matter of fact bids for a much smaller amount and the bid is accepted, the sale cannot be allowed to stand. To do so would be to deprive R. 72 (1) of its value. The conditions cannot be disregarded. (*Roughton, F.C.*) Mst. Sawanabai *v.* Krishnaji. **1938 N.L.J. 180.**

———**O. 21, R. 72 (2)**—Decree-holder purchasing—Rights of other decree-holders for rateable distribution. *See* C.P. Code, S. 73. **A.I.R. 1937 Nag. 383.**

———**O. 21, Rr. 82-92**—*Execution sale—Setting aside of—Power of Court.*

A sale in execution can only be set aside if the ground mentioned in R. 89, 90 or R. 91 of O. 21, C.P. Code, be established as the case may be. If no such application is made, the Court has no option but to confirm the sale. If any such application is made and the ground mentioned in those rules be not established, the onus being on him who applies for reversal of the sale, the Court has no option but to confirm the sale under O. 21, R. 92. (*R.C. Mitter and Sen, JJ.*) Nerode Chandra *v.* Official Trustee of Bengal. **179 I.C. 226=11 R.C. 505=A.I.R. 1938 Cal. 798.**

———**O. 21, R. 83**—*Order refusing postponement of sale—Appeal.*

No appeal lies from a decision under O. 21, R. 83, C.P. Code, refusing to postpone the sale of the property. (*Almond, A.J.C.*) Attar Singh *v.* Mohammad Akbar Khan. **169 I.C. 315=10 R. Pesh. 1=A.I.R. 1937 Pesh. 64.**

———**O. 21, R. 84**—*Bid on behalf of temple—Failure to deposit 25 per cent.—Deficit on re-sale—Nature of liability.*

Where a bid is made on behalf of a temple, which not being a juristic person cannot either sue or be sued, and a default is made in the payment of the 25 per cent. and a resale is held, the liability in respect of the deficit is not that of the bidder personally, but only as a representative of the temple and hence is recoverable out of the temple funds. (*Stone, C.J. and Bose, J.*) Lokman Chhabilal Jain *v.* Motilal Tulsiram. **186 I.C. 872=12 R.N. 261=1939 N.L.J. 504=A.I.R. 1939 Nag. 269.**

———**O. 21, R. 84**—*Failure to deposit—Irregularity.*

The omission to pay 25 per cent. of the sale money amounts only to an irregularity and a sale can be set aside on this ground only if it is proved that substantial injury has been caused by it. (*Almond, J.C. and Mir Ahmad, J.*) Boota Mal Charandas *v.* Nand Ram Santo Mal. **176 I.C. 609=11 R. Pesh. 15=A.I.R. 1938 Pesh. 36.**

———**O. 21, R. 84 and S. 47**—*Order setting aside sale—Appeal.*

Where on account of the failure of the auction-purchaser in execution to deposit 25 per cent. of the purchase-money, the Court orders a fresh auction to be held under O. 21, R. 84, no appeal lies from such order. It makes no difference whether the auction-purchaser is an outsider or the decree-holder himself, because the fact that the decree-holder himself is the auction-purchaser does not bring the case within the purview of S. 47 as the auction-purchaser is not a party to the suit nor can it be said that the order setting aside the sale and ordering re-sale is one which relates to execution, discharge or satisfaction of the decree. A.I.R. 1939 Lah. 46, Reserved.' (*Addison and Ram Lall, JJ.*) MRS. J. PELITI *v.* KANSHI GOPAL. **186 I.C. 152=12 R. L. 369=41 P. L.R. 568=A.I.R. 1939 Lah. 210.**

———**O. 21, Rr. 84 and 72**—*Re-sale—Duty of decree-holder purchaser to deposit 25 per cent.—Omission by him to deposit—Sale, if complete.*

In N.-W.F. Province, no permission is, of course necessary for the decree-holder to bid at an auction in view of O. 21, R. 72, C.P. Code, as applicable to that province. It cannot be inferred, however, from this that the Court has under R. 84 (2) impliedly dispensed with the requirement of that rule which requires a deposit of 25 per cent. of the bid which is accepted. The sale in his favour is not completed until such deposit is made, for if such a deposit is not made, it is the duty of the officer conducting the sale to put the property up to auction again immediately. His action in doing so is not really a re-sale of the property but a continuation of the previous auction. (*Almond, A.J.C.*) TAJ MOHAMMAD KHAN *v.* KARAM CHAND. **165 I.C. 554=9 R. Pesh. 49.**

———**O. 21, R. 84**—"Re-sale"—Meaning of Decree-holder purchaser—Failure to deposit 25 per cent.—Fresh sale after fresh proclamation—If "re-sale". *See* C.P. CODE, O. 21, R. 71 AND 84. **1937 A.W.R. 426.**

———**O. 21, Rr. 84 and 71**—*Sale when complete—Deposit when to be made—'Forthwith,' meaning of—Re-sale if can be held on same day.*

An auction sale is complete when the final bid is accepted by the Sale Amin who conducts it, and to make it binding on the parties, it is not necessary to obtain the permission of the Court ordering the sale. The deposit of 25 per cent. has to be paid to the person conducting the sale, 'immediately' after a person is declared to be the purchaser. If it is not so paid the property shall 'forthwith' be re-sold. That word in R. 84 governs the time at which the re-sale is to be held and an officer is justified in holding a re-sale the same day and is not bound to wait for the payment of 25 per cent. If there is any deficiency by reason of the purchaser's default it can be recovered from him. (*Stone, C.J. and Bose, J.*) LOKMAN CHHABILAL JAIN *v.* MOTILAL TULSIRAM. **186 I.C. 872=12 R.N. 261=1939 N.L.J. 504=A.I.R. 1939 Nag. 269.**

———**O. 21, R. 85**—*Applicability—Withdrawal of deposit on sale being set aside.*

O. 21, R. 85, C.P. Code, has no application to a case where the purchaser had duly deposited the price but had withdrawn it on the sale being set aside. (*Stone, C.J. and Bose, J.*) TARACHAND *v.* KALU. **1938 N.L.J. 207.**

———**O. 21, Rr. 85 and 86**—*Applicability—Collector's sale—Non-payment of balance within time—Effect.*

In Collector's sales, the non-payment of three-fourths of the sale price within the time limited by O. 21, R. 85, C.P. Code, is a mere irregularity and does not automatically involve the holding of a sale afresh. (*G.P. Burton, R.M.*) VINAYAK RAO *v.* PANNALAL. **20 N.L.J. 80.**

———**O. 21, Rr. 85, 86 and 90**—*Failure to deposit 75 per cent. of purchase-money within fortnight—Duty of Court.*

The 'publishing' of the sale has reference to all proceedings that take place till the sale is actually held. Any proceedings that take place after the deposit of 25 per cent. of the purchase-money has been made cannot be regarded as falling within the meaning of the words 'publishing' or 'conducting the sale'. The failure to deposit 75 per cent. of the sale price within a fortnight as required by O. 21, R. 85, C.P. Code, does not therefore amount to a material irregularity in publishing or conducting a sale within the meaning of O. 21, R. 90. When default is made by the auction-purchaser in paying into Court full amount of the purchase-money within the time allowed by O. 21, R. 85 the Court has no jurisdiction to extend the time but must order a re-sale under R. 86. The only discretion given by R. 86 is in the matter of forfeiture of the deposit of 25 per cent. made by the auction-purchaser, and not in the matter of re-sale. (*Tek Chand and Abdul Rashid, JJ.*) A. R. DAVAR *v.* JHINDA RAM. **I.L.R. (1938) Lah. 97=40 P.L. R. 509 and 1004=181 I.C. 124=11 R.L. 769=A.I.R. 1938 Lah. 198.**

———**O. 21 (Mad. H.C.), Rr. 85 and 86**—*Failure to deposit stamp for sale certificate—Forfeiture of whole deposit—If justified.*

Where default is committed in respect of the cost of the general stamp to be affixed to the sale certificate only the initial deposit of 25 per cent. can in any case be forfeited. The whole amount cannot be forfeited. (*Stodart, J.*) PONNAMBALA MUDALI, *In re.* **48 L.W 416=178 I.C. 96=1938 M.W.N. 864=11 R.M. 403 (2)=A.I.R. 1938 Mad. 905=(1938) 2 M.L. J. 529.**

———**O. 21, R. 86**—*Applicability—Decree-holder purchaser—Leave obtained for bidding but not for set-off—Deposit of balance beyond time—Effect—Order forfeiting whole amount—Propriety—Proper order.*

In execution of a decree certain property of the judgment-debtor was sold. Before such sale the decree-holder had applied for leave to bid at the auction sale and the leave was granted. He however had omitted to apply under O. 21, R. 72, C.P. Code, to set off. The property was purchased by the decree-holder who deposited 25 per cent. of the purchase money but the balance was paid by him one day late. The Court without considering the question that the delay might be due to the *bona fide* mistake about the date of the payment or the question of possible prejudice which could have been caused to the judgment-debtor by the delay of one day, ordered that the whole amount deposited be forfeited and property re-sold.

Held, that the order forfeiting the whole amount was without jurisdiction and even though the Court had jurisdiction to forfeit 25 per cent. deposit, under the circumstances it was a sufficient punishment to the purchaser decree-holder for his mistake to hold him liable only for the costs of the re-sale of the property under O. 21, R. 86, C.P. Code. (***Rupchand Bilaram, J.C. and Lobo, A.J.C.***) LAHRUMAL SABANMAL *v.*

Taromal Siroomal. **172 I.C. 575=10 R.S. 169 =A.I.R. 1937 Sind 311.**

———**O. 21, Rr. 86 and 87**—Re-sale under—Application for—Limitation—Duty of decree-holder—Limitation Act, Art. 181. *See* C.P. Code, O. 21, Rr. 71, 86 and 87. **(1940) 1 M.L.J. 537.**

———**O. 21, R. 86**—*Scope—Re-sale—Default in payment of balance of sale price—Duty of Court.*

O. 21, R. 86, C.P. Code, makes it obligatory on the Court to re-sell the property in case default is made in payment of the balance of the purchase money as required by O. 21, R. 85. The discretion vested in the Court is only as regards the forfeiture of the deposit. (*Venkataramana Rao, J.*) Monni Aidruz *v.* Saffani Mira Mohideen. **179 I.C. 320 (1)=11 R.M. 574=1938 M.W.N. 1031=48 L.W. 659=A.I.R. 1939 Mad. 57=(1938) 2 M.L.J. 833.**

———**O. 21, R. 88**—*Object of—Powers of executing Court acting under.*

O. 21, R. 88 is intended to safeguard the rights of the co-sharers in undivided immovable property. The executing Court is to act judicially and not arbitrarily and particularly when the law gives a co-sharer a right of pre-emption, it is necessary for the Court to interpret the rule in such a manner as will protect that right and not in a manner as will have the effect of depriving co-sharers of their right. (*Puranik, J.*) Munnalal *v.* Gopilal. **1940 N.L.J. 453=A.I.R. 1940 Nag. 337.**

———**O. 21, R. 89**—*Applicability—Agreement between decree-holder purchasers and judgment-debtor on date of sale—Part payment of decree amount—Time fixed for payment of balance—Joint application to Court praying that on payment by fixed date sale to be set aside and in default sale be confirmed—Effect—Time—If of essence of contract—Non-payment on fixed date—Effect—Order confirming sale—Appeal—Revision—O. 43, R. 1 (j)—S. 115—Contract Act, S. 55.*

A property was sold in execution of a decree on 13—9—1935 and was purchased by the decree-holder himself. On the same day both the parties filed a petition in Court to the effect that the judgment-debtor had paid Rs. 500 to the decree-holder purchaser towards satisfaction of the decree, and that it was agreed between them on payment of the balance of the decretal amount with interest, etc., by 10—11—1935, the sale would be set aside, the decree-holder auction-purchaser foregoing his 5 per cent. compensation, but that in default of such payment by the date fixed, the sale would be confirmed. The Court was closed on 10—11—1935, and re-opened on 13—11—1935, but it was not until 20—11—1935, that the requisite amount was actually deposited in Court, though the chalan was applied for on 14—11—1935 and was issued on the 15th. The decree-holder applied on 20—11—1935 for confirmation of the sale, ignoring the deposit, and the Court confirmed the sale. The judgment-debtor appealed against the order.

Held, (1) that though the parties agreed to substitute an agreed procedure for the procedure prescribed by law, it was nevertheless in essence, though not in form, one falling under O. 21, and that the application filed by the parties on the date of sale might be treated as an application under R. 89 of O. 21, C.P. Code, and the order confirming the sale was therefore appealable under O. 43, R. 1 (*j*); even if there be no appeal, the High Court could interfere in revision if the order were shown to be wrong, as a question of jurisdiction was involved; (2) that the contract between the parties clearly showed that time was of the essence of the contract, and that on the expiry of 10—11—1935, the sale automatically became confirmed, no order of the Court being necessary for the purpose and there was nothing left which could be set aside after that date. (*Courtney-Terrel, C.J., Khaja Mahommad Noor, James Dhavle and Varma, JJ.*) Bhatwat Narain Singh *v.* Srinivas. **16 Pat. 202=1937 P.W.N. 13=169 I.C. 483=10 R.P. 16=3 B.R. 579=17 Pat.L.T. 940=A.I.R. 1937 Pat. 113 (F.B.).**

———**O. 21, R. 89**—*Applicability—Execution sale under Revenue Court decree.*

O. 21, R. 89, C.P. Code, does apply to executions of Revenue Court decrees. (*Marsh, S.M.*) Panchi Devi *v.* Zalim Singh. **1939 R.D. 204 (1)=1939 A.W.R. (B.R.) 202.**

———**O. 21, R. 89**—*Applicability—Sales by Registrar on original side of High Coourt.*

Whether or not the provisions of O. 21, R. 89, C.P. Code, do in terms apply to sales by the Registrar on the original side of the High Court, the principles laid down in that rule have always been observed in dealing with applications to set aside such sales. (*McNair, J.*) National Insurance Co., Ltd. *v.* Ezekiel Aaron David. I.L. **R. (1937) 2 Cal. 606=41 C.W.N. 998.**

———**O. 21, R. 89**—*Application under—Cash deposit in Court for payment to decree-holder—If necessary—Arrangement between decree-holder and judgment-debtor for adjustment of claim—Sufficiency.*

It is unnecessary, in an application under O. 21, R. 89, C.P. Code, to insist on a cash deposit in Court of the amount specified in the sale proclamation for payment to the decree-holder. If an arrangement is entered into between the decree-holder and the judgment-debtor for adjustment of the claim, the provisions of the rule are substantially complied with, and the sale will be set aside. (*McNair, J.*) National Insurance Co., Ltd. *v.* Ezekiel Aaron David. **I.L.R. (1937) 2 Cal. 606=41 C.W.N. 998.**

———**O. 21, R. 89**—Application under—Limitation—Starting point—Sale by Qurq Amin—Acceptance by Court on later date. *See* Limitation Act, Art. 166—'Date of Sale'. **1940 O.W.N. 381.**

———**O. 21, R. 89**—*Application to set aside sale—Form of—Form of tender for deposit of sale price and 5 per cent. extra—Signing by Judge—Specific prayer for setting aside sale, if necessary.*

Where a person comes to Court with a tender form, for the deposit of the sale price plus a penalty of 5 per cent. on it and the Judge signs the tender and the money is deposited, the tender must be deemed to be an application not only to deposit but also to have the sale set aside.

Though the form does not use those actual words, it is clearly the intention of the person tendering the form to a Court for signature, that the deposit is being made for that purpose. (*Bennet and Verma, JJ.*) MAHBOOB KHAN *v.* MAJID HUSSAIN. **I.L.R. (1939) All. 403=181 I.C. 908=11 R.A. 622=1939 A.W.R. (H.C.) 145=1939 A.L.J. 97=A.I.R. 1939 All. 241.**

———O. 21, R. 89—*Compliance—Deposit of decree amount and compensation within 30 days —Sufficiency—Application to set aside sale not presented—Effect—Sale—If can be set aside—Order refusing to set aside sale—Revision.*

A sale cannot be set aside under O. 21, R. 89, C.P. Code, in the absence of an application praying to set aside the sale, although the full decretal amount has been deposited. The deposit of the decretal amount and compensation does not amount to an application within the meaning of O. 21, R. 89, nor can an application be implied from the fact of the deposit. Where within 30 days of the sale the decree amount together with the compensation was deposited, but the deposit was not accompanied by an application praying the Court to set aside the sale and the executing Court confirmed the sale holding that it could not be set aside in the absence of an application therefor, and an application by the judgment-debtor made after 30 days under S. 151 and O. 21, R. 89, C.P. Code, for review of the prior order was dismissed.

Held, that the sale could not be set aside as there was no application to set aside the sale, and that the High Court had no power to interfere in such a case under S. 115, C.P. Code. (*Harries, C.J. and Rowland, J.*) BHARI JENA *v.* GAURANGA CHARAN SAHU. **186 I.C. 143=6 B.R. 290 =12 R.P. 453=5 C.L.T. 27=18 Pat. 210 =A.I.R. 1940 Pat. 87.**

———O. 21, R. 89—*Conditional deposit—Validity—Alternative applications under Rr. 89 and 90—Maintainability.*

Neither the judgment-debtor nor a person interested in the property sold can attach any condition to his deposit under O. 21, R. 89 and the Court cannot accept the deposit subject to any condition or protest. A judgment-debtor made applications under Rr. 90 and 89. The prayer under R. 89 was in the first place "in the alternative". It was to be taken into consideration only if the first prayer in the application which was the main prayer was not granted, namely, if the sale was not set aside under R. 90. Further, even this alternative prayer was hedged round with conditions. The deposit made was to be retained only if the sale was set aside. If the sale was confirmed it was to be refunded. The main prayer under R. 90 was dropped by the judgment-debtor subsequently.

Held, that the application was conditional and hence not maintainable and the date on which the application under R. 90 was dropped must be taken to be the date on which the application under R. 89 was filed. The application if more than thirty days after the date of the sale was accordingly time barred. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JETHABHAI. **177 I.C. 952=11 R.S. 74=A.I.R. 1938 Sind 177.**

———O. 21, R. 89—*Construction—Deposit not accepted by decree-holder—If amount received by decree-holder.*

R. 89 has to be strictly construed and even a mistake cannot be availed of as justifying a departure from the requirements of the rule. The judgment-debtor cannot be allowed to take credit for any amount which he might have deposited in Court behind the back and without the consent of the judgment-creditor and which the judgment-creditor has refused to accept. The only deduction allowed by the rule is the amount which since the date of the proclamation of sale has been actually received by the decree-holder. (*Lobo, J.*) HARIRAM DIPCHAND *v.* RAGHUNATH JETHABHAI. **177 I.C. 952=11 R.S. 74=A.I.R. 1938 Sind 177.**

———O. 21, R. 89—*Construction—Payment under—If to be in cash—Adjustment between judgment-debtor and decree-holder out of Court —Effect of—Court closed on 30th day or after —Deposit on reopening day—Sufficiency.*

Any payment or adjustment made by the judgment-debtor which satisfies the decree-holder is a payment within the meaning of R. 89, O. 21, C.P. Code. Where the decree-holder is paid most of the amount due to him by the judgment-debtor assigning a mortgage in his favour out of Court, and a small balance due to him is deposited by the judgment-debtor into Court at the time he makes the application to Court for setting aside the sale, that would be sufficient compliance with O. 21, R. 89, C.P. Code. The fact that the deposit is not made within 30 days of the sale makes no difference, where the deposit cannot be so made on account of the Court being closed. Where it is made on the reopening day, it is in time by virtue of S. 10 of the General Clauses Act.

Krishnaswami Aiyangar, J.—O. 21, R. 89 cannot be construed as contemplating payment in cash and in cash only. What is done by consent of parties as a substitute for the deposit is to be regarded as its equivalent in every respect and judged by the same principles as those applicable to a deposit. By such consent what is not in fact a payment in cash is turned into a deposit within the meaning of the rule to be acted upon by the Court in all respects as if it were a payment in cash. (*Leach, C.J., King and Krishnaswami Aiyangar, JJ.*) MUTHUVENKATAPATHY REDDI *v.* KUPPU REDDI. **188 I.C. 557=13 R.M. 24=51 L.W. 527=1940 M.W.N. 379=A.I.R. 1940 Mad. 427=(1940) 1 M.L.J. 629 (F.B.).**

———O. 21, R. 89—*Deposit—Sufficiency—Decree-holder purchasing one of properties.*

Under O. 21, R. 89, C.P. Code, the person who seeks to set aside a sale must deposit the amount of the decree unless the decree-holder may have received any sum. The decree-holder cannot be said to have notionally received a sum equal to the amount for which he (the decree-holder) purchased one of the properties, and a deposit of a sum less that amount would not, therefore, be sufficient. (*Wort, J.*) ADO DAS v. BANSI DAS. **6 B.R. 692=188 I.C. 467=13 R.P. 8.**

———O. 21, R. 89—*Deposit under—Sufficiency —Test—Amount mentioned in proclamation of sale.*